

# APPELLATE CASE NOTES

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## THE STANDARD FOR ADMISSION OF EXPERT TESTIMONY IN MISSOURI IS CONTROLLED BY STATE STATUTE, NOT *FRYE* OR *DAUBERT*

### *STATE BOARD OF REGISTRATION FOR THE HEALING ARTS V. MCDONAGH*

In a decision that makes clear the standard for admission of expert testimony, the Missouri Supreme Court held in *State Board of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146 (Mo. banc 2003), that the standard set out in § 490.065 RSMo controls. The Missouri Supreme Court's decision overrules all prior civil cases which applied a different rule concerning the admission of expert testimony, thereby rejecting the standards set forth in *Frye* and *Daubert*.

Accordingly, the controlling standard for admission of expert testimony in Missouri is contained in § 490.065 RSMo which requires that the facts and data on which an expert relies be of a type reasonably relied upon by experts in the field and be otherwise reasonably reliable.

#### RELEVANT FACTS

The State Board of Registration for the Healing Arts filed a disciplinary complaint against Edward McDonagh, D.O., primarily alleging that he endangered the health of his patients in violation of § 334.100 RSMo by prescribing and using chelation therapy in his practice -- a treatment for acute metal poisoning for patients with heart or vascular disease or to mitigate circulatory problems. Dr. McDonagh contested the allegations in the complaint. During a November 1997 hearing before the Administrative Hearing Commission, the Board objected to Dr. McDonagh's use of expert testimony regarding his "off label" use of chelation therapy to treat vascular disease. The Commission heard all of the evidence, without ruling on its admissibility, and ultimately ruled that the testimony was admissible. The Commission found no cause to discipline Dr. McDonagh and denied the Board's complaint.

The Board appealed, asserting that the Commission improperly admitted the expert testimony regarding chelation therapy. The Board argued that the testimony of Dr. McDonagh and his experts was admissible under § 490.065 but inadmissible under *Frye*.<sup>1</sup> The Circuit Court affirmed the Commission's decision. The Missouri Supreme Court reversed and remanded, holding that the Commission failed to properly apply the legal standard governing admission of expert testimony -- specifically the § 490.065.3 standard regarding "experts in the field." *McDonagh*, 123 S.W.3d at 152.

#### LEGAL ANALYSIS

##### A. SECTION 490.065 PROVIDES THE STANDARD FOR THE ADMISSIBILITY OF EXPERT TESTIMONY

The Honorable Laura Denvir Stith wrote the majority opinion.<sup>2</sup> In addressing the standard for admission of expert testimony in civil cases, Judge Stith held that "section 490.065 provides the applicable standard in evaluating the admission of expert testimony."<sup>3</sup> *McDonagh*, 123 S.W.3d at 153.

Judge Stith pointed out that since the statute was enacted in 1989, various courts of appeal have expressed confusion as to whether the statute, *Frye* or *Daubert*, sets forth the relevant standard.<sup>4</sup> According to the Court, any confusion should have been resolved by the Missouri Supreme Court's en banc decision in 1997 in the *Lasky v. Union Electric Co.* case:

"While *Lasky* did not further expressly state that to the extent that prior civil cases

applied a different rule they should no longer be followed, such a holding was implicit in *Lasky's* direction that 'on remand the trial court shall be guided by § 490.065, RSMo, in evaluating the admission of expert testimony.'

To clarify, however, this Court expressly holds that to the extent that cases since *Lasky* have suggested that the standard of admissibility of expert testimony in civil cases is that set forth in *Frye* or some other standard, they are no longer to be followed. The relevant standard is that set out in § 490.065."

*McDonagh*, 123 S.W.3d at 153.

**B. SECTION 490.065 REQUIRES THAT AN EXPERT OPINION REST ON MATTERS "OF A TYPE REASONABLY RELIED ON BY EXPERTS IN THE FIELD" AND "BE OTHERWISE REASONABLY RELIABLE."**

In 1989, the legislature enacted § 490.065, the first subsection of which provides:

In any civil action, 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.

Subsection 1 of 490.065 is identical to Federal Rule of Evidence 702 (construed in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)).

Subsection 3 of § 490.065 provides:

The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable.

Subsection 3 of § 490.065 is similar to Federal Rule of Evidence 703, but there are important differences.

