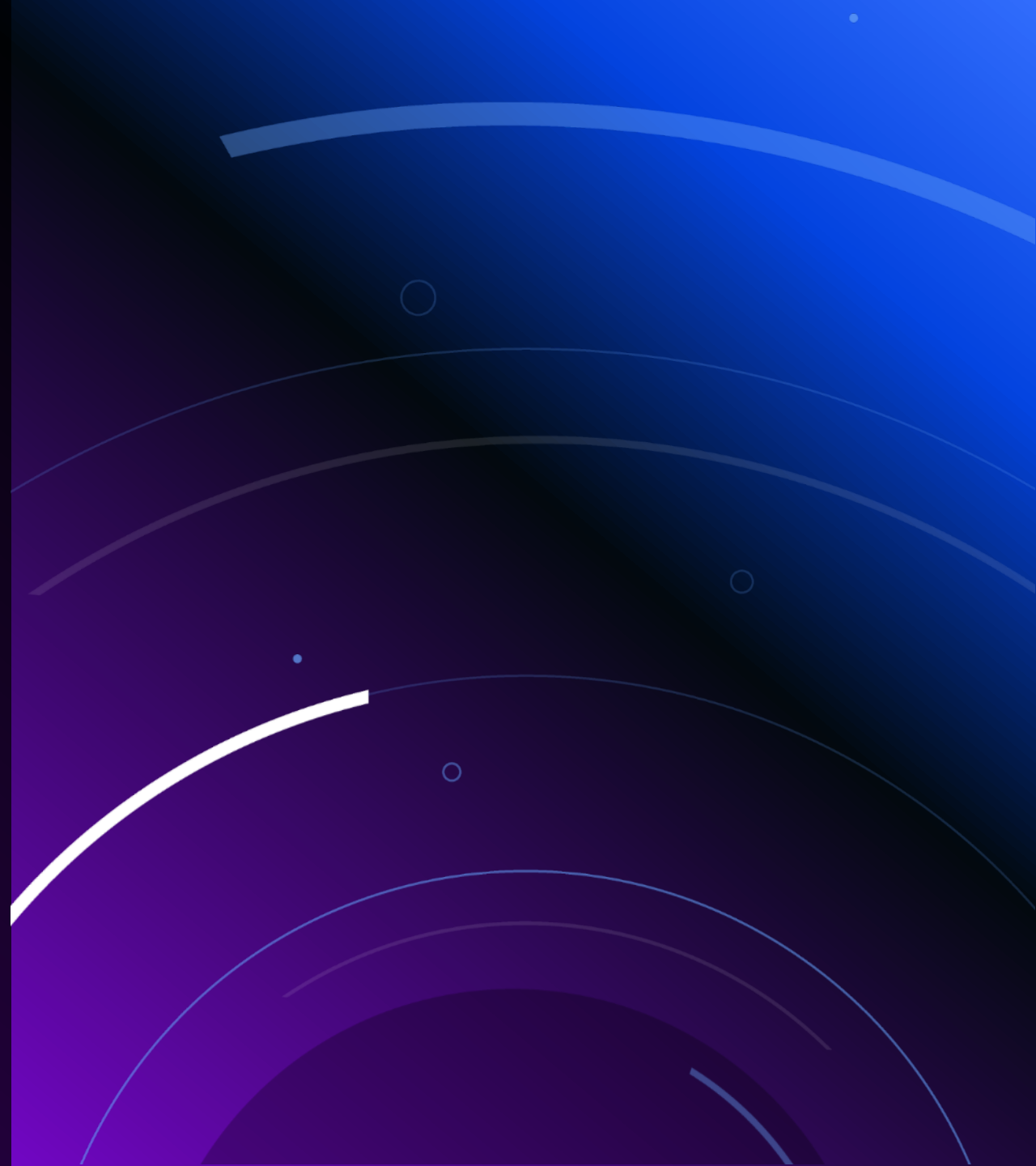


THE MODERN USES OF DAUBERT



FRYE/REED/DYAS STANDARD





DAUBERT STANDARD



WHAT DO THE RULES OF
EVIDENCE TELL US

GO TO THE RULES

- Rule 701
- Rule 702
 - *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)
- Rule 703
 - *Sardis v. Overhead Door Corp.*, 10 F.4d 268 (4th Cir. 2021)

RULE 701

Opinions are not Four Letter Words.

- Anyone Can Have An Opinion
- Anyone Can Testify To An Opinion
- But The Court Does Control What Types Of Opinions A Witness Can Testify To.

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: **(a)** rationally based on the witness's perception; **(b)** helpful to clearly understanding the witness's testimony or to determining a fact in issue; and **(c)** not based on scientific, technical, or other specialized knowledge within the scope of Rule 702

RULE 702

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 the proponent demonstrates to the court that it is more likely than not that:

- (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's opinion **reflects a reliable application** of the principles and methods to the facts of the case.

RULE 702(B) INTERACTION WITH 703

THE TESTIMONY IS **BASED ON SUFFICIENT FACTS OR DATA**

What Facts Can The Expert Use

- Case File
- Depositions
- Facts that “in the particular filed [the expert] would reasonably rely . . . In forming an opinion.”

