

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FOURTH DISTRICT

JANUARY TERM 2002

**HOLY CROSS HOSPITAL, INC., d/b/a  
HOLY CROSS MEDICAL GROUP, and  
SALVATORE DiGIORGIO, M.D.,**

Appellants,

v.

**ELEANOR MARRONE and  
MELBOURNE J. SMITH, M.D.,**

Appellees.

---

CASE NO. 4D01-1140

---

Opinion filed May 17, 2002

Appeal and cross-appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; George A. Brescher, Judge; L.T. Case No. 00-6776 25.

Louise H. McMurray and Michael A. Petruccelli of McIntosh, Sawran, Peltz & Cartaya, P.A., Miami, for appellants.

Julie H. Littky-Rubin of Lytal, Reiter, Clark, Fountain & Williams, LLP, West Palm Beach, for appellee Eleanor Marrone.

**ON MOTION FOR CLARIFICATION**

PER CURIAM.

Appellant's Motion for Clarification is hereby denied to the extent it moves this court to revisit the directions previously ordered upon remand. Notwithstanding, we write to further refine our previous holdings in the instant case.

Appellant contends if the trial court finds Dr. Sokol's opinion testimony inadmissible under *Frye*<sup>1</sup>, the trial court should enter a directed verdict in appellant's favor. We disagree.

Here, appellee disclosed Dr. Sokol as a trial expert, namely an expert oncologist, on August 2, 2000. Trial was set on an expedited basis due to the fact Mrs. Marrone had been diagnosed with cancer. Dr. Sokol was not deposed by appellant until December 29, 2000, less than two weeks before the commencement of trial. Appellant's memorandum in support of the exclusion of Dr. Sokol's testimony on the basis of *Frye* was subsequently filed the first day of trial, January 9, 2001.

As a matter of course, where a *Frye*-type admissibility issue is raised, a hearing on the merits of this issue should be held before trial. We note on the aforementioned facts, such was an impossibility; we expressly do not attribute any fault to Judge Brescher whose actions were reasonable given the extenuating circumstances.

Notwithstanding, we refine our directions on remand as provided in our Opinion on Grant of Clarification issued March 20, 2002. Upon review of the record, we note not all of Dr. Sokol's opinion testimony is subject to the threshold test of *Frye*. As a litany of cases have provided, only evidence based on "new and novel" scientific techniques is subject to *Frye*. As this court previously held in our original opinion filed December 19, 2001, Dr. Sokol's usage of staging studies, and to the extent his subsequent conclusions were derived therefrom, constituted a "new and novel" application of scientific datum, and, as such, needed to be *Frye*-tested. Yet, we conclude, as a matter of law, a large portion of Dr. Sokol's testimony offered below constitutes "pure opinion." See *Florida Power & Light Co. v.*

---

<sup>1</sup> *Frye v. U.S.*, 293 F. 1013 (D.C.Cir. 1923).

*Tursi*, 729 So. 2d 995 (Fla. 4th DCA 1999). There is no question as to Dr. Sokol's competency as an expert in the field of oncology. For example, his general discussion regarding the growth and history of tumors and the spread of cancer, to the extent such testimony is based on his experience and training and as it relates to Mrs. Marrone's condition, is admissible as opinion testimony. As a general rule, the ultimate determination(s) regarding whether or not appellant's alleged negligence in failing to timely diagnose Mrs. Marrone's cancer acted in concert with her pre-existing condition to produce an injury, and if so, to what extent (*i.e.*, apportionment of damages), are matters to be decided by the jury. See *Auster v. Gertrude and Philip Strax Breast Cancer Detection Institute, Inc.*, 649 So. 2d 883, 887-8 (Fla. 4th DCA 1995).

On remand the trial court shall have the task of determining whether Dr. Sokol's testimony as it relates to staging studies, and conclusions derived therefrom, are admissible under *Frye*. If the trial court holds all of Dr. Sokol's testimony is admissible (including testimony relating to staging studies), the jury verdict entered below shall be reinstated. On the other hand, if the trial court holds Dr. Sokol's testimony relating to staging studies is inadmissible under *Frye*, the trial court shall order a new trial. In this regards, the trial court shall exercise its discretion in determining what portions of Dr. Sokol's testimony shall be excluded if he is offered as an expert witness at the new trial.

GUNTHER and WARNER, JJ., concur.  
POLEN, C.J., concurs specially with opinion.

POLEN, C.J., concurring specially.

I concur with the majority opinion and write specially solely to further clarify the procedure to be employed where *Frye* issues are raised, and why policy dictates the result discussed, *supra*, in the instant case.

The majority properly notes a pre-trial *Frye* hearing was an impossibility in the instant case. Litigation is indeed a curious animal and one cannot readily discern from the record whether this situation was the result of the action of one or both of the parties below, or merely a result of the complex nature of this case, which was set on an expedited schedule.

Notwithstanding, in most cases a hearing concerning *Frye*-type admissibility issues can, and should, be raised before trial. In that instance, where a hearing regarding the applicability of *Frye* is addressed a sufficient amount of time before trial, if a party learns the opinion of one of its experts will not be admissible, that party will at the least have the ability to undertake curative actions before trial. Where such is not a possibility due to extenuating scheduling circumstances, we do not believe a party should be penalized and lose its opportunity to act as if the more proper procedures had been followed, *i.e.*, consideration of the *Frye* issue a sufficient time before trial. This, in turn, would require a party opposing anticipated testimony on *Frye* grounds to do its discovery and raise the issue by motion and hearing a sufficient amount of time prior to the trial setting. It seems unduly harsh not only to snatch victory from a party due to a procedural error of the trial court in declining to conduct a mid-trial *Frye* hearing, but also to maintain that party shall have no opportunity to proceed as if the trial court had made the correct ruling. Allowing appellee to attempt to establish her cause of action at a new trial (if Dr. Sokol's testimony is held to be partly inadmissible) would not constitute a proverbial "second bite of the apple." If Dr. Sokol's testimony were to be excluded, then appellee's "first bite" was ineffectual, as the trial court never afforded her the opportunity to prove her case through all alternative admissible means at her disposal.

**NOT FINAL UNTIL THE DISPOSITION  
OF ANY TIMELY FILED MOTION FOR**

**REHEARING.**