The Fourth Circuit

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A. Fourth Circuit Court of Appeals

Baxter v. Commissioner of IRS[1]

THIS is an appeal of a tax court decision. The taxpayers had claimed a taxable capital loss deduction based on a Custom Adjustable Rate Debt Structure ("CARDS") transaction. The Internal Revenue Commissioner determined the CARDS transaction lacked economic substance and, accordingly, the deduction was invalid, and assessed penalties. At trial in the tax court, the Commissioner offered the report and opinions of Dr. A. Lawrence Kolbe, an economics and management consultant. Dr. Kolbe opined, on particular, that the CARDS transaction had a lower net present value than the taxpayers claimed.

The Fourth Circuit affirmed the admissibility of Dr. Kolbe's opinion. The taxpayers argued that the expert failed to use appropriate data regarding interest rates and costs in his analysis. The court determined that "such challenges … affect the weight and credibility of [the expert's] assessment, not its admissibility."[2]

This holding runs afoul of the 2023 amendments to Rule 702, which makes clear that the sufficiency of data is a question for the court to determine, not the jury.

Bresler v. Wilmington Trust Co.[3]

Plaintiffs, personal representatives of an estate, sued defendants, a trustee and its subsidiary, for a breach of contract relating to insurance policies of the decedent. The jury awarded $23 million in damages to the plaintiffs. The plaintiffs offered damages calculations prepared by their accounting expert, Robert E. Pugh, concerning present and future shortfalls of the net-in-trust resulting from the trustee's breach.

On appeal, the defendants argued that the plaintiffs' accounting expert 1) erroneously incorporated certain data into his calculations; 2) used an invalid interest spread; and 3) improperly discounted an amount to present value. The Fourth Circuit affirmed and held that "courts may not evaluate the expert witness's conclusion itself, but only the underlying methodology. Moreover, 'questions regarding the factual underpinnings of the [expert witness'] opinion affect the weight and credibility of the witness' assessment, 'not its admissibility.'"[4] The court further held that any challenges to the accuracy of the expert's calculations also went to weight and credibility.

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[1] 910 F.3d 150, 158 (4th Cir. 2018).
[2] *Id.* at 158.
[3] 855 F.3d 178, 195-196 (4th Cir. 2017).
[4] *Id.* at 195.

This case is no longer good law because, under the 2023 amendment, questions regarding the factual underpinnings of the expert witness's opinion are for the court to decide as part of its admissibility determination.

Burns v. Anderson[5]

Plaintiff sued to collect the remaining balance due on a note after a sale of collateral yielded less than the total amount due. The lender offered Russell Bregman as an expert in stock valuation. He opined as to the commercial reasonableness of the value obtained for the collateral (shares of stock) that was sold in a private sale.

The Fourth Circuit affirmed the trial court's admission of the lender's expert's testimony. The court rejected the borrowers' arguments that the potential error rate of the methodology was large; that the expert failed to review pertinent documents; and that some of the data used by the expert was unreliable. It instead affirmed the trial court's determination that the challenge related to the error rate associated with the methodology was a "weight" issue. The Fourth Circuit further noted that the borrowers' argument did "not mount a true *Daubert* argument challenge" and that the arguments relating to the facts and data supporting the expert's opinion went to weight, not admissibility.[6]

This case is no longer good law because, under the 2023 amendment, questions regarding the factual underpinnings of the expert witness' opinion do not go to weight and are, rather, for the court to decide as part of its admissibility determination.

Price v. MOS Shipping Co.[7]**;** ***Price v. Atlantic Ro-Ro Carriers, Inc.***[8]

The plaintiff brought an action under the Longshore & Harbor Worker's Compensation Act alleging he was injured while unloading freight in the hold of a ship when a forklift being operated by another longshore worker fell through an unprotected hatch and struck him. The plaintiff challenged the admissibility of testimony by the defendant's expert witness, Walter Curran, an expert in stevedoring. Mr. Curran testified regarding the respective duties of a longshore worker, stevedore employers, and vessel owners.

The Fourth Circuit affirmed. It rejected the plaintiff longshore worker's argument that the expert's opinion was based on a misinterpretation of certain, disputed testimony. The Fourth Circuit noted that "questions

[5] 123 F. App'x 543, 549 (4th Cir. 2004).