**C. THE *Frye* STANDARD OF GENERAL ACCEPTANCE DOES NOT APPLY**

The *Frye* standard, known as the general acceptance standard, was set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *Frye* requires a court to reject an expert opinion unless the "principle or discovery" on which the opinion is based has gained "general acceptance" in the relevant scientific community. 293 F. at 1014. In practice, the rule resulted in an inquiry into whether the expert's

conclusion, not necessarily his methodology, possessed widespread acceptance. Oftentimes, courts applying the *Frye* standard produced disparate results. See e.g., *State v. Butler*, 24 S.W.3d 21 (Mo. App. 2000) (debate amongst judges regarding whether the evidence elicited from the State's expert in a pedophile rape case was admissible under *Frye* resulting in three different conclusions).<sup>5</sup>

**D. SECTION 490.065 IS SIMILAR BUT NOT IDENTICAL TO THE STANDARDS SET FORTH IN THE FEDERAL RULES OF EVIDENCE AND AS INTERPRETED BY *DAUBERT***

Few cases have interpreted § 490.065. To the extent that § 490.065 mirrors FRE 702 and FRE 703, the cases interpreting those federal rules provide relevant and useful guidance in applying § 490.065. "To the extent, however, that the two approaches differ, the standard set out in section 490.065 must govern." *McDonagh*, 123 S.W.3d at 155.

The *McDonagh* Court acknowledged that the standard set out in 490.065 is very similar to that initially adopted by the federal courts in *Daubert* and set out in FRE 702.<sup>6</sup> *Id.* However, the Court pointed out that there are important differences in section 490.065.3 and FRE 703: "Section 490.065.3 expressly requires a showing that the facts and data [on which an expert bases an opinion or inference] are of a type reasonably relied on by experts in the field in forming opinions or inferences upon the subject of the expert's testimony." *McDonagh*, 123 S.W.3d at 156. The *McDonagh* Court further held that the trial court must independently assess their reliability. By contrast, under FRE 703 whether the facts or data are of a type reasonably relied upon by experts is relevant only to determine whether the facts or data must be otherwise admissible in evidence. *Id.*

Thus, under *Daubert* in federal court, an expert need not necessarily identify the relevant scientific community or field in which the data and facts are significant. However, in Missouri, the statute requires that in order to be admissible, the expert opinion testimony must be based on facts or data of a type reasonably relied upon by experts in the field. The *McDonagh* Court held that the relevant field must be determined not by the approach a particular expert chooses to take, but by the standard in the field in which the expert has chosen to practice.<sup>7</sup> *Id.* at 156. Applying the standard to the facts of the case, the *McDonagh* Court held that the relevant scientific community consisted of doctors treating persons with vascular disease, not just the limited number of physicians who used chelation therapy and presumably agreed with Dr. McDonagh that this particular form of treatment was acceptable. *McDonagh*, 123 S.W.3d at 156-57.

The Court cautioned that it was not, in effect, re-adopting the *Frye* standard under another name: "Nothing in section 490.065 suggests that the conclusions reached in reliance on these facts and data must be in conformity with the general medical consensus or must be generally accepted." *Id.* at 157.

Acceptance is only one factor of the relevant inquiry for the admissibility of expert testimony. *Id.* Section 490.065.3 only requires the court to consider whether the facts and data used by the expert are of a type reasonably relied on by experts in the field or if the methodology is otherwise reasonably reliable. "If not, then the testimony does not meet the statutory standard and is inadmissible." *Id.*

The *McDonagh* Court also held that the lack of controlled studies is not dispositive as to the admissibility of the expert testimony. "Controlled studies are a form of data and the admissibility of an expert's opinion does not depend upon an external standard (such as the presence of controlled studies) but whether experts in the particular field can reasonably rely on other types of data in forming their

opinions or whether in that field controlled studies are required." *McDonagh*, 123 S.W.3d at 157. Consistent with *Daubert* and FRE 703, whether the theory is or can be tested is merely one factor, albeit an important one, in determining its admissibility. *Id.* citing *Daubert*, 509 U.S. at 593-94.

