DELAWARE STATE BAR ASSOCIATION

PRESENTS

DAUBERT AND EXPERT TESTIMONY 2022

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CLE

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DAUBERT AND EXPERT TESTIMONY 2022

ABOUT THE PROGRAM

Expert testimony can sometimes be the most difficult evidence introduced at trial. Delaware's rules and case law have wrestled with how lawyers and judges determine whether an expert witness's testimony is based upon the requisite valid reasoning to be properly applied to facts in issue. Former Chief Justice Myron Steele and attorney Connor Bifferato consider Daubert v. Merrell Dow Pharmaceuticals (1993) and Kumho Tire Co. v. Carmichael (1999) and the factors that a judge may consider in evaluating whether expert testimony will be used for the purposes counsel intends. And, here's a chance to learn everything you wanted to know about Ipse Dixit!

PANELISTS

Myron T. Steele, Esquire
Chief Justice of the Supreme Court of Delaware (retired)
Potter Anderson & Corroon LLP

Jack B. Jacobs, Esquire
Justice, Supreme Court of the State of Delaware (retired)
Young Conaway Stargatt & Taylor, LLP

The Honorable Henry duPont Ridgely
Justice, Supreme Court of the State of Delaware (retired)

The Honorable Jan R. Jurden
President Judge, Superior Court of the State of Delaware

Ian Connor Bifferato, Esquire
The Bifferato Firm P.A.

PROGRAM

Part 1: Background – The history (and pronunciation) of Daubert.

Part 2: Trial Judges' Considerations – What trial judges consider when ruling on expert testimony under Daubert and other case law, the weighing of the factors involved.

Part 3: On Appeal – What is the standard of review upon appeal; What the appellate courts look for in making their rulings.

Part 4: Litigation Topics – What lawyers need to know about Expert Testimony; Considering how to use expert testimony; Determining if an expert withstands judicial scrutiny under Daubert; When to challenge testimony; How to cross-examine.

Part 5: Procedural vs. Substantive Law – Ipse Dixit, motion practice and how to best handle your client's case when it involves expert testimony.

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Daubert and Expert Testimony 2022

January 4, 2022, 1PM – 2PM

Panel:

The Honorable Myron T. Steele

The Honorable Henry Ridgely

The Honorable Jack Jacobs

The Honorable Jan R. Jurden

Moderator: Connor Bifferato

Outline for CLE Presentation

1) (Dow-bert): Confusion on how to pronounce this landmark case was expressed during the interviews for this project and hence, emphasized the need for clarification. Out of this need and respect to the original plaintiff, the authors verified the pronunciation of Jason Daubert's name through his original trial attorney; it is pronounced (Dow-bert). Nicole L. Waters, Ph.D. & Jessica P. Hodge, M.S., *The Effects of Daubert Trilogy in Delaware Superior Court,* THE NATIONAL CENTER FOR STATE COURTS, https://www.ncsc.org/__data/assets/pdf_file/0013/27220/daubert-exec-summary.pdf.

2) Pre-Daubert Standard for Admissibility under Article VII of the Delaware Rules of Evidence *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), which generally held that expert testimony must be based on "sufficiently established" scientific principles to have "gained general acceptance in the particular field in which it belongs." *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923)).

3) Post-2001 DRE 702 Testimony by Expert Witness:

   A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
(b) the testimony is based on sufficient facts or data;
(c) the testimony is the product of reliable principles and methods; and
(d) the expert has reliably applied the principles and methods to the facts of the case. (as amended 2001 to track FRE 702, *in effect on December 31, 2000* to be *consistent with the United States Supreme Court's decisions in Kumho Tire Co., Ltd v. Carmichael, 526 U.S. 137 (1999) and Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993). See also M.G. Bancorporation, Inc. v. LeBeau, Del. Supr., 737 A.2d 513 (1999) (adopting Kumho Tire and Daubert as the correct interpretation of D.R.E. 702), Nelson v. State, Del. Supr., 628 A.2d 69 (1993).*

a) The Amendment of DRE 702 was in specific recognition of the trial court's role as "gatekeeper", to prevent unreliable evidence from proceeding to the finder of fact. When a trial court, applying this amendment, rules that an expert's testimony is reliable, this does not necessarily mean that contradictory expert testimony is unreliable. The amendment is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise. *See, e.g., Heller v. Shaw Industries, Inc*., 167 F.3d 146, 160 (3d Cir. 1999) (expert testimony cannot be excluded simply because the expert uses one test rather than another, when both tests are accepted in the field and both reach reliable results). As the court stated in *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 744 (3d Cir. 1994), proponents "do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of evidence that their opinions are reliable. . . . The evidentiary requirement of reliability is lower than the merits standard of correctness." *See also Daubert v. Merrell Dow Pharmaceuticals, Inc*., 43 F.3d 1311, 1318 (9th Cir. 1995) (scientific experts might be permitted to testify if they could show that the methods they used were also employed by "a recognized minority of scientists in their field."); *Ruiz-Troche v. Pepsi Cola*, 161 F.3d 77, 85 (1st Cir. 1998) (" *Daubert* neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance."). *Committee Notes on Rules – 2000 Amendment.*

4) Delaware Decisions on *Daubert* Reach Beyond Our Borders

a) "More than a quarter century ago, in the landmark decision of *Daubert* v. *Merrell Dow Pharmaceuticals,* the U.S. Supreme Court inaugurated a new approach to the admissibility of expert testimony on scientific matters." Overturning the time-honored *Frye* '' test of "general acceptance"—under which expert testimony would be admissible if (and only if) the expert's approach was generally accepted in the relevant scientific community—^the Supreme Court held that general acceptance was not required by Federal Rule of Evidence 702; and thus, that expert testimony could be premised on theories outside the scientific mainstream so long as the expert employed a sound and reliable scientific methodology." John McNichols, Timothy Houseal & Kyle Thomason, *Delaware's Daubert Standards for Toxic Tort Cases: An Issue of Nationwide Importance*, 26 WIDENER L. REV. 181 (2020).