An expert may base an opinion on **facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. . . .**

RULE 702(B) INTERACTION WITH 703

THE TESTIMONY IS BASED ON SUFFICIENT FACTS OR DATA

What Data Can The Expert Use

- Again, we have a Rule for this

FRE: 803

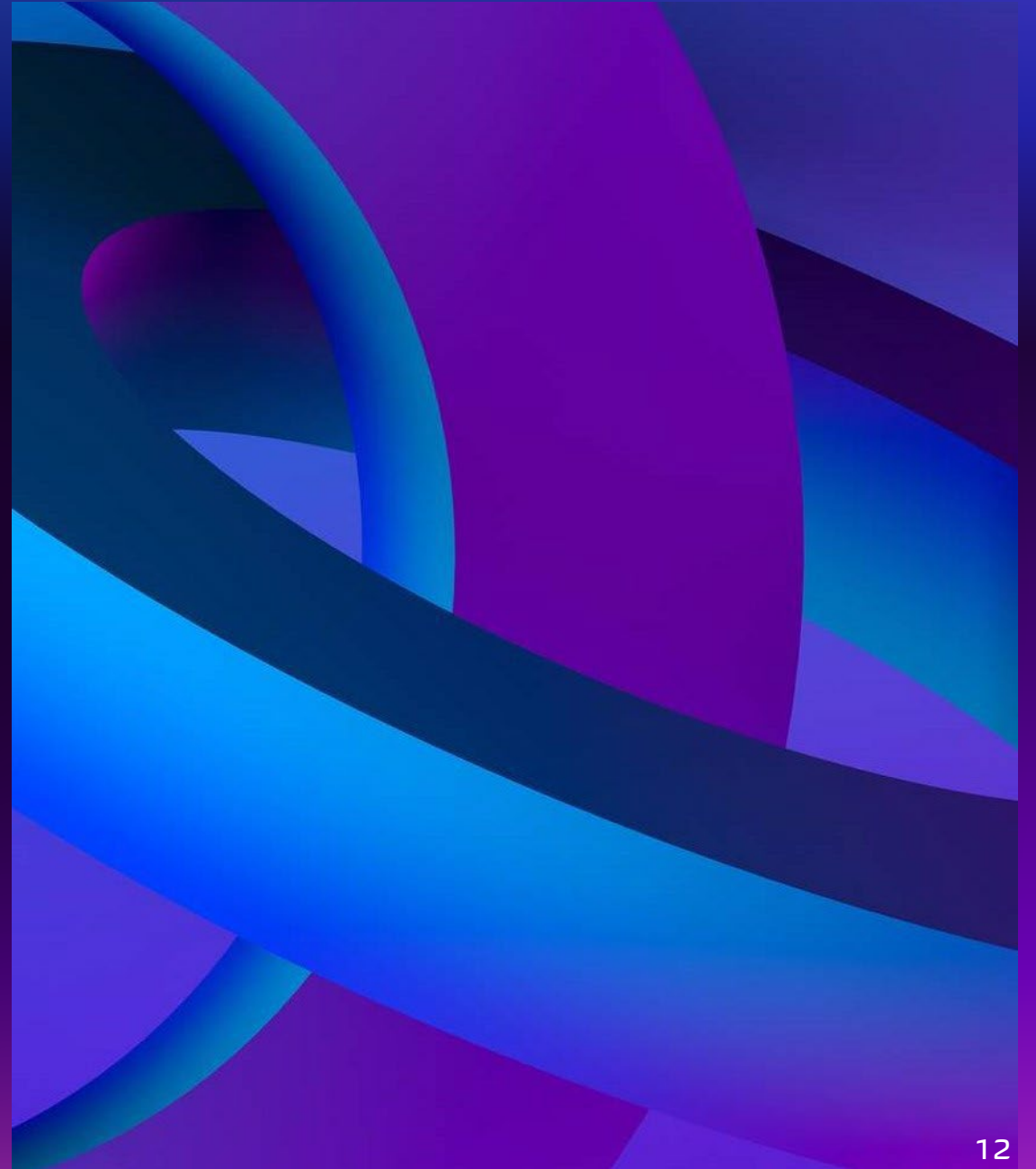
(18) *Statements in Learned Treatises, Periodicals, or Pamphlets.* A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

OVERCOMING
THE DAUBERT
STANDARD



CORNERSTONE OF DAUBERT ADDRESSING RULE 702(C) & (D)

