

[Products Liability Law Daily Wrap Up, EXPERT EVIDENCE NEWS—
CHEMICAL PRODUCTS—Pa. Super.: Pesticide exposure suit remanded
after successful challenge to exclusion of expert testimony, \(May 23, 2018\)](#)

Products Liability Law Daily Wrap Up

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By Miriam A. Friedman, J.D.

A trial court erred in the manner in which it applied the standard enunciated in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) to exclude expert testimony in a wrongful death suit involving long-term exposure to pesticides, a Pennsylvania appellate court found in a non-precedential decision. The court reversed the grant of summary judgment in favor of manufacturers of the pesticides, vacated the order precluding the experts from testifying, and remanded the case for further proceedings. Disagreeing with the majority's finding that the trial court's *Frye* inquiry was "overly expansive," President Judge Emeritus John Bender [dissented](#) ([Walsh v. BASF Corp.](#), May 22, 2018, Bowes, M.).

The decedent was employed for almost 40 years as a groundskeeper and golf course superintendent at several golf courses, during which he frequently and regularly applied insecticides and fungicides. After he was diagnosed with Acute Myelogenous Leukemia (AML), cytogenetic testing showed chromosomal aberrations consistent with secondary leukemias, which are linked to radiation, chemotherapy, or chemical exposure. Following his death, his executor filed a wrongful death and survival action against the manufacturers of various pesticides the decedent had used over the years, asserting claims of strict products liability, negligence, and breach of warranty.

The court granted summary judgment in favor of many of the manufacturers and sellers of the allegedly defective pesticides, based on a lack of expert causation testimony, leaving fifteen products in the lawsuit. The remaining defendants filed "*Frye* motions" to exclude the experts offered by the executor of the decedent's estate. These were ultimately granted by the trial court. The parties then stipulated to the entry of an order granting summary judgment, preserving all rights to appeal the *Frye* determinations. The executor appealed, challenging the exclusion of his expert testimony.

Trial court's *Frye* inquiry. Although the appellate court found considerable support for the executor's argument that "the link between pesticides and cancer has crossed the threshold from novel to general acceptance," because the manufacturers had offered expert opinion that neither of the executor's experts had applied the, admittedly accepted, methodology used in a generally accepted manner, the court found no abuse of discretion on the part of the trial court in conducting a *Frye* inquiry. However, the appeals court concluded that the inquiry undertaken by the trial court was overly expansive.

The appellate court criticized the lower court's assumption of the role of a "gatekeeper," charged with determining whether studies and articles relied upon by the experts actually stood for what the experts said that they did. The appellate panel characterized the lower court's finding that one of the experts did not follow accepted methodologies in relying upon certain studies in forming his opinions as to general causation as "add[ing] another layer to the generally accepted methodology requirement." That is, in looking behind the expert's differential diagnosis methodology and challenging his conclusion, the trial court "applied its own view of what studies were scientifically/medically acceptable to support the expert's opinion. In doing so, the trial court impermissibly set itself up 'as a super expert in the field of medicine.'"

In conclusion, the appellate court found that the literature and studies supported the general acceptance of the scientific principle underlying the experts' opinions that long-term exposure to pesticides can cause or increase the risk of leukemia, specifically AML. Furthermore, medical science "in the form of cytogenetic studies linking

changes in certain chromosomes with exposure to chemicals supported a causal link." So, too, the differential diagnosis theory used by one of the experts to arrive at his opinion that long-term pesticide exposure was the cause of the decedent's AML was generally accepted in the scientific community. Finally, the court noted that an expert's ability to opine with a reasonable degree of scientific or medical certainty that exposure to a particular defective product substantially caused or contributed to the injury" went to the legal sufficiency of the expert testimony, not to whether the science is generally accepted. As such, a *Frye*, inquiry was not "the appropriate vehicle" for addressing that question, the panel concluded, reversing and remanding the trial court's decision.

The case is No. [1661 WDA 2016](#).

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Companies: BASF Corp.; Bayer Corp. d/b/a Bayer CropScience, LP; Monsanto Co.

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