Admissibility of Expert Testimony

Abandonment of Dyas/Frye and Application of FRE 702

Motorola Inc., v. Murray, 147 A.3d 751 (D.C. 2016)

Procedural History

Murray came before the Court after Motorola appealed a D.C. Superior Court decision holding that only a small portion of plaintiffs' proffered expert testimony was admissible under the *Dyas/Frye* evidentiary standard, but most of the testimony was inadmissible under the standard articulated in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). The *Daubert* Standard is similar to Federal Rule of Evidence 702 in that it gives the trial court discretion to determine the applicability of an expert's principles and methods to the facts at issue in a particular case.

Facts

Plaintiffs in thirteen cases sued various cell phone manufacturers, service providers, and trade associations, alleging that long-term exposure to cell phone radiation caused brain tumors. The trial court held evidentiary hearings to determine the admissibility of plaintiffs' expert testimony. The trial court then concluded that some of the expert testimony would be admissible under the *Dyas/Frye* test but that most of it would be excluded under Rule 702 of the Federal Rules of Evidence. Finally, the trial court certified a question of law for interlocutory appeal asking "whether the District of Columbia should adopt Federal Rule of Evidence 702 (or a revised Frye standard) for the admissibility of expert evidence." *Murray*, 147 A.3d at 752.

Issue

Should the Court abandon the *Dyas/Frye* test in favor of adopting the standards codified in Rule 702 of the Federal Rules of Evidence?

Analysis

A. *Dyas/Frye* test

In *Frye v. U.S.*, 293 F. 1013 (D.C. Cir 1923), the Court of Appeals of the District of Columbia articulated a test for admitting expert testimony. The court held that the theory from which scientific testimony was deduced must be sufficiently established and have gained general acceptance in the particular field it belongs to be deemed admissible. Later, in *Dyas v. U.S.*, 407 A.2d 626 (1979), the Court expanded on *Frye* by implementing the following test for the admission of expert testimony:

(1) the subject matter "must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman";

(2) "the witness must have sufficient skill, knowledge, or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth"; and

(3) expert testimony is inadmissible if "the state of the pertinent art or scientific knowledge does not permit a reasonable opinion to be asserted even by an expert."

Dyas, 376 A.2d at 832. The *Frye*/*Dyas* test focuses on whether the scientific methodology has been generally accepted, meaning "[t]he answer to the question about the reliability of a scientific technique or process does not vary according to the circumstances of each case." *Nathaniel Jones v. United States*, 548 A.2d 35, 40 (D.C. 1988).

B. *Daubert*

Most jurisdictions apply the *Daubert* standard when determining whether to admit a witness as an expert. *Daubert* emphasizes the trial court's "robust gatekeeper function." *See generally Daubert*, 509 U.S. 579. Like *Frye* and *Dyas*, *Daubert* focuses on scientific methodology but also adds a focus on the application of the methodology in a particular case. The *Daubert* court found that the *Frye*/*Dyas* test was too restrictive on expert opinions and was inconsistent with the Federal Rules and its approach of relaxing the barriers to opinion testimony from experts. *Daubert* requires the following test for expert admissibility:

> **Is the expert qualified** to help the finder of fact understand technical or scientific evidence or to determine a technical or scientific fact in issue? (Rule 702(a))
>
> **Is the testimony reliable?**
>
> - Based on sufficient facts or data? (Rule 702(b))
> - The product of reliable principles and methods? (Rule 702 (c))
> - The product of reliable application of principles and methods to the facts of the case? (Rule 702(d))

C. FRE 702

Federal Rule of Evidence 702 was amended in response to the Supreme Court's ruling in *Daubert*. Like *Daubert*, it focuses on applying scientific methods and principles to a particular case, instead of determining admissibility solely based on general acceptance in a particular field. Rule 702 of the Federal Rules of Evidence provides:
"A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
(b) the testimony is based on sufficient facts or data;
(c) the testimony is the product of reliable principles and methods; and
(d) the expert has reliably applied the principles and methods to the facts of the case."

Fed. R. Evid. 702. The court in *Murray* listed clarity, simplicity, and being able to use opinions from the many jurisdictions that apply the FRE 702 standard as reasons for adopting the FRE 702 standard.

a. Court's Gatekeeping Role

The court in *Murray* reaffirmed its role as gatekeeper in determining an expert's reliability. The court's gatekeeping role is not intended to be a replacement for the adversarial system. *Murray*, 147 A.3d at 757. The gatekeeper's role is a discretionary one, meaning as long as the court recognizes that it has discretion and exercises it by

reference to proper criteria used to assess reliability, the decision to admit or exclude expert opinion testimony is reviewable only for abuse of discretion. *Id.* at 756. Additionally, "the trial judge has the discretion 'both to avoid unnecessary "reliability" proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises.'" Fed. R. Evid. 702 Advisory Committee's notes to 2000 Amendments (quoting *Kumho Tire v. Carmichael*, 526 U.S. 137, 152 (1999)). The court cannot automatically admit expert testimony just because it has become accustomed to doing so under the *Dyas*/*Frye* test. *Murray*, 147 A.3d at 758.

Holding

The Court of Appeals for the District of Columbia held that it would apply FRE 702 to this case and any other civil or criminal cases. The court also held that it would decide at a later time whether the FRE 702 standard would apply to cases that have already been tried but are not yet final on direct appeal. *Murray*, 147 A.3d at 758.

What Does This Mean For Practitioners?

The Court of Appeals for the District of Columbia held that it would replace the *Frye* test with the FRE 702/*Daubert* standard in determining the admissibility of expert opinion. Applying FRE 702, means that practitioners must prepare their witnesses differently before attempting to qualify the witness as an expert. As opposed to preparing a witness to testify to whether methods and principles are generally accepted in their particular field, practitioners will now have to prepare witnesses to testify to the reliability of their methods and principles used to form their opinion and to whether these methods and principles apply to the specific facts at issue in the case at hand. For example, witnesses should be prepared to answer whether they have used a particular set of methods and principles in the past and whether that past experience helped guide their opinions in the case at hand. Additionally, the adoption of FRE 702 allows practitioners to looks to more jurisdictions to see how courts apply FRE 702 for witnesses particularly relevant in abuse, neglect, custody, and adoption cases.