b) Delaware Courts and judges are very experienced in applying the laws of various jurisdictions because it has always been the case that Delaware corporations subject themselves to the jurisdiction of Delaware Courts, so it should come as no surprise to anyone that Delaware jurisprudence will govern alleged malfeasance of the Delaware corporations. The important aspect recognized by above referenced law review article is not the consideration of where to incorporate, but rather, what law will dictate the admissibility of evidence.

b) As the Delaware Supreme Court noted in *Tumlinson, et al. v. Advanced Micro Devices, Inc.*, the application of substantive law does not dictate the application of procedural law, including the rules of evidence. As the Court noted "Choice of law is a legal question that we review *de novo*. We review a trial judge's decision to admit or exclude expert testimony for abuse of discretion." (*Tumlinson* footnotes excluded at Pg5)

c) "Because *admissibility* is a procedural question, the Superior Court judge should have analyzed both relevance and reliability under Delaware law. It appears the judge concluded that the expert's testimony was not relevant under Delaware procedural law (and thereby not admissible under Delaware law) because he considered it *insufficient* as a matter of Texas law, specifically the standards the Texas Supreme Court set forth in *Merrell*

Dow Pharmaceuticals, Inc. v. Havner and reaffirmed in *Merck & Co. v. Garza*. Questions concerning evidentiary sufficiency usually arise at summary judgment proceedings, rather than at the admissibility determination that occurs during a *Daubert* hearing." (*Id*. at 13).

d) It is important to note here that the standard that the defendants sought to impose for admissibility was an extremely high burden under Texas law known as the *Havner* standard that is both complex and rarely results in a ruling of admissibility.

e) Citing *Daubert* the Court in *Tumlinson* noted "Vigorous cross examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. Additionally, in the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to direct a judgment and likewise to grant summary judgment." *(Id at n. 52).*

f) The *Tumlinson* Court finally concluded "We have not addressed whether substantive law concerning evidentiary sufficiency can be subsumed under a *relevance* analysis when a trial judge determines admissibility under Delaware law. Before we reach that analysis, it would be helpful to have the trial judge's view of the expert testimony's reliability under Delaware law. Because expert opinion testimony is admissible '*only if* it is *both* relevant *and* reliable,'" (*Id*. at 14-15 (*citing* *Kumho Tire Co., Ltd v. Carmichael*, 526 U.S. 137 (1999)).

5) Use of statistical evidence by expert witnesses
   a) The Delaware Supreme Court set the standard for use of such statistical evidence in the case of *Timblin v. Kent General Hospital. (Inc.)* and further developed it with *Wong v. Broughton*
   b) Background: *Timblin* involved a patient at Kent General who was experiencing a heart attack. Following an adverse reaction to Lidocaine, the patient experienced a grand mal seizure and eventually went into cardiac arrest. Two emergency room physicians attempted to insert a tube down the patients throat to establish an artificial airway. The doctors were unsuccessful and the patient went without oxygen for approximately 25

minutes before a nurse anesthetist arrived and successfully intubated the patient. The patient suffered brain damage due to the prolonged lack of oxygen.

At trial, Kent General put forward two doctor-witnesses, one a fact witness and one an expert witness, who both mention studies with findings that the success rate of in-hospital cardiac arrests are very low – the studies were not produced at trial. At closing argument, Kent General's counsel repeatedly stressed the statistical evidence by repeating that people often die or suffer brain damage following cardiac arrest. The jury ultimately found for Kent General and the plaintiff appealed the case. *Timbin v. Kent General Hosp. (Inc.)*, 640 A.2d 1021, 1022-23 (Del. 1994).

c) Supreme Court Decision: The Supreme Court noted at the outset that it was addressing "the admissibility of statistical evidence presented by medical expert witnesses. . .concerning the percentage of patients who die or suffer brain damage following a cardiac arrest." *Timbin*, 640 A.2d at 1021. Plaintiff disputed admissibility on three grounds, the first of which was that the statistical evidence was irrelevant to Kent General's treatment and that it was highly prejudicial – since the ultimately Court agreed with this proposition it did not address the other two arguments. *Timblin*, 640 A.2d at 1023.

   The Court first established that the propriety of admitting challenged statistical evidence must be determined under the balancing test of D.R.E. 403.[1] *Id*. A Court "must assess the probative value of the proffered evidence and weigh that value against the negative consequences of admitting the evidence, including the risk of unfair prejudice and jury confusion." *Id*. Based on this, the Court held that the statistical probability of an outcome (i.e. death or brain damage) following some condition (i.e. cardiac arrest) cannot be used to show that the defendant acted in conformity with the applicable standard or care. In other words, "a defendant may not use evidence that a patient's treatment ended with an expected result to infer that the patient received proper care." *Timblin*, 640 A.2d at 1024. The Court found that the statistical evidence offered was

[1] Th text of D.R.E. 403 is as follows: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.

highly prejudicial with little probative effect as it mislead the jury from the ultimate question of whether the doctors fell below the standard of care in their attempt to intubate the patient.

d) The Supreme Court added greater clarity to the *Timblin* standard in *Wong v. Broughton* – the only Supreme Court case to re-address *Timblin* so far

In *Wong*, complications during childbirth resulted in the newborn sustaining a permanent injury to their right brachial plexus. Following trial and a verdict in favor of the plaintiff, the defendant appealed and argued, *inter alia*, that certain evidence was admitted at trial in violation of *Timblin*. This evidence included 1.) testimony from an expert that there would be a much greater percentage of brachial plexus injuries to newborn's if a mother's pushing is was caused the injury; 2.) testimony that neurological injuries only occur rarely, in about one or two out of every 10,000 births; and 3.) defendant's recurring questions to each of the experts and Dr. Wong about their professional career and experience (i.e. how many births they performed and how many brachial plexus injuries they encountered). *Wong v. Broughton*, 204 A.3d 105, 107 (Del. 2019).

