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A PRIMER ON FRYE
by Ted Babbitt

Hearings on the admissibility of expert testimony have recently become common place. The advance sheets are full of opinions interpreting the trial court's responsibility to conduct a hearing mandated by the Federal case of Frye v United States, 293 F. 1013 (D.C. Cir. 1923). Florida retains the "Frye" test despite the U.S. Supreme Court's rulings in Daubert v Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 13 S.Ct. 2786, 125 L.Ed.2d 469 (1993) and Kumho Tire Co. v Carmichael, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). The Florida Courts prefer the stricter rule contained in Frye to the more lenient rule of the recent Federal cases. See Brim v State, 695 So.2d 268 (Fla. 1997), Hadden v State, 690 So.2d 573 (Fla. 1997), Flanagan v State, 625 So.2d 827 (Fla. 1993).

Courts ought to be aware that not every subject of expert testimony requires a Frye hearing. Only when opinions of an expert are based on "new and novel" scientific techniques are they subject to a Frye inquiry. Holy Cross Hospital v Marrone, 27 F.L.W. D1212 (Fla. 4th DCA, May 17, 2002). Where the expert does not claim a specific scientific technique or test supports his or her opinion but rather merely offers the opinion as, just that, "pure opinion," there is no reason to hold a Frye hearing. Florida Power & Light v Tursi, 729 So.2d 995 (Fla. 4th DCA 1999). To the extent that testimony is based purely on the experience and training of the expert, it is admissible without a preliminary hearing. See Holy Cross Hospital v Marrone, supra.

When a hearing under Frye is required, the proper procedure is for the questioning party to obtain a hearing a sufficient amount of time prior to trial, so that if the Court determines the testimony to be inadmissible, the party proposing the testimony has sufficient time to obtain additional expert testimony prior to trial. See Holy Cross v Marrone, supra (special concurring opinion Chief Judge Pollen).

Justice Shaw's opinion in Ramirez v State, 810 So.2d 836 (Fla. 2001) is instructive as to the underlying requirements of a Frye hearing. Ramirez was a murder case in which a lab technician's testimony that a comparison of a wound with a knife justified an opinion that that particular wound could only have been made with that particular knife. The testimony was permitted despite the fact that the "scientific" test utilized by the technician was comparing the single suspected knife with the wound and then opining that no other knife could possibly have caused that wound. In reversing the subsequent conviction, Justice Shaw explained what the trial court's duty is with respect to conducting a Frye hearing.

An expert witness is normally permitted to testify relative to generally accepted scientific theory in a witness's area of expertise. The witness's testimony is subject to the balancing test set forth in section 90.403, Florida Statutes (2000), which focuses on 'legal' reliability and applies to all evidence. When a court is faced with expert testimony based on a new or untried scientific theory, however, the balancing test in section 90.403 is inapposite because the court may be unable to gauge accurately the danger of misleading or confusing the jury due to the unproven nature of the testimony. In such a case, 'scientific' reliability must be established as a predicate to 'legal' reliability.

Thus in such a case, it is the trial court's responsibility to review the evidence and make a determination as to whether or not it has scientific reliability. The test in that regard is whether or not the testimony is derived from a well-recognized scientific principal or discovery so as to have gained general acceptance in the particular field of expertise to which the expert belongs.

The trial court has broad discretion in the resources it may use in making the determination as to whether or not the theory used by the expert has been accepted in the scientific community. Recognizing that there may be a difference of opinion among scientists in any field on differing theories, the Court in Ramirez, supra, points out that it is not simply a "nose count" of experts in the field by the trial judge that is appropriate.

In gauging acceptance, the court must look to properties that traditionally inhere in scientific acceptance for the type of methodology or procedure under review – i.e., ‘indicia’ or ‘hallmarks’ of acceptability.

This may include expert testimony from the witnesses involved as well as disinterested witnesses, scientific or legal writings and judicial opinions.

Once the trial court has marshaled the evidence, it is up to him or her to make a determination as to whether or not the general acceptance test under Frye has been established by a preponderance of the evidence. If it has, the testimony goes in. If it has not, the Court makes the determination that it is too unreliable to be considered by the jury and thus must not be admitted. On appeal, the trial court’s ruling is subject to a de novo review by the appellate court. See Hadden v State, supra.

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