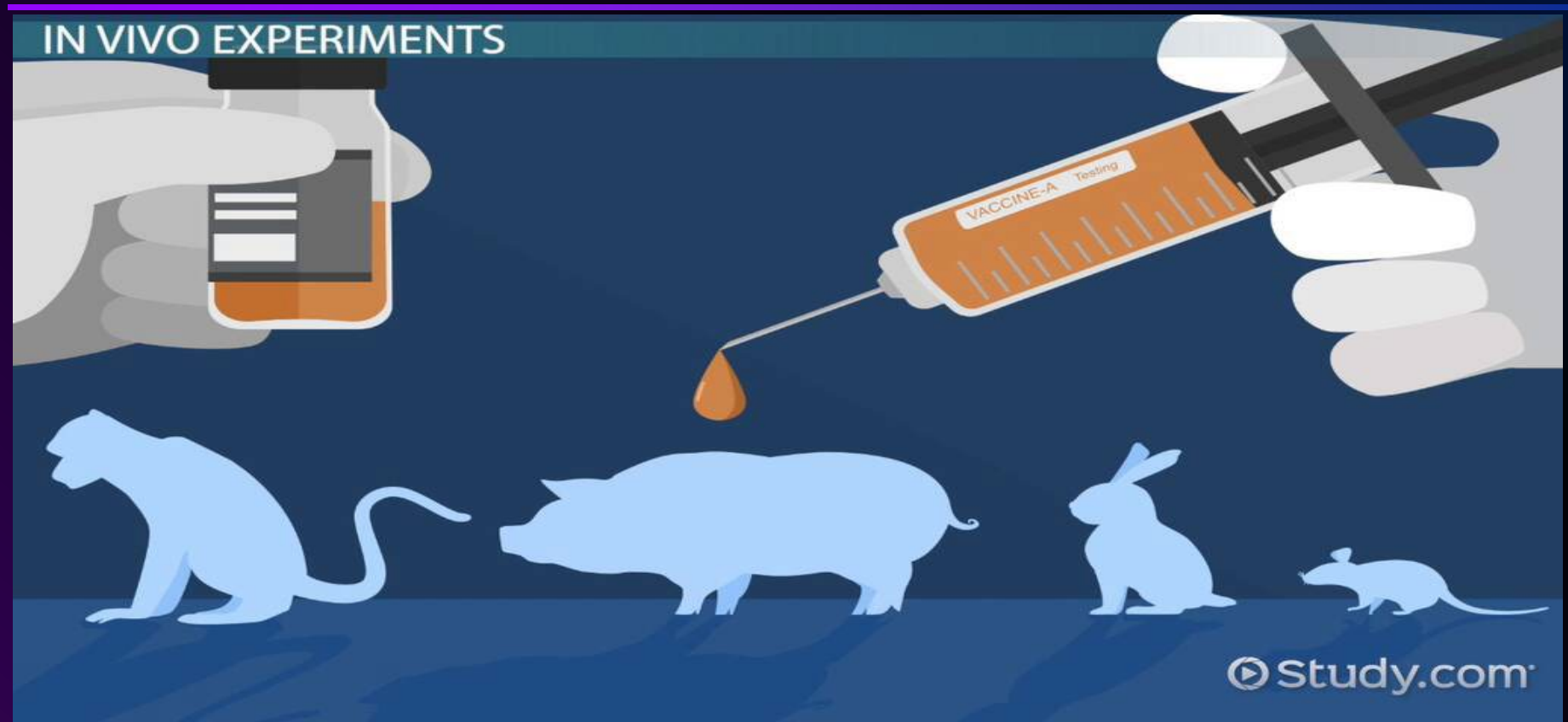
“This entails a preliminary assessment of **whether the reasoning or methodology underlying the testimony is scientifically valid** and of whether that reasoning or methodology properly can be applied to the facts in issue.”

Daubert v. Merrell Dow Pharms., Inc.,
509 U.S. 579, 592-93, 113 S. Ct. 2786,
2796 (1993)

“Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested. ‘Scientific methodology today is based on **generating hypotheses and testing them to see if they can be falsified**; indeed, this methodology is what distinguishes science from other fields of human inquiry.’”

Daubert v. Merrell Dow Pharms., Inc., 509
U.S. 579, 593, 113 S. Ct. 2786, 2796 (1993)


WHAT WAS DAUBERT ABOUT?



METHODOLOGY

Their conclusions were based upon "in vitro" (test tube) and "in vivo" (live) animal studies that found a link between Bendectin and malformations; pharmacological studies of the chemical structure of Bendectin that purported to show similarities between the structure of the drug and that of other substances known to cause birth defects; and the "reanalysis" of previously published epidemiological (human statistical) studies.

Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 583, 113 S. Ct. 2786, 2791-92 (1993)



"Relevant evidence" is defined as that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401. The Rules' basic standard of relevance thus is a liberal one.

Frye, of course, predated the Rules by half a century.

Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 587, 113 S. Ct. 2786, 2794 (1993)



WHAT DOES THE
COMMON LAW TELL
US

DAUBERT'S UNDERLYING TEST

- This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue. We are confident that federal judges possess the capacity to undertake this review. Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test.

Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 592-93, 113 S. Ct. 2786, 2796 (1993)

DAUBERT'S UNDERLYING TEST

To summarize: "General acceptance" is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence -- especially Rule 702 -- do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands.

Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 597, 113 S. Ct. 2786, 2799 (1993)

AMBROSINI V. LABARRAQUE

“Rule 703 explains that if ‘the facts or data in the particular case upon which an expert bases an opinion or inference’ are ‘of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.’”

Ambrosini v. Labarraque, 322 U.S. App. D.C. 19, 101 F.3d 129, 133 (1996).

AMBROSINI V. LABARRAQUE

“the district court must focus ‘solely on principles and methodology, not on the conclusions that they generate.’”

Ambrosini v. Labarraque, 101 F.3d at 133 citing to *Daubert*

D.C. VS M.D.

Motorola v. Murray, 147 A.3d 751 (D.C. 2016)

- "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."
- *Motorola Inc. at 754* citing to *Daubert*, 509 U.S. at 596.

Rochkind v. Stevenson, 471 Md. 1, 236 A.3d 630 (M.D. 2020)

- "“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.””
- *Rochkind at 38* citing to *Daubert*, 509 U.S. at 596.

