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COURT OF APPEALS HOLDS DAUBERT STATUTE UNCONSTITUTIONAL

Lear v. Fields (Ct. Appeals, Div. Two, January 12, 2011)

Lear was charged with sexual abuse of a minor. The State intended to call a counselor as a "blind expert" - a witness to testify regarding the character traits of child sexual abuse victims rather than this particular victim. Lear moved to preclude the expert from testifying, arguing that the counselor's testimony did not meet the requirements of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), and the newly-enacted A.R.S. § 12-2203. The State moved the court to declare A.R.S. § 12-2203 unconstitutional, and asked the court to use the standard Ariz.R.Evid. 702 and the test set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), to determine whether the counselor could testify.

Under the Frye test, trial judges must determine whether a scientific principle has "gained general acceptance" in the relevant scientific community such that an expert, whose testimony is based on that principle, may be regarded as sufficiently reliable to be permitted to testify. In Arizona, the Frye test applies when an expert witness reaches a conclusion by deduction from others' novel scientific principles. It does not apply when a witness reaches a conclusion by inductive reasoning based on his or her own experience, observation, or research.

Under Daubert, a trial judge must serve as the gatekeeper for determining the admissibility of expert testimony. He first decides whether the expert is proposing to testify to scientific knowledge that will assist the trier of fact to understand or determine a fact in issue. To determine that, the judge assesses whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue. Judges consider four factors in conducting that inquiry: (1) whether the theory or technique "can be (and has been) tested," (2) "whether the theory or technique has been subjected to peer review and publication," (3) "the known or potential rate of error," and (4) whether the theory or technique has been generally accepted by the relevant scientific community. Daubert applies not only when an expert has relied on the application of a scientific principle, but also to testimony based on the expert's own skill and observations.

Before A.R.S. § 12-2203 was enacted, Arizona courts used the Frye test to determine the admissibility of expert testimony on novel scientific evidence. The Supreme Court had rejected the Daubert approach in *Logerquist v. McVey* (2000). The court was vigorously opposed to the broad gate-keeping power that Daubert gives to federal judges because questions about the accuracy and reliability of a witness's factual basis, data, and methods go to credibility and are questions for the jury. The Legislature nevertheless recently enacted A.R.S. § 12-2203 (eff. July 29, 2010), which incorporates the Daubert factors for determining the admissibility of expert testimony in Arizona.

The trial court held the statute unconstitutional because it usurps the Supreme Court's rulemaking authority and violates the separation of powers. It ruled that the statute does not supplement Rule 702, but rather "tends to engulf" it, in that it "extends well beyond . . . Rule [702,] embracing something more akin to the Daubert standard," which the supreme court rejected in Logerquist and other decisions.

The court of appeals affirmed. It reasoned that having adopted the Daubert test, the legislature promulgated an evidentiary rule that ascribes to trial judges the kind of broad gate keeping role that Logerquist opposed. In this respect, the statute essentially repealed a rule of evidence. The statute also is procedural in nature because it is a general rule of evidence that applies to the admission of expert testimony in "any civil or criminal action." It does not alter any particular substantive law. Being a conflicting procedural rule, it is unconstitutional.

ARIZONA COURT MAY EXERCISE PERSONAL JURISDICTION OVER NON-RESIDENT DEFENDANTS WHO POSSESS PURPOSEFUL, MINIMUM CONTACTS WITH STATE

The Planning Group of Scottsdale v. Lake Mathews Mineral Properties, Ltd. (Ariz. Supreme Court, January 21, 2011)

This case involves a suit between Arizona Plaintiffs and California Defendants.

TPG, an Arizona LLC, contacted Defendant LMMP, a California limited partnership, regarding providing investment capital for an LMMP mining operation. To negotiate TPG's investment, LMMP employees initiated several phone calls, e-mails, faxes, and letters to TPG in Arizona. TPG employees traveled to California for face-to-face meetings regarding the investment.

The court found that California-based LMMP's contacts with Arizona-based TPG, culminating in investment capital from TPG to LMMP, were sufficient minimum contacts to exercise personal jurisdiction over non-resident LMMP. Moreover, given that the Plaintiffs were Arizona companies, that Arizona law applied, and that LMMP was located in a neighboring state, the court found it reasonable to exercise personal jurisdiction over LMMP.