[6] *Id.* at 549.

[7] 740 F. App'x. 781, 785 (4th Cir. 2018).

[8] 2017 WL 2876473 (D. Md., July 6, 2017).

regarding the factual underpinnings of the expert witness's opinion affect the weight and credibility assessment, not its admissibility."[9] It further noted that the district court had "properly allowed these disputes to be tested through '[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof,'" and that the expert's testimony was "not misleading or unduly confusing to the jury."[10]

This case is no longer good law because, under the 2023 amendment, questions regarding the factual underpinnings of the expert witness' opinion are for the court to decide as part of its admissibility determination.

TFWS, Inc. v. Schaefer[11]

The plaintiff, a liquor retailer, sued the Maryland State Comptroller claiming that Maryland regulations regarding wholesale pricing of wine and liquor violated the Sherman Act. In a first appeal, the Fourth Circuit affirmed the finding of violation, but remanded for consideration of the State's Twenty-First Amendment defense —that is, that the regulations furthered Maryland's interest in promoting temperance, which outweighed the federal interest in promoting competition under the Sherman Act. The district court granted summary judgment to the Comptroller and the liquor retailer appealed again. Among other experts, the State offered an economist, Dr. David T. Levy, who gave opinions as to liquor price comparisons between Maryland and other states.

The Fourth Circuit affirmed. The court rejected the retailer's argument that the expert's calculations did not support the conclusions he reached. The Fourth Circuit held that the retailer did not "mount a true *Daubert* challenge," noting that the focus of *Daubert* is on the methodology or reasoning used by an expert, not the conclusion itself. In noting that the retailer did *not* argue that the expert's "methods have not been tested, have not withstood peer review and publication, have excessive rates of error or have not been accepted in the field," the court found that the challenge was "to the proper weight to be given to [the expert's] evidence, not to admissibility."[12]

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[9] *Id.* at 785 (citation omitted).
[10] *Id.*
[11] 325 F.3d 234, 240 (4th Cir. 2003).
[12] *Id.* at 240. *See also* Heckman v. Ryder Truck Rental, Inc., Civ. No. 12-664-CCB, 2014 WL 3405003 at * (D. Md. July 9, 2014) (citing to the reasoning of Synergetics Inc. v. Hurst, 477 F.3d 949, 956 (8th Cir. 2007) ("so long as the methods employed are scientifically valid, … mere disagreement with the

This case is inconsistent with the 2023 amendment because the court found that the question of whether an expert's calculations support his conclusion went to weight, not admissibility, and because the court restricted its review to the expert's methodology and declined to evaluate the reliability in its application to the expert's conclusion.

B. District of Maryland

Dugger v. Union Carbide Corp.[13]

In this asbestos case, a defendant moved to exclude testimony of plaintiff's causation experts, including Dr. Arthur L. Frank and Dr. John C. Maddox. Defendant argued, among other things, that Dr. Frank had not employed a reliable methodology because he relied on regulatory statements, mixed fiber studies and an amicus brief in reaching his conclusions. The district court found the evidence to be scientific and reliable, but also said that the asbestos defendant can challenge the reliability of the evidence during cross examination. The court further found the defendant's argument that the studies relied on by the expert do not support the expert's conclusions are challenges "more appropriately brought before a jury."[14] The court ruled that Dr. Maddox's opinions were admissible for the same reasons, and also said that the defendant's argument that Dr. Maddox considered studies regarding asbestos generally as opposed to brake pad manufacturing in particular went to the weight of his conclusion, not its admissibility.

The court's decision is inconsistent with the 2023 amendment because it leaves reliability challenges to cross-examination and the jury's consideration.

Glass v. Anne Arundel County[15]

A driver brought civil rights claims against a county and a police officer under 42 U.S.C. § 1983 after a traffic stop. The plaintiff driver moved to strike the opinions of the defendants' expert in accident reconstruction, Cpl. Gregory Russell, arguing, among other things, that the report was not based on reliable data.

In rejecting the driver's argument, the district court noted that the driver's objections were to the conclusions the expert reached from the calculations made and the expert's failure to consider other data. The court held that those

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assumptions and methodology used does not warrant exclusion of expert testimony")).

