IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel., MIKE HUNTER, ATTORNEY GENERAL OF OKLAHOMA, Plaintiff, v. PURDUE PHARMA L.P., *et al.*, Defendants.	Case No. CJ-2017-816 Judge Thad Balkman William C. Hetherington Special Discovery Master

DEFENDANTS' MOTION TO EXCLUDE TESTIMONY OF MS. TERRI WHITE AND BRIEF IN SUPPORT

REDACTED VERSION

THIS DOCUMENT WAS FILED IN ITS ENTIRETY APRIL 23, 2019,
UNDER SEAL PER COURT ORDER DATED APRIL 16, 2018

The Defendants move this Court for an order excluding certain testimony of the State's purported expert witness, Ms. Terri White, pursuant to 12 O.S. §§ 2702-2705. Ms. White should not be permitted to testify concerning (1) the necessity of the State's proposed abatement plan or (2) the length of time needed for successful abatement. Ms. White's opinions on both topics are unsupported by any reliable basis, and amount to precisely the kind of *ipse dixit* the Oklahoma Supreme Court has refused to allow. Defendants thus respectfully request that their Motion to Exclude be granted, and for such other and further relief as the Court deems just and proper.

BRIEF IN SUPPORT

In support of this Motion, the Defendants show the following:

I. INTRODUCTION

Ms. White, a social worker by training and Commissioner of the Oklahoma Department of Mental Health and Substance Abuse Services ("ODMHSAS") by employ, may be qualified to talk about both past actions the State has taken to address opioid-related issues in Oklahoma and the mental illness and substance abuse programs and services ODMHSAS currently provides. *See* Ex. A, State's Dec. 21, 2018 Expert Witness Disclosure of Ms. Terri White ("White Disc.") 1. She may also have knowledge, based on her role as Commissioner, about state-funded admissions to treat opioid use disorder. But that is not all the State proffers her to testify about in this case: Ms. White also seeks to offer opinions about the purported necessity of certain programs to solve the epidemic and the length of time those programs supposedly must remain in effect to successfully solve the epidemic. *Id.* During her deposition in this case, however, it became clear that Ms. White has no reliable basis for these opinions.

Ms. White's testimony on the necessity of the abatement plan and amount of time necessary to abate is not based on sufficient facts or data, nor is it the result of reliable principles

and methods. To the contrary, Ms. White's testimony is based on unexamined assumptions, back-of-the-envelope calculations, and uninformed speculation about what she thinks (or what other State representatives think) might help Oklahoma eliminate the opioid crisis. Ms. White's testimony, in other words, is precisely the sort of unsupported *ipse dixit* that the Oklahoma Supreme Court has refused to allow. *Christian v. Gray*, 2003 OK 10, ¶ 36, 65 P.3d 591, 607 (expert opinion "must be more than *ipse dixit*"). It must be excluded.[1]

II. LEGAL STANDARD[2]

Expert testimony is admissible only if it satisfies several prerequisites, one of which is relevant here. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993); *Christian*, 2003 OK 10, ¶8, 65 P.3d at 597-98. Specifically, to be admitted, expert testimony must be reliable, meaning (a) the opinion is "based upon sufficient facts or data," (b) it is "the product of reliable principles and methods," and (c) "[t]he witness has applied the principles and methods reliably to the facts of the case." 12 O.S. § 2702; *accord Nelson*, 2016 OK 69, ¶13, 376 P.3d at 217. The party offering the expert

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[1] As elaborated in the Defendants' motions for summary judgment, Ms. White's testimony about the necessity of the State's plan for abating the opioid crisis and the time supposedly required for abatement also is irrelevant. Ms. White concedes that the State's proposed abatement plan does not seek to abate any "act" or "omi[ssion]" by the Defendants. Ex. B, Apr. 11, 2019 Deposition of Terri White ("White Dep.") 254:16-23, 255:24-256:5. Rather, it seeks to "abate the opioids crisis." *Id.* at 258:9-16. Ms. White's testimony relates at most to remedying past damages; it has thus no bearing on the well-settled concept of abatement, and therefore no bearing on this case.

[2] Because Oklahoma's statutes governing expert testimony, 12 O.S. §§ 2702, 2703, 2704, and 2705, parallel the language of Federal Rules of Evidence 702, 703, 704, and 705 in all relevant respects, both state and federal jurisprudence on the subject is instructive. *See, e.g., Nelson v. Enid Med. Assocs., Inc.*, 2016 OK 69, ¶¶10-61, 376 P.3d 212, 216-31; *Christian v. Gray*, 2003 OK 10, ¶9, 65 P.3d at 598-99.

testimony—here, the State—has the burden of showing by a preponderance of the evidence that the testimony is admissible. *Christian*, 2003 OK 10, ¶23, 65 P.3d at 603.

An opinion that is based only on speculative assumption and is not supported by reliable data must be excluded. *See, e.g., Guidroz-Brault v. Mo. Pac. R.R. Co.*, 254 F.3d 825, 829 (9th Cir. 2001) (expert may not rely on "unsupported speculation and subjective beliefs" (citing *Daubert*, 509 U.S. at 590)). A court thus must closely inspect how the expert arrives at her conclusions, and exclude "opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997); *see also, e.g.*, Ex. C, *Shank v. Whiting-Turner Contracting Co.*, No. 17-cv-446-JED-FHM, 2018 WL 6681223, at *2 (N.D. Okla. Dec. 19, 2018) ("analytical gap" in expert's testimony requires its exclusion under *Daubert*). Under these standards, Ms. White's testimony about the necessity of the State's proposed programs for abating the opioid crisis and the amount of time required for abatement is inadmissible and must be excluded.

III. ARGUMENT

Ms. White's testimony about the State's proposed abatement plan and the time supposedly required to solve Oklahoma's substance abuse-related harms should be excluded because it is not "based upon sufficient facts or data" and is not "the product of reliable principles and methods." *See* 12 O.S. § 2702. Ms. White uses none of the tools a qualified expert would use to explain the necessity of the plan or the time needed to abate, and her position as Commissioner cannot cloak her unsubstantiated, subjective opinion in expert garb.

A. Ms. White's Testimony About The Necessity Of The State's Abatement Plan Is Not Based On Reliable Facts, Data, Or Analysis

Ms. White intends to opine that "the programs and services in the [State's] [a]batement [p]lan are necessary to abate the opioid crisis in Oklahoma." Ex. A, White Disc. 1. But Ms. White is not an epidemiologist. Ex. B, White Dep. 15:13-14 ("Q And you're not an epidemiologist; correct? A Correct."). She has *never* developed or implemented an abatement plan before. *Id.* at 11:8-11 ("Q (BY MS. STRONG) Understood. Have you ever been involved with preparing an abatement plan before? A No."). Notwithstanding her lack of familiarity with the subject matter, Ms. White did not cite to, testify about, or provide the Defendants a copy of a single study related to abating *any* public health crisis, let alone the opioid crisis. Nor are any such materials cited in Ruhm's supplemental expert report, and Ruhm himself has disavowed any opinion about whether any element of the State's abatement plan is necessary, effective, or even remotely tied to any conduct by a Defendant in this case. *E.g.*, Ex. D, Supplemental Report of Dr. Christopher Ruhm 14 n.14 [redacted] *id.* at 19 n.33 [redacted] *id.* at 3 [redacted]

Similarly missing from Ms. White's testimony is any scientific support for the supposed necessity of any of the programs in the State's proposed abatement plan with reference to scientific data or text. Instead, Ms. White repeatedly offered nothing more than what she "think[s]" is "possible" based on her own subjective opinions. Ex. B, White Dep. 294:14-25 ("Q

Do you think this -- if you didn't get this component, are you telling me that you believe the state would not be able to abate the opioid crisis, with all the other components, but you're missing the hotline services? Is that your testimony, Ms. White? . . . THE WITNESS: I think it -- I think it would be -- I think it is quite possible. I think it would be really difficult. If you look at what we've had to do to attempt to abate the tobacco crisis, helpline has been integral in that. So I think this is necessary.").

When pressed for further details about her understanding of the problem to be remedied or the basis for her necessity opinion, she either did not know, pointed to another agency, or refused to answer. *Id.* at 318:7-21 ("Q (BY MS. STRONG) Did you rely upon that data in coming up with these numbers, or you just relied on the total number of folks in SoonerCare? A So there were two entities that came up with these numbers: The Department of Mental Health and Substance Abuse Services along with the Health Care Authority. The Health Care Authority provided to us the number of screenings they thought would take place per year based on the number of 345,919. I cannot tell you with certainty whether or not they relied on the number of visit data.").

Courts routinely exclude an expert's testimony where her opinions are "not supported by citation or reference to any scientific data or texts," but rather are based on "subjective belief[s]." Ex. E, *Reger v. A.I. duPont Hosp. for Children of Nemours Found.*, 259 Fed. App'x 499, 500 (3d Cir. 2008) (quotation omitted); *see also* Ex. F, *Smith v. Sears Roebuck & Co.*, 232 F. App'x 780, 783 (10th Cir. 2007) (expert's opinion speculative, unreliable, and inadmissible because he did not support his theories with scientific studies); Ex. G, *Kolesar v. United Agri Prods., Inc.*, 246 F. App'x 977, 980-81 (6th Cir. 2007) (expert opinion based on methodology not supported by literature or studies properly excluded as unreliable). So too here.

The insufficiency of Ms. White's opinions is compounded by her admission that she relies in large part merely on the untested say-so of *other* witnesses with direct ties to the State. Ex. B, White Dep. 156:8-24, 170:14-173:25. When pressed for details on why she believes Oklahoma does not have an illicit opioid problem, she did not testify from her own expert knowledge, but instead identified Drs. Andrew Kolodny and Jason Beaman, two other putative state experts, as persons with knowledge of those facts. *Id.* at 170:14-172:14. Ms. White also vaguely identified staff at the Oklahoma State Department of Health, but could not even remember their names, let alone the content of any data they allegedly provided her and on which she actually relied. *Id.* at 173:13-17. The reason for that is unsurprising: Ms. White did not interface with the Oklahoma State Department of Health. She simply relied on information conveyed to her ODMHSAS staff by staff of another agency.

