

THE PENNSYLVANIA SUPREME COURT CLARIFIES THE TRIAL COURT'S ROLE IN DETERMINING THE ADMISSIBILITY OF AN EXPERT'S OPINION

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On July 27, 2020, a divided (5-2) Pennsylvania Supreme Court issued a significant opinion defining the trial court's role in determining the admissibility of an expert's opinion testimony in Pennsylvania.¹ The majority's opinion limited the trial court's role to solely determining whether the expert had applied "generally accepted methodology" in reaching his/her opinion(s), thus precluding the trial court from even examining whether the expert's proposed opinion(s) was consistent with the studies the expert reportedly relied upon in reaching his/her opinion(s). Walsh v. Basf Corp., 2020 Pa LEXIS 3794 (Pa., Jul. 27, 2020).

The Walsh case involved a lawsuit brought against numerous pesticide manufacturers for the death of Thomas Walsh who had a 40-year occupational exposure as a golf course groundskeeper and superintendent at Pittsburgh area golf courses to various pesticides, some of which contained carcinogens and teratogens. Walsh was diagnosed with Acute Myelogenous Leukemia (AML) in 2008 and subsequently died in February 2009. Walsh's estate brought suit against numerous pesticide manufacturers alleging that the chemical exposure was a substantial contributing factor to Walsh's death from AML.

Following the completion of discovery, the pesticide manufacturers filed *Frye* motions to dismiss the lawsuit arguing that the case involved "novel" science, and that the methodologies used by Walsh's expert epidemiologists were not generally accepted or conventionally applied in the relevant scientific communities. Specifically, the defendants argued that the plaintiff's claims should be dismissed because plaintiff's experts did not follow the generally accepted Bradford Hill criteria in reaching their causation opinions as there are no studies establishing a link between AML and exposure to the chemicals found in the various pesticides at issue. Judge Wettick of the Allegheny County Court of Common Pleas ultimately granted the defendants' motions and excluded the testimony of plaintiff's experts. In the opinion supporting his decision, Judge Wettick noted that, in his "gatekeeper" role, he had reviewed multiple studies cited by the plaintiff's experts and found that many of the studies did not support the propositions proffered by the experts. After the *Frye* motions were granted, the parties stipulated to the entry of summary judgment because Walsh's estate could not prove causation absent the excluded expert testimony. The plaintiff then filed an appeal to the Pennsylvania Superior Court.

A three-judge panel of the Superior Court reversed Judge Wettick's *Frye* rulings in a 2-1 decision. The majority held that a *Frye* motion should only be used to determine whether the scientific community has generally accepted an expert's principles and methodology, not to

¹ As will be discussed below, although the majority's opinion affirmed the Superior Court's holding that the trial court had "overstepped" its role in granting defendants' motions to preclude the testimony of plaintiff's liability experts, the Court instructed the trial court on remand to readdress the defendants' *Frye* motions in accordance with their holding in Walsh.

evaluate an expert's conclusions. The majority did not believe that the proper role of the trial court in a *Frye* inquiry was to review studies and other scientific literature and reach a conclusion on their proper meaning and interpretation; the majority stated that the substance of the studies and literature goes to the weight of the expert testimony, not its admissibility. While the majority acknowledged that the epidemiological studies cited by plaintiff's experts "did not explore whether exposure to one particular pesticide product caused AML," the majority nevertheless rejected the contention that specific studies of this type were required in order to survive a *Frye* challenge.

The defendants then filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court. The Supreme Court granted allowance of appeal as to three issues:

1. Did the Superior Court majority commit reversible error in concluding that, when evaluating scientific evidence under the *Frye* standard, trial courts are not permitted to act as "gatekeepers" to ensure the relevance and reliability of scientific studies offered by experts to support their opinions by scrutinizing whether those studies actually support their opinions?
2. Did the Superior Court majority commit reversible error in concluding that trial courts may not review experts' opinions extrapolating from a broad class of products and injuries to a specific product and injury, thereby eliminating plaintiff's burden to show product-specific causation of plaintiff's specific injury?
3. Did the Superior Court majority commit reversible error in concluding that the trial court erred without explaining how it abused its discretion because of manifest unreasonableness, partiality, prejudice, bias, ill-will or such lack of support from the evidence or the record so as to be clearly erroneous?