[13] Civ. No. 16-3912, 2019 WL 4750568 at *5 (D. Md. Sept. 30, 2019).

[14] *Id.* at *5.

[15] 38 F. Supp.3d 705, 716 (D. Md. 2014).

challenges "go to the weight of the report, not its admissibility, and may be challenged on cross-examination."[16]

This case is inconsistent with the 2023 amendment because it holds that the sufficiency of an expert's factual basis for an opinion is an issue affecting weight, not admissibility. The plaintiff only challenged the relevance of the data on which the expert's conclusion was based, not the methodology used, so the court also did not address the expert's application of methodology.

Jordan v. Town of Fairmount Heights[17]

The plaintiff brought various state and federal civil rights claims against the defendant police officers and a municipality arising out of an alleged use of excessive force in the course of a traffic stop and arrest. The plaintiff designated Gregory G. Gilbertson as an expert on police procedure and to offer opinions on whether a defendant breached the standard of care by hiring one of the defendant officers despite a history of excessive use of force and whether a defendant breached the standard of care in supervising and retaining the two officers who effected the arrest.

The defendants claimed that the expert's opinion lacked a sufficient factual basis. Specifically, the defendants argued that the expert relied on press releases and news articles that he found performing internet searches and that as a result his "opinions are not grounded in reliable, admissible facts as evidenced by the fact that his reports do not include citation to any record evidence."[18] The district court rejected the defendants' challenge, finding that "'questions relating to the bases and sources of an expert's opinion affect the weight to be assigned [to] that opinion, rather than admissibility.'"[19] But the court also found that, contrary to the defendants' argument, an expert may rely on inadmissible evidence, consistent with Federal Rule of Evidence 703.

The court's decision is inconsistent with the 2023 amendment because, instead of resolving this as part of its admissibility determination, it says that the jury could evaluate as a question of weight whether the expert's opinion had a sufficient factual basis.

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[16] *Id.* at 716.

[17] Civ. No. 22-CV-02680-AAQ, 2024 WL 732011 at *5 (D. Md. Feb. 21, 2024). The court improperly relied on *Bresler*, *supra* note 3, in reaching its decision.

[18] 2024 WL 732011 at *5.

[19] *Id.*

National Fair Housing Alliance v. Bank of America[20]

The defendants were sued by fair housing advocates and individuals for "allegedly discriminatory maintenance and marketing of real estate owned properties."[21] The plaintiffs retained multiple experts to testify regarding racial disparities in housing based on statistical and economic analyses: Dr. Michael D. Fetters, Pamela A. Kisch, Dr. Jacob S. Rugh, Deavay Tyler, and Lindsay Augustine. Defendants moved to exclude all of the experts and their opinions.

As to two of the experts, Dr. Fetters and Dr. Rugh, the defendants argued, among other things, that they relied upon flawed data and incomplete variables in reaching their conclusions. The district court rejected this argument, noting that "'under *Daubert*, a court evaluates the methodology or reasoning that the proffered scientific or technical expert uses' – 'it does not evaluate the conclusion itself.'" [22] The court further held that the defendants' argument that the expert's calculations did not support his conclusion went to weight, not admissibility.

This case is inconsistent with the 2023 amendment because the court found that the question of whether an expert's calculations support his conclusion went to weight, not admissibility, and because the court restricted its review to the expert's methodology and declined to evaluate the reliability of its application to the expert's conclusion.

St. Michael's Media, Inc. v. Mayor & City Council of Baltimore[23]

This is a First Amendment case where the plaintiffs asked the court to enjoin a local government from banning a prayer rally and conference at a city-owned venue based on alleged public safety concerns arising from the expected content of speeches to be given. The court granted a temporary restraining order and the plaintiff then moved for a preliminary injunction. The court granted the injunction in part and denied it in part.

Plaintiff offered Dr. James P. Derrane as an expert in special event security planning who would give a safety risk assessment regarding the proposed rally.