It is well-settled that merely parroting or endorsing the information provided by another expert falls short of providing reliable "expert" testimony. *See, e.g.*, *United States v. Charley*, 189 F.3d 1251, 1267 (10th Cir. 1999) ("In general, expert testimony which does nothing but vouch for the credibility of another witness . . . does not 'assist the trier of fact' as required."); *Tunis Bros. Co. v. Ford Motor Co.*, 124 F.R.D. 95, 98 (E.D. Pa. 1989) ("It is the [trier of fact]'s function to determine the validity of [an expert's] opinions and not to judge [another expert's] opinions of [the expert's] opinions."). An expert must *herself* "vouchsafe the reliability of the data on which he relies and explain how the cumulation of that data was consistent with the expert's profession" for her testimony to be admissible. *SMS Syst. Maint. Servs., Inc. v. Digital Equip. Corp.*, 188 F.3d 11, 25 (1st Cir. 1999). Ms. White did not do so. Her testimony on the alleged necessity of the State's abatement plan should be excluded.

B. Ms. White's Testimony About How Much Time Is Needed To Abate An Oklahoma Opioid Epidemic Is Unreliable

Ms. White's testimony that it will take 30 years to abate Oklahoma's alleged opioid epidemic is likewise unreliable. Ms. White did not rely upon or perform *any* study—scientific or otherwise—to support that conclusion. She instead offers bare speculation combined with some degree of "hope" and a completely indeterminate amount of certainty.

Ms. White could not possibly offer any reliable testimony on the amount of time needed to abate, given that she concedes that no one associated with the plan has developed any actual criteria or metrics to test its success or failure. Ex. B, White Dep. 246:10-18 ("Q Okay. And what would be the measure you'd need to understand to determine that you've successfully abated illicit opioid use in Oklahoma? THE WITNESS: So I don't know what the specific measure will be we will use in the abatement plan to measure it. We will -- if we are successful in getting the abatement plan, we will create very specific outcome measures that we would utilize.").

The lack of any reliable method for determining the time necessary to abate or for determining the plan's success was abundantly clear in Ms. White's testimony: When asked how long it would take to abate the opioid crisis, Ms. White testified at one point that she "would hope" that the State's abatement plan "would address the crisis by the end of 30 years." *Id.* at 296:15-22. At another point, she testified that she "*believe[s]* it will take *at least* [20-30 years] to abate the crisis for opioids." *Id.* at 278:11-18 (emphasis added). Later, she testified that she "think[s] [she] could say . . . with some degree of certainty" that the opioid crisis is likely to be abated at the end of the abatement plan but that she "cannot put a degree on that." *Id.* at 301:5-19. Wishing, even by a Commissioner, does not make it so. Nor is hope a reliable scientific

method. Because that is all Ms. White has to offer on the time needed to abate the opioid crisis in Oklahoma, her testimony should be excluded.

IV. CONCLUSION

For all of these reasons, the Court should grant the Defendants' Motion to Exclude and issue an order excluding the State from introducing Ms. White's testimony about (1) the necessity of the State's proposed plan to abate Oklahoma's opioid-related issues or (2) the length of time needed for abatement.

Dated: April 23, 2019

Respectfully submitted,

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CERTIFICATE OF MAILING

Pursuant to 12 O.S. § 2005(D), and by agreement of the parties, this is to certify on April 23, 2019, a true and correct copy of the above and foregoing has been served via electronic mail, to the following:

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EXHIBIT A

Exhibit W - Terri White, Commissioner of the Oklahoma Department of Mental Health and Substance Abuse Services

A. Commissioner White is expected to testify about the following subject matters:

- The scope of the Oklahoma opioid crisis, and its impact on the health and safety of Oklahoma citizens.
- Commissioner White will testify regarding the Abatement Plan, which is summarized in more detail in the Report prepared by Dr. Christopher J. Ruhm.
- The length of time for which the services and programs in the Abatement Plan need to be in effect to abate the Oklahoma opioid crisis.
- Past actions the State has taken to abate the Oklahoma opioid crisis.
- The programs and services ODMHSAS provides to Oklahoma citizens in the areas of the promotion of mental health and the prevention and treatment of mental illness and substance abuse.

B. Commissioner White is expected to testify about the following facts and/or opinions:

The opioid crisis in Oklahoma has resulted in a dangerous and deadly crisis that takes the lives of numerous Oklahomans every week and negatively affects the lives of adults and children, State agencies, and other stakeholders across Oklahoma. Extensive and expensive efforts must be undertaken to abate and reverse this sweeping crisis. Commissioner White will opine that the programs and services in the Abatement Plan are necessary to abate the opioid crisis in Oklahoma.

The individual costs of the services and programs in the Abatement Plan were provided to the State's expert, Christopher J. Ruhm, Ph.D., so he could calculate the net present value of each program and service in the Abatement Plan.

With the limited resources it has available, the State of Oklahoma has provided certain programs and services aimed at addressing the opioid crisis in Oklahoma. However, the State

currently does not possess the necessary resources to fund the programs and services in the Abatement Plan, which are necessary to fully abate the opioid crisis in Oklahoma.

As discovery is ongoing, additional programs and services may be added to the Abatement Plan before trial. Commissioner White reserves the right to supplement her opinions as needed to reflect those additional programs and services and their associated costs.

C. Summary of the grounds for each opinion

The basis for Commissioner White's testimony is her education, knowledge, experience, training, leadership and expertise with mental illness and addiction, the treatment and prevention services ODMHSAS provides, the State's effort to abate the Oklahoma opioid crisis, and the impact of the opioid crisis on the health and safety of Oklahoma citizens.

As Commissioner of ODMHSAS, Commissioner White has 11 years of professional experience leading the single State agency authority on mental health and substance abuse in Oklahoma. Commissioner White runs one of the largest State agencies. ODMHSAS oversees State-run facilities and contracts with hundreds of mental health and substance abuse organizations across the State that provide a wide range of mental health and substance abuse treatment, prevention and early intervention services and programs. Commissioner White was appointed to and served as a member to the Oklahoma Commission on Opioid Abuse. Before becoming Commissioner of ODMHSAS, Commissioner White held numerous positions within the agency, including Deputy Commissioner for Communications and Prevention; Director of Communications and Public Policy; Management Analyst; and, executive director of two State-operated facilities. Commissioner White has been recognized and honored numerous times for her efforts to improve the quality of life of Oklahomans living with mental illness and addiction.

D. Commissioner White's Compensation

Commissioner White is not seeking compensation for her time spent in expert preparation or for expert testimony.

E. Commissioner White's Qualifications

Commissioner White's qualifications are reflected in the biography attached as Exhibit W-1.

F. Commissioner White's Publications

Commissioner White does not have any recent publications.

G. Commissioner White's Prior Testimony

Commissioner White has never testified or been deposed as an expert in any previous litigation.

EXHIBIT W-1

TERRI L. WHITE, MSW
COMMISSIONER FOR THE OKLAHOMA DEPARTMENT OF MENTAL HEALTH AND SUBSTANCE ABUSE SERVICES

Terri White, commissioner for the Oklahoma Department of Mental Health and Substance Abuse Services (ODMHSAS), is a passionate advocate for individuals experiencing mental illness and addiction. Because of her leadership, ODMHSAS has become nationally known for its children's behavioral health services; community-based treatment programs; technological innovations such as "telepsychiatry;" and, the integration of behavioral health care into primary healthcare settings.

White, appointed commissioner in May 2007, also was the first woman to serve as Oklahoma's Secretary of Health, holding that post under then-Governor Brad Henry from 2009 to 2011. Before becoming commissioner, White held numerous positions within the department, including Deputy Commissioner for Communications and Prevention; Director of Communications and Public Policy; Management Analyst; and, executive director of two state-operated facilities.

As commissioner, White serves as CEO for one of Oklahoma's largest state agencies. The ODMHSAS has an annual operating budget of nearly $400 million and a workforce of approximately 1,800. In addition to overseeing state-run facilities, the agency contracts with more than 300 private and non-profit mental health and substance abuse organizations across the state, providing services ranging from treatment to housing to prevention and early intervention.

In addition to her career endeavors, White has been recognized by numerous civic organizations for her outstanding leadership abilities and tireless efforts to improve the quality of life for Oklahomans living with mental or addictive disorders.

She received a national Henry Toll Fellowship with the Council of State Governments in 2015. In 2014, White received the "Kate Barnard Award" from the Oklahoma Commission on the Status of Women, created to honor outstanding women who have made a difference in Oklahoma through public service. In 2012, she was recognized by The Journal Record newspaper as one of Oklahoma's top "Achievers Under 40."

White is a three-time honoree of The Journal Record's "50 Women Making a Difference" program and was named to its "Circle of Excellence" in 2011.

In 2017, she was named "Compassionate Citizen of the Year" by the Oklahoma Foundation for the Disabled. Also in 2017, the University of Oklahoma College of Arts and Sciences awarded her its Distinguished Alumnus honor. She was inducted into OU's Anne and Henry Zarrow School of Social Work Hall of Fame in 2011, and is a volunteer faculty member with the University's School of Medicine.

A native of Edmond, White received both her Master of Social Work and her Bachelor of Arts in Social Work from OU.

EXHIBIT B

IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel.,
MIKE HUNTER, ATTORNEY GENERAL
OF OKLAHOMA,
Plaintiff,
vs. No. CJ-2017-816
(1) PURDUE PHARMA L.P.;
(2) PURDUE PHARMA, INC.;
(3) THE PURDUE FREDERICK
COMPANY;
(4) TEVA PHARMACEUTICALS
USA, INC.;
(5) CEPHALON, INC.;
(6) JOHNSON & JOHNSON;
(7) JANSSEN PHARMACEUTICALS, INC.;
(8) ORTHO-McNEIL-JANSSEN
PHARMACEUTICALS, INC., a/k/a
JANSSEN PHARMACEUTICALS, INC.;
(9) JANSSEN PHARMACEUTICALS,
INC., a/k/a JANSSEN
PHARMACEUTICALS, INC.;
(10) ALLERGAN, PLC, f/k/a
ACTAVIS PLC, f/k/a ACTAVIS, INC.,
f/k/a WATSON PHARMACEUTICALS, INC.;
(11) WATSON LABORATORIES, INC.;
(12) ACTAVIS LLC; and
(13) ACTAVIS PHARMA, INC.,
f/k/a WATSON PHARMA, INC.
Defendants.