The Superior Court found that all of the evidence at issue was distinct from the evidence not allowed in *Timblin* and thus allowed its admission. *Broughton v. Wong*, 2018 WL 1867185, at *1 (Del. Super. Feb. 2018). The Supreme Court affirmed the Superior Court's ruling on appeal and explicitly adopted its reasoning. *Wong*, 240 A.3d at 110. The Court found that none of the evidence in question invaded upon the province of the trier of fact, and none of it had the same potential to mislead the jury as the statistical evidence in *Timblin* did. In *Timblin*, the proffered statistical evidence invited the jury to infer that the attending physicians did not violate the standard of care since neurological damage is a common side effect of cardiac arrest, when in reality the primary issue was whether the physicians fell below the standard of care during the intubation process. The *Timblin* Court struck the evidence under D.R.E. 403 because it had such little probative value, if any at all, while at the same time risking substantial prejudice to the jury.

The evidence in *Wong* did not carry such risks. The expert testimony regarding causation did not contain any statistics and it was more of an appeal to the jury's common sense. *Id*.; *Broughton*, 2018 WL 1867185, at

*7. The statistic regarding one or two brachial plexus injuries out of every 10,000 births was merely speaking to the rarity of such injuries. *Wong*, 240 A.3d at 110; *Broughton*, 2018 WL 1867185, at *7. This is something that was agreed upon by all experts, so it did not invade on the province of the jury. Finally, the recurring questions to the experts had greater probative value than the evidence in *Timblin* as it established the qualifications of the witnesses and the rarity of the injuries. *Wong*, 240 A.3d at 110; *Broughton*, 2018 WL 1867185, at *7. None of the evidence at issue distracted from the ultimate issue of whether the doctor was negligent in his delivery of the baby.

e) Impact on *Daubert*:
The holdings in *Timblin* and *Wong* do not impact the *Daubert* analysis so much as they impose an additional gatekeeping function by which statistical evidence may be kept from admission. After a court determines that statistical evidence passes muster under *Daubert*, it must then conduct a D.R.E. 403 analysis to ensure that its potential probative value is not outweighed by any risk of prejudicing or misleading the jury. Exclusion is appropriate where the evidence will likely distract the jury from the ultimate issue of the case. Exclusion is not necessary where the statistical evidence further proves a fact agreed upon by all other experts (i.e. that brachial plexus injuries are rare during childbirth).

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Wendolyn TUMLINSON, Jake Albert Tumlinson, Jillveh Ontiveros and Paris Ontiveros, by her natural mother and next friend Jillveh Ontiveros, Plaintiffs Below, Appellants,
v.
ADVANCED MICRO DEVICES, INC., Defendant Below, Appellee.

No. 672, 2012.

Supreme Court of Delaware.

Submitted: Nov. 6, 2013.
Decided: Nov. 21, 2013.

[81 A.3d 1266]

Court Below: Superior Court of the State of Delaware, in and for New Castle County, C.A. No. 08C–07–106.
Upon Remand from the Superior Court. **AFFIRMED.**

Ian Connor Bifferato, Richard S. Gebelein, Thomas F. Driscoll, III and J. Zachary Haupt, Esquires, Bifferato LLC, Wilmington, Delaware; Of Counsel: Steven J. Phillips and Victoria E. Phillips, Esquires, Phillips & Paolicelli, LLP, New York, New York; Thornton & Naumes, LLP, Boston, Massachusetts, for Appellants.

Frederick L. Cottrell, III, and Travis S. Hunter, Esquires, Richards, Layton & Finger, P.A., Wilmington, Delaware; Of Counsel: Stacey A. Martinez and Marcy Hogan Greer, Esquires, Fulbright & Jaworski L.L.P., Austin, Texas; Stephen C. Dillard, Esquire, Fulbright & Jaworski L.L.P., Houston, Texas; Lisa Horvath Shub, Esquire, Fulbright & Jaworski L.L.P., San Antonio, Texas, for Appellee.

Before STEELE, Chief Justice, JACOBS and RIDGELY, Justices.

JACOBS, Justice:

This is an appeal from a final judgment of the Superior Court in favor of the defendants. In this action, the Plaintiff–Appellants assert various tort claims against Advanced Micro Devices, Inc. ("AMD"). AMD moved to exclude certain expert testimony under Delaware Rule of Evidence 702—a motion that the Superior Court granted after determining that the evidence was not relevant. Plaintiff–Appellants timely appealed to this Court, which remanded the case to the Superior Court for further findings related to the expert testimony's admissibility. On remand, the Superior Court found that the expert testimony was unreliable and therefore inadmissible. We conclude that the Superior Court did not abuse its discretion in finding the expert testimony unreliable, and affirm its judgment. As a result, we do not reach or address the question of whether the trial court properly concluded that the evidence was not relevant under D.R.E. 702.