SUBSEQUENT D.C. OPINIONS

Dicta

- Dickerson v. D.C. 182 A.3d 721
 - Reviewed whether an expert was qualified to reach 702(c).
 - Expert could not diagnose injuries so preclusion.
- Townsend v. D.C., 183 A.3d 727
 - Failure to proffer witness as an expert to testify to the horizontal gaze nystagmus test for sobriety. Addressed in FN10

- UNITED STATES V. TIBBS, 2019 D.C. SUPER.LEXIS 9 (SEP. 5, 2019)

Thus, under *Daubert* and Rule 702, the admissibility of proffered expert opinion testimony does not exclusively rest on the acceptance of the opinion's underlying theory or methodology within a community of scientists or practitioners. Nor does it turn on the trial judge's view on the ultimate accuracy of the offered conclusion. Instead, the admissibility inquiry focuses on whether reliable principles and methods support the proposed testimony and on whether those principles and methods were reliably applied in the case at hand.

United States v. Tibbs, 2019 D.C. Super. LEXIS 9, *12

Judge Edelman

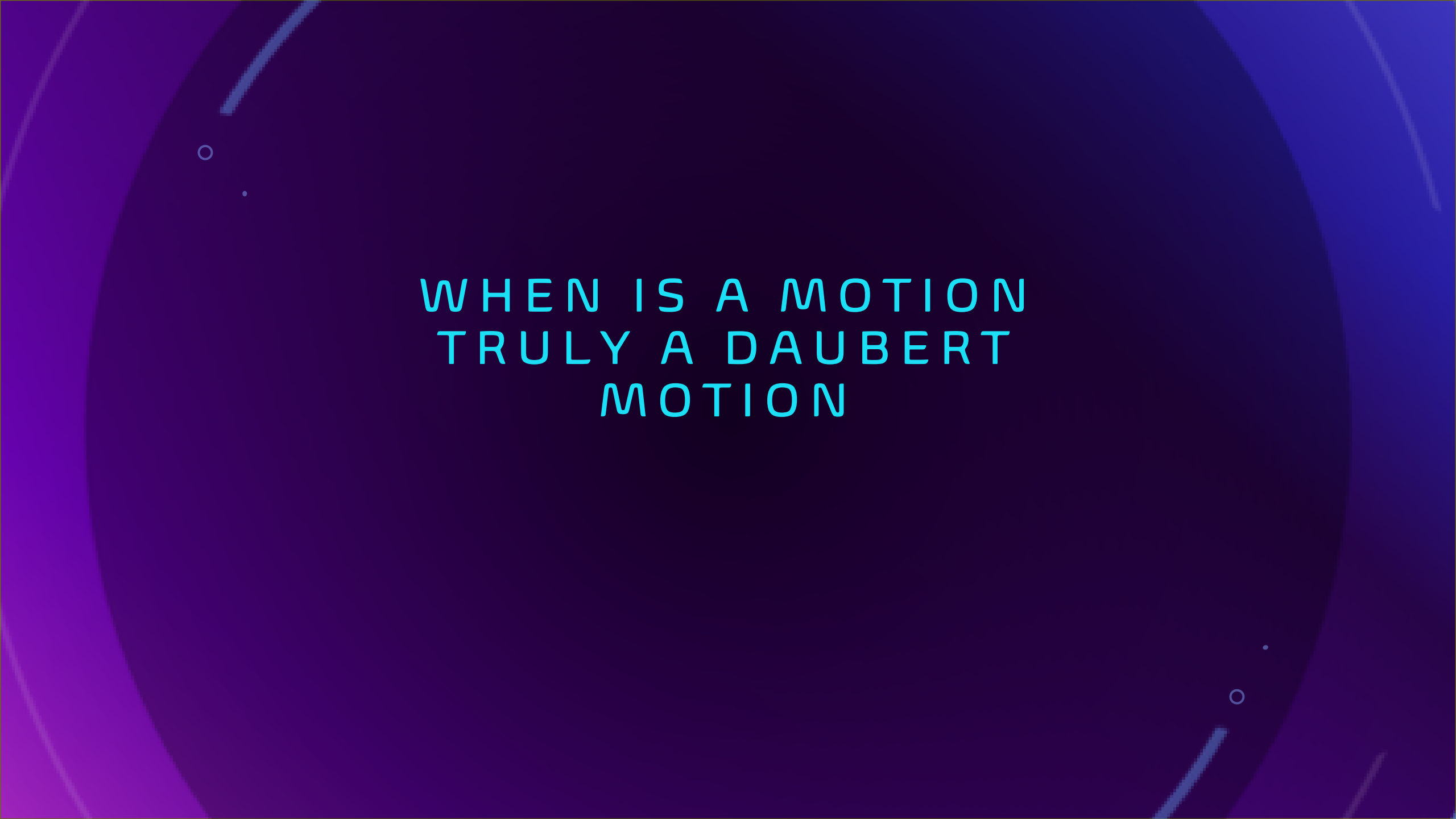
- WILLIAMS V. UNITED STATES, 210 A.3D 734 (2019)

Although decided when *Frye/Dyas* was still the law, *Gardner* scrutinized the firearms and toolmark examiner's opinion testimony through a reliability lens and cited sources that explain that the empirical foundation does not currently exist to permit these examiners to opine with certainty that a specific bullet can be matched to a specific gun. In line with *Motorola*, *Gardner* determined that these conclusions are simply unreliable.

