[J-190-1999]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

JEFFREY BLUM, A MINOR, BY HIS PARENTS AND NATURAL GUARDIANS, JOAN AND FRED BLUM, AND JOAN AMD FRED BLUM, IN THEIR OWN RIGHT,	:	001 E.D. App. Dkt. 1999
	:	Appeal from the Order of the Superior Court of Pennsylvania, Philadelphia District, dated December 29, 1997 at Docket No. 3711 Philadelphia 1995, reversing the Order and Judgment of the Court of Common Pleas, Philadelphia County, dated September 15, 1995 at Docket No. 1027, September Term, 1982.
Appellants	:	
v.	:	
	:	___ A.2d ____ (Pa. Super. Ct. 1997)
MERRELL DOW PHARMACEUTICALS, INC.,	:	ARGUED: October 18, 1999
Appellee	:	

DISSENTING OPINION

MR. JUSTICE CAPPY **DECIDED: December 22, 2000**

I respectfully dissent.

While I agree that the majority that the Frye[1] standard is still the test by which the courts in this jurisdiction determine whether scientific evidence is admissible, I feel compelled to write in order to address the Superior Court's reasoning below. It is certainly not incumbent on this court to engage in a point-by-point analysis of a lower court's opinion.

[1] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

However, I believe that in this matter it is important to discuss the Superior Court's recitation of the Frye test as it has the potential to mislead the lower courts and the practicing bar. Specifically, I refer to the Superior Court's statement that there are "two ways to analyze the question of whether the causation testimony proffered . . . meets the Frye . . . standard. One focuses on whether the causal relationship is generally accepted by the scientific community, and the other on whether the methodology is generally accepted by the scientific community." Super. Ct. slip op. at 18.

The Superior Court is correct that this court has long interpreted Frye as requiring that the methodology employed by the testifying scientist be generally accepted in the scientific community. See e.g. Commonwealth v. Blasioli, 713 A.2d 1117, 1119 (Pa. 1998). Yet, we have not stated that the conclusion reached by the scientist regarding causation must also be generally accepted in the scientific community.

As noted by the Superior Court, this additional step in the Frye test - requiring that the conclusion also be generally accepted by the scientific community - was added by the Commonwealth Court in McKenzie v. Westinghouse Electric Corp., 674 A.2d 1167 (Pa. Commw. Ct. 1996). I cannot find that this court, however, has endorsed this interpretation of the Frye test.

Furthermore, I believe that it would be imprudent for us to do so at some future date. The Frye standard is limited to an inquiry into whether the methodologies by which the scientist has reached her conclusions have been generally accepted in the scientific community. This is a sensible standard, one which imposes appropriate restrictions while stopping short of being needlessly inflexible. It restricts the scientific evidence which may be admitted as it ensures that the proffered evidence 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. Yet, such a standard is not senselessly restrictive for it allows a scientist to testify as to new conclusions which have emerged

during the course of properly conducted research. Thus, I would squarely reject that portion of the Superior Court's holding which would require that a scientist's conclusions, as well as the methodologies utilized in reaching those conclusions, are generally accepted in the medical community.

Next, I turn to examining the conclusion of the majority that the trial court erred in determining that the scientific evidence presented by Appellants was admissible. In my opinion, there exists great confusion as to precisely what standard the trial court utilized in making this determination. The trial court claimed it properly applied the Frye standard in making the determination that Appellants' scientific evidence was admissible. Tr. ct. slip op. at 50 n. 143. The Superior Court, on the other hand, concluded that while the trial court claimed that it was applying the Frye standard, it did not in fact do so. The Superior Court found that the trial court abandoned its role of keeping out junk science as a "gatekeeper," and instead improperly left in the hands of the jury the initial determination of whether the scientific evidence was reliable. Super. Ct. slip op. at 16. Finally, the majority of this court states that the trial court admitted the evidence under the federal rule announced in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Majority slip op. at 2.

In a situation such as this - where there is great confusion as to what standard was employed by the trial court - I question whether it is possible for an appellate court to execute its appellate review within its narrow confines, and examine only whether the trial court abused its discretion in admitting the evidence. Rather, I believe that in situations such as these, an appellate court attempting to "review" the decision of the trial court would instead be performing its own, independent review of the evidence, arriving at its own Frye conclusion rather than reviewing the Frye determination made by the trial court. For, how can an appellate court be said to be reviewing the determination of the trial court where there is so much confusion as to what the trial court actually decided?

Thus, I propose that this matter be remanded for a new trial. As recognized by our sister states, the trial court judge's role as "gatekeeper" in applying the Frye test is a critical one. State v. Porter, 698 A.2d 739 (Conn. 1997); State v. Copeland, 922 P.2d 1304 (Wash. 1996). In my opinion, this crucial gatekeeper function is one which demands the particular skills and abilities of a trial court judge, and should not be commended to an appellate court in the first instance. Thus, in recognition of the special function played by the trial court judge in these determinations, I believe that where, as in this case, there is confusion as to which standard was applied, it would be prudent to remand the matter to the trial court for a new trial and therefore respectfully dissent. [2] [3]

[2] I note that Appellee raised six other issues before the Superior Court, asserting that each of these claims entitled it to the grant of a new trial. Since my proposed disposition of the Frye issue would result in such relief being ordered, I believe that it would be unnecessary to remand this matter to the Superior Court for consideration of these claims.

[3] I note that Appellants have raised an issue which was not addressed by the majority. Appellants claim that since Appellee did not raise the Frye objection in the first trial, then this issue is forever waived and could not have been raised in the second trial. This argument is specious. This court has long held that a new trial wipes the slate clean, and the second trial is held de novo. Arthur v. Kuchar, 682 A.2d 1250, 1255 (Pa. 1996); Commonwealth v. Oakes, 392 A.2d 1324, 1326 (Pa. 1978).

Appellants, however, try to manufacture an inconsistency in our case law by pointing to the "holding" in Commonwealth v. Dobson, 405 A.2d 910 (Pa. 1979) that an issue not raised in the first trial is waived for purposes of the second. Dobson, however, is a plurality opinion and is thus of no precedential value. Furthermore, any validity that the Dobson plurality opinion ever had has been definitively erased by the recent Arthur opinion. Thus, I believe that this is a meritless issue.