I. FACTUAL AND PROCEDURAL HISTORY[1]

Defendant–Appellee AMD, a Delaware corporation headquartered in California, specializes in manufacturing computer processors and other components. Plaintiff–Appellant Wendolyn Tumlinson and Anthony Ontiveros, the father of Plaintiff–Appellant Paris Ontiveros, (collectively, the "Plaintiffs"), worked in AMD's semiconductor manufacturing facilities in San Antonio, Texas and Austin, Texas, respectively.[2]

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Tumlinson's son, Jake, was born on July 5, 1987 with several birth defects, including anal atresia and stenosis, neurogenic bladder, renal agenesis/hypoplasia, imperforate anus, and colo-vesicular fistula. Those birth defects, in combination, are referred to as "VATER

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association." That combination or syndrome of birth defects occasionally appears in the general population. Tumlinson continued to work for AMD after Jake's birth and in 1988 had a second child who had no birth defects. [3]

Ontiveros gave birth to a daughter, Paris, on August 12, 1994. Paris was born with pulmonic stenosis, congenital pulmonary valve atresia, ventricular septal defect, right pulmonary hypoplasia, lower limb reduction defects, and situs inversus with dextrocardia. Like VATER association, these defects also sometimes appear in the general population. Later, Ontiveros had another child while she was working for AMD. That child was born without any birth defects.[4]

On July 11, 2008, Plaintiffs sued AMD in the Superior Court on claims of negligence, premises liability, strict liability, abnormally dangerous ultra hazardous activity, and willful and wanton misconduct. The Plaintiffs claimed that the birth defects of Jake and Paris resulted from their parents' exposure to chemicals at AMD's Texas semiconductor plants.[5] In April 2010, AMD moved to sever Plaintiffs' claims for separate trials and also for a determination that Texas substantive law would govern both liability and damages issues. The Superior Court granted those motions in July 2010, but also concluded that Delaware law would apply to procedural issues.

On December 15, 2010, after the close of discovery, AMD moved *in limine* to exclude the testimony of the Plaintiffs' expert, Dr. Linda Frazier, claiming that it was unreliable and not relevant under Delaware Rule of Evidence 702. Dr. Frazier, an epidemiologist who has both a medical degree and a master's degree in public health, was to testify that Plaintiffs' exposure to chemicals while working at AMD caused Jake's and Paris's birth defects. After holding a four-day *Daubert* hearing [6] in April 2011, the Superior Court ultimately excluded Dr. Frazier's testimony. The trial court concluded that Dr. Frazier's testimony was not relevant as a matter of Delaware procedural law because her methodology was inadequate to establish causation under Texas substantive law.[7] After this Court refused Plaintiffs' petition to accept an interlocutory appeal, the parties stipulated to a final judgment in favor of AMD, to enable the Plaintiffs to perfect an appeal from the Superior Court's determination to apply Texas substantive law and to exclude Dr. Frazier's testimony.[8]

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On that appeal, we affirmed the trial court's determination to apply Texas substantive law and Delaware procedural law.[9] However, we reserved any determination of admissibility, and remanded the case to the Superior Court with instructions to determine the reliability of Dr. Frazier's testimony under Delaware law.[10]

On remand, the trial court engaged in an analysis prescribed by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[11] to determine the expert testimony's reliability.[12] In its reliability analysis, the trial court relied, in part, upon the same Texas cases upon which the trial court had previously relied in its earlier relevancy analysis.[13] Ultimately, the trial court concluded that Dr. Frazier's expert testimony was unreliable under D.R.E. 702 and excluded it from evidence.[14]

The case was then returned to this Court, which must now review the Superior Court's determination of the admissibility of Dr. Frazier's expert testimony. Because that is an issue of procedural law (the admissibility of evidence), we apply Delaware, not Texas, law. We find that the trial court did not abuse its discretion in concluding that the expert testimony was unreliable. For that reason we do not reach or address whether the trial court correctly concluded that the evidence was also not relevant under D.R.E. 702.

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II. STANDARD OF REVIEW

We review a trial court's decision to admit or exclude expert evidence for abuse of discretion.[15] "To find an abuse of discretion, there must be a showing that the trial court acted in an arbitrary and capricious manner." [16] " 'That standard applies as much to the trial court's decisions about how to determine reliability as to [the trial court's] ultimate conclusion.' " [17]

III. ANALYSIS

A. D.R.E. 702 and *Daubert*

Delaware Rule of Evidence 702 governs the admissibility of expert opinion testimony. The Rule provides:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and

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methods reliably to the facts of the case.[18]

In *Daubert,* the United States Supreme Court held that Federal Rule of Evidence 702—the nearly identical federal counterpart to D.R.E. 702—displaced *Frye v. United States* 's [19] "general acceptance" test for determining the admissibility of expert opinion testimony.[20] This Court, in *M.G. Bancorporation, Inc. v. Le Beau,*[21] adopted *Daubert* and its progeny, as the "correct interpretation of Delaware Rule of Evidence 702." [22]

Daubert describes Rule 702's "overarching subject [a]s the scientific validity—and thus the evidentiary *relevance* and *reliability*—of the principles that underlie a proposed submission." [23] For proffered expert testimony to be admissible, the trial court must act as a gatekeeper to determine whether the expert opinion testimony is both (i) relevant and (ii) reliable.[24] Therefore, "a trial judge may preclude the evidence as inadmissible if it is either irrelevant or unreliable." [25]

For expert opinion testimony to be relevant under *Daubert,* it must relate to an "issue in the case" [26] and "assist the trier of fact to understand the evidence or to determine a fact issue." [27] Although Rule 702 requires that the witness be an "expert by knowledge, skill, experience, training or education," [28] those qualifications are not the exclusive or sole indicia of reliability.[29]

To determine reliability under *Daubert,* a trial court must consider a non-exhaustive list of factors. Those factors include: (1) whether the expert opinion testimony "can be (and has been) tested," (2) "whether it has been subjected to peer review and publication," (3) "its known or potential error rate," and (4) "whether it has attracted widespread acceptance within a relevant scientific community." [30]

The United States Supreme Court has emphasized that those factors are not a "definitive checklist." [31] "[W]hether *Daubert* 's specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine." [32] Although *Daubert* emphasized that the trial court's Rule 702 inquiry is a "flexible one," the inquiry "must be solely [focused] on principles and methodology, not on the conclusions that they generate."