The majority's opinion was authored by Justice Donohue, and joined by Justices Dougherty, Wecht, and Mundy; Justice Wecht also filed a concurring opinion. Justice Baer filed a concurring and dissenting opinion, and Chief Justice Saylor filed a dissenting opinion in which Justice Todd joined.

As to the first issue on appeal, i.e., the trial court's role in evaluating evidence under the *Frye*² standard, the majority noted that Pennsylvania Rule of Civil Procedure 207.1 authorizes the filing of a "motion to exclude expert testimony which relies upon novel scientific evidence" and that Rule 702 of the Pennsylvania Rules of Evidence permits the admissibility of expert opinion testimony if "(c) the expert's methodology is generally accepted in the relevant field." The majority noted that the defendants alleged in their *Frye* motions that the plaintiff's experts had "failed to apply methodologies generally accepted in the relevant scientific communities" to

² *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The Pennsylvania Supreme Court adopted the *Frye* standard for determining the admissibility of expert testimony in *Commonwealth v. Topa*, 369 A.2d 1277 (Pa. 1977).

establish the required proof that the defendants' products caused the decedent's AML. The majority observed that one of plaintiff's expert, Dr. Brautbar, had described in his deposition "the generally accepted methodology" he used to establish the necessary elements of "general causation", i.e., the chemicals in the defendants' pesticides can cause AML, and "specific causation", i.e., the chemicals in defendants' products that can cause AML actually caused the decedent's AML. Although Dr. Brautbar claimed that all the expert studies he reviewed and relied on in reaching his opinion agreed that applying the "Bradford Hill" factors/criteria³ was the appropriate methodology to assess causation, he claimed that the difference between the causation conclusions he reached from some of the studies he reviewed and relied on was "due to differences in professional judgment, rather than methodology." As noted, the trial court had granted the defendants' *Frye* motions on the basis of the discrepancies between the studies Dr. Brautbar reportedly reviewed and relied on and his own causation conclusions.

The majority also noted that in conducting his Bradford Hill analysis on the association between AML and pesticides, Dr. Brautbar did not mention the pesticides manufactured by any of the defendants or refer to any studies or articles relating to any specific pesticide or product. In addition, the majority noted that although Dr. Brautbar concluded that the Bradford Hill factors supported the existence of a causal link between AML and pesticides generally, he did not purport to present any direct evidence of a causal link between AML and the defendants' specific products. Rather, Dr. Brautbar opined that the causal link could be demonstrated "indirectly" by ruling in all identifiable known causes of AML and then ruling out those causes for which there is inadequate evidence (which he referred to as "differential etiology").

In reviewing the Superior Court's decision to reverse the trial court's grant of the defendants' *Frye* motions, the majority noted that the Supreme Court in Grady v. Frito Lay, Inc., 839 A.2d 1038 (Pa. 2003), had clarified that the *Frye* rule applies to an expert's methodology, not his conclusions:

The *Frye* standard is limited to an inquiry into whether the methodology by which the scientist has reached her conclusions have been generally accepted in the scientific community.... It restricts the scientific evidence which may be admitted as it ensures that the preferred evidence that results from scientific research which has been conducted in a fashion that is generally recognized as being sound, and is not the fanciful creations of a renegade researcher.

The majority also noted that subsequently in Betz v. Pneumo Abex, 44 A.3d 27 (Pa. 2012), the Supreme Court reaffirmed the trial court's role in a *Frye* hearing as deciding whether "an expert witness has...applied accepted scientific methodology in a conventional way in reaching his or her conclusions."