VIDEOTAPE DEPOSITION OF TERRI WHITE
TAKEN ON BEHALF OF THE DEFENDANTS
ON APRIL 11, 2019 AT 9:25 AM
IN OKLAHOMA CITY, OKLAHOMA

REPORTED BY:
Jody Graham,
CSR, RPR, RMR, CRR
Job No. 3289790
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VIDEOTAPED BY: Jim Herzig

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EXHIBITS

STIPULATIONS

It is stipulated that the deposition of TERRI WHITE may be taken pursuant to Notice on APRIL 11, 2019, before Jody Graham, CSR, RPR, RMR, CRR.

It is stipulated that all objections to questions, except as to the form of the question, may be made at the time of the trial when said deposition is offered into evidence.

VIDEOGRAPHER: Good morning. We are going on the record at 9:25 a.m. on Thursday, April 11th, 2019. This is the video recorded deposition of Terri White taken by counsel for defendant in the matter of State of Oklahoma and Mike Hunter versus Purdue Pharma, et al.

Counsel and -- Counsel will now state their appearances and affiliations for the record.

MS. BALDWIN: Lisa Baldwin, Nix Patterson, for the State of Oklahoma.

MS. STRONG: Sabrina Strong of O'Melveny & Myers on behalf of the Janssen defendants.

MR. KAISER: Matthew Kaiser on behalf of O'Melveny & Myers, the Janssen defendants.

MR. JOHNSON: Steve Johnson, Foliart, Huff, Ottaway & Bottom, for the Janssen defendants.

MS. PATTERSON: Nancy Patterson, Morgan Lewis, for the Teva and Actavis defendants.

VIDEOGRAPHER: Thank you. Will the court reporter, please, swear in the witness.

TERRI WHITE,

being first duly sworn, was examined and testified as follows, to wit:

DIRECT EXAMINATION

BY MS. STRONG:

THE WITNESS: Yes. Social work is my education.

Q (BY MS. STRONG) You're not a marketing expert; correct?

A No.

Q We're going to have a problem with double negatives so I'll try and correct that when I hear that.

A No problem.

Q But you're not a marketing expert; is that correct?

A Correct.

Q And you're not an epidemiologist; correct?

A Correct.

Q You're not a doctor?

A No.

Q Is that correct? Are you a doctor?

A It is correct I am not a doctor.

Q Thank you. It's just a double negative issue, and I can frame the questions differently.

A Sure, sure, sure.

Q But I just want to make sure that we have a clear record as to what the answer is to the questions I'm asking. Are you a psychologist?

A No.

Q Do you know whether illicit fentanyl gets mixed into cocaine that comes into the United States?

A I do not know the answer to that.

Q And do you know whether illicit fentanyl gets mixed into methamphetamines that come into the United States?

A I do not know the answer to that.

Q So to the extent that a death is categorized as a fentanyl death, do you know one way or the other whether that person could have been using methamphetamines that were contaminated with illicit fentanyl?

MS. BALDWIN: Object to the form. Outside of Commissioner White's expert testimony.

THE WITNESS: So my understanding is that the health department is able to provide -- the data may come from the medical examiner -- data on deaths and they're able to categorize what's prescription drugs and what's not.

So I can't tell you those answers. But my understanding is that very clearly deaths in Oklahoma are overwhelmingly related to opioid prescription drugs. But the detail of what you're asking, I'm not prepared to answer today.

Q (BY MS. STRONG) And to the extent that we

Q Okay. And you don't know one way or the other whether that's accurate or not sitting here today; is that correct?

MS. BALDWIN: Object to the form.

THE WITNESS: Well, what I was actually thinking is I'm curious what they're using to make that statement from. So I don't know what they used to make that statement from.

Q (BY MS. STRONG) And I'm asking you independently now, sitting here one way -- sitting here today, you don't know whether that statement is accurate or not; is that correct?

MS. BALDWIN: Object to the form.

THE WITNESS: So it says, "Diverted pharmaceuticals pose a significant threat." Again, when I asked -- when we talked about this earlier, any substance poses a threat.

So do I believe we have diverted opioid medications in the state? Yes. Is that a threat? Yes. Do I believe that the majority of opioid-use disorder and overdose deaths are related to diverted pharmaceuticals? I do not know that, but I -- I do not know that definitively.

But what I do know is that we have continued to be told by experts that we have -- unlike other

states where they may be seeing significant increases in illicit opioids as their problem, for us it is prescription drugs.

Q (BY MS. STRONG) And who are the experts who you're referring to right now?

A Health Department, national experts including experts involved in this case such as Dr. Kolodny.

Q Can you think of any expert who's not paid for by the state?

MS. BALDWIN: Object to the form.

THE WITNESS: I don't know who's paid for or not paid for.

Q (BY MS. STRONG) Do you know that Dr. Kolodny has been retained by the state as an expert in this case?

A I know he is an expert in this case, yes.

Q And do you know if he's been paid as an expert in this case?

A I have no idea whether he's been paid or not.

MS. BALDWIN: Object to the form. Argumentative.

THE WITNESS: Sorry. That's my fault for talking over Lisa.

Q (BY MS. STRONG) Can you identify any expert who is not a retained expert by the plaintiffs in this case to support your position on that?

MS. BALDWIN: Object to the form. She already did.

THE WITNESS: So the state health department.

MS. STRONG: Avoid speaking objections, Lisa. Go ahead.

THE WITNESS: One of the other experts, although I believe that they are a witness or an expert in this case, is -- one of our Oklahoma experts is Dr. Jason Beaman.

Q (BY MS. STRONG) Okay. Again, I just want to make sure you understand my question. I'm asking for you to identify an expert who is not retained by the plaintiffs in this case or otherwise paid by the state of Oklahoma. Can you identify any expert that provides a basis for your statement other than those folks?

MS. BALDWIN: Object to the form.

THE WITNESS: So you're wording your question differently now than you did a second ago. So the State Department of Health are experts in data

for the state of Oklahoma. I don't believe -- when you said "paid for as a witness in this case," I don't believe they're paid for as witnesses in this case.

But when you asked your question just now, you said "paid for by the state of Oklahoma." Well, they're state employees so, yes, they're paid by the state of Oklahoma. So I feel like -- I'm confused.

Q (BY MS. STRONG) We'll focus in on that, but can you identify any other experts other than what you've already identified at this point?

A Not that are not connected to the state of Oklahoma, no.

Q Okay. And who at the State Department of Health are you referring to?

A I wouldn't be able to give you their names, but it's the Injury Prevention division that does a lot of the data that we're --

Q You have an understanding from them. Who did you -- how did you get that understanding?

A So my staff do that work and then share with me what they're finding, what they're seeing. So, for example, Jessica Hawkins does a lot of work with the Injury Prevention department. I don't remember the names of the people that work in the Injury Prevention department.

because you don't like the answer doesn't mean she's not answering it.

Q (BY MS. STRONG) Let's try this again. Are there any services listed on page 8 to -- designed to stop the allegedly false marketing of opioids by defendants?

MS. BALDWIN: Object to the form. Asked and answered.

THE WITNESS: I'm still understanding your question the same way, and my answer's still the same. There are items in the abatement plan listed here on page 8 that are designed to get correct, evidence-based information to individuals to counter the false information that has been provided by the defendants.

Q (BY MS. STRONG) Is there anything in here that asks the defendants to do anything as to its marketing, Ms. White?

MS. BALDWIN: Object to the form. Asked and answered.

Q (BY MS. STRONG) Just as to their marketing.

A I don't believe it's in this abatement plan.

Q And do any of the service in the abatement -- services in the abatement plan require

defendants to provide services to Oklahomans directly?

A No. We would not want defendants -- that's part of the problem is that defendants have been providing false information, inaccurate education, inaccurate information to physicians and the public.

So, no, we would not want the defendants doing that. We need non-pharmaceutical companies providing true, accurate and evidence-based information.

Q And so I think the answer to my question is that, no, there's nothing in the abatement plan that requires defendants to provide services to Oklahomans; is that correct?

MS. BALDWIN: Object to the form. Asked and answered.

Q (BY MS. STRONG) It's not a trick question. I'm just hoping you can answer my question, and not a question I didn't ask.

MS. BALDWIN: Same objection.

THE WITNESS: So I was getting ready to answer your question, and then you said something else and then you confused me. Can you ask me the question again, please.

Q (BY MS. STRONG) There's not anything in the abatement plan that requires defendants to

provide services to Oklahomans; correct?

MS. BALDWIN: Same objection.

THE WITNESS: I do not believe in this abatement plan there's anything that would require that.

Q (BY MS. STRONG) Who would provide the services that are contemplated in the abatement plan?

A It would depend which service you were talking about.

Q Generally speaking, what are the entities that would be asked to provide the services, Ms. White?

MS. BALDWIN: Object to the form.

THE WITNESS: So it would depend on which service you were talking about. So there would be -- if we -- I'll just start at the top and go through it.

Q (BY MS. STRONG) Are there state -- I'm looking broadly. I'm not asking you to go through the entire list. Broadly speaking, who is it that you contemplate providing these services versus, state agencies?

MS. BALDWIN: Object to the form. And, again, if you need to review the document in order to answer the question, feel free to do so.

of healthcare professionals, the majority of which, I think, would not work for the state. Schools, community coalitions, higher education institutions, law enforcement.

Healthcare professionals would include everything from physicians, hospitals, nurses, dentists, broad spectrum of healthcare professionals. I think that's the majority of the folks.

Q (BY MS. STRONG) And as for defendants, you want the defendants to pay to cover the costs of those services; is that right?

MS. BALDWIN: Object to the form.

THE WITNESS: I believe that the defendants caused the opioid crisis and, therefore, I believe the defendants should pay the cost to abate the opioid crisis.

Q (BY MS. STRONG) You believe the two families of defendants present remaining in this case should pay the entirety of what you believe the costs are to abate the opioid crisis in the state of Oklahoma?

A Yes.

MS. BALDWIN: Object to the form.

THE WITNESS: Sorry. Yes.