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[33] Moreover, in this context, a trial court may have to engage in a two-layered reliability analysis:

If the foundational data underlying opinion testimony are unreliable, an expert will not be permitted to base an opinion on that data because any opinion drawn from that data is likewise unreliable. Further, an expert's testimony is unreliable even when the underlying data are sound if the expert draws conclusions from that data based on flawed methodology.[34]

In this case we previously affirmed the Superior Court's decision to apply Texas substantive law and Delaware procedural law.[35] The admissibility of expert testimony is a procedural issue governed by Delaware law, including *Daubert* and its progeny. Limiting our analysis to the issue of reliability, we apply these legal precepts to the expert testimony at issue in this case.

B. The Trial Court's Application of the *Daubert* Factors on Reliability

1. The Nature of Dr. Frazier's Testimony

Dr. Frazier's expert testimony was based on her analysis of numerous peer-reviewed articles and studies. Plaintiffs contend that the quantum of underlying foundational evidence supports their claim that the trial court abused its discretion in finding Dr. Frazier's testimony inadmissible. AMD responds that the trial court did not abuse its discretion, because there are numerous analytical gaps in Dr. Frazier's methodology that render her opinion unreliable and, therefore, inadmissible.

Because the reliability of the foundational sources was never a central issue, [36] this Court is concerned only with the reliability of the methodology the expert used to arrive at her opinions from those sources—not the reliability of the sources themselves. This Court will not usurp the gatekeeping function of the trial court unless it is shown that the trial court abused its discretion in finding the testimony inadmissible. As gatekeeper, the trial court had the benefit of a four-day *Daubert* hearing, which included extensive cross-examination of Dr. Frazier and numerous studies. We will not disturb the trial court's result unless its analysis is found to be arbitrary and capricious.

2. The Superior Court's Daubert *Analysis*

One of the *Daubert* factors is whether the expert's hypothesis is testable. Although agreeing it is not necessary to "expose humans to harmful chemicals for a controlled, clinical experiment," [37] even Dr. Frazier acknowledged that " 'in designing a proper epidemiologic study, it is important to properly define the characteristics of the group being studied.' " [38] Dr. Frazier was unable to identify which specific chemicals, either individually or in combination, caused the Plaintiffs' "very

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different" birth defects.[39] Dr. Frazier also failed to distinguish between the Plaintiffs' differing work environments [40] and how those environments may have impacted exposure levels.[41] The trial court concluded that Dr. Frazier's opinion, though not required to actually be tested, lacked the specificity required to pass muster under *Daubert* 's "testability" factor. The trial court did not abuse its discretion in so concluding. The testability factor alone, however, is not dispositive of a *Daubert* reliability analysis.

A second reliability factor contemplated by *Daubert* is whether the expert's methods were subject to the rigors of peer review and publication. The trial court recognized that "[Dr. Frazier] ha[d] found *reliable foundational studies* " that were subjected to peer review.[42] The trial court interpreted Dr. Frazier's methodology to be that "because her personal opinion was formed by synthesizing peer reviewed foundational studies, that is as strong as if her opinion was peer reviewed." [43]

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In rejecting Dr. Frazier's methodology, the trial court noted the importance of a layered reliability analysis, which requires that an expert's opinion, even if based on reliable, peer-reviewed sources, demonstrate independent indicia of reliability. Plaintiffs contend that Dr. Frazier's methods were peer reviewed (and therefore reliable) because "three prominent expert physicians and scientists endorsed Dr. Frazier's opinions." [44] But, nothing in the record indicates that Dr. Frazier submitted her methods and conclusions to any scientific journal or publication for review before this litigation. That three other experts "endorsed" Dr. Frazier's opinions—in the midst of ongoing litigation—does not constitute "peer review" as envisioned by *Daubert*.[45]

Courts also frequently consider, as did the trial court, whether the expert opinion was formed outside of litigation.[46] Plaintiffs argue that the generic label of "conclusions developed for litigation" "could be leveled against virtually any expert." [47] To be sure, every trial expert witness will necessarily form an opinion or draft a report for purposes of litigation. What is important, however, is whether the opinion or conclusion offered in litigation is consistent with, or based on, the expert's research and experience developed outside

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the litigation context. [48] Here, the trial court discounted the expert testimony's reliability because "Dr. Frazier's findings were made for this litigation." [49] We find no reason to reject that conclusion.

To establish reliability an expert may also rely on techniques that have gained widespread acceptance in the scientific community.[50] In order to establish reliability in this manner, "the experts must explain precisely how they went about reaching their conclusions and point to some objective source ... to show that they have followed the scientific method, as it is practiced by (at least) a recognized minority of scientists in their field." [51] The parties agree that epidemiologists routinely rely on two methods to establish causation: the Bradford–Hill factors and the weight-of-the-evidence analysis. The Bradford–Hill factors permit epidemiologists to infer a causal relationship from an association of variables, which include: 1) temporal relationship, 2) strength of relationship, 3) dose-response relationship, 4) replication of the findings, 5) biological plausibility, 6) consideration of alternative explanations, 7) cessation of exposure, 8) specificity of the association, and 9) consistency with other knowledge. [52] The "weight-of-the-evidence [analysis], on the other hand, allows an expert to fit all the sources together like a puzzle." [53] The Superior Court acknowledged that although "there is no generally agreed upon method for weighing different data," Dr. Frazier was required to "detail her method of weighing the importance and validity of each data source to assemble a cohesive picture." [54]

The Superior Court concluded that Dr. Frazier did not adequately "articulate her thought process, evaluation methods, and conclusions to establish reliability." The court based that conclusion on its evaluation of the studies and testimony presented, and their failure to "fit" this case.[55] Although Dr. Frazier was found to be "well-qualified," [56] her qualifications alone were not enough to overcome the "gaps" [57] in her methodology used to synthesize the foundational sources relied upon to reach her ultimate conclusion. After reviewing the record, we agree with the trial court's finding that Dr. Frazier's conclusory testimony did not adequately detail her methodology under either scientific technique.