Williams v. United States, 210 A.3d 734, 742 (D.C. 2019) – Judge Easterly

PARKER V. UNITED STATES, 249 A.3D 388

The trial court applied the Dyas/Frye Test standard; however, the appellate court found the error to be “harmless because the record makes it clear that the trial court’s decision to exclude the expert testimony would have been the same if it applied the correct standard.”



WHEN IS A MOTION
TRULY A DAUBERT
MOTION



RECALL NOTICE

Heated Hand Grips Can Cause Throttle To Stick.

Does “stick” = “jam”

Eye-witness testimony states front tire was shaking.

But even if relevant, an opinion must also be sufficiently reliable. Reliability is a "flexible" inquiry that focuses on "the principles and methodology" employed by the expert. *Daubert*, 509 U.S. at 594-95. Specifically, district courts must ensure that an expert's opinion is "based on scientific, technical, or other specialized *knowledge* and not on belief or speculation." *Oglesby v. Gen. Motors Corp.*, 190 F.3d 244, 250 (4th Cir. 1999). **And to the extent an expert makes inferences based on the facts presented to him, the court must ensure that those inferences were "derived using scientific or other valid methods."** *Id.*

Sardis v. Overhead Door Corp., 10 F.4th 268, 281 (4th Cir. 2021)

SARDIS V. OVERHEAD DOOR CORP., 10 F.4TH 268, 282 (4TH CIR. 2021)

Shaking front tire \neq reliable basis of knowledge and experience in the field of engineer to demonstrate that both a brake is being applied as a throttle is open



2021 K Street NW, Suite T-115, Washington, DC 20006
202-775-8692

Medication Reconciliation Form

Date: 3/1/2016 10:15 AM
Patient Name: Frank W. Hankins **Gender:** Male
Account #: MGG129748 **DOB (age):** 4/7/1936 (79)
Endoscopist(s): George Bolen, MD

Allergies:
Patient has no known allergies or drug allergies

Medications you reported taking:	Last dose taken:	Resume taking:
acetaminophen-codine 300-30 mg tablet Take 1 tablet by mouth three to four times a day	2 days ago	Yes
amlodipine 5 mg tablet twice daily	yesterday	Yes
aspirin 81 mg tablet, delayed release (DR/EC) Take 1 tablet by mouth once a day	2 days ago	Yes
B12 5,000-100 mcg lozenge daily	yesterday	Yes
Bystolic 10 mg tablet daily	yesterday	Yes
co-q 10 300 mg daily	yesterday	Yes
Crestor 20 mg tablet take one at bedtime	yesterday	Yes
furosemide 40 mg tablet daily	yesterday	Yes
hydralazine 100 mg tablet 3x daily	yesterday	Yes
Nexlum 24HR 22.3 mg capsule, delayed release (DR/EC) Take 1 capsule by mouth once a day before breakfast for 14 days	yesterday	Yes
Plavix 75 mg tablet	2 days ago	Do not resume
Uloric 40 mg tablet one tablet at bedtime	yesterday	Yes
Vitamin D3 1,000 unit capsule daily	yesterday	Yes

Medications you were given during this procedure:
Ephedrine 10 mg
Lidocaine 2% 100 mg IV
Propofol 250 mg IV

Medication orders from today's procedure:



CDC 28
10027

HILL V. CAPITAL DIGESTIVE CARE, ET AL.



BY MR. BARRY NACE:

Q. And PAD is what Mr. Hankins had, correct?

A. Yeah, peripheral arterial disease, but the paper did not focus in on patients with peripheral arterial disease is what I'm saying.

Q. It focused on patients --

A. A general group of patients with hyperlipidemia, so it could be anybody that -- you could have hyperlipidemia without risk factors, you could have hyperlipidemia with risk factors, it's very -- nonspecific group.

Q. Right. And you reported in that paper that 9 out of 13 or 69 percent of patients with hyperlipidemia had poor responsiveness to aspirin, correct?

A. In that particular set group, that is correct.

Q. And you also said, interestingly, 12 out of 14 or 86 percent of patients with poor responsiveness to aspirin were taking lipid lowering therapy, correct?

A. That is correct.

Q. And that's like a cholesterol drug, correct?

3 A. That's my understanding.

4 Q. So, if anything, this particular gentleman fit
5 your category of hyperlipidemia, not responding as well to
6 aspirin as those who don't have hyperlipidemia, correct?

7 A. I would disagree with that --

8 MS. CHROSTOWSKI: Objection.

9 THE WITNESS: -- actually because, again, this --
10 our study looked at every -- you know, it was -- it would
11 not be generalizable to a PAD population. Okay. Our study
12 looked at patients who we found in our outpatient clinic who
13 had hyperlipidemia. Some of them were young, had no risk
14 factors for heart disease, some may have had others, we did
15 not purely --

16 To make the generalization that you're suggesting
17 would be to study exclusively a population of patients with
18 PAD similar to Mr. Hankins and then trying to narrow the
19 kind of comorbidities that Mr. Hankins had using aspirin
20 versus nonaspirin. But what you're saying here is not
21 generalizable to this case.

