

Chew on This: Doritos Decision Disavows Daubert

By: Daniel S. Altschuler, Esquire
Richard B. Wickersham, Jr., Esquire
Ryan M. Cohen, Esquire

In a long awaited ruling on New Year's eve, the Supreme Court of Pennsylvania decided that the Frye test would remain the state standard for considering the admissibility of expert testimony rather than the Daubert test which is used by all federal and several state courts. In Grady v. Frito-Lay, Inc., ___ A.2d ___, 2003 Pa. LEXIS 2590 (December 31, 2003), an opinion authored by Chief Justice Cappy, the testimony at issue was that of a chemical engineer who concluded that the sharp corners of Doritos chips caused a tear in plaintiff's esophagus. In reaching his conclusion the expert utilized a test whereby he measured the downward force necessary to break the chip by applying pressure to the chip while it was set on a gram balance. The expert also examined the effect of saliva on the decomposition of the chip. The trial court ruled that the expert's testimony was not admissible stating that the expert's methodology "smacked of a high school science fair project [which] did not bear any relationship to the reality of the mastications and consumption of foodstuffs." Grady, 2003 Pa. LEXIS at *10. On appeal the Superior Court reversed the trial court's decision. The Supreme Court, in reversing the Superior Court, held that the trial court did not abuse its discretion in finding the testimony inadmissible because the tests which the expert employed were not generally accepted by scientists in the relevant field.

In holding that Pennsylvania Courts will continue to follow the Frye test rather than the Daubert analysis, the Court explained that Frye's "general acceptance test is a proven and workable rule, which when faithfully followed, fairly serves its purpose of

assisting the courts in determining when scientific evidence is reliable and should be admitted.” Grady, 2003 Pa. LEXIS at *18.¹ Under Frye, the proponent of expert scientific evidence bears the burden of establishing that the methodology which underlies the expert’s opinion has gained general acceptance in the relevant scientific community. Further, it must be demonstrated that the evidence fits within the framework of Pennsylvania Rule of Evidence 702, which requires that the expert be qualified by knowledge, skill, experience, training or education and that the proposed testimony will assist the trier of fact. “Whether a witness is qualified to render opinions and whether his testimony passes the Frye test are two distinct inquiries that must be raised and developed separately by the parties, and ruled on separately by the trial courts.” Grady, 2003 Pa. LEXIS at *21.

Chief Justice Cappy explained that Frye’s general acceptance standard “is more likely to yield uniform, objective, and predictable results among the courts, than is the application of the Daubert standard, which calls for a balancing of several factors,” including hypothesis testing, error rate, peer review and general acceptance. Grady, 2003 Pa. LEXIS at *19. Practitioners beware, the opinion emphasizes that the Frye test only applies to an expert’s methodology and not to his conclusions. As Chief Justice Cappy explained, the proponent of the expert testimony need not “prove that the scientific community has also generally accepted the expert’s conclusion. We have never required and do not require such a showing. This, in our view, is the sensible approach, for it imposes appropriate restrictions on the admission of scientific evidence, without stifling

¹ Also voicing its support for the Frye rule was the Products Liability Advisory Council as Amicus Curiae.

creativity and innovative thought.”² Grady, 2003 Pa. LEXIS at **20-21. “In summary, we reaffirm our adherence to the Frye rule; clarify that the rule applies to an expert’s methods, not his conclusions; emphasize that the proponent of the expert scientific evidence bears the burden of proof on the Frye issue; and reiterate that the standard of appellate review on the Frye issue is the abuse of discretion standard.” Grady, 2003 Pa. LEXIS at *27.

In Grady, applying the freshly reaffirmed Frye test, our Supreme Court held that the expert testimony at issue was inadmissible because plaintiffs were unable to establish that the tests utilized by the expert were “a generally accepted method that scientists in the relevant field (or fields) use for reaching a conclusion as to whether Doritos remain too hard and too sharp as they are chewed and swallowed.” Grady, 2003 Pa. LEXIS at *26. The court found that the expert’s methodology “misses the mark” of admissibility. Plaintiff cited “no evidence” that the expert’s methodology was accepted by scientists in the relevant field and did not meet their burden of proof. *Id.*

Given the Court’s ruling in Grady, it is clear that the Frye general acceptance standard is firmly in place in our Commonwealth. Grady, 2003 Pa. LEXIS at *27. Therefore, it is incumbent upon defense counsel to establish that the methodology used by opposing experts is not generally accepted in the relevant field. While the Daubert analysis, strictly speaking, does not apply, the Daubert factors such as hypothesis testing, peer review and error rate, can still be utilized to establish that a particular methodology is not generally accepted. For example, if after peer review or scrutiny it has been

² However, as noted in Justice Lamb’s concurring opinion, “in the usual case, consensus by the relevant scientific community that a particular methodology is appropriately employed to reach a particular conclusion, will also imply consensus as to the conclusion itself.” Grady, 2003 Pa. LEXIS at *49.

determined that a particular methodology yields an unacceptably high rate of error or highly inconsistent results, it is unlikely that such a methodology will gain general acceptance. As a result, whether trial courts employ the Frye test with or without direct citation to the Daubert factors, it is imperative for counsel to expose the methodology that an expert witness employs in reaching his conclusions.