C. The Trial Court's Misapplication of Texas Substantive Law on Reliability

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Under D.R.E. 702, a reliability analysis is a flexible one and may encompass many factors, including factors not

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articulated in *Daubert*.[58] In addition to *Daubert* 's four factors, the trial court consulted the same two Texas cases upon which it relied in its relevancy determination.[59] Although in different circumstances those cases may be non-binding, persuasive authority, they are inapposite here—and the trial court should not have relied upon them—because of their different procedural postures.[60] Those cases analyzed reliability under Texas law, but they did so to determine whether causation had been proved—a substantive issue. Here, the issue was the admissibility of evidence—a procedural matter that is governed by Delaware law. Although the trial court should not have consulted the Texas cases, the trial court did not abuse its discretion in concluding that the evidence was unreliable, because it arrived at the same outcome after independently applying the *Daubert* factors.

The Superior Court—after hearing four days of testimony at a *Daubert* hearing, after evaluating the voluminous studies contained in the record, after presiding over oral argument on the issue, and after reviewing the various affidavits submitted by Dr. Frazier and her colleagues—did not abuse its discretion as a gatekeeper when it found Dr. Frazier's expert testimony unreliable. Accordingly, we uphold the final judgment of the Superior Court.

IV. CONCLUSION

Accordingly, we AFFIRM the judgment of the Superior Court to exclude the admission of the expert testimony on the basis that it was unreliable under the factors articulated in *Daubert*. Jurisdiction is not retained.

Notes:

1. Because the parties have already litigated several issues in this matter, the facts are drawn from the prior opinions determining those issues. *See Tumlinson v. Advanced Micro Devices, Inc. (Tumlinson IV),* C.A. No. 08C–07–107 (Del.Super.Oct.15, 2013); *Tumlinson v. Advanced Micro Devices, Inc. (Tumlinson III),* 2013 WL 4399144 (Del. Aug. 16, 2013) (affirming trial judge's application of Texas substantive law and Delaware procedural law, but remanding for a reliability assessment of the expert testimony); *Tumlinson v. Advanced Micro Devices, Inc. (Tumlinson II),* 2012 WL 1415777 (Del.Super. Jan. 6, 2012) (granting a motion to exclude expert testimony); *Tumlinson v. Advanced Micro Devices, Inc. (Tumlinson I),* 2010 WL 8250792 (Del.Super. July 23, 2010) (granting motions to apply Texas substantive law and to sever claims for separate trials). At this stage of the litigation, we focus on the procedural history.

2. For further discussion of the day-to-day tasks and exposure to chemicals within the plants, see *Tumlinson I,* 2010 WL 8250792, at *1 and *Tumlinson II,* 2012 WL 1415777, at *1.

3. *Tumlinson II,* 2012 WL 1415777, at *2.

4. *Id.* at *1.

5. *Tumlinson I,* 2010 WL 8250792, at *1.

6. A *Daubert* hearing refers to a pre-trial hearing in which a trial court determines the admissibility of expert testimony under the relevant rule of evidence. *See Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). For a more detailed discussion of *Daubert's* importance

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under D.R.E. 702, see Part III.A *infra*.

[7] The court based its ruling on *Merrell Dow Pharmaceuticals, Inc. v. Havner,* 953 S.W.2d 706 (Tex.1997), and *Merck & Co. v. Garza,* 347 S.W.3d 256 (Tex.2011). In *Tumlinson II,* the trial court subsumed a reliability analysis, *as a matter of Texas substantive law,* within its admissibility determination as to the expert testimony's relevance under D.R.E. 702— *a matter of Delaware procedural law*. *See Tumlinson II,* 2012 WL 1415777.

[8] *Tumlinson v. Advanced Micro Devices, Inc.,* C.A. No. 08C–07–106, at 4 (Del.Super. Nov. 29, 2012).

[9] *Tumlinson III,* 2013 WL 4399144, at *3 (Del. Aug. 16, 2013).

[10] *Id.* at *4. In its first assessment, the Superior Court concluded that the testimony was inadmissible because it was not relevant.

[11] 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

[12] *Tumlinson IV,* C.A. No. 08C–07–107, at 16–28 (Del.Super.Oct.15, 2013).

[13] *Id.* at 10–15.

[14] *Id.* at 31.

[15] *Gen. Motors Corp. v. Grenier,* 981 A.2d 531, 536 (Del.2009); *M.G. Bancorporation, Inc. v. Le Beau,* 737 A.2d 513, 522 (Del.1999).

[16] *Spencer v. Wal–Mart Stores E., LP,* 930 A.2d 881, 887 (Del.2007) (citing *Chavin v. Cope,* 243 A.2d 694, 695 (Del.1968)).

[17] *Grenier,* 981 A.2d at 536 (citing *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 152, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999)); *M.G. Bancorporation,* 737 A.2d at 522 (citing *Kumho Tire,* 526 U.S. at 152, 119 S.Ct. 1167).

[18] D.R.E. 702.

[19] 293 F. 1013 (D.C.Cir.1923).

[20] *Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

[21] 737 A.2d 513 (Del.1999).

[22] *Id.* at 522.

[23] *Daubert,* 509 U.S. at 594–95, 113 S.Ct. 2786 (emphasis added).

[24] *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 141, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) (stating that expert opinion testimony is admissible "only if it is both relevant and reliable").

[25] *Tumlinson III,* 2013 WL 4399144, at *4 (Del. Aug. 16, 2013).

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[26] *Daubert,* 509 U.S. at 591, 113 S.Ct. 2786.

[27] *Id.* (citing Fed.R.Evid. 702).

[28] D.R.E. 702.

