

Pa. Supreme Court Considers the Trial Court's 'Gatekeeper' Role Under *Frye*



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By Caleb J. Holmes | **August 13, 2020** | **The Legal Intelligencer**

On July 21, 2020, the Pennsylvania Supreme Court issued an anticipated decision in *Walsh v. BASF Corp.*, in which it considered the trial court's role as the "gatekeeper" for expert testimony, tackling again the state's application of the *Frye* test—as opposed to the *Daubert* test most frequently applied in federal courts and a majority of state courts. Although the Pennsylvania Supreme Court declined to specifically endorse the trial court's "gatekeeper" role, its opinion assures that the trial court's role in assessing the admissibility of expert testimony still exists under Pennsylvania's *Frye* analysis.

In *Walsh v. BASF Corp.*, the Executor of the Estate of Thomas J. Walsh brought a wrongful death and survival action against manufacturers of pesticides that Mr. Walsh, a groundskeeper, had applied during his career. Walsh had served as a groundskeeper and golf course superintendent at several golf courses over the course of nearly 40 years.

The defendants moved to exclude the testimony of the plaintiff's two expert witnesses. Dr. Brautbar, a physician, explained in his expert report his methodology for assessing whether a chemical caused a person's disease—he utilized the "Bradford Hill criteria." Using the nine factors under that methodology, Dr. Brautbar concluded a causal link existed between acute myeloid leukemia (AML) and pesticides generally. Dr. Brautbar did not present direct evidence demonstrating a causal link between AML and specific products, instead opining a causal link existed through indirect evidence, including studies showing the active ingredients in the specific

pesticides are genotoxic and so cause chromosomal abnormalities. Finally, Dr. Brautbar ruled out other known causes of the disease.

Dr. Zambelli-Weiner, plaintiff's other expert witness, conducted a review of "published epidemiological literature on pesticide exposure and leukemia" and concluded that "exposure to organophosphate pesticide formulations, individually or in combination, is causally related to an increased risk of leukemia in humans exposed to them."

The trial court determined that Dr. Brautbar failed to demonstrate general or specific causation with regard to non-benzene-containing products, and failed to demonstrate specific causation with regard to benzene-containing products, concluding that the studies cited did not support the contention that low-level exposures could cause AML. It also rejected Dr. Brautbar's "fingerprint theory" because it resulted in no cases of idiopathic instances of AML. The trial court—because it found Dr. Brautbar's report failed to establish specific causation—found it unnecessary to consider Dr. Zambelli-Weiner's report, which only addressed general causation. After granting the *Frye* motion, summary judgment was stipulated for all defendants, and the plaintiff appealed.

The Superior Court reversed, finding that the trial court overstepped its gatekeeping role required under a *Frye* inquiry by evaluating what research could be relied upon. The *Frye* analysis is set forth in Rule 702 of the Pennsylvania Rules of Evidence. Under Rule 702, an expert's testimony will be admissible if:

(a) the expert's scientific, technical, or other specialized knowledge is beyond that possessed by the average layperson; (b) 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; and (c) the expert's methodology is generally accepted in the relevant field.

By applying its own view of which studies an expert may rely on, the trial court set itself up as a "super expert in the field of medicine." According to the Superior Court, its evaluation went to "the weight, not the admissibility, of expert opinion," which is inconsistent with the *Frye* analysis. The Superior Court, by limiting the role of the trial court, allowed aggregate expert opinions, finding that a category of chemicals could cause cancer was admissible under the *Frye* analysis and sufficient to preclude summary judgment.

On appeal, defendant-appellants and amici—composed of associations of product manufacturers, trade associations, Chambers of Commerce and others—attacked the Superior Court's opinion for a number of reasons. According to amici, expert causation opinions must address the particular chemical substance and the particular injury plaintiff alleges to have suffered. Thus, allowing experts to opine that categories of chemicals could cause a broad category of disease—in this case, cancer—short circuits the trial court's gatekeeping function.

The *Frye* analysis—as interpreted in *Walsh*—allows certain cases to survive the summary judgment stage that might otherwise not have under a Daubert analysis. As designed, it leaves a jury to evaluate whether the evidence relied on by the expert is reliable. Where the trial court's role as gatekeeper ends is not so clear.

The Pennsylvania Supreme Court affirmed the Superior Court, finding that whether an expert's methodology is generally accepted in that expert's field must not be determined by the trial court's own evaluation, but must instead rely on the materials provided by the parties. The proponent of the admission of expert evidence bears the burden of establishing the elements supporting its admission. However, by substituting its own assessment of the scientific evidence rather than relying

on Appellants' experts' analysis, the trial court abused its discretion in concluding that Appellee's expert testimony was inadmissible under *Frye*.

The Supreme Court danced over whether the trial court, in fact, serves a “gatekeeping” role, finding the use of that term “inconsequential.” Rather, it found that the trial court’s proper function is “to ensure that the expert has applied a generally accepted scientific methodology to reach his or her scientific conclusions,” based on “scientists in the relevant field, including the experts retained by the parties in the case and any other evidence of general acceptance presented by the parties (e.g. textbooks).” The trial court rejected certain studies without citation to authorities in support of its rejection. Under the Supreme Court’s view of *Frye*, this was error.

The Supreme Court next addressed whether expert opinions establishing a causal link between cancer and “pesticides-as-a-class” can survive under the *Frye* test. The Supreme Court found such opinions were admissible, while noting the dangers of “extrapolation.” Although such a general opinion would not be admissible if it were being used for the purpose of demonstrating that a specific product caused cancer, because the expert was not offering any opinions extrapolating the general causation opinion, the testimony should have survived a *Frye* test.

Although the Supreme Court’s decision provides what appears to be a long leash to experts, it places increased importance on the role of the opposing party’s experts. Although the trial court judge may not substitute his or her own analysis for that of the expert in conducting a *Frye* analysis, the trial court judge may rely on the experts and materials offered by the parties. Although the Supreme Court chose not to explicitly endorse the “gatekeeper” role under its opinion in *Walsh*, a trial court that excludes testimony based on the submissions of the parties is unlikely to be reversed, so long as it addresses the factors contained in the *Frye* analysis/Rule 702.

About the Author:

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