22 Q. I'm just talking about what you wrote, sir.

23 You also said in here that in most people -- most
24 people aspirin produces irreversible inhibition of platelet
25 aggregation, but in a sizeable minority of patients, the

2 Q. I'm just talking about what you wrote, sir.

3 You also said in here that in most people -- most
4 people aspirin produces irreversible inhibition of platelet
5 aggregation, but in a sizeable minority of patients, the

61

1 degree of platelet aggregation needed to prevent events
2 according to in vitro assessments is not achieved.

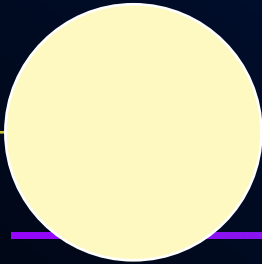
3 So it doesn't achieve the goal of stopping the
4 platelet aggregation specifically in people with
5 hyperlipidemia, correct?

6 A. In some patients. But, again, it's not -- you
7 can't take a small study that we did and say this is
8 generalizable to the population at large. That's how --
9 that's not how we write national guidelines. So --

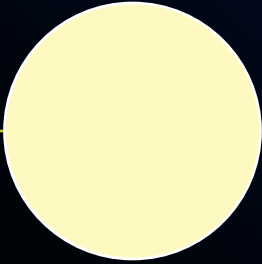
0 Q. But, sir, that's what you wrote in this paper that
1 was published --

2 A. Yes.

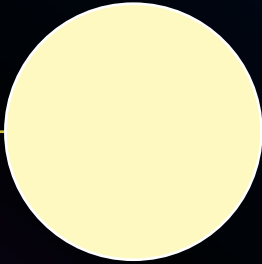
All PAD Patients = <50% Effective



PAD Patients with Just Diabetes = Unknown



PAD Patients with Just Hyperlipidemia = Unknown



PAD Patients with Just AIDS = Unknown

Q. In conjunction with your assignment in this case, what expert methodology did you employ?

A. I took the information from this case that's been provided to me. I compared it to regulatory standards as well as other standards enumerated in sources like the CDL Manual that are commonly used in the trucking industry.

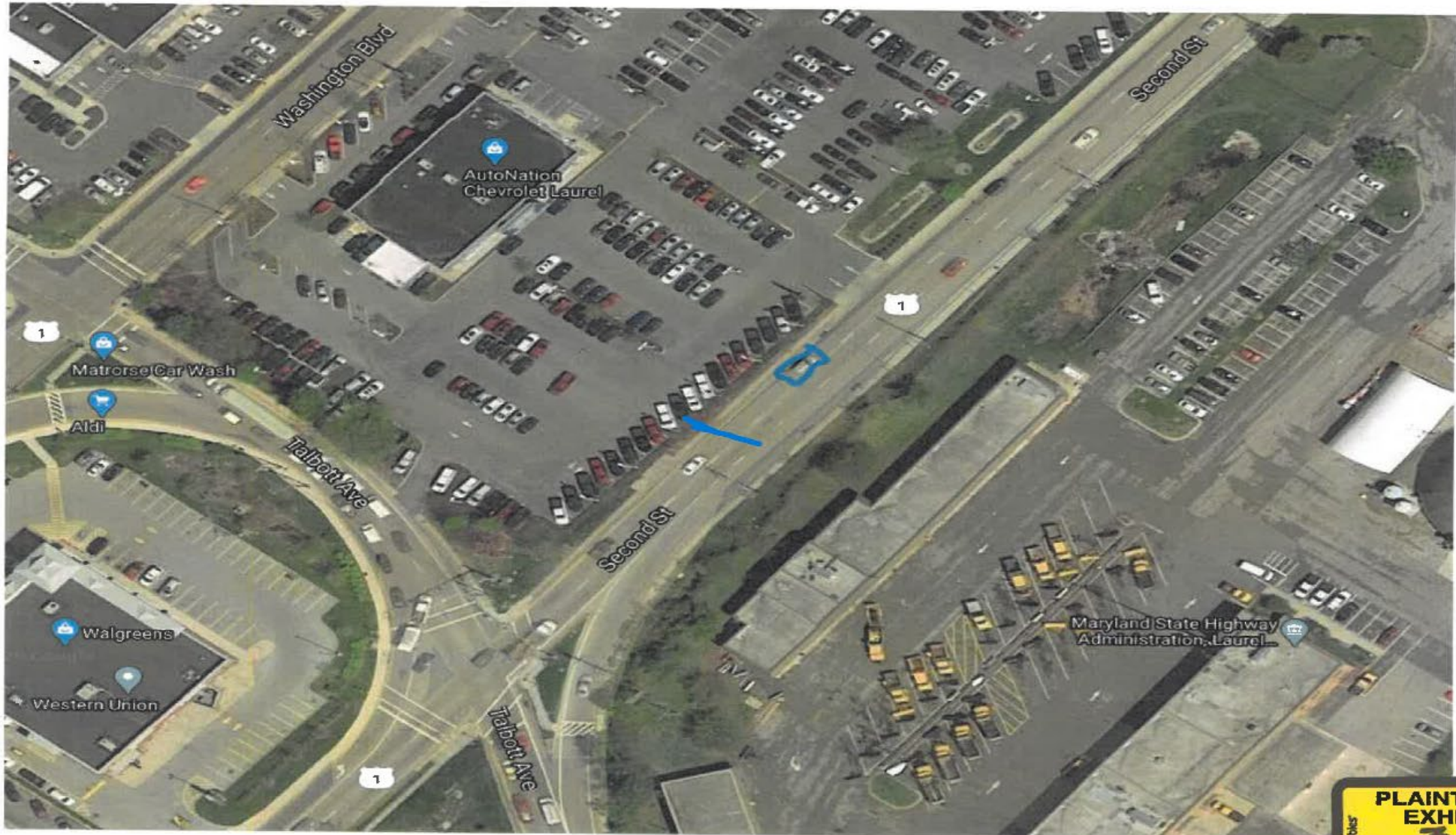
I determined if there were any specific discrepancies between what happened in the case facts and what is expected or enumerated in those commonly-used resources.