The district court considered whether the proffered expert's report had indicia of reliability without making a final determination as to admissibility under Rule 702 and *Daubert*. The court ultimately did not consider the

[20] Civ. No. 18-1919, 2023 WL 1816902 at *5, *8 (D. Md. Feb. 8, 2023).
[21] *Id.* at *1.
[22] *Id.* at *5.
[23] 566 F. Supp.3d 327, 355 (D. Md. 2021).

report, finding issues with the expert's qualifications and methodologies. But before reaching its conclusion, the district court stated because the court's focus is on the methodology used by an expert and not the conclusions reached, any question regarding the factual bases for the expert's opinions go to the weight, not the admissibility of the opinion.[24]

The court's discussion is inconsistent with the 2023 amendment because it suggests the question whether an expert's calculations support his conclusion goes to weight, not admissibility, and because it suggests the court should focus on an expert's methodology and not his conclusions.

C. District of North Carolina

Fredeking v. Triad Aviation, Inc.[25]

An airplane owner sued an airplane repair company for negligence, breach of contract and breach of warranty arising out of an alleged "overspeed" event. The plaintiff airplane owner designated two experts, including, in particular, Douglas Sleeman, to testify as to whether an "overspeed event" occurred and what caused it.

The defendant repair company moved to strike the expert, arguing that his opinion 1) was not supported by sufficient facts and data; 2) was the result of an unreliable methodology; and 3) was not relevant and would not help the jury. Specifically, the repair company argued that the expert's opinion was not based on any data, measurements, or scientific analysis.

After determining that the "process of elimination" was a valid and reliable scientific approach, the court addressed the repair company's argument that the expert failed to conduct tests or cite to any peer reviewed literature that supported his conclusion. The court held that, to the extent the expert's "data, or factual assumptions, have flaws, these flaws go to the weight of the evidence, not to its admissibility."[26]

This decision is inconsistent with the 2023 amendment because it held that flaws in the factual basis supporting the expert's opinion were issues for the jury to consider as a question of weight, not issues for the court to consider as part of its admissibility determination.

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[24] *See also* Maryland Shall Issue, Inc. v. Hogan, Civ. No. 16-3311, 2021 WL 3172273 at *4 (D. Md. July 7, 2021); Rozinsky v. Assurance Co. of America, Civ. No. 15-2408, 2017 WL 3116682 at *4 (D. Md. July 21, 2017).

[25] 647 F. Supp.3d 419, 433 (M.D. N.C. 2022).

[26] *Id.* at 433.

Rhyne v. United States Steel Corp.[27]

In a toxic tort action, plaintiff sued defendant manufacturers claiming that he was exposed to benzene while using the product as a pipefitter, which caused him to develop acute myloid leukemia. The plaintiff's expert in industrial hygiene made certain calculations relating to plaintiff's exposure. The defendants moved to strike the industrial hygienist's opinions claiming, among other things, that the data used in reaching his opinions was unreliable.

The district court found that the expert's opinions were reliable and the "challenges to the accuracy of the factual underpinnings go to the weight that the jury should give [the expert's] opinion" not the admissibility.[28]

This decision is inconsistent with the 2023 amendment because it leaves challenges to the accuracy of an opinion's factual underpinnings to the jury as part of its determination of weight instead of deciding them as part of the court's admissibility determination.

Soho Wilmington LLC v. Barnhill Contracting Co.[29]

The plaintiff sued the defendant for nuisance related to the construction and placement of sewer pipes near the plaintiff's building. The plaintiff offered Erik Hector as an expert to opine on the economic impact of the sewer pipe project on the plaintiff.

The defendant moved to exclude the plaintiff's economic expert, arguing that the expert's opinions were speculative and unreliable because he failed to consider critical data points or perform certain analyses. In rejecting the defendant's challenge, the district court noted that the defendant's challenge was to perceived factual inadequacies in the expert's analysis. The court held that such attacks go to the weight of the testimony, not the admissibility, and should be explored during cross-examination.

This decision is inconsistent with the 2023 amendment because it ruled that a perceived factual inadequacy in an expert's analysis was an attack for the jury to consider as part of weight, not an issue for the court to resolve in determining admissibility.

[27] 474 F. Supp.3d 733, 760 (W.D. N.C. 2020).
[28] *Id.* at 760.
[29] Civ. No. 7:18-CV-79-D, 2020 WL 6889207 at *7 (E.D. N.C. Nov. 23, 2020).

