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Medical Malpractice Update

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Frye Challenges in the Medical Malpractice Setting: A Refresher Course

Medical malpractice attorneys do not commonly experience the practical application of *Frye* in the types of cases they handle—partly due to attorneys and trial judges' lack of familiarity with its use in the medical malpractice context. This article serves as a "*Frye* 101" refresher course, covering the basics of the *Frye* standard, when to invoke a *Frye* challenge, and recent developments in case law.

Generally, expert testimony is admissible when the expert testifies to matters that are beyond the common knowledge of ordinary citizens and when the testimony will aid the fact-finder in reaching its conclusion. *People v. Gilliam*, 172 Ill. 2d 484 (1996); ILL. R. EVID. 702 (eff. Jan. 1, 2011). When it comes to the scientific evidence, however "special care must be taken by the trial court in ruling upon the admissibility." *Torres v. Midwest Dev. Co.*, 383 Ill. App. 3d 20, 26 (1st Dist. 2008). "Juries tend to equate science with truth and may place substantial weight on any evidence labeled scientific." *Torres*, 383 Ill. App. 3d at 26. Therefore, it is crucial to challenge the validity of your opponent's scientific evidence before trial to prevent the jury from hearing unreliable scientific evidence.

A *Frye* hearing is a pretrial hearing to test the admissibility of novel scientific evidence. Under Illinois law, scientific evidence is only admissible at trial if the methodology, or scientific principle upon which the opinion is based, is "sufficiently established to have gained general acceptance in the particular field to which it belongs." *In re Commitment of Simons*, 213 Ill. 2d 523, 529–30 (2004) (quoting *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923)). *Frye* is the exclusive test in Illinois for determining the admissibility of scientific evidence. *Donaldson v. Central Illinois Public Service Co.*, 199 Ill. 2d 63, 77 (2002). The test is codified under Illinois Rule of Evidence 702. ILL. R. EVID. 702.

Counsel should file a *Frye* motion when the opposing side seeks to introduce an expert opinion based on a new or novel scientific theory or methodology, which is not generally accepted in the relevant scientific community. *Donaldson*, 199 Ill. 2d at 79, *abrogated on other grounds*, *In re Simons*, 213 Ill. 2d at 532. A theory is novel if it is "original or striking" or does "not resemble something formerly known or used." *Id*.

A *Frye* motion should be brought as a motion *in limine* to exclude the evidence. Once a *Frye* motion is filed, the judge will conduct a *Frye* hearing during which the proponent of the evidence bears the burden of showing general acceptance. *People v. McKown*, 236 Ill. 2d 278, 294 (2010). The proponent can present evidence including scientific publications, prior judicial decisions, practical applications, as well as the testimony of scientists as to the attitudes of their fellow scientists. *People v. Kirk*, 289 Ill. App. 3d 326, 332 (1997). The movant will then have an opportunity to respond.

Frye motions are often brought in combination with other foundational challenges to the admissibility of expert testimony. It should be noted, though, that the standard of review is not the same for *Frye* rulings as for

other foundational and relevancy determinations. As of 2004, Illinois has adopted a *de novo* standard of review for *Frye* hearings. *In re Simons*, 213 Ill. 2d at 530-31. Under the *de novo* standard, the reviewing court can consider not only the trial court record, but also sources outside the record, including legal and scientific articles, as well as court opinions from other jurisdictions. *Id*. at 531. Other foundational and relevancy challenges to expert testimony remain subject to review only for an abuse of discretion. *Id.*

Some illustrative examples of how *Frye* hearings have served physician defendants in medical malpractice cases are listed below.

Agnew v. Shah illustrates the benefit of seeking a *Frye* hearing before trial, particularly when the other side's case rests heavily on the testimony of a single expert. *Agnew v. Shah*, 355 Ill. App. 3d 981 (1st Dist. 2005). *Agnew* was a medical malpractice occult breast cancer case in which the plaintiff's theory of liability rested on the testimony of an expert witness who opined as to the timing of the plaintiff's lymph node metastasis, and based his opinion on a backward extrapolation methodology. *Agnew*, 355 Ill. App. 3d at 989. The defendant moved *in limine* to bar the opinions of the plaintiff's expert, arguing that the backward extrapolation methodology was not generally accepted in occult breast cancer patients. *Id.* The trial court conducted a piecemeal *Frye* hearing during the course of the trial. *Id*. at 983.