I then made a determination, from the perspective of a safety director or safety professional, whether or not there were specific steps reasonably within my control as a truck driver or a motor carrier that could have been in opposition to the steps that were taken in this case to better align them with the expectation and rules that are enumerated in sources like the CDL Manual.

The step-by-step process I just described was something that was specifically taught to me through part of my certification process as a certified director of safety and is the same step-by-step process that we would use in the trucking industry for one of our own vehicles in our own fleet.

LIABILITY TESTIMONY

“Sitting Duck” Tractor-Trailer Case



PLAINTIFF'S
EXHIBIT
3

Photos1017

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2.5.2 – Communicating Your Presence

Other drivers may not notice your vehicle even when it's in plain sight. To help prevent accidents, let them know you're there.

When Passing. Whenever you are about to pass a vehicle, pedestrian, or bicyclist, assume they don't see you. They could suddenly move in front of you. When it is legal, tap the horn lightly or, at night, flash your lights from low to high beam and back. And, drive carefully enough to avoid a crash even if they don't see or hear you.

When It's Hard to See. At dawn, dusk, in rain, or snow, you need to make yourself easier to see. If you are having trouble seeing other vehicles, other drivers will have trouble seeing you. Turn on your lights. Use the headlights, not just the identification or clearance lights. Use the low beams; high beams can bother people in the daytime as well as at night.

When Parked at the Side of the Road. When you pull off the road and stop, be sure to turn on the four-way emergency flashers. This is important at night.

Don't trust the taillights to give warning. Drivers have crashed into the rear of a parked vehicle because they thought it was moving normally.

If you must stop on a road or the shoulder of any road, you must put out your emergency warning devices within ten minutes. Place your warning devices at the following locations:

If you must stop on or by a one-way or divided highway, place warning devices 10 feet, 100 feet, and 200 feet toward the approaching traffic. See Figure 2.8

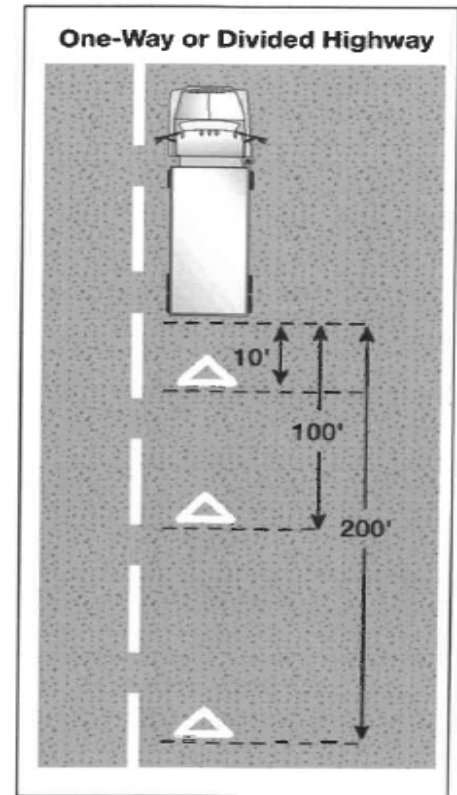


Figure 2.8

If you stop on a two-lane road carrying traffic in both directions or on an undivided highway, place warning devices within 10 feet of the front or rear corners to mark the location of the vehicle and 100 feet behind and ahead of the vehicle, on the shoulder or in the lane you stopped in. See Figure 2.9.

LIABILITY TESTIMONY

“Sitting Duck” Tractor Trailer
Case

Qualifications	Reliance	Field	Opinions
Truck Driver/Safety Director for 20+ years	All depositions	Standard of Care	Deviations
Teaches CDL Classes for the State	All discovery documents	Causative Effect	Yes
Holds CDL	FMCSR		
Military Experience with Heavy Machinery	Published Authoritative Literature		
Takes Continuing Education Courses	Commercial Drivers Manuel		

DAMAGES TESTIMONY

Romanoski v. Olokun, et al.

Opinions of Jessica Stoll

1. It is my opinion that projecting an individual's wage loss and earning capacity past the age of normal retirement in the U.S., age 66 for an individual born in 1950, is entirely speculative and without sufficient foundation. **In 2020, only 9.8 million or 18% of Americans age 65 and older were in the labor force. It cannot be stated within a reasonable degree of vocational probability how much longer Mr. Romanoski would have continued to work past the normal age of retirement.**
2. Mr. Romanoski had a significant premorbid medical history. While he attributes his inability to continue working to his MVA's, **a review of medical records indicates that he had many medical conditions that may have contributed to his overall decline in health and inability to continue with his employment.**
3. It is my opinion that his MVAs occurred after the age of normal retirement, there is no loss of earning capacity or future wage loss claim for Mr. Romanoski that can be attributed to subject accidents.