United States v. Johnson[30]

The federal government sued a county sheriff alleging a pattern and practice of discriminatory law enforcement activities. The defendant sheriff offered the opinions of an expert in statistics, who performed various statistical analyses relating to the county's law enforcement practices.

The government moved to exclude the expert, arguing that the expert's opinion lacked a sufficient factual basis in the record. The district court held that the "[g]overnment's argument, … is directed toward the weight and persuasiveness of [the expert's] explanations rather than their admissibility."[31]

This decision is inconsistent with the 2023 amendment because it leaves challenges to the accuracy of an opinion's factual underpinnings to the jury as part of its determination of weight instead of deciding them as part of the court's admissibility determination.

D. District of South Carolina

Funderburk v. South Carolina Electric & Gas Co.[32]

Following a massive rainstorm, the plaintiffs sued various defendants for failing to take certain actions to prevent floods, thereby causing damage to the homes and personal property. Plaintiffs offered two experts, including in particular an engineer, Rick Van Bruggen, who opined that the construction of certain railroad property caused or contributed to the damage. The defendant railroad moved to limit the expert's testimony.

The court denied the defendant's motion as to Mr. Van Bruggen. In analyzing the expert's opinion under *Daubert,* the district court noted that it "may not evaluate the expert witness' conclusion itself, but only the opinion's underlying methodology"[33] and that "questions regarding the factual underpinnings of the [expert witness's] opinion affect the weight and credibility of the witness' assessment, not its admissibility."[34]

The decision is inconsistent with the 2023 amendment because the court stated that it could not evaluate the expert's conclusion as part of its admissibility determination, and reserved questions regarding the factual basis for the expert's opinion for the jury as part of a weight determination instead of resolving them as part of the court's admissibility determination.

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[30] 122 F. Supp.3d 272, 340 (M.D. N.C. 2015).
[31] *Id.* at 340.
[32] 395 F. Supp.3d 695 (D. S.C. 2019).
[33] *Id.* at 707.
[34] *Id*. at 713.

In re *Levesque*[35]

A bankruptcy trustee sued a debtor's former business partners for breach of fiduciary duty and fraudulent transfer. Both sides offered expert witnesses as to the value of the debtor's equity ownership interest in another company. The trustee moved to exclude the defendants' valuation expert.

Although the court granted the trustee's motion as to those issues where the valuation expert had no factual support for certain opinions, the court rejected the trustee's challenges to the reliability of the data the expert used to support other opinions. The court held that "[q]uestions regarding the factual underpinnings of the [expert witness's] opinion affect the weight and credibility of the witness' assessment, not its admissibility."[36]

Similarly, the defendants moved to exclude the trustee's valuation expert, arguing that the expert either failed to consider critical facts or that his data was flawed.

Again, the court noted that "challenges to the facts and data underlying an expert report, however go to the 'weight and credibility of the witness's assessment, not admissibility.'"[37] The decision is inconsistent with the 2023 amendment insofar as it views challenges to the facts and data underlying an opinion to be related to weight, not admissibility. This decision is in a different posture than most, however, because it is in the context of an expected bench trial, not a jury trial.

Moore v. BPS Direct, LLC[38]

In a product liability case arising from an allegedly defective tree stand, the plaintiff sued the manufacturer and seller for injuries relating to a fall. Among other experts, the plaintiff offered Jo Anna Vander Kolk as a vocational expert. The defendants moved to exclude the plaintiff's vocational expert, raising challenges to the bases of her opinions.

The district court determined that the expert had sufficient facts to form an opinion and that the defendants' challenge as to her factual bases and weight were more appropriate for cross examination. This decision is inconsistent with the 2023 amendment because it determined that the sufficiency of the factual basis for the expert's opinion went to weight, not admissibility.

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[35] 653 B.R. 127, 141, 150 (Bankr. D. S.C. 2023).
[36] *Id.* at 150.
[37] *Id.*
[38] Civ. No. 17-3228, 2019 WL 2913306 at *5 (D. S.C. July 8, 2019).