After the plaintiff's expert testified, the trial court determined that the backward extrapolation methodology as applied to occult breast cancer patients was not generally accepted and struck the testimony that relied on this methodology. *Id*. at 987. The jury returned a verdict in favor of the defendant. The appellate court conducted a *de novo* review and affirmed the trial court's *Frye* ruling. *Id*. at 989. The court rejected the plaintiff's argument that the ruling was inconsistent with the *Donaldson* case, where backward extrapolation was found to be generally accepted as applied to a neuroblastoma. *See Donaldson*, 199 Ill. 2d at 82-85. The oncologic community that studied neuroblastomas was distinct from the occult breast cancer community for purposes of the *Frye* analysis. *Agnew*, 355 Ill. App. 3d at 990.

The court also held that it was appropriate for the defendant to raise the *Frye* objection during motions *in limine*, and that the piecemeal *Frye* hearing did not deny the plaintiff a fair trial. *Id*. at 991.

Wilhelm ex rel. Wilhelm v. Ferolo, illustrates how *Frye* and foundational objections can be asserted simultaneously for strategic leverage. See *Wilhelm*, 2012 IL App (2d) 110271-U (non-precedential unpublished written order under Illinois Supreme Court Rule 23(e)). In *Wilhelm*, the minor plaintiff alleged that her pediatricians failed to recognize early signs of retinoblastoma, a type of eye cancer. The plaintiff alleged that the delay in diagnosis led to optic nerve involvement, resulting in the need for drastic treatment measures including the removal of the plaintiff's eye and extensive chemotherapy and radiation. *Wilhelm*, 2012 IL App (2d) 110271-U, ¶ 3.

The plaintiff's expert, a pathologist, opined that the retinoblastoma was present before the defendants saw the plaintiff and that the optic nerve involvement occurred eight to ten weeks prior to diagnosis. *Id*. ¶ 5. The expert relied on a photograph of the minor plaintiff, which revealed an obstruction of the plaintiff's red reflex and the presence of a white reflex. *Id.*

The defendants filed a motion *in limine* to bar the expert's opinion as to the rate and timing of the plaintiff's tumor progression. The defendants cited the testimony of the other testifying physicians, who denied that the rate of growth of the plaintiff's tumor could be determined with any degree of medical certainty. *Id*. ¶¶ 8-17. The defendants argued that the methodology used by the plaintiff's expert to reach her conclusions, including the use of the photograph, were not generally accepted in the scientific community and did not meet the *Frye* test. *Id*. ¶¶ 5-6. The trial court conducted an extensive *Frye* hearing, and determined that the expert's opinions were appropriately barred pursuant to foundational and *Frye* standards. The court barred the testimony pursuant to lack of foundation, but acknowledged that the result would be the same under *Frye*. *Id*. ¶ 22.

Following the trial court's evidentiary ruling, the defendants moved for summary judgment, arguing that the plaintiff had no reliable scientific evidence to establish that earlier detection would have led to a different outcome. *Id*. ¶ 47. The trial court granted the motion for summary judgment, and the appellate court affirmed. *Id*. ¶¶ 54-65.

In *Ruffin ex rel. Sanders v. Boler*, the plaintiffs alleged that the defendant obstetrician applied excessive lateral traction during the minor plaintiff's delivery, resulting in a brachial plexus injury. *Ruffin ex rel. Sanders v. Boler*, 384 Ill. App. 3d 7, 9 (1st Dist. 2008). The defendant's proximate cause expert was a biomedical engineer who analyzed the forces in play during the delivery. He opined that the gentle traction applied by the defendant could not have caused the child's injury. *Ruffin*, 384 Ill. App. 3d at 16. The court conducted a *Frye* hearing prior to trial, and determined that the engineer's methodology met the *Frye* standard and was generally accepted in the relevant engineering and obstetric communities. *Id*. at 14-16. The appellate court affirmed. *Id*. at 25.

These three cases show how *Frye* hearings, when properly executed, can have profound effects on the outcome of a case. The cases discussed in this article represent only a fraction of the instances where *Frye* challenges have led to dispositive rulings on major issues.

Keep in mind, whether you are seeking to introduce or defend scientific evidence, a methodology generally accepted in one field may not be generally accepted in the scientific field in your case. As *Agnew* illustrates, one must carefully discern the specific field in which the evidence is proffered.

Practitioners should be familiar with *Frye*'s application in medical malpractice cases as it can be an effective tool to bar medical opinions based on flawed or unaccepted science. Conversely, if met with a *Frye* challenge, practitioners should be prepared to defend the scientific evidence that forms the basis of their experts' opinions. The trial court's gatekeeping function with regard to novel scientific evidence is a crucial part of the trial process. Through properly conducted *Frye* hearings, opinions based upon unreliable scientific theories should not reach the jury for their consideration.

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