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January 28, 2020

The Honorable William C. Smith, Jr.
Senate Judicial Proceedings Committee
2 East Miller Senate Building
11 Bladen Street
Annapolis, Maryland 21401

**Re: Senate Bill 187 – Real Property – Civil Actions – Health Care Malpractice Claims (Life Care Act)**

Dear Chairman Smith and Members of the Committee,

During the process of developing this bill, it has evolved materially. It is subtitled the "Life Care Act" but at this point has nothing to do with life care. In addition, there is an amendment on your desks that strikes from the bill draft lines 21 – 26 on page 3 of the bill, thus completely eliminating the caps on attorneys fees contained in the bill. If the amendment is adopted, Senate Bill 187 will have nothing to do with capping attorneys fees.

What is left of the bill deals with a single, very complex issue. The issue is: what standard will determine whether or not proffered expert witnesses will be permitted to deliver opinion testimony in Maryland courts?

The original expert witness standard, adopted by the U. S. Supreme Court in 1923, was known as the *Frye* standard. Fifty-five years later, Maryland adopted the Frye standard in its decision in *Reed v. State* in 1978. The key sentence in the *Reed* opinion is contained in the two-page sheet of extracts that you'll find on your desks. The sentence reads as follows: "… before a scientific opinion will be received as evidence at trial, the basis of that opinion must be shown to be *generally accepted* as reliable within the expert's particular scientific field." So, under the Frye standard, the *exclusive* test of admissibility of expert testimony is whether the basis of the opinion is *generally accepted* as reliable within the expert's particular scientific field.

In 1993, the U. S. Supreme Court decided the seminal decision known as *Daubert v. Merrell Dow Pharmaceuticals, Inc.* Prior to 1993, the Supreme Court had adopted the Federal Rules of Evidence. On the two-page sheet of extracts, you'll find the key portion of the *Daubert* decision. It reads as follows: "Frye made "general acceptance" the exclusive test for admitting expert scientific testimony. That austere standard, absent from and incompatible with the Federal Rules of Evidence, should not be applied in federal trials. Under the [Federal] Rules, the trial judge

must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable. The primary locus of this obligation is Rule 702...."

So the Supreme Court's *Daubert* holding dispensed with the *Frye* standard and substituted the standard set forth in Rule 702 of the Federal Rules of Evidence. Rule 702 is re-printed on the two-page sheet of extracts. It establishes five criteria for the admission of expert testimony: (1) the witness must be qualified as an expert by knowledge, skill, experience, training or education; (2) the expert's scientific, technical or other specialized knowledge must be found to help the trier of fact to understand the evidence or to determine a fact in issue; (3) the testimony must be based on sufficient facts or data; (4) the testimony must be the product of reliable principles and methods; and (5) the expert must be shown to have reliably applied the principles and methods to the facts of the case. All five of these criteria are important. The fourth is essentially the Frye standard. The fifth criterion, however, adds a critical test to supplement the Frye standard – the expert must be shown to have reliably applied the principles and methods to the facts of the case. In other words, the expert cannot use his expert status to present opinions on case issues that do not directly relate to the principles and methods upon which the expert has been qualified.

*Daubert* thus liberalized the admission of expert testimony by offering flexible guidelines, instead of limiting admission solely to *Frye*'s general acceptance standard.

Since 1993, not only do all of the federal courts use the *Daubert* standard, but 38 states have also adopted it. Only Maryland and 11 other states have not formally adopted Daubert.

But wait! Maryland too is steadily slouching towards abandoning the *Frye* standard and adopting *Daubert*. In its most recent decision on point, the case of *Savage v. Maryland*, decided in 2017, the Court of Appeals addressed the issue raised by the fifth criterion in Daubert, whether the expert in that case bridged the "analytical gap" between accepted science and his ultimate conclusions. The court held that "since our opinion in *Reed,* however, our approach to assessing the threshold question of the admissibility of scientific and expert evidence has evolved.... Generally accepted methodology ... must be coupled with generally accepted analysis in order to avoid the pitfalls of an analytical gap." This is *Daubert*'s fifth criterion. And three of the seven judges on the Maryland Court of Appeals went even further in *Savage*. They filed a concurring opinion. In this opinion, they cited "[t]he federal courts' adoption of *Daubert*, coupled with our own jurisprudential drift towards the *Daubert* standard and they stated, "we should follow the majority of states and acknowledge our implicit adoption of *Daubert*.

As we meet here today, the Maryland Court of Appeals is prepared to hear oral argument on February 7th in the case of *Rochkind v. Stevenson.* The first question presented to the Court in *Rochkind* is "Should the court adopt the standard for admitting expert testimony under *Daubert*? So a decision by the Maryland Court of Appeals on the formal adoption of the Daubert standard in Maryland may be handed down later this year. But don't count on it. Faced with similar appeals to overturn Maryland's boulevard rule and its contributory negligence jurisprudence, the Court of Appeals has declined to act and suggested that if Maryland's law is to be changed, such a change lies within the purview of the Maryland General Assembly.

Senate Bill 187, as amended to delete the caps on Plaintiffs' attorneys fees, merely would enact the Daubert standard in Maryland medical malpractice cases. It tracks Federal Rule of Evidence

702 word for word. Medical malpractice cases always involve expert testimony, and the issues surrounding the admissibility of the expert testimony are generally very complicated. Currently, medical malpractice trials involve a disproportionate amount of time and effort litigating whether the Frye-Reed standard should apply or the Daubert standard. Adopting Daubert via the enactment of Senate Bill 187 would bring Maryland in line with all of the federal courts and 38 of the state courts, would eliminate uncertainty about which standard applies and would generally expedite medical malpractice trials in Maryland courts.