³ The "Bradford Hill criteria" is a set of nine factors developed by Sir Austin Bradford Hill to determine whether an observed association between a potential toxin and a particular disease is in fact the outcome of an actual causal relationship.

Based on the language of Rule 702 of the Pennsylvania Rules of Evidence, and the prior decisions of the Supreme Court in Grady and Betz, the majority concluded:

The trial court may consider only whether the expert applied methodologies generally accepted in the relevant field and may not go further to attempt to determine whether it agrees with the expert's application of those methodologies or whether the expert's conclusions have sufficient factual support. These are questions for the jury to decide.

Also, based on their review of the trial court record, the majority agreed with the Superior Court's assessment that the trial court's *Frye* inquiry was "overly expansive" and that the trial court's role was limited to examining whether Dr. Brautbar reached his scientific conclusions by applying generally recognized methodologies. However, the majority also found that while the trial court had exceeded its role in precluding the testimony of plaintiff's liability experts, the trial court had never ruled on defendants' *Frye* challenges to the methodology applied by plaintiff's experts in reaching their opinions and, therefore, instructed the trial court on remand to review the defendants' challenges to the methodology utilized by the experts in reaching their opinions. Further, in their discussion of the defendants' challenges to the methodology reportedly utilized by plaintiff's experts, the majority expressly referenced a number of potential issues with the methodology employed by plaintiff's experts that needed to be examined and addressed by the trial court on remand.

With regard to the second issue, i.e., defendants' contention that the Superior Court erred in holding that plaintiff's experts can satisfy their burden under the *Frye* test of establishing causation to the specific pesticide products of defendants by establishing a causal link between cancer and long term exposure to "pesticides-as-a-class," the majority rejected defendants' contention: "The Appellants have misread the Superior Court's opinion, as it does not in any respect bless the unfettered use of extrapolation."

Further, the majority specifically noted that the Supreme Court in *Rost v. Ford Motor Co.*, 151 A.3d 1032 (Pa. 2016), had reaffirmed that Pennsylvania law requires a plaintiff to show product-specification: "In our decision in *Rost*, this Court reaffirmed that the plaintiff has a burden to show product-specification....The Superior Court's opinion may not be fairly read to alter that burden in any respect."

As to the third issue on appeal, whether the Superior Court erred in reversing the trial court's order because the Superior Court failed to make a specific finding that the trial court had "abused its discretion" in excluding the testimony of plaintiff's experts, the majority noted that the Superior Court had found that the trial court's decision was "flawed in multiple respects" which warranted the reversal of the trial court's order without a specific finding of "abuse of discretion."

As noted, Justice Wecht filed a concurring opinion, agreeing that the majority had properly held that the trial court exceeded its role under the *Frye* standard in determining to exclude the testimony of plaintiff's experts. Justice Wecht also specifically expressed his opinion

regarding the difference between the *Frye* standard for determining whether to admit expert testimony that is the standard in Pennsylvania and the *Daubert* standard which is the test applied in numerous other states and federal courts. According to Justice Wecht, under the *Daubert* standard, the trial court may not only consider whether “the expert arrived at his opinion by employing principles and methods ‘generally accepted’ in the relevant community of experts”, but may also “consider whether the expert ‘reasonably applied’ the methodology in question and whether the opinions and conclusions that he or she reached are supported by ‘sufficient facts or data.’”

Justice Wecht defined the four principles utilized by the *Daubert* standard as follows: 1) an expert must be qualified; 2) the testimony must be based on sufficient facts and data; 3) the testimony is the product of reliable principles and methods; and 4) the expert has reliably applied those principles/methods to the facts of the case. Justice Wecht noted that under the *Frye* standard, as applied by Pennsylvania, principles 2 and 4 have no applicability to the admissibility of an expert’s opinion. Justice Wecht also observed that 25 states currently follow the *Daubert* standard, 15 states follow *Frye* very strictly, 6 states have not rejected the *Frye* standard in principle but follow the *Daubert* standard in practice, and 4 states (including Pennsylvania) follow a test “of their own devising”:

Regardless, in my view what the *Daubert* Court characterized as *Frye*’s ‘austerity’ manifests in Pennsylvania practice not in an overly exclusionary effect, but rather in its assurance that the trial court does not adopt too expansive a view of its importance but limited role in ensuring that only qualified expert evidence reaches a jury.

