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STATE HIGH COURT REJECTS *DAUBERT* BUT EMBRACES SCIENTIFIC GATEKEEPING

by
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Although Pennsylvania adopted a code of evidence in 1998 that contained an expert testimony provision similar to Federal Rule of Evidence 702, the Pennsylvania courts have not followed the *Daubert* line of cases and, until now, have appeared unwilling to exercise a gatekeeper function with respect to all but novel scientific expert testimony, usually involving medical causation. The recent decision of Pennsylvania's highest court in *Grady v. Frito-Lay, Inc.*, 2003 Pa. LEXIS 2590 (Dec. 31, 2003), appears to indicate that although Pennsylvania remains committed to the *Frye* standard, its courts may be applying that standard to a broader range of proffered expert testimony in the future.

The plaintiff in *Grady* filed suit in 1993, alleging that after eating Doritos brand corn chips he suffered injuries to his throat and stomach, including massive internal bleeding. The plaintiff's ingestion of the Doritos was allegedly nothing out of the ordinary; he claimed that he ate the chips, felt something stuck in his throat, drank some water and felt better. But the following day, he claimed, he felt weak and was rushed to the hospital, where his injuries were diagnosed and treated. *Id*. at *2.

Plaintiff's suit against the chip maker alleged that the chips he had eaten caused the cuts in his throat and stomach. Plaintiff supported this theory in the trial court with a report from Dr. Charles S. Beroes, an engineering professor whose area of expertise was in the field of fire retardation.

Dr. Beroes intended to testify as to causation and product defect based on a series of tests that he designed and performed on exemplar corn chips. His tests involved squeezing chips from two bags of Doritos (one moistened with saliva and the other dry) with his fingers onto a platform gram balance that was covered with a Styrofoam pad, and measuring the force he required to crush the chips. He calculated the downward force needed to break each Doritos chip in grams, converted that force into pounds, and set forth the average pressure that developed under the chip tips and the average breaking force he had applied to the tips. Based on this testing, Dr. Beroes concluded and opined that pieces of Doritos chips could readily pierce human tissue when driven by the force needed to chew them. Dr. Beroes further concluded that Doritos brand corn chips are defective products for this reason. *Grady v. Frito-Lay, Inc.*, 789 A.2d 735, 745 (Pa. Super. 2001) (listing Dr. Beroes's conclusions in Judge Eakin's dissenting opinion).

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Frito-Lay moved to preclude Dr. Beroes's testimony in the trial court. The court granted the motion to preclude without an evidentiary hearing, calling the intended testimony "junk science." The trial court equated Dr. Beroes's finger-press test with "a high school science fair project."

Plaintiff appealed to Pennsylvania's middle-level appellate court, the Superior Court, which reversed. The Superior Court reviewed Dr. Beroes's methodology and held that "crunch strength and compression" calculations like those used in the finger-press test are "as old as the pyramids." As such, the Superior Court reasoned, the methodology did not involve any "novel scientific principles." Interestingly, while the Superior Court might have stopped there, holding the expert's methodology must be "novel" to trigger an inquiry under *Frye,* instead it reached the merits of the *Frye* issue, holding that Dr. Beroes's testing passed the *Frye* standard.

A dissenting judge on the three-judge Superior Court panel pointed out that Dr. Beroes's expert report was deficient in that it did not properly link the methodology used (the finger-press test) to the conclusion that the corn chips have the same compressive strength when chewed and applied to human tissue. That is, a person cannot pinch corn chips with his fingers and perforce arrive at a conclusion that chewing a corn chip might result in internal bleeding. According to the dissent, Dr. Beroes's report failed to address the vital question of how his methods and conclusions translate to the human body, stating that "Dr. Beroes's analysis makes a leap of logic in this and other questions, and the trier of fact cannot be expected to fill in the gaps." *Grady v. Frito-Lay, Inc.*, 789 A.2d 735, 747 (Pa. Super. 2001) (Judge Eakin dissenting).

The case then went to the Pennsylvania Supreme Court before returning to the trial court, and the Supreme Court reversed. The Court first addressed the question of whether Pennsylvania should abandon its adherence to *Frye* in favor of a *Daubert* standard and held that *Frye* should continue to be the law in the Pennsylvania state courts. The Court reasoned that, where *Daubert* involves a complicated balancing of multiple factors, *Frye* is simpler to apply and therefore more likely to yield uniform, objective and predictable results.

The Supreme Court next concluded that, as noted by the dissent in the Superior Court, Dr. Beroes's report failed to connect his methodology with his conclusion. The Supreme Court wrote that Dr. Beroes's report "misses the mark, in light of the conclusion about Doritos that Dr. Beroes was going to present to the jury at trial." Indeed, the report contained no evidence that the finger-press test was a generally accepted method used by experts in food safety to determine if specific foods could be chewed and swallowed safely. Thus, the Court held that Dr. Beroes's opinions did not pass muster under *Frye*.

While Dr. Beroes's failure to link his methodology to his conclusions was the core of the Supreme Court's opinion, the very fact that the Court applied *Frye* to the more technical and less scientific type of testimony at issue in *Grady* could be the most significant feature of the case. Before Grady, Pennsylvania's courts had not followed the lead of the *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999), which extended the application of *Daubert* in the federal courts to technical expert testimony (*Kumho* involved the testimony of a tire failure analyst who intended to testify about the alleged defectiveness of a tire). To be sure, the *Grady* Court did not expressly embrace *Kumho* or announce a rule that *Frye* would be applied in the future to a broader category of expert testimony. Yet the fact that the *Grady* Court did indeed apply *Frye* as a gatekeeping standard to an area of testimony akin to that at issue in *Kumho* seems to indicate a recognition that *Frye's* application is not to be limited to scientific or medical causation cases in the future.

The degree to which Pennsylvania's courts will now fall in line with the growing number of courts that practice strict gatekeeping with respect to all manner of proffered expert testimony remains to be seen. The *Grady* case, however, appears to indicate that the Pennsylvania courts are moving in that direction.

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