[29] *Eskin v. Carden,* 842 A.2d 1222, 1228 (Del.2004); *Goodridge v. Hyster Co.,* 845 A.2d 498, 503 (Del.2004).

[30] *Daubert,* 509 U.S. at 580, 113 S.Ct. 2786.

[31] *Id.* at 593, 113 S.Ct. 2786.

[32] *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 153, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).

[33] *Daubert,* 509 U.S. at 595, 113 S.Ct. 2786.

[34] *Merrell Dow Pharms., Inc. v. Havner,* 953 S.W.2d 706, 714 (Tex.1997).

[35] *Tumlinson III,* 2013 WL 4399144, at *3 (Del. Aug. 16, 2013).

[36] *See* App. to Opening Br. at A1653; *Tumlinson IV,* C.A. No. 08C–07–107, at 19 (Del.Super.Oct.15, 2013) ("In summary, as to Dr. Frazier's general causation opinion, she has found reliable foundational studies suggesting an association between working in the semiconductor industry and reproductive problems.").

[37] *Tumlinson IV,* C.A. No. 08C–07–107, at 17.

[38] *Id.*

[39] *Id.*

[40] The Plaintiffs worked in AMD plants located in two different cities. Tumlinson "worked as a fab operator in AMD's San Antonio, Texas photolithography department" where she "operated a 'stepper/aligner' tool that was cleaned daily with isopropyl alcohol and acetone." *Tumlinson II,* 2012 WL 1415777, at *1 (Del.Super. Jan. 6, 2012). "There also were other organic solvents, including xylene and glycol ethers, in the tight quarters where Tumlinson worked." *Id.* Ontiveros worked as an "etch operator" in AMD's Austin facility, where he "dipped computer parts into baths containing a sulfuric acid-hydrogen peroxide mixture." *Id.* "He then dipped the parts into a hydrofluoric acid and ammonium fluoride bath. Ontiveros refilled the chemical baths two or three times per shift." *Id.*

[41] *Tumlinson IV,* C.A. No. 08C–07–107, at 18.

[42] *Id.* at 19 (emphasis added).

[43] *Id.*

[44] App. Opening Supp. Br. at *6.

[45] *Daubert* describes the peer review process as the "submission to the scrutiny of the scientific community." *Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579, 593, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) (citations

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omitted).

[46] *See Daubert v. Merrell Dow Pharms., Inc.* (*Daubert II*), 43 F.3d 1311, 1317 (9th Cir.1995).

[47] Opening Supp. Br. at 6.

[48] *See Daubert II,* 43 F.3d at 1317 ("One very significant fact to be considered is whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for the purposes of testifying.").

[49] *Tumlinson IV,* C.A. No. 08C–07–107, at 20 (Del.Super.Oct.15, 2013).

[50] *Daubert,* 509 U.S. at 594, 113 S.Ct. 2786.

[51] *Daubert II,* 43 F.3d at 1319.

[52] *Tumlinson IV,* C.A. No. 08C–07–107, at 22 (citing *King v. Burlington Northern Santa Fe Railway Co.,* 277 Neb. 203, 762 N.W.2d 24, 40 (2009) (citing Reference on Manual on Scientific Evidence 376 (Federal Judicial Center 2d ed.2000))).

[53] *Id.*

[54] *Id.* at 26.

[55] *Id.* at 27.

[56] *Id.* at 30.

[57] *Id.* at 27.

[58] *Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579, 593–94, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

[59] The trial court consulted *Merrell Dow Pharmaceuticals, Inc. v. Havner,* 953 S.W.2d 706 (Tex.1997) and *Merck & Co. v. Garza,* 347 S.W.3d 256 (Tex.2011), in its D.R.E. 702 reliability analysis.

[60] The *Garza* court considered the reliability of expert testimony while assessing the sufficiency of the evidence on the element of causation. *Garza,* 347 S.W.3d 256.*Havner* similarly involved the Texas Supreme Court's assessment of whether the plaintiff's evidence of causation was sufficient to sustain the jury's verdict. *Havner,* 953 S.W.2d 706.*Daubert* warned against conflating issues of reliability and *admissibility* of expert evidence with those of reliability and *sufficiency* of expert evidence. *Daubert,* 509 U.S. at 595–97, 113 S.Ct. 2786. The United States Supreme Court in *Daubert* suggested that "in the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to direct a judgment and likewise to grant summary judgment." *Id.* at 596, 113 S.Ct. 2786. "[R]ather than wholesale exclusion," procedural devices such as summary judgment and directed verdict "are the appropriate safeguards where the basis of scientific testimony meets the standards of Rule 702." *Id.* Thus, trial courts must assess the evidence

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in its proper context to avoid making a premature assessment of its sufficiency when inquiring about its admissibility.

Del. R. Civ. P. Super. Ct. 26

Rule 26 - General provisions governing discovery

(a) Discovery methods. Parties may obtain discovery by one or more of the following methods: Depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery scope and limits. Unless otherwise limited by order of the Court in accordance with these rules, the scope of discovery is as follows:

(1) In general. - Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, including the existence, description, nature, custody, condition and location of any documents, electronically stored information (EST), or tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the triaf. The frequency or extent of use of the discovery methods set forth in paragraph (a) shall be limited by the Court if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(iii) the discovery sought is not proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, and-the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. The Court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).[1]

(2) Insurance agreements. - A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) Trial preparation: Materials. Subject to the provisions of subdivision (b)(4) of this Rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this Rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer or agent) only

upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering the discovery of such materials when the required showing has been made, the Court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a) (4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the party making it and contemporaneously recorded.

