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"Can I Have Frye With That?"

By Hillary A. Frommer

When it comes to the admissibility of expert testimony, New York state courts apply the test set forth in *Frye v United States*[1] — *i.e.* the "*Frye* test"— which provides that an expert opinion based on a scientific technique is admissible if that technique is "generally accepted" as reliable in the scientific community. A party seeking to preclude his adversary's expert testimony will often request a pre-trial *Frye* hearing to challenge the opinion and prove it is unreliable. That is easier said than done, however. The inquiry under the *Frye* test is different from the admissibility concerns of evidence generally, such as whether there is a proper foundation. Rather, it focuses on the "specific reliability of the procedures followed to generate the evidence proffered and whether they establish a foundation for the reception of evidence at trial." [2] Not every challenge to an expert's opinion constitutes a challenge to the procedures utilized to form that opinion. As the case law developing over the past few years shows, when that is not the case, a *Frye* hearing is not warranted.

For example, in *Munoz v Rubino*,[3] a medical malpractice action, the plaintiff requested a *Frye* hearing to preclude the defendant's expert testimony concerning the causation of the alleged injury. In support of the application, the plaintiff submitted affirmations from two physicians and citations to medical journals which refuted the defense expert's opinion. In opposition, the defendant submitted competent evidence, including medical literature, that there could have been causes for the plaintiff's injury other than those alleged in the action, and that those causes were accepted by members of the scientific community. The court denied the plaintiff's motion. It found that the defendant's submissions, particularly the medical literature, showed that the procedures relied on by the defendant's expert was generally accepted as reliable and thus, no hearing was necessary. Moreover, the court noted that whether the expert's opinions are accepted by a jury was not for it to decide because under *Frye*, "the court's job is not to decide who is right and who is wrong, but rather to decide whether or not there is sufficient scientific support for the expert's theory." v [4]


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In *In Matter of Bethany F*,[5] a proceeding under Article 10 of the Family Court Act to place a father under the supervision of a social services agency, the court denied the father's motion for a *Frye* hearing to challenge the "validation testimony" of the court-appointed mental health counselor. There, the evidence showed that the counselor utilized a particular method that had been admissible in other actions, and which was used by all counselors in that field to "validate" the child's allegations against the father. The court noted that because a *Frye* hearing is necessary only where a party seeks to introduce expert testimony based on a novel technique, and there was no evidence that the counselor's methodology was novel, there was no basis for a *Frye* hearing.

Additionally, in *Jones v Catalano*,[6] a personal injury action where plaintiff claimed he was exposed to lead paint, the court denied the plaintiff a *Frye* hearing where the plaintiff's own expert admitted that the "compilation of tests" used by one of the defendant's experts was "appropriate." Thus, the court found that the plaintiff was essentially challenging the *reliability* of the expert's opinion — not the fundamental *non-admissibility* thereof — and a *Frye* hearing was not warranted. Additionally, the plaintiff's challenge to a second defense expert was supported only by an attorney affirmation which was of no probative value. Finally, the court found that the plaintiff did not show that the expert's opinions were based on "novel scientific evidence."[7] Similarly, in *Dutcher v Vandeloo*,[8] the plaintiff's motion for a *Frye* hearing was denied because the court found that the plaintiff did not meaningfully challenge the admissibility of the defendant's expert opinions. Rather, that challenge was essentially to the weight and reliability thereof, which was not a proper basis for a hearing.

So, what does it take to obtain a *Frye* hearing? Clearly, any challenge cannot be to the credibility or weight of the expert's opinion itself. A party must demonstrate to the court with admissible evidence that the underlying procedures and techniques upon which the expert formed his opinion — not the opinion itself — are novel or not generally accepted as reliable in the professional community. The defendant in *Kerenyi v Lanzkowsky*[9] was successful in making that argument and obtaining a *Frye* hearing. In that medical malpractice action alleging that the defendant negligently performed a D & C operation, the plaintiff's expert opined that the defendant used an overly aggressive technique given the presence of fragments of fibromuscular tissue. In seeking a *Frye* hearing to challenge and preclude that opinion, the defendant argued that such theory was not generally accepted in the medical community — an argument notably different than merely challenging whether the expert was right or wrong. In support, the defendant submitted an affidavit from his expert stating, in part, in effect at the time the D & C was performed, there were no standard of care protocols from the American College of Obstetricians and Gynecologists or the American Association of Reproductive Medicine nor empirical medical studies to indicate that the technique used was overly aggressive and would constitute a breach of the standard of care. In opposing that motion, the plaintiff's expert failed to provide any medical or scientific literature supporting the grounds for his opinion. Thus, the court held that the defendant was entitled to a *Frye* hearing to determine whether the plaintiff's expert based his opinion on principles that "would have been sufficiently established and have gained general acceptance so as to render them admissible at trial."[10]

Note: Hillary A. Frommer is counsel in the commercial litigation department of Farrell Fritz, P.C. She represents large and small businesses, financial institutions, construction companies, and individuals in federal and state trial and appellate courts and in arbitrations. Her practice areas include a variety of complex business disputes, including shareholder and partnership disputes, employment disputes, construction disputes, and other commercial matters. Ms. Frommer has extensive trial experience in both the federal and state courts. She is a frequent contributor to Farrell Fritz's New York Commercial Division Case Compendium blog. Ms. Frommer tried seven cases before juries in the United States District Court for the Southern and Eastern Districts of New York and in all of those cases, received verdicts in favor of her clients.

1. 293 F 1013 [1923].
2. *Parker v Mobile Oil Corp.*, 7 NY3d 434, 447 [2006], *quoting People v Wesley*, 83 NY2d 417, 429 [1994].
3. 37 Misc3d 1216[A] [Sup Ct, Orange County 2012]. In *Munoz*, as in most cases, the moving party sought to preclude the expert's testimony or, alternatively, for a *Frye* hearing. There, also as in many cases, that motion was denied in its entirety.
4. *Id*. *quoting Gallegos v Elite Model Mgt. Corp.*, 195 Misc2d 223, 225 [Sup Ct, NY County 2003].
5. 85 AD3d 1588 [4th Dept 2011].
6. 29 Misc3d 1215[A] [Sup Ct, Albany County 2010].
7. *Id. see also Robinson v Bartlett*, 95 Ad3d 1531 [3d Dept 2012], where the Appellate Division affirmed the trial court's decision denying the plaintiff's motion for a *Frye* hearing because both parties' experts relied on the same scientific literature in forming their respective opinions.
8. 34 Misc3d 1223[A][Sup Ct, Albany County 2012].
9. 39 Misc3d 1217[A][Sup Ct, Kings County 2013].
10. *Id*.