Patenaude v. Dick's Sporting Goods, Inc.[39]

In a products liability case, the plaintiff sued a manufacturer of athletic cups for strict liability, negligence, and breach of warranty. The plaintiff retained an expert to opine as to the performance of the athletic cup and whether the manufacturer's cup provided adequate protection from injury. The manufacturer moved to strike the expert's opinion, arguing that the testing the expert performed failed to account for certain facts.

The court rejected the manufacturer's argument, holding that "it is well settled that the factual basis of an expert opinion generally goes to weight, not admissibility."[40] The decision is inconsistent with the 2023 amendments because it views a challenge to the factual basis for an expert's opinion as raising an issue of weight, not admissibility.

E. District of Virginia

Coleman v. Tyson Farms, Inc.[41]

An employee sued his employer for gender discrimination under Title VII of the Civil Rights Act of 1964, retaliation under the Family and Medical Leave Act, and breach of implied contract under Virginia law. The employee designated Dustin Chambers, Ph.D. as his economic expert to opine regarding his "front pay" damages. The employer moved to exclude Dr. Chambers's opinions asserting, in part, that his opinions on wage loss were based on two assumptions that were speculative, and therefore not reliable. First, the employer argued that Dr. Chambers's opinion that the employee would have worked continuously in his current position for the defendant employer for thirty years was not grounded in fact, nor were his assumptions regarding attendant wages and benefits. Second, in calculating wage loss, Dr. Chambers assumed replacement employment for the employee in a field unrelated to his prior occupation and made assumptions about the future pay and benefits the employee would receive.

The district court denied the employer's motion, holding that "the asserted fallibility of an expert's assumptions affect the weight of his testimony, not its admissibility."[42]

In so doing, the district court failed to determine whether the expert's assumptions (and as a result, his conclusions) were based on sufficient facts, and instead left that decision to the jury. Under current Rule 702 (and likely prior to the amendments), the district court

[39] Civ. No. 18-3151, 2019 WL 5288077 at *2 (D. S.C. Oct. 18, 2019).
[40] *Id.* at *2.
[41] Civ. No. 2:10cv403, 2011 WL 1833301 at *3 (E.D. Va. Apr. 13, 2011).
[42] *Id*. at *3.

would have abused its discretion in abdicating its gatekeeping role.

In re *Zetia (Ezetimibe) Antitrust Litigation*[43]

This is a multidistrict antitrust litigation regarding the manufacture of patented and generic medications. Plaintiffs offered two economists as experts. Defendants moved to exclude the testimony of Plaintiffs' economic experts, arguing that certain data entered into the economic model was based on unsupported assumptions and, as a result, the opinions were unreliable.

The court rejected defendants' argument and declined to exclude the experts. The court noted that the experts could rely on disputed facts so long as there was evidence in the record to support them. As to the sufficiency or accuracy of those facts, "the court should allow the opposing party to 'test the accuracy of the expert's conclusions through cross-examination and presentation of contrary evidence to the jury.'"[44] The court held that it was for the jury to determine whether an expert's inputs into an economic model were reliable inputs.

This opinion is inconsistent with the 2023 amendment because the court decided that the jury would be permitted to determine the accuracy of the expert's conclusions, including whether data the expert relied on was reliable.

Nationwide Mutual Fire Ins. Co. v. Bryant Thomas Heating & Cooling, Inc.[45]

In this subrogation claim, an insurance company sued an HVAC company, alleging that the HVAC company's negligence in installing a gas-fired water heater resulted in an explosion and fire, damaging the insured's property. The plaintiff insurer's expert, an engineer, opined that the HVAC company negligently installed a water heater which caused a leak, based on the assumption that a certain connection on the water heater had not been manipulated in the ensuing months after installation. The defendant HVAC company moved to exclude the expert, arguing that his opinion was based on conjecture and that he failed to consider other factors that could have led to the leak and, ultimately, the explosion and fire.

The district court denied the motion to exclude. It reasoned that "shaky but admissible" testimony is properly dealt with through cross examination and that the factual underpinnings of an expert's testimony went to weight and not admissibility. The court further noted that in assessing the

[43] MDL No. 2:18-md-2836, 2022 WL 3337796 at *7, *11 (E.D. Va. Aug. 3, 2022).
[44] *Id.* at *7.
[45] Civ. No. 3:19-CV-780, 2020 WL 5415659 at *2, *3 (E.D. Va. June 26, 2020).

reliability of an expert's opinion, a court is only concerned with the methodology, not the conclusions the methodology generates.