Q (BY MS. STRONG) And when there were three

Q (BY MS. STRONG) And how about any other entity? Do you believe that any other entity played a role in causing the opioid crisis in Oklahoma or just the defendants that were named in this case?

MS. BALDWIN: Same objection. Outside the scope of Commissioner White's expert testimony as to causation.

THE WITNESS: I believe --

Q (BY MS. STRONG) If you're going to repeat the same answer, just say, "I'm going to repeat the same answer." I don't need to hear you say it ten times if you're just saying the same thing over and over.

I'm asking you about other entities. Is it your opinion that no other entity had a role in causing the opioid crisis in Oklahoma? Yes or no?

MS. BALDWIN: Same objection. You don't have to answer yes or no --

MS. STRONG: Unless we can go to the judge and we can ask the judge to have you answer the question.

MS. BALDWIN: The judge cannot force her to answer the question in a manner that you find suitable. She's answering your question.

MS. STRONG: She is not answering the

is that what your testimony is?

A Absolutely. My budget doesn't anywhere near meet the need in the state of Oklahoma for mental health or substance abuse needs. My budget is the budget I'm given. We stretch it as far as possible.

But as I testified earlier, we're only able to serve currently one out of every three people who needs help. There's a huge gap between the number of people who need help and the number of people that are able to get help.

Q And for how long a period of time do you think these services will need to be offered in your abatement plan?

A The life of the abatement plan is -- if you look just below that, you see the calculations for 20-year period, 25-year period and 30-year period. I believe it will take at least this long to abate the crisis for opioids.

Q And so you don't think that there will be any lessening of the need for 30 years? Is that your testimony?

A For T-1 that's correct. When someone has opioid-use disorder, they -- that's a -- it's a chronic disease that you struggle with for a lifetime. And so not only do we have the people who are alive

4:37 p.m.

(A recess was taken from 4:37 PM to 4:54 PM.)

VIDEOGRAPHER: We are going back on the record at 4:54 p.m.

Q (BY MS. STRONG) Ms. White, I believe you testified that you believe it will take at least 30 years to abate the opioid crisis in Oklahoma; is that correct?

MS. BALDWIN: Object.

THE WITNESS: Yes. I'm sorry. It's my fault.

Q (BY MS. STRONG) Go ahead.

A Yes.

Q By when do you believe that it will be abated?

A So the plan that I put together here is a comprehensive plan that I would hope would address the crisis by the end of 30 years. But I'll tell you, it's going to take at least as long as it took to get us in this situation. So it's possible that it wouldn't be abated at the end of 30 years.

Q So sitting here today you don't know when precisely it will be abated or even generally when it will be abated? You just don't know?

A Yes, I did say possible. I said I think it is possible and I think it is likely at the end of 30 years.

Q That it could be abated?

A Yes. With this full comprehensive plan, yes. With any degree of certainty, I think I could say -- without knowing what you -- with any -- what you mean by any degree of certainty that, yes, with some degree of certainty I could say that.

Now, when you start saying "a reasonable degree," that's when I'm saying I don't know.

Q And you can't put any kind of measure on what type of certainty you've got here. You say some certainty, but you just don't know sitting here today. Is that fair to say?

MS. BALDWIN: Object to the form. Calls for legal conclusion. Asked and answered.

THE WITNESS: I cannot put a degree on that. That is correct.

Q (BY MS. STRONG) And you've talked about how you think the need reflected in the abatement plan will remain consistent over approximately a 30-year period, but you agree that the number of people admitted to treatment for opioids has fluctuated over the years based on your experience

folks go in -- individuals go in for treatment of any kind. Have you looked at that data?

MS. BALDWIN: Object to the form. Asked and answered.

THE WITNESS: Yes, we have that data. Yes, we know that information.

Q (BY MS. STRONG) Did you rely upon that data in coming up with these numbers, or you just relied on the total number of folks in SoonerCare?

A So there were two entities that came up with these numbers: The Department of Mental Health and Substance Abuse Services along with the Health Care Authority.

The Health Care Authority provided to us the number of screenings they thought would take place per year based on the number of 345,919. I cannot tell you with certainty whether or not they relied on the number of visit data. But if you understand how the SBIRT program works and you understand how it becomes part of the routine practices, then I think that would make sense.

Q Let's go to T-11. And this is "K12 prevention"?

A Yes.

Q And this is for services that would be --

EXHIBIT C

2018 WL 6681223
Only the Westlaw citation is currently available.
United States District Court, N.D. Oklahoma.

Arlon SHANK, Plaintiff,
v.
WHITING-TURNER CONTRACTING COMPANY, Defendant.

Case No. 17-CV-446-JED-FHM
|
Signed 12/19/2018

Attorneys and Law Firms

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OPINION & ORDER

JOHN E. DOWDELL, UNITED STATES DISTRICT JUDGE

*1 Before the Court is Defendant Whiting-Turner Contracting Company ("Whiting-Turner")'s *Daubert* Motion to Exclude Plaintiff's Lost Earnings Opinions. (Doc. 53). Plaintiff has submitted a response (Doc. 56), and Whiting-Turner has submitted a reply (Doc. 60).

I. Background

This is a slip and fall case in which Plaintiff alleges that he sustained serious injury after tripping at his work site on May 5, 2015. Plaintiff has retained an expert, Dr. Ralph D. Scott, Jr., to testify as to the economic losses suffered by Plaintiff as a result of his injury. Dr. Scott, an economist, calculated that Plaintiff suffered a past loss of $233,420.53 and will suffer a loss in earning capacity in the range of $534,160.29 to $632,469.86. (Doc. 53-4 at 2). He further calculated that Plaintiff suffered a past loss of fringe benefits of $98,469.80 and will suffer a future loss of fringe benefits in the range of $283,154.69 to $335,267.92. (*Id.* at 6). In total, Dr. Scott concluded that Plaintiff's overall economic loss would be between $1,149,205.32 and $1,299,628.11. (*Id.* at 1, 6).

II. Standards Governing Expert Testimony

Rule 26(a)(2) of the Federal Rules of Civil Procedure describes the mandatory disclosures parties must make concerning expert testimony. Under Rule 26(a)(2)(A), a party must disclose to the other parties the identity of any expert witness it may use at trial. Rule 26(a)(2)(B) then describes the written report that must accompany any Rule 26(a)(2)(A) disclosure. This written report must contain:

> (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
>
> (ii) the facts or data considered by the witness in forming them;
>
> (iii) any exhibits that will be used to summarize or support them;
>
> (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
>
> (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
>
> (vi) a statement of the compensation to be paid for the study and testimony in the case.

Fed. R. Civ. P. 26(a)(2)(B).

A district court may only allow evidence violating Rule 26(a) if the violation was justified or harmless. *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 953 (10th Cir. 2002). In determining whether a violation was justified or harmless, courts should consider the following factors: "(1) the prejudice or surprise to the party against whom the testimony is offered; (2) the ability of the party to cure the prejudice; (3) the extent to which introducing such testimony would disrupt the trial; and (4) the moving party's bad faith or willfulness." *Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985, 993 (10th Cir. 1999).

Moving beyond procedural requirements, Rule 702 of the Federal Rules of Evidence provides important substantive requirements for the admissibility of expert testimony. Rule 702 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:
>
> *2 (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.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, 597 (1993), the Supreme Court held that district courts act in a "gatekeeping role" to ensure that scientific expert testimony is relevant and reliable. An expert's opinion must be based on "more than subjective belief or unsupported speculation." *Daubert*, 509 U.S. at 590. The applicability of *Daubert* was later expanded to apply to the opinions of all experts, not just scientific experts. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) ("We conclude that *Daubert's* general holding—setting forth the trial judge's general 'gatekeeping' obligation —applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge.").

The Supreme Court set forth several non-exclusive factors that a court may consider in making its determination whether proposed expert testimony will assist the trier of fact: (1) "whether it 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" of a technique; and (4) whether the theory or technique has "general acceptance," which is an important consideration because " 'a known technique which has been able to attract only minimal support within the community' may properly be viewed with skepticism." *See Daubert*, 509 U.S. at 593-94. The inquiry into these factors is "a flexible one," and the focus is "on principles and methodologies, not on the conclusions that they generate." *Id.* at 593.

In *Bitler v. A.O. Smith Corp.*, 400 F.3d 1227 (10th Cir. 2005), the Tenth Circuit discussed the role of district courts when considering a *Daubert* challenge. The court should make a preliminary finding whether the expert is qualified, by determining "if the expert's proffered testimony ... has 'a reliable basis in the knowledge and experience of his [or her] discipline.' " 400 F.3d at 1232-33 (quoting *Daubert*, 509 U.S. at 592). The proponent of expert testimony must establish that the expert used reliable methods to reach his conclusion and that the expert's opinion is based on a relevant factual basis. *See id.* at 1233. "[A] trial court's focus generally should not be upon the precise conclusions reached by the expert, but on the methodology employed in reaching those conclusions." *Id.* However, an impermissible analytical gap in an expert's methodology can be a sufficient basis to exclude expert testimony under *Daubert*. *See id.; see also Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 886 (10th Cir. 2005). "Neither *Daubert* nor the Federal Rules of Evidence 'require[ ] a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert.' " *Norris*, 397 F.3d at 886 (quoting *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)).

II. Analysis

*3 It is clear from the tables included as part of Dr. Scott's report that he utilized historical data showing Plaintiff's income from shortly after Plaintiff's injury to the present in order to estimate Plaintiff's projected income until retirement. (*See* Doc. 53-4 at 4). Because Plaintiff only made approximately $26,000 from June 1, 2017, to May 31, 2018, Dr. Scott assumes Plaintiff will only make $26,000 per year—much less than his projected annual income of approximately $85,000 as a union electrician —for the rest of his working life. (*Id.*). Because the post-injury historical data shows no earned fringe benefits, Dr. Scott assumes that Plaintiff will continue to earn no fringe benefits. (*Id.* at 5). In other words, a basic assumption of Dr. Scott's opinions is that Plaintiff is permanently impaired—that his limited earnings from the past few years since his injury can be extrapolated into the future until retirement.