Justice Wecht went on to express his concern that the Supreme Court’s prior holding in *Betz v. Pneumo Abex*, 44 A.3d 27 (Pa. 2012), detailing the *Frye* standard, could be misinterpreted to have introduced a requirement that the proposed expert not only apply “accepted scientific methodology” but do so “in a conventional fashion in reaching his or her conclusions.” Justice Wecht proceeded to express his view of the significant difference between the limited role of a trial court in those jurisdictions applying the *Frye* standard and the broader mandate of a trial court reviewing expert testimony under the *Daubert* standard, and his concern that the Supreme Court’s use of the term “**in a conventional fashion**” in discussing the *Frye* standard in *Betz* not be misinterpreted to allow the trial court to examine anything more than the expert’s “methodology.”

Justice Baer filed a concurring and dissenting opinion. He joined the majority opinion as to issues 1 and 3, including the majority’s decision to remand the case to the trial court to allow the defendants to reassert their challenges to plaintiff’s expert scientific evidence pursuant to *Frye*. However, Justice Baer dissented as to the majority’s holding on issue 2, agreeing with Chief Justice Saylor’s dissent that the record established that the plaintiff’s experts had engaged in improper extrapolation, as well as questioning the majority’s conclusion that the trial court had abused its discretion in excluding the testimony of plaintiff’s experts “given the analytical gaps identified by the trial court that called into question the methodology employed by Appellee’s experts” some of which he noted were in fact “detailed in the majority’s recitation of

the Appellants' experts' testimony." Further, Justice Baer also criticized the majority's opinion "to the extent it declines to recognize the trial court as 'gatekeeper' in *Frye* challenges."

Chief Justice Saylor, joined by Justice Todd, filed a dissenting opinion to the majority's decision. Initially, the Chief Justice expressed his disagreement with the majority's refusal to "denominate trial judges as gatekeepers relative to the admission of novel scientific evidence in Pennsylvania courtrooms." Chief Justice Saylor noted that, in prior cases, the Pennsylvania Supreme Court had expressly designated the role of the trial courts as "gatekeepers" "to screen scientific evidence for reliability before permitting such evidence to be put before jurors." The Chief Justice also opined that *Frye* should not be interpreted to limit trial judges' ability to screen expert opinions for sufficient reliability and that he believed that Pennsylvania should move to adopting *Daubert* as the appropriate standard for determining the admissibility of expert testimony.⁴

Further, the Chief Justice opined that, even applying the *Frye* standard, the trial court had correctly found "there were extensive, unexplained analytical gaps between the expert's opinions and the material on which he relied" warranting exclusion of the expert's proffered opinion testimony. In addition, Chief Justice Saylor agreed with the trial court that the plaintiff's experts had "inappropriately extrapolated from 'pesticides' as a product class - including numerous pesticides that Mr. Walsh never used - to Appellees' specific products, with no analysis of whether the products were chemically, functionally or toxicologically similar."

As to Justice Wecht's criticism that the opinion Chief Justice Saylor authored in Betz "muddied the waters...of the *Frye* standard" by stating that the testimony of an expert is only admissible when the expert has applied accepted scientific methodology "in a conventional fashion" in reaching his or her conclusions, Chief Justice Saylor rejected that criticism and responded that the phrase "in a conventional fashion" in Betz was only used in connection with a trial court's determination of whether a *Frye* hearing was warranted, and was never used to define the *Frye* standard of "accepted scientific methodology."