This decision is inconsistent with the 2023 amendment because the court decided that concerns regarding the factual underpinnings of an expert's testimony go to weight, not admissibility, and it declined to evaluate the conclusion resulting from the expert's methodology.

Smith v. Wellpath, LLC[46]

An estate filed a claim against a jail and certain officers alleging negligence in connection with the death of its decedent while in custody. The plaintiff estate offered Anthony Callisto, Jr. as an expert. Although the opinion does not discuss his opinions in detail, it seems he was offered as an expert on the standard of care required of correctional officers. One of the defendant officers moved to exclude the estate's expert, arguing, in part, that the expert relied on disputed facts.

The district court rejected the officer's argument, finding that "any asserted fallibility of [the expert's] assumptions affects the weight of his testimony, not its admissibility."[47]

This decision is inconsistent with the 2023 amendment because it determined that the sufficiency of the factual basis for the expert's opinion went to weight, not admissibility.

F. District of West Virginia

Degarmo v. C.R. Bard, Inc.[48]

In a multidistrict product liability action regarding the use of transvaginal surgical mesh to treat pelvic organ prolapse and stress urinary incontinence, plaintiffs identified William Porter, M.D. to offer opinions regarding specific causation. Dr. Porter arrived at his opinions after employing a differential diagnosis, which the district court concluded was a reliable methodology. In moving to preclude Dr. Porter's testimony, the defendant argued, *inter alia,* that Dr. Porter did not have a sufficient factual basis to opine that the pubovaginal sling at issue actually contracted.

In denying the defendant's motion, and in reliance on decisions holding that the reliability of an expert's data affects the weight and not the admissibility of an opinion, the district court held that "[i]t is not the role of the court to evaluate the veracity of the facts underlying an expert's opinion."[49]

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[46] Civ. No. 2:20cv77, 2023 WL 9317261 at *16 (E.D. Va. Mar. 30, 2023).
[47] *Id*. at *16.
[48] Civ. No. 2:12-cv-07578, 2018 WL 700795 at *3 (S.D. W. Va. Feb. 2, 2018).
[49] *Id.* at *3.

The district court's failure to undertake any type of reliability analysis of the facts and data and how, if at all, they were applied to Dr. Porter's methodology is contrary to the amendments to Rule 702.

Morrison v. C&K Industrial Services, Inc.[50]

Plaintiff filed a wrongful discharge claim against his former employer, claiming that he was terminated from employment after making two requests for a respirator to protect himself and others against exposure to chemical fumes. The employer argued that the equipment was not necessary and that the employee was terminated due to performance issues.

Plaintiff designated Russell Pfifer to testify that the employer was negligent in not providing a respirator to plaintiff; that plaintiff was justified in insisting he be provided with one; and that discharging plaintiff for raising a safety complaint violated the Occupational Safety and Health Act. In reaching his opinion, the expert determined that plaintiff was exposed to harmful chemicals. The employer moved to exclude Mr. Pfifer's opinion that plaintiff should have been provided with a respirator, arguing that the conclusion that the employee was exposed to hazardous chemical was based on speculation, as the expert had no information as to whether plaintiff was actually exposed to the pertinent harmful chemical and, even if so, at what level. Specifically, the employer argued that Mr. Pfifer only had a list of chemicals found in the wastewater but did *not* have the levels of the chemicals in the water, nor any other analytical data.

The district court rejected the employer's argument. The district court determined that the employer's challenge to the facts underlying Mr. Pfifer's opinion was appropriate for cross examination, as it affected the weight of the testimony, not the admissibility.

Under the current iteration of Rule 702 (and likely its prior version), the district court's ruling would be wrong, as the sufficiency of the facts used by the expert, as well as whether such facts are applied in a reliable way, are all questions to be answered by the trial court, not the jury.

[50] 2010 WL 11636104 (N.D. W. Va. Aug. 17, 2010).