(4) Trial preparation: Experts. - Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b) (1) of this Rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A) (i) party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the Court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b) (4) (C) of this Rule, concerning fees and expenses as the Court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the Court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b) (4) (A) (ii) and (b) (4) (B) of this Rule; and (ii) with respect to discovery obtained under subdivision (b) (4) (A) (ii) of this Rule the Court may require, and with respect to discovery obtained under subdivision (b) (4) (B) of this Rule the Court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) Pro tection for draft reports or disclosures. -- Rule 26(b)(3) protects drafts of any report or disclosure required under Rule 26 regardless of the form in which a draft is recorded.

(6) Protection of communication between a party's attorney and expert witnesses. -- Rule 26 protects communications between the party's attorney and any witness required to provide an opinion under Rule 26(b)(4) regardless of the form of the communications, except to the extent that communications:

(i) relate to compensation for the expert study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(7) Claims of Privilege or Protection of Trial Materials. When a party withholds information otherwise discoverable under these rules by claimng that it is privileged or subject to protection as a trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(c) Protective orders. - Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the Court or alternatively, on matters relating to a deposition taken outside the State of Delaware, a court in the state where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the discovery not be had;

(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place or the allocation of expenses;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the Court;

(6) that a deposition after being sealed be opened only by order of the Court;

(7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the Court. A party has standing to move for a protective order with respect to discovery directed at a nonparty on the basis of annoyance, embarrassment, oppression, or undue burden or expense that the moving party will bear. A non-party from another state from whom discovery is sought always may move for a protective order from the court in the state where discovery is sought or, alternatively, from this Court provided the non-party agrees to be bound by the decision of this Court as to the discovery in question. If the motion for a protective order is denied in whole or in part, the Court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the to the motion.

(d) Sequence and timing of discovery. Unless the Court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired except as follows:

(1) A party is under a duty seasonably to supplement the response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the person's testimony.

(2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which (A) the party knows that the response was incorrect when made, or (B) the party knows that the response although correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the Court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

(f) Discovery conference. At any time after commencement of an action the Court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The Court shall do so upon motion by the attorney for any party if the motion includes:

(1) A statement of the issues as they then appear;

(2) A proposed plan and schedule of discovery;

(3) Any limitations proposed to be placed on discovery;

(4) Any other proposed orders with respect to discovery; and

(5) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion. Each party and each party's attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.
Following the discovery conference, the Court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the Court may combine the discovery conference with a pretrial conference authorized by Rule 16.

(g) Signing of discovery requests, responses, and objections. Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that the signer has read the request, response, or objection, and that to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry it is: (1) Consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response or objection and a party shall not be obligated to take any action with respect to it until it is signed.
If a certification is made in violation of the rule, the Court, upon motion, or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

[1] Comment: The 2019 amendment to Delaware Superior Court Rule 26(b)(1) follows the Federal Rules of Civil Procedure in confirming that relevance is the touchstone for discovery. Under this standard, relevant evidence is discoverable, even if it may not be admissible. The 2019 amendment removes the qualification about the information appearing "reasonably calculated to lead to the discovery of admissible evidence." As the comments to Federal Rule of Civil Procedure 26(b)(1) explain, this phrase "has been used by some, incorrectly, to define

the scope of discovery." To avoid this implication, the drafters of the federal rules removed the language and replaced it with the direct statement that information within the scope of discovery need not be admissible in evidence to be discoverable.

Subject to other considerations, such as privilege and proportionality, all relevant evidence is discoverable, whether or not it is admissible. This clarification is not intended to change the scope of available discovery under the Delaware rules. The scope of discovery remains ""broad and far-reaching...." *Cal. Pub. Emps. Ret. Sys. v. Coulter,* 2004 WL 1238443, at *1 (Del. Ch. May 26, 2004) (citation omitted); *see also Woodstock v. Wolf Creek Surgeons, P.A.,* 2017 WL 3727019, (Del. Super. Aug. 30, 2017 at *6; *Levy v. Stern,* 687 A.2d 573, 1996 WL 742818, at *2 (Del. Dec. 20,1996) (Table) (noting that the "discovery rules are to be afforded broad and liberal treatment"); "[T]he spirit of Rule 26(b) calls for all relevant information, however remote, to be brought out for inspection not only by the opposing party but also for the benefit of the Court ...." *Boxer v. Husky Oil Co.,* 1981 WL 15479, at *2 (Del. Ch. Nov. 9, 1981). Relevance "must be viewed liberally," and discovery into relevant matters should *be permitted if there is "any possibility that the discovery will lead to relevant evidence. " Loretto Literary & Benevolent Inst. v. Blue Diamond Coal Co.,* 1980 WL 268060, at *4 (Del. Ch. Oct. 24, 1980); *see also Incyte Corporation v. Flexus Biosciences, Inc.,* 2017 WL 5128979, at *4 (Del. Super. Oct. 27, 2017)(as a general rule, information sought in discovery is considered relevant "if there is any possibility that the information sought may be relevant to the subject matter of the action." (citations omitted).

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Amended September 25, 2015, effective October 1, 2015; Amended June 27, 2019, effective August 1, 2019.

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Del. R. Evid. 403

Rule 403 - Exclusion of Excluding Relevant Evidence for Prejudice, Confusion, or Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice,confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Del. R. Evid. 403

Amended November 28, 2017, effective January 1, 2018.

Comment

This rule tracks F.R.E. 403.

In Concord Towers, Inc. v. Long, Del. Supr., 348 A.2d 325 (1975), the Delaware Supreme Court ruled that whether the existence of surprise is reversible error depends on whether the surprise is prejudicial.

It is not intended that this rule will change that rule of law. See also Bennett v. State, Del. Supr., 164 A.2d 442 (Supr.1960) and Hoey v. Hawkins, Del. Supr., 332 A.2d 403 (1975).

D.R.E. 403 was amended in 2017 in response to the 2011 restyling of the Federal Rules of Evidence. The amendment is intended to be stylistic only. There is no intent to change any result in ruling on evidence admissibility.

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