Analysis of Opinions

With the exception of the majority's refusal to designate the trial court's role in a *Frye* hearing as that of a "gatekeeper", the majority's opinion, in this author's opinion, seems to be an accurate interpretation and application of existing Pennsylvania law on the admissibility of expert testimony, particularly in toxic tort litigation.

Initially, despite Chief Justice Saylor's and Justice Todd's preference for Pennsylvania to adopt the broader *Daubert* standard of review for the admissibility of expert testimony, Pennsylvania adopted the *Frye* standard of review in 1977 and, based on the current composition of the Pennsylvania Supreme Court, will not abandon that standard anytime in the foreseeable

⁴ The *Daubert* standard is the standard used by all federal courts and a large majority of state courts to determine the admissibility of expert testimony; it allows the trial court to screen expert opinions for "sufficient reliability" as opposed to *Frye*'s limitation of the trial court's review solely to the methodology employed by the expert.

future. Under the *Frye* standard, the trial court's review of the proffered testimony is limited to an examination of the expert's "methodology."⁵

Secondly, the majority was correct in affirming the Superior Court's holding that the trial court's *Frye* inquiry in Walsh went beyond a review of the experts' methodology. In fact, as noted, the majority found that the trial court had not even addressed/decided the issues raised by the defendants in their *Frye* motions regarding the experts' methodology.

Furthermore, a review of the majority's analysis of the plaintiff's experts' deposition testimony describing the "methodology" the experts used to reach their opinions, and the majority's decision to remand the case back to the trial court to address the issues regarding the validity of the methodology employed by the experts, suggests to this author that the majority would affirm a decision by the trial court that the experts' methodology was flawed and improper.

Also, although it is pure speculation at this time, it seems that this majority would likely affirm a finding by a trial court that an expert's "methodology" would be flawed and improper if the expert simply rejected the findings and conclusions of expert studies he/she reportedly reviewed and relied on "due to differences in professional judgment." Also, Chief Justice Saylor, Justice Todd, and Justice Baer all indicated in their opinions that "analytical gaps" in an expert's conclusions would constitute "unacceptable scientific methodology."

Also, it seems noteworthy that the majority briefly addressed another issue that regularly arises in evaluating the admissibility of an expert's opinion, particularly in toxic tort litigation. In addressing the second issue raised on appeal by the defendants, i.e., the alleged improper extrapolation from a broad class of products and injuries to a specific product and injury by plaintiff's experts, the majority indicated in dicta that it would be improper scientific methodology for an expert to purport to establish a causal link between cancer and the specific products of defendants by establishing a causal link between cancer and long term exposure to "pesticides-as-a-class," specifically citing the Court's recent holding in Rost v. Ford Motor Co. 151 A.3d 1032 (Pa. 2016), that "the plaintiff has a burden to show product-specification."

In summary, all of the Justices expressed some concerns with the methodology employed by plaintiff's experts and, as noted, all would appear ready to affirm the exclusion of the experts' testimony by the trial court so long as the exclusion was based on a finding by the trial court that the experts had not applied "acceptable scientific methodology." Unfortunately for the defendants in Walsh, the trial judge did not simply address the methodology issues with the opinions of plaintiff's experts raised in defendants' *Frye* motions and exclude their proposed expert testimony on that basis.

Going forward, it would seem that the opinions in Walsh would make the next significant issue regarding the admissibility of an expert's opinion in Pennsylvania the question of what

⁵ Interestingly, there was a conservative, defense-oriented majority of Justices on the Supreme Court in 2003 which specifically held in Grady v. Frito-Lay, Inc., 839 A.2d 1038 (Pa. 2003), that the *Frye* rule **only** applies to an expert's methodology, not his conclusions.

constitutes the expert's "methodology" that would be subject to review by the trial court. As noted, all the Justices in Walsh appeared to have some concern with the "methodology" of an expert who would reject the findings and conclusions of studies the expert reportedly reviewed and relied upon in reaching his/her opinion simply "due to differences in professional judgment."

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