

COURT OF APPEALS HOLDS DAUBERT STATUTE UNCONSTITUTIONAL

January 12, 2011 | Law Alerts, News

Lear v. Fields

Ct. Appeals, Div. Two, January 12, 2011

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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 newlyenacted 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.