## CONCLUSION

The standard for the admissibility of expert testimony in Missouri is not one of general acceptance. The standard, set forth in § 490.065 RSMo, focuses on reliability. Expert opinion testimony will be challenged based on § 490.065 using objective criteria identified by *Daubert* and case law interpreting *Daubert*.<sup>8</sup>

Some will argue that Subsection 3 of Section 490.065 is more restrictive than Federal Rule of Evidence 703 as it requires that the facts and data on which an expert opinion rests must be "of a type reasonably relied upon by experts in the field" and "must be otherwise reasonably reliable". Clearly, under *McDonagh*, the relevant field must be identified not by the approach the particular expert chooses to take, but by the standards in the field in which the expert practices. Because the *McDonagh* Court held that the trial court "must independently assess the reliability" of the expert's data, I expect there to be more challenges to expert opinion testimony. The analysis will require the trial court to focus on the foundation for the expert's opinion not just the conclusion reached. ■

## ENDNOTES:

1. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). By contrast, Dr. McDonagh argued that the applicable standard was that of *Daubert v. Merrell Dow*

*Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

2. Judge Michael Wolff, wrote separately in a concurring opinion to offer advice for lawyers on expert witnesses and advice for the Healing Arts Board on the future of this case against Dr. McDonagh. Judge Wolff noted that "neither party gave the statute [Section 490.065] due regard." *McDonagh*, 123 S.W.3d at 161. He questioned why an 80 year old federal court of appeals case would trump a Missouri statute directly on point. *Id.* "Forget *Frye*. Forget *Daubert*. Read the statute." *Id.* at 160.

3. The *McDonagh* Court held that § 490.065 is applicable in administrative proceedings as well as civil actions. *McDonagh*, 123 S.W.3d at 155.

4. The *McDonagh* Court cited several appellate decisions wherein confusion as to the applicable standard was evident: *McReynolds v. Mindrup*, 108 S.W.3d 662 (Mo. App. W.D. 2002); *Keyser v. Keyser*, 81 S.W.3d 164 (Mo. App. W.D. 2002); *Long v. Mo. Delta Med. Ctr.*, 33 S.W.3d 629 (Mo. App. S.D. 2000); *M.C. v. Yeargin*, 11 S.W. 3d 604 (Mo. App. E.D. 1999); and *Whitman's Candies, Inc., v. Pet, Inc.*, 974 S.W.2d 519 (Mo. App. W.D. 1998).

5. In *State v. Butler*, the defense counsel failed to object to the state's expert's testimony. For seven of the judges, the failure to object was dispositive. *Butler*, 24 S.W.3d 21 (Mo. App. 2000). The opinion, however, contains a debate among the judges about whether the evidence from the state's expert on hair (which was the key testimony linking the defendant with the crime), was admissible under *Frye*. The panel reached three different conclusions. *Id.* at 28-29; 38-44; 49.

6. At the time *Daubert* was decided, FRE 702 was identical to § 409.065.1.

7. This was a significant issue in the *McDonagh* case. Dr. McDonagh argued that the relevant "field" was the "the universe of medical practitioners who utilize chelation therapy." *McDonagh*, 123 S.W.3d at 156. Judge Stith pointed out that "to limit the relevant 'field' to only those doctors who have already expressed their view that the therapy in question is appropriate would make the inquiry into acceptance by experts in the field pointless, for, by definition, only those who had accepted the therapy would be asked for their opinion. The relevant field must be determined not by the approach a particular doctor chooses to take,

but by the standards in the field in which the doctor has chosen to practice." *Id.* at 156. Here, because Dr. McDonagh chose to treat patients with vascular disease, the relevant field is doctors treating persons with vascular disease and the facts or data on which Dr. McDonagh's experts rely must be of a type reasonably relied upon by doctors treating vascular disease. *Id.* at 156-57.

8. *Daubert* suggested four non-exclusive criteria for analyzing the reliability of an expert's opinion: 1) whether the theory or technique "can be (and has been) tested." *Daubert*, 509 U.S. at 593; 2) whether the theory or technique "has been subjected to peer review and publication." *Id.*; 3) the "known or potential rate of error." *Id.* at 594; and 4) "general acceptance can yet have a bearing on the inquiry." *Id.* The United States Supreme Court has emphasized that these four factors "do not constitute a definitive checklist or test." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999) (emphasis in original) (citations omitted). Because there are many different kinds of experts and many different kinds of expertise, trial courts will use different criteria to assess reliability. *Id.*