BASIS OF STOLL'S OPINIONS

1. Ms. Stoll holds no opinion of Dr. Romanoski's pre-incident work-life expectancy.
2. In 2020, only 9.8 million or 18% of Americans age 65 and older were in the labor force
3. Ms. Stoll uses the U.S. Department of Health and Human Services Administration for Community Living and the Administration of Aging Published in May 2021

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES ADMINISTRATION FOR COMMUNITY LIVING AND THE ADMINISTRATION OF AGING PUBLISHED IN MAY 2021

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About the U.S. and its government

A-Z index of U.S. government departments and agencies

Administration for Community Living

State and local governments

Administration for Community Living (ACL)

The Administration for Community Living (ACL) supports the needs of the aging and disability populations, and improves access health care and long-term services.



Advancing independence and inclusion of older adults and people with disabilities

The Administration for Community Living was created around the fundamental principle that older adults and people of all ages with disabilities should be able to live where they choose, with the people they choose, and with the ability to participate fully in their communities.

By funding services and supports provided primarily by networks of community-based organizations, and with investments in research, education, and innovation, ACL helps make this principle a reality for millions of Americans.

DR. ROMANOSKI

- He was not in assisted living
- He was not disabled
- He was not in community living
- He was a full-time practicing psychiatrist at Johns Hopkins and with his own private practice at the time of the collisions.

U.S. CENSUS BUREAU DATA

Sex, labor force status, and employment status ¹	Total 55 years and over		55 to 59 years		60 to 64 years		65 to 74 years		75 to 84 years	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Both sexes	92,762	100.0	21,610	100.0	20,073	100.0	30,367	100.0	14,558	100.0
In civilian labor force	37,467	40.4	15,498	71.7	11,624	57.9	8,431	27.8	1,595	11.0
Employed ²	36,258	96.8	15,003	96.8	11,236	96.7	8,187	97.1	1,529	95.9
Unemployed ²	1,208	3.2	495	3.2	387	3.3	244	2.9	66	4.1
Not in civilian labor force	55,296	59.6	6,112	28.3	8,449	42.1	21,935	72.2	12,964	89.0
Male	42,945	100.0	10,492	100.0	9,393	100.0	14,340	100.0	6,449	100.0
In civilian labor force	19,916	46.4	8,150	77.7	5,968	63.5	4,697	32.8	911	14.1
Employed ²	19,249	96.6	7,876	96.6	5,744	96.2	4,560	97.1	887	97.4
Unemployed ²	668	3.4	274	3.4	224	3.8	136	2.9	24	2.6
Not in civilian labor force	23,028	53.6	2,342	22.3	3,425	36.5	9,644	67.2	5,539	85.9

In analyzing Ms. Stoll's opinions, the Court considers Plaintiff's arguments in kind. First, Ms. Stoll provides an opinion that projects Plaintiff's future retirement age by

4

basing her opinion on United States Census Bureau data. However, Ms. Stoll does not provide an explanation to how this particular data set is connected to or accurate in projecting the retirement age of Plaintiff.

The cause-and-effect argument employed by Ms. Stoll is flawed. Similar to the "before-and-after" method analyzed in *Parkway Neuroscience and Spine Institute, LLC v. Katz, Abosch, Windesheim, Gershman & Freedman, P.A., et al.*, Ms. Stoll's analysis attempts to draw conclusions based on the provided data set. *See Neuroscience and Spine Institute, LLC v. Katz, Abosch, Windesheim, Gershman & Freedman, P.A., et al.*, 2022 WL 4588207 at *4-5, 12 (Md. Ct. Spec. App. Sep. 30, 2022). But, unlike in *Katz*, Ms. Stoll has not provided an explanation to why the data set was appropriate as applied to Plaintiff and without a "sufficient factual basis" supporting Ms. Stoll's methodology the opinion cannot be admitted. *Id.* at 12, 14.

Further, when analyzing the reliability of expert testimony courts must consider whether an “analytical gap” exists which results from “the failure by the expert witness to bridge the gap between his or her opinion and the empirical foundation on which the opinion was derived.” *Savage v. State*, 455 Md. 138, 163 (2017). Where generally accepted methodology and analysis are applied, an analytical gap may not be found even if an unknown degree of uncertainty exists. *Matthews*, 479 Md. at 318-19. But, for example in *Savage*, where a defense expert failed to “connect the dots” between defendant’s psychological tests and the expert’s opinion that the defendant was more likely to have difficulty controlling reactions under conditions of stress, the analytical gap prevented the testimony from being admitted. *Savage v. State*, 455 Md. 138, 164 (2017).

Plaintiff was employed as a psychiatrist prior to the accidents and no testimony has been provided to contradict his employment history. Ms. Stoll has not “connected the dots” between the data presented and the opinion offered regarding pre-accident work-life expectancy and therefore does not provide a sound relationship between the methodology applied and conclusion reached.

THANK YOU

Matthew A. Nace
Paulson & Nace, PLLC
1025 Thomas Jefferson Street, NW
Suite 810
Washington, D.C. 20007
man@paulsonandnace.com