BOTH MINOR AND PARENT HAVE THE RIGHT TO RECOVER MINOR'S MEDICAL EXPENSES

Desela v. Prescott Unified School District (Ariz. Supreme Court, January 18, 2011)

On November 10, 2004, minor plaintiff was injured at Prescott High School. On January 31, 2005, minor's mother assigned to the minor all claims for medical expenses. On March 22, 2005, minor filed a notice of claim. She turned eighteen on December 29, 2006. Six weeks later, a court-appointed conservator filed another notice of claim for her. On December 31, 2007, Plaintiff's estate filed this negligence action against PUSD.

The trial court granted PUSD's motion to dismiss the claim for the minor's medical expenses because the claim originally belonged to mother and was not brought within one year of its accrual. The court of appeals reversed. In *Pearson & Dickerson Contractors, Inc. v. Harrington* (1943), the Supreme Court held that the parent, and not the minor child, is the proper party to sue to recover a minor's medical expenses. But *Pearson* also recognized that a parent can assign the right of recovery to the minor. Relying on this portion of *Pearson*, the court of appeals said the assignment triggered the tolling provision of A.R.S. § 12-502, allowing Plaintiff to bring her action for medical expenses within one year of her eighteenth birthday.

The Arizona Supreme Court overruled *Pearson* and held that both the minor and the minor's parents are entitled to recover pre-majority medical expenses resulting from injuries to the minor, but double recovery is not permitted. Furthermore, because a minor may sue a public entity or public employee within one year after turning eighteen (even if the cause of action accrues during childhood), the minor's suit for expenses was timely, regardless of the assignment.

INSURED AND PRIMARY INSURER CANNOT JOIN IN A "MORRIS" AGREEMENT TO AVOID INSURER'S OBLIGATION TO PAY POLICY LIMITS

Leflet v. Redwood Fire and Cas. Ins. Co. (Ct. Appeals, Div. One, January 20, 2011)

The lawsuit arose out of a construction defect class action that homeowners filed against the developer Hancock. Hancock in turn filed a third-party complaint against several subcontractors, asserting claims for breach of contract, breach of warranty, negligence and indemnity. Hancock and the subcontractors tendered their defenses to their respective insurers, all but one of which accepted the tenders under a reservation of rights. Hancock also tendered its defense to the subcontractors' insurers, who were obliged under their policies to provide primary coverage to Hancock for claims arising from the scope of the subcontractors' work.

Under the terms of the policies, Hancock's insurance carriers furnished primary coverage to Hancock for its own liability and excess coverage for liability attributed to the subcontractors. The subcontractors' insurers accepted Hancock's tender under reservations of rights.

After substantial discovery, the court ordered the parties to mediation. Plaintiffs and Hancock attempted to enter into a Morris/Damron type agreement whereby Hancock agreed to pay Plaintiffs $375,000 - an amount well below its insurers' policy limits - assign to Plaintiffs its rights against the subcontractors and their insurers, and to stipulate to a judgment in favor of Plaintiffs for an amount to be determined later. In exchange, Plaintiffs agreed not to execute the judgment against Hancock or its insurers.

The subcontractors and their insurers had no knowledge of the agreement, and thus challenged it, arguing a breach of the cooperation clause. The trial court agreed: the failure to notify the subcontractors and their insurers of the agreement breached the cooperation clause. The court thus entered judgment for subcontractors and their insurers, excusing them from having to defend and indemnify, and awarded them fees and taxable costs to be paid jointly and severally by the Plaintiff homeowners.

The court of appeals affirmed. Not only had the cooperation clause been breached, but in addition, the agreement was invalid as outside the bounds of Morris. Unlike a Morris situation, here Hancock did not act simply to protect itself from an excess verdict. It acted as an agent of its insurer that sought to limit its own liability and place the burden on the subcontractors' insurers. Hancock's interests were aligned with those of its insurers, not opposed to them. Also, unlike an insured defendant, a primary insurer who acts in good faith is subject to liability only to the extent of its policy limits, a risk for which it bargained and was paid. A primary insurer does not face the prospect of an excess judgment or a judgment within policy limits for which it might not receive coverage. Therefore an insurer that reserves its rights may not employ Morris to reduce its liability below policy limits, and an insured that facilitates such an effort breaches its duty to cooperate with its other insurers.

The court did, however, overturn the award of attorneys' fees to the subcontractors' insurers.

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