One of the primary arguments in Defendant's Motion to Exclude is that Plaintiff's expert lacks a foundation to assume permanent disability. In response, Plaintiff points to five pieces of evidence that, he asserts, serve as the foundation for Dr. Scott's economic calculations of diminished wages and fringe benefits:

- A July 15, 2016, order by an administrative law judge (ALJ) of the Oklahoma Workers' Compensation

Commission authorizing medical treatment for Plaintiff (Doc. 56 at 15-18) ("Exhibit 1");

- A July 3, 2017, pleading submitted to the Workers' Compensation Commission by Plaintiff's employer, P1 Group, Inc. (*id.* at 19) ("Exhibit 2");

- Reports from June and July 2017 by Antoine Jabbour, M.D., an independent medical examiner appointed by the Workers' Compensation Commission (*id.* at 20-24) ("Exhibit 3");

- October 11, 2017, post-operation notes by Jason Joice, M.D. (*id.* at 25-31) ("Exhibit 4"); and

- A Joint Petition for Settlement of Plaintiff's workers' compensation claim filed on March 2, 2018 (*id.* at 32) ("Exhibit 5").

Plaintiff claims that "[f]rom these facts and records and summaries thereof, Dr. Scott knew that [Plaintiff] had been unable to work ... for the two years following June 15, 2015 (the date of [Plaintiff's] first shoulder surgery)." (Doc. 56 at 7-8). Plaintiff goes on to state that "[f]rom these facts and records, Dr. Scott knew that Plaintiff has only worked intermittently during the third and fourth years post-injury." (*Id.* at 8). According to Plaintiff, Dr. Scott also "knew that the workers' compensation commission had entered an order fixing the degree of Plaintiff's permanent partial disability at 30.5% to the 'whole person.' " (*Id.*). Therefore, Plaintiff asserts, "Dr. Scott had sufficient basis to make lost wage calculations based on the likelihood that Mr. Shank will never work as a union electrician again." (*Id.*).

Yet, these materials identified in Plaintiff's response brief were not cited anywhere in Dr. Scott's written report. On the first page of his report, Dr. Scott states that "[b]ecause of his injury, [Plaintiff] has been deprived of a flow of income that he could have otherwise generated." (Doc. 53-4 at 1). He then goes on to describe the mathematical calculations he used—all of which depend on the assumption that Plaintiff has a permanent impairment. If Dr. Scott relied on the aforementioned materials to inform his opinions concerning Plaintiff's economic losses, these materials needed to be identified in his written report pursuant to Rule 26(a)(2)(B).

"Before an attorney can even hope to deal on cross-examination with an unfavorable expert opinion he must have some idea of the bases of that opinion and the data relied upon." *Smith v. Ford Motor Co.*, 626 F.2d 784, 794 (10th Cir. 1980) (quoting Jack H. Friedenthal, Discovery and Use of an Adverse Party's Expert Information, 14 Stan. L. Rev. 455, 485 (1962)). The federal rules regarding expert witness designations are meant "to take the guesswork out of expert testimony for all parties involved in litigation." *Addleman v. Keller Transp., Inc.*, No. 13-CV-230-S, 2014 WL 10222534, at *3 (D. Wyo. Dec. 9, 2014). "Parties are entitled to a *timely* and *detailed* description of what the witnesses relied upon in forming *each* particular opinion so the opposing party may adequately prepare discovery for the deposition and cross-examination of the witness at trial." *Id.* (emphasis in original). In this case, Plaintiff's own response brief suggests that Dr. Scott considered a lot of material that is not cited in his report.

***4** Typically, the Court would conduct an analysis using the *Woodworker's Supply* factors to determine whether Dr. Scott's testimony should be allowed despite his incomplete report. *Jacobsen*, 287 F.3d at 953. However, in this case, the Court finds that such an analysis is unnecessary because Dr. Scott's opinions must be excluded under Fed. R. Evid. 702 and *Daubert*. Pursuant to Rule 702, an expert witness's testimony must be "based on sufficient facts or data." Fed. R. Evid. 702(b). Here, even if the Court assumes Dr. Scott considered the facts and data identified in the Plaintiff's response brief, these facts and data are insufficient to serve as a foundation for his opinions.

Exhibit 1, the order authorizing medical treatment, merely shows that a motion by Plaintiff's employer before the Workers' Compensation Commission to terminate Plaintiff's *temporary total* disability benefits was denied and the employer was mandated to provide medical treatment, including surgery, for Plaintiff's right shoulder. (Doc. 56 at 17). This order does not provide any information as to whether Plaintiff's injury is permanent and will limit his earning capacity indefinitely. Exhibit 2, the Workers' Compensation pleading, also only concerns *temporary total* disability benefits. (*Id.* at 19).

The medical reports by Dr. Jabbour, Exhibit 3, discuss whether or not Plaintiff needed to have a third surgery on his right shoulder. (*Id.* at 20-24). Ultimately, in a letter dated July 6, 2017, Dr. Jabbour expressed his opinion that Plaintiff should undergo "a third and hopefully final shoulder surgery." (*Id.* at 24). Dr. Jabbour does

not give an opinion on whether Plaintiff will suffer a permanent disability as a result of the initial injury. Exhibit 4, the post-operation notes, state that Plaintiff's work status is "light work/activity," but that his status is "improving." (Doc. 56 at 27). The "Work Status Report" restricts Plaintiff from using his right shoulder and arm, but an end date of November 11, 2017, is provided for those restrictions. (*Id.* at 26).

The only exhibit to mention permanent disability is Exhibit 5, the Joint Petition for Settlement. This document, filed with the Workers' Compensation Commission, states that Plaintiff's employer and/or the employer's insurance carrier will pay $34,513.50 "for permanent partial disability (aprx 30.5%)." (*Id.* at 32). However, this document merely represents the settlement terms agreed to by Plaintiff, his employer, and the employer's insurance carrier. *See Okla. Stat.* tit. 85A, § 115(A) ("If the employee and employer shall reach an agreement for the full, final and complete settlement of any issue of a claim pursuant to this act, a form designated as 'Joint Petition' shall be signed by both the employer and employee, or representatives thereof, and shall be approved by the Workers' Compensation Commission or an administrative law judge, and filed with the Commission."). The Court finds that this settlement agreement alone is not sufficient to support Dr. Scott's crucial assumption that Plaintiff's recent earnings represent the limit of his earning capacity for the rest of his career. [1] Without a proper basis for that assumption, Dr. Scott's opinions are too speculative to pass muster under *Daubert*. *See McClain v. Metabolife Int'l*, 401 F.3d 1233, 1237 (11th Cir. 2005) ("*Daubert* requires the trial court to act as a gatekeeper to insure that speculative and unreliable opinions do not reach the jury.").

1 Plaintiff also points to Whiting-Turner's experts' findings as supporting the conclusion of permanent impairment. (Doc. 56 at 8-9). However, Plaintiff does not suggest that Dr. Scott was provided these materials in advance of preparing his own report. As such, the Court is unable to treat these findings as bases of Dr. Scott's opinions.

***5** For the foregoing reasons, Defendant Whiting-Turner's Motion to Exclude is **granted**. Dr. Scott will be excluded from testifying at trial.

SO ORDERED this 19th day of December, 2018.

All Citations

Slip Copy, 2018 WL 6681223

End of Document

EXHIBIT D

[FILED UNDER SEAL]

EXHIBIT E

259 Fed.Appx. 499
This case was not selected for
publication in the Federal Reporter.
Not for Publication in West's Federal Reporter See
Fed. Rule of Appellate Procedure 32.1 generally
governing citation of judicial decisions issued
on or after Jan. 1, 2007. See also Third Circuit
LAR, App. I, IOP 5.7. (Find CTA3 App. I, IOP 5.7)
United States Court of Appeals,
Third Circuit.

Kathleen REGER; Michael Reger, as Parents and Natural Guardians of Nicholas Reger, a Minor, Deceased; Kathleen Reger 1; Michael Reger 2 Individually and in their own right, Appellants
v.
The A.I. duPONT HOSPITAL FOR CHILDREN OF the NEMOURS FOUNDATION; The Nemours Foundation; William I. Norwood, M.D., Ph.D.; Christian Pizarro, M.D.; Russell Raphaely, M.D.; Ellen Spurrier, M.D.; Deborah Davis, M.D.; D. Duncan, Perfusionist.

No. 07–1387.
|
Submitted pursuant to Third Circuit
LAR 34.1(a) Dec. 6, 2007.
|
Opinion Filed Jan. 9, 2008.

Synopsis

Background: Minor deceased patient's parents sued hospital and physicians for medical malpractice. The United States District Court for the Eastern District of Pennsylvania, Berle M. Schiller, J., entered judgment for the defendants, and plaintiffs appealed.

Holdings: The Court of Appeals, McKee, Circuit Judge, held that:

[1] expert's report did not meet the reliability requirement for the admission of expert testimony;

[2] evidence supported a "two schools of thought" charge; and

[3] district court properly refused to engraft Pennsylvania's "considerable number" language onto the "two schools of thought" charge.

Affirmed.

West Headnotes (3)

[1] Evidence
Medical Testimony

Expert's report, opining that the chylous effusions suffered by a patient were caused by the manner in which a physician performed a deep hypothermic circulatory arrest (DHCA) procedure did not meet the reliability requirement for the admission of expert testimony; his opinion about the cause of the chylous effusions was not supported by citation or reference to any scientific data or texts, but was based on his subjective belief. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

5 Cases that cite this headnote

[2] Health
Instructions

Evidence supported a "two schools of thought" charge in a medical malpractice suit arising from a patient's death in connection with a deep hypothermic circulatory arrest (DHCA) procedure; one physician testified that there was only one way to cool using DHCA, while defendant and his experts testified there were other approaches to cooling.

Cases that cite this headnote

[3] Health
Instructions

District court properly refused to engraft Pennsylvania's "considerable number" language onto a "two schools of thought" charge in a medical malpractice suit brought under Delaware law; defense sought an

instruction that a considerable number of practitioners followed the alternative approach to a procedure favored by a defendant physician.

Cases that cite this headnote

an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation —i.e., "good grounds," based on what is known. In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability.

*499 Appeal from the United States District Court for the Eastern District of Pennsylvania (Civ. No. 05–cv–00661), District Judge: Hon. Berle M. Schiller.

Attorneys and Law Firms

Theresa M. Blanco, Eaton & McClellan, Philadelphia, PA, for Appellants.

Sara L. Petrosky, Linda A. Carpenter, McCann & Geschke, Philadelphia, PA, for Appellees.

*500 Before: McKEE, CHAGARES and HARDIMAN, Circuit Judges.

OPINION

McKEE, Circuit Judge.

**1 Kathleen and Michael Reger appeal from the verdict entered against them in the medical malpractice action they filed following their infant son's death. For the reasons that follow, we will affirm.

I.

Because we write primarily for the parties, we need only address the arguments raised on appeal, as the parties are familiar with the factual and procedural background of this case.

A. Exclusion of expert testimony.

[1] Scientific opinion is admissible under Fed.R.Evid. 702. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), the Court held that in order to qualify as scientific knowledge, *Id.* at 590, 113 S.Ct. 2786. The Rule "embodies a trilogy of restrictions on expert testimony: qualification, reliability and fit." *Schneider v. Fried,* 320 F.3d 396, 404 (3d Cir.2003) (citations omitted). To establish "reliability" the testimony "must be based on the methods and procedures of science rather than on subjective belief or unsupported speculation; the expert must have good grounds for his or her belief." *Id.* (citation and internal quotations omitted). "[A]n inquiry into the reliability of scientific evidence under Rule 702 requires a determination as to its scientific validity." *Id.* (citation omitted).

In his report, Dr. Hannan opined that the chylous effusions suffered by Nicholas were caused by the manner in which Dr. Pizarro performed the DHCA. However, his opinion about the cause of the chylous effusions was not supported by citation or reference to any scientific data or texts. The district court precluded Dr. Hannan's testimony on this issue because "Dr. Hannan's opinion is based on [his] 'subjective belief' as to what caused Nicholas's chylous effusions, rather than 'methods and procedures of science.' " That was not an abuse of discretion.[1] Quite simply, Hannan's *ipse dixit* does not meet Rule 702's reliability requirement. *See Oddi v. Ford Motor Company,* 234 F.3d 136, 158 (3d Cir.2000).

B. Jury instructions.

(i). There was insufficient evidence to warrant a "two schools of thought" charge.

[2] The Regers argue that the district court's instruction on the "two schools of thought" doctrine was an abuse

of discretion because there was insufficient evidence to warrant the charge.[2] Presumably, they base their argument on the following portion of Dr. Pizarro's cross-examination:

> *501 Q: You didn't say that yesterday, did you? You didn't tell Mr. Hudgins that Dr. Gaynor and Dr. Spray had periods of time that they took to get to that target temperature, right?
>
> A: No, my take away message during the training was that, you know, surgeons had different preferences, generally they target temperature and that's how they carry surgery, and then certainly tailor the strategy as to how they did things according to what the anatomy of the lesion was, what the repair to be undertaken was, what the patient's size was, and what, you know, a number of other circumstances.
>
> **2 Q: And you think that they tailored it to what was required by the standard of care, correct?
>
> A: I don't know if you want to talk about standard of care, but maybe I think it would be worthwhile to talk about that, you know, so the jury could understand what standard of care means.
>
> Q: Well, wait, answer my question and then you can explain it. Do you think that they cooled their patients for the period of time that they cooled them as we see here, based on what they thought was right for the person according to the standard of care?
>
> A: No, they made a decision based on what they thought individually was the right thing to do for that patient. *There is no standard of care.*

App. 634–35 (emphasis is the Regers').

The Regers argue that, "in the absence of **any** standard of care, there cannot be a second school of thought unless that school of thought is known as 'anything goes.' " Regers' Br. at 24 (emphasis is the Regers'). However, they have taken Dr. Pizarro's statement out of context. Immediately after Dr. Pizarro's last answer recited above, Dr. Pizzaro offered the following explanation:

> there is a governing body called the Institute of Medicine that is trying to establish guidelines particularly based on evidence, you know, based on information.
>
> * * *
>
> Now the amount of evidence that really exists in the world of pediatric congenital heart surgery is very different for a number of reasons.... And, therefore, there is really not a great deal of consensus regarding how it is that you do things. As a matter of fact during recent meetings a couple of documents have been published as a result of those meeting where, ... a survey of practices, ... have been performed as to what it is you do about this, what you do about that.
>
> And there is a specific effort not to use the word standard of care because peers and experts in the field recognize that there is a great deal of variation as to how it is that you could approach a problem and have a satisfactory outcome and, therefore, it's been described as common practices, but certainly not a standard of care.

App. at 635. It is clear from this exchange that Dr. Pizarro explained what he meant when he said there is no standard of care. Accordingly, we reject the Regers' contention that the only standard of care is the "anything goes" standard.

Moreover, there was sufficient evidence to warrant the "two schools of thought" charge. During the trial, the main points of contention were whether a single standard of care governed how long DHCA should last and the target temperature the body should be cooled to. Dr. Hannan testified that the duration should be for at least 20 minutes and the target temperature should be under 20 degrees centigrade to ensure "uniform cooling" in the entire brain. Pizarro's expert witnesses *502 testified that there was not one unified standard of care and that different surgeons, based on differing studies and modalities, had adopted different approaches. For example, Dr. Leonard Bailey, a cardiothoracic surgeon, testified that there is no single standard way to cool a patient for circulatory arrest. However, like Dr. Pizarro, Dr. Bailey cools until the infant reaches a target temperature of 20 degrees centigrade, and does not focus on the duration of the cooling. Dr. Bailey opined that there is no medical or scientific reason to cool for 20 minutes, as opined by Dr. Hannan. Dr. Bailey testified that he does not wait, after reaching a target temperature, for a certain number of minutes to expire before he starts

to operate. He said: "That's precious time, and so you go to work." App. 330–32.

**3 Since Dr. Hannan testified that there was only one way to cool using DHCA and Dr. Pizarro and his experts testified there were other approaches to cooling, the district court did not abuse its discretion in giving the "two schools of thought" charge.

(ii). The "two schools of thought" charge should have included an instruction that a considerable number of practitioners followed the alternative approach favored by Dr. Pizarro.

[3] The Regers argue that if a "two schools of thought" charge was warranted, the district court should have included an instruction that a considerable number of practitioners followed the alternative approach favored by Dr. Pizarro. During a hearing on objections to the jury charge, the Regers asked that a "proper alternative" be defined as treatment that a "considerable number of respected doctors would provide in the same or similar circumstances." The district court refused to add that language. On appeal, the Regers argue that refusal was error. The argument is without merit.

In essence, the Regers are arguing the district court should have engrafted a portion of Pennsylvania's "two schools of thought" charge onto the charge it gave. Pennsylvania's "two schools of thought" instruction is as follows:

> Where competent medical authority is divided, a physician will not be held responsible if in the exercise of his judgment he followed a course of treatment advocated by a considerable number of recognized and respected professionals in his given area of expertise.

Jones v. Chidester, 531 Pa. 31, 610 A.2d 964, 969 (1992). However, it is undisputed that Delaware law applies to this case and Delaware does not have the same standard as Pennsylvania. Delaware's "two schools of thought" doctrine is referred to as an "alternate approaches" doctrine, and the appropriate charge is as follows:

> Where there is more than one recognized approach and no one of them is used exclusively and uniformly by all practitioners of good standing, a physician is not negligent if, in the exercise of his best judgment, he selects one of the approved methods which in hindsight might be a wrong selection or one not favored by other practitioners. Stated otherwise, when a physician chooses between appropriate alternative medical approaches, harm which results from physician's good faith choice of one proper alternative over the other, is not malpractice.

Dunning v. Barnes, 2002 WL 31814525 at * 1 n. 1 (Del.Super.Ct. Nov. 4, 2002).

Accordingly, the district court correctly refused to engraft Pennsylvania's "considerable number" language onto the charge.

(iii). The "informed consent" charge.

The Regers contend that the district court's charge on informed consent was wrong for the following reason:

> *503 Where a doctor feels that his technique is allowable because there is no standard of care, the jury must be given an opportunity to determine if the physician omitted a material fact that would have made a difference to the consenting person—the fact being that all other surgeons take the view that there is a standard of care regarding cooling time, and they follow it with excellent results.

**4 However, this argument is without merit. As noted earlier, the Regers' statement of the appropriate standard of care is incorrect. In addition, their argument ignores the fact that, as the evidence produced at trial clearly shows, all other surgeons do not take the view that there is a single standard of care regarding cooling time.

II.

For all of the above reasons, we will affirm the district court.

All Citations

259 Fed.Appx. 499, 2008 WL 84540

Footnotes

1 We review a district court's decision to admit or exclude expert testimony for an abuse of discretion. *Oddi v. Ford Motor Co.*, 234 F.3d 136, 146 (3d Cir.2000).

2 The decision whether a party has produced sufficient evidence to warrant a requested instruction is a matter within the discretion of the district court and will not be disturbed absent an abuse of discretion. *Tormenia v. First Investors Realty Co., Inc.*, 251 F.3d 128, 136 (3d Cir.2000).

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EXHIBIT F

232 Fed.Appx. 780
This case was not selected for
publication in the Federal Reporter.
Not for Publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also Tenth
Circuit Rule 32.1. (Find CTA10 Rule 32.1)
United States Court of Appeals,
Tenth Circuit.

Vicki Lynn SMITH, as Mother and personal representative of the estate of James Thomas Howard IV, Plaintiff–Appellant,
v.
SEARS ROEBUCK AND CO., a New York corporation; The Chamberlain Group Inc., an Illinois corporation, Defendants–Appellees.

No. 06–6151.
|
May 1, 2007.

Synopsis

Background: Mother, whose minor child was killed after becoming trapped under garage door, sued door's manufacturer and seller. The United States District Court for the Western District of Oklahoma, 2006 WL 687151, entered summary judgment in favor of defendants. Plaintiff appealed.

Holdings: The Court of Appeals, Monroe G. McKay, Circuit Judge, held that:

[1] expert's opinion that garage door opener was prone to failure was inadmissible, and

[2] mother, who never read owner's manual for garage door, could not establish that failure to warn caused child's death.

Affirmed.

West Headnotes (5)

[1] **Evidence**
Due care and proper conduct

Expert's opinion that garage door opener was prone to failure, because in ordinary use reverse mechanism would rarely be actuated and mechanism would tend to get inoperably stuck when not actuated frequently, was inadmissible in products liability and negligence action arising out of death of minor child who was trapped under garage door, where expert did no testing to substantiate his theory, opinion ignored mother's testimony that she had tested door's reverse mechanism at least three to four times a year from when she moved into home through date of accident, and expert could not rule out any of the numerous alternative causes for accident. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

2 Cases that cite this headnote

[2] **Evidence**
Machinery and mechanical devices and appliances

Court's describing expert as having "many of the attributes of an 'expert for hire' rather than someone with independent credentials in the field of engineering" was properly part of the court's gatekeeper role, in products liability and negligence action.

3 Cases that cite this headnote

[3] **Evidence**
Necessity and sufficiency

Facts of products liability and negligence action arising out of death of minor child who was trapped under garage door did not call for an uneven application of *Daubert* or evidence rule governing expert testimony, in favor of Oklahoma's evidentiary rules on admissibility of expert testimony. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

1 Cases that cite this headnote

[4] **Products Liability**
⇐ Warnings or instructions
Products Liability
⇐ Buildings and building components and materials

Homeowner, who never read owner's manual for garage door, could not establish that failure of door's manufacturer or seller to warn caused her son's death after becoming trapped under door.

2 Cases that cite this headnote

[5] **Federal Courts**
⇐ Preliminary proceedings;depositions and discovery

Mother, whose minor child was killed after becoming trapped under garage door, could not for the first time on appeal challenge responses of door's manufacturer or seller to her interrogatories.

Cases that cite this headnote

Attorneys and Law Firms

*781 Timothy B. Hummel, Michael D. McGrew, Michael D. McGrew & Associates, Oklahoma City, OK, for Plaintiff–Appellant.

John C. Niemeyer, Linda G. Alexander, Charles A. Dickson, III, Niemeyer Alexander Austin & Phillips, Oklahoma City, OK, Carol A. Hogan, Wendy A. Aeschlimann, Jones Day, Chicago, IL, for Defendants–Appellees.

Before HOLMES and McKAY, Circuit Judges, BRORBY, Senior Circuit Judge.

ORDER AND JUDGMENT *

MONROE G. McKAY, Circuit Judge.

**1 Plaintiff Vicki Lynn Smith appeals from the district court's order excluding the testimony of her expert witness under Rule 702 of the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and for summary judgment in favor of defendants Sears Roebuck and Co. (Sears) and The Chamberlin Group Inc. (Chamberlin). [1] She also assigns as error the court's denial of her motions to compel discovery. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

BACKGROUND

In April 2003, Ms. Smith's four-year-old son Tommy, was killed when he was trapped under a garage door that was installed with a garage door opener manufactured by Chamberlin and sold by Sears. At the time of the accident, the opener had been in use for twenty-four years. By the time her lawsuit was filed in October 2004, the garage door itself had been badly damaged *782 and the opener had been dismantled. At some unknown time, numerous component parts of the opener were lost or misplaced, and could not be produced for inspection and testing during discovery.

To prove her claims for products liability and negligence, Ms. Smith identified Gene Litwin as an expert witness to testify that the garage door opener was defectively designed and that this design defect caused the accident. Mr. Litwin also opined that the warnings contained in the Owner's Manual were inadequate. Following discovery, Sears and Chamberlin moved to strike Mr. Litwin's testimony, challenging the reliability and relevance of his testimony and his qualifications as an expert witness. They also moved for summary judgment.

EXPERT TESTIMONY

Rule 702 of the Federal Rules of Evidence codifies the Supreme Court's decision in *Daubert* and sets forth the standard that expert testimony must meet to be admissible in evidence. As part of its gate keeping function, and in addition to determining whether the proposed expert is qualified to offer an opinion, the trial court must also determine whether "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has

applied the principles and methods reliably to the facts of the case." Fed.R.Evid. 702. Reliability under *Daubert* is determined by looking at "whether the reasoning or methodology underlying the testimony is scientifically valid," 509 U.S. at 592–93, 113 S.Ct. 2786 and relevance is determined by "whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 593, 113 S.Ct. 2786.

In determining the reliability of expert testimony, there are several nonexclusive factors that the court may consider, including (1) whether the expert's 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 of the technique or theory, and (4) the general acceptance of the theory or technique. *Id.* at 592–94, 113 S.Ct. 2786. *Daubert* itself, however, recognizes these factors are not definitive, and a trial court has broad discretion to consider other factors in determining the reliability of the proffered expert testimony. *Id.* at 594, 113 S.Ct. 2786; *see also Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 152, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) (concluding that "the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable").

**2 The party sponsoring expert testimony

> need not prove that the expert is undisputably correct or that the expert's theory is generally accepted in the scientific community. Instead, the [party] must show that the method employed by the expert in reaching the conclusion is scientifically sound and that the opinion is based on facts which sufficiently satisfy Rule 702's reliability requirements.

Truck Ins. Exch. v. MagneTek, Inc., 360 F.3d 1206, 1210 (10th Cir.2004) (internal quotations and citations omitted).

On appeal,

> we review de novo the question of whether the district court applied the proper standard and actually performed its gatekeeper role in the first instance. We then review the trial court's actual application of the standard in deciding whether to admit or exclude an expert's testimony for abuse of discretion.... The trial court's broad discretion applies both in deciding how to assess an expert's *783 reliability, including what procedures to utilize in making that assessment, as well as in making the ultimate determination of reliability.... A court does not abuse its discretion unless its decision is arbitrary, capricious, whimsical or manifestly unreasonable, or unless we are convinced it made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.

Dodge v. Cotter Corp., 328 F.3d 1212, 1223 (10th Cir.2003) (internal citation and quotations omitted).

[1] Ms. Smith asserts the district court misapplied *Daubert* and Rule 702 to the undisputed facts. We disagree. Specifically, Mr. Litwin's opinion was that the garage door opener "was prone to failure because in ordinary use [the reverse mechanism] would rarely be actuated and the mechanism would tend to get inoperably stuck when not actuated frequently." Aplt.App., Vol. II at 736. The court found Mr. Litwin's opinion failed to meet the standards of reliability under *Daubert* and Rule 702 because, among other things:

- He did no testing to substantiate his theory.
- His opinion ignored Ms. Smith's testimony that she had tested the reverse mechanism of the garage door opener at least three to four times a year from 1996 (when she moved into the home) through the date of

the accident in April 2003, thus eliminating lack of use as a cause of the failure.

- He could not rule out any of the numerous alternative causes for the accident, including the fact that mechanical devices do not last forever and are subject to failure without warning, the motor in the garage door opener had a weeping capacitor, the opener may have not been properly adjusted, the garage door may not have been properly lubricated, and the old and worn motor may have had insufficient torque to activate the reverse mechanism.

This opinion testimony is inadmissible because it is "connected to the existing data only by the *ipse dixit* of the expert." *Gen. Elec. v. Joiner,* 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997); *see also Bitler v. A.O. Smith Corp.,* 400 F.3d 1227, 1238 (10th Cir.2004) (holding that although an expert does not have to categorically exclude each and every possible cause of an accident, "an inference to the best explanation for the cause of an accident must eliminate other possible sources as highly improbable, and must demonstrate that the cause identified is highly probable").

**3 [2] In addition to challenging the reliability and relevance of Mr. Litwin's expert testimony, Sears and Chamberlin also challenged his qualifications as an expert witness. Even though the district court found Mr. Litwin was qualified to render expert testimony, Ms. Smith contends the court unfairly described him as having "many of the attributes of an 'expert for hire' rather than someone with independent credentials in the field of engineering." Aplt.App., Vol. III at 1413. According to Ms. Smith, this description "colored [the judge's] remaining analysis and overall conclusion." Aplt. Opening Br. at 8. Setting aside the fact that this is not a legal argument, but simply a quarrel with the words used by the judge in ruling in her favor, our review of the record convinces us this comment was properly part of the court's gatekeeper role, which requires it to "adequately demonstrate by specific findings on the record that it has performed its duty as gatekeeper." *Goebel v. Denver & Rio Grande W.R.R. Co.,* 215 F.3d 1083, 1088 (10th Cir.2000).

[3] Next, Ms. Smith argues the district court should have applied Oklahoma's evidentiary *784 rules to determine the admissibility of Mr. Litwin's expert testimony. Plainly, this is not the law, and she offers no support for this proposition other than this is a "case involving Oklahoma law, the Oklahoma market place, and an Oklahoman child." Aplt. Opening Br. at 21. We similarly reject her argument that a court should be more liberal in allowing expert testimony in a case "where a child has lost his life." *Id.* To the contrary, "[r]egardless of the specific factors at issue, the purpose of the *Daubert* inquiry is always 'to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.' " *Dodge,* 328 F.3d at 1222–23 (quotation omitted). In fact, one could just as easily argue for heightened scrutiny in a case such as this where a jury could be swayed by emotion. Regardless, the underlying facts of a case do not call for an uneven application of *Daubert* or Rule 702.

[4] As to Mr. Litwin's expert testimony concerning the inadequacy of the warnings in the Owner's Manual for the garage door opener, the district court found that this testimony was irrelevant under *Daubert* and Rule 702 because the reasoning and/or methodology used by Mr. Litwin was not only unreliable, but irrelevant because it did not apply to the facts in the case. The reason why it did not apply to the facts in the case is because under Oklahoma products liability law, a plaintiff must establish, among other things, that "the failure to warn caused the injury." *Daniel v. Ben E. Keith Co.,* 97 F.3d 1329, 1332 (10th Cir.1996). Where, as here, the undisputed evidence is that Ms. Smith never read the Owner's Manual, she cannot establish that the failure to warn caused the injury.

**4 Our review of the record convinces us that the district court properly performed its gatekeeper role and its decision to exclude Mr. Litwin's expert testimony as unreliable and irrelevant was not an abuse of discretion.

MOTIONS TO COMPEL

Ms. Smith also argues that the district court wrongly denied that portion of her motions to compel that requested Sears and Chamberlin to "disclose lawsuits, complaints or records of other similar incidents involving allegations of injury to persons using the Chamberlin/ Sears [garage door openers]." Aplt. Reply Br. at 23. But as Sears and Chamberlin point out, Ms. Smith never identifies the specific interrogatories or document requests she contends were improperly resolved by the court.

Our examination of the record reveals that Ms. Smith's Interrogatories Nos. 4 and 5, requested the information she seeks on appeal. Those interrogatories asked Sears and Chamberlin:

> ***Interrogatory No. 4:*** Have you ever received notice of any accidents or injuries involving the Product or Similar Openers from the time it was originally manufactured and sold to the present time? If so, please describe each such injury or accident of which defendant has been notified.
>
> ***Interrogatory No. 5:*** Has a claim or lawsuit ever been filed against [you] wherein a person claimed that he (or a person he brought the lawsuit for) was injured or killed as a result of using or coming into contact with the Product or any Similar Opener? If so, please list the name and address of each claimant and give a complete description of the claim or lawsuit. Also, please state the name and address of any person whom you know or you have reason to believe ***785** has sustained any injury while using the Product or any Similar Opener.

Aplt.App., Vol. I at 53.

[5] However, Ms. Smith did not challenge either Sears' or Chamberlin's responses to Interrogatories 4 or 5 in her motions to compel. *Id.* at 28–44, 143–61. Therefore, she cannot raise this argument for the first time on appeal. *See, e.g., O'Connor v. City & County of Denver,* 894 F.2d 1210, 1214 (10th Cir.1990).

The judgment of the district court is AFFIRMED.

All Citations

232 Fed.Appx. 780, 2007 WL 1252487, 73 Fed. R. Evid. Serv. 415, Prod.Liab.Rep. (CCH) P 17,736

Footnotes

* After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. *See* Fed. R.App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R.App. P. 32.1 and 10th Cir. R. 32.1.

1 Although Ms. Smith claims that she is appealing from the grant of summary judgment in favor of Sears and Chamberlin, she offers no argument in her opening brief that the district court's decision was error assuming that its expert-witness ruling was correct. Therefore, the issue is waived. *State Farm Fire & Cas. Co. v. Mhoon,* 31 F.3d 979, 984 n. 7 (10th Cir.1994). In her reply brief, Ms. Smith addresses the issue for the first time, however, the discussion comes too late because "[i]t robs the appellee of the opportunity to demonstrate that the record does not support an appellant's factual assertions and to present an analysis of the pertinent legal precedent that may compel a contrary result." *Stump v. Gates,* 211 F.3d 527, 533 (10th Cir.2000). Regardless, we have examined the authorities relied upon by the court and cited by Ms. Smith in her reply, and agree that without the testimony of an expert witness, she could not prove her claims under Oklahoma law for products liability (defective design) or negligence based on failure to warn.

EXHIBIT G

246 Fed.Appx. 977
This case was not selected for
publication in the Federal Reporter.
Not for Publication in West's Federal Reporter
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also
Sixth Circuit Rule 28. (Find CTA6 Rule 28)
United States Court of Appeals,
Sixth Circuit.

Thomas A. KOLESAR, Plaintiff–Appellant,
v.
UNITED AGRI PRODUCTS, INC. and UAP Distribution, Inc., f/k/a Grower Service Corp. (New York), Defendants–Appellees.

No. 06–1416.
|
Sept. 4, 2007.

Synopsis
Background: Hazardous materials tanker driver brought suit arising from exposure to a toxic chemical as a result of an unloading accident at defendants' facility. The United States District Court for the Western District of Michigan, 412 F.Supp.2d 686, granted defense motions in limine and for summary judgment.

Holdings: The Court of Appeals, Siler, Circuit Judge, held that:

[1] methodological deficiencies in a physician's hypothesis that plaintiff suffered from reactive airways dysfunction syndrome (RADS) caused by a chemical exposure exacerbating his preexisting disease warranted exclusion of her testimony, and

[2] expert testimony was necessary to prove causation.

Affirmed.

West Headnotes (2)

[1] **Evidence**
⇐ Medical Testimony

Methodological deficiencies in a physician's hypothesis that plaintiff suffered from reactive airways dysfunction syndrome (RADS) caused by a chemical exposure exacerbating his preexisting disease warranted exclusion of her testimony; the physician's diagnosis was not a "differential diagnosis" because she failed to consider or rule out alternative causes for the plaintiff's illness, including his preexisting asthma and long history of cigarette smoking, and her conclusion was not the result of a careful study of his prior medical records, but rather, she changed her diagnostic criteria for RADS so that her initial diagnosis could remain intact.

3 Cases that cite this headnote

[2] **Negligence**
⇐ Miscellaneous Particular Cases

Under Wisconsin law, expert testimony was necessary to explain how plaintiff's exposure to an admittedly corrosive, although nonvolatile, liquid metam sodium resulted in a significant exposure to an inhalable gas or vapor such that a juror could conclude his post-incident pulmonary symptoms were caused by a chemical spill, rather than by his preexisting asthma, and without such proof of causation he could not succeed on his negligence claim.

4 Cases that cite this headnote

*978 On Appeal from the United States District Court for the Western District of Michigan.

Before: SILER, MOORE, and GILMAN, Circuit Judges.

Opinion

SILER, Circuit Judge.

1 Plaintiff Thomas A. Kolesar filed suit against United Agri Products, Inc. and UAP Distribution, Inc. (collectively, "Defendants" or "UAP") alleging that as a result of Defendants' negligence, Kolesar was exposed to a toxic chemical and thereafter contracted Reactive Airways Dysfunction Syndrome ("RADS"). The district court granted Defendants' motions in limine to exclude Kolesar's proffered expert testimony and also granted Defendants' summary judgment motion, reasoning that Kolesar could not support his claims that chemical exposure caused him permanent injury without qualified expert testimony. Kolesar appeals the district court's decision, asserting: (1) the district court abused its discretion by excluding the testimony of his treating physician, Dr. Taiwan Chen, because her opinions were based on a valid differential diagnosis; (2) even without the expert testimony, a jury question exists as to causation, and therefore summary judgment is improper; and (3) the district court erroneously cited alternative grounds for summary judgment—Kolesar's contributory negligence and Wisconsin public policy—that usurped the jury's function in deciding disputed issues of fault allocation. For the reasons set forth below, we **AFFIRM.

BACKGROUND

Thomas A. Kolesar was employed as a hazardous materials tanker driver for Aero Bulk Carrier, Inc., a trucking company based in Grand Rapids, Michigan. On September 22, 2001, Kolesar delivered a shipment of Nemasol ® 42, or metam sodium, to Defendants' facility in Plainfield, Wisconsin. Metam sodium is a pesticide classified by the government as an Acute Toxicity Category III substance, where Category I is the most toxic ranking. Aero Bulk provided Kolesar with a Material Safety Data Sheet ("MSDS") describing the makeup of the chemical and health hazards associated with exposure to the chemical. The MSDS detailed the type of personal protective equipment ("PPE") that should be worn when transferring the product.

When Kolesar reached his destination, he was met by Brian Cullen, UAP Production Manager, who directed him to pull his truck onto the unloading pad. Cullen was wearing his PPE—rubber boots, rubber gloves, rubber apron, and safety goggles—while Kolesar remained in street clothes, although he initially did use chemical gloves. Kolesar admits that he knew metam sodium was a corrosive liquid and that the MSDS recommended PPE, but claims that he deferred to Cullen who allegedly told him, "Don't worry about [the PPE], it's no big deal." Cullen, on the other hand, maintains that he told Kolesar to wear the PPE and that Kolesar responded, "Oh, I don't need it." The two men proceeded to connect hoses linking Kolesar's truck to the receiving tank and then to the storage silo. Kolesar activated the pump on the tanker truck, and Cullen opened the *979 valve to the storage silo to begin the unloading process.

After completing the unloading tasks, Kolesar assumed that Cullen had "[done] his job" and had closed off the valve to the receiving tank to prevent the chemical from flushing back through the hose. Cullen had not, however, shut the valve. Therefore, when Kolesar disconnected the hose, the pressure from the product that was backflowing through the pump caused the hose to "come out in a circle, like a garden hose when it's running" and spray Kolesar's legs, hair, and arms with metam sodium.

**2 Soon thereafter, Kolesar began to feel ill, stating that "every breath burned.... My nose started watering. My eyes started watering. I started getting really dizzy and nauseated...." He began vomiting and called 911. An ambulance transported him to the local hospital where he was immediately given a decontamination shower. Hospital records indicate that Kolesar was experiencing bilateral expiratory wheezes, the skin on his face was irritated, and he was treated with an Albuterol nebulizer for his bronchospasm. He was observed overnight and was "well and asymptomatic" when he was discharged the next day.

Once back in his hometown of Pittsburgh, Pennsylvania, Kolesar met with pulmonologist Dr. Chen. Dr. Chen's first examination of Kolesar was on October 8, 2001, slightly more than two weeks after the chemical spill. During that visit, Kolesar explained to Dr. Chen that he had been suffering shortness of breath and wheezing since the exposure, and that he had no prior history of respiratory difficulty, other than smoker's cough. In fact, Kolesar had a long history of serious asthma that had required him to be hospitalized only six months before the chemical spill. Kolesar also neglected to tell Dr. Chen

that he was HIV positive. Based on Kolesar's clinical presentation, clinical examination, pulmonary function tests, x-rays, and what Dr. Chen knew of his medical history, she concluded that Kolesar's symptoms were caused by the metam sodium spill and diagnosed him with RADS.

Kolesar planned to present the expert testimony of Dr. Chen to support his claim at trial that chemical exposure to metam sodium caused him permanent injury. At the end of discovery, however, UAP filed a *Daubert* motion to exclude Dr. Chen's anticipated testimony. The district court granted UAP's motion and excluded Dr. Chen's conclusions as to causation, holding that her opinions would have been unreliable and not helpful to the jury under Rule 702 of the Federal Rules of Evidence. *Kolesar v. United Agri Prods., Inc.,* 412 F.Supp.2d 686, 698 (W.D.Mich.2006).

UAP was granted summary judgment. The district court reasoned that under Wisconsin law, because Kolesar did not present qualified expert testimony to prove causation, he could not carry his burden of proof for that element. Kolesar now contends that even if the testimony of Dr. Chen is excluded, summary judgment was not appropriate.

After the district court had completed its discussion of causation, thereby ending the suit, it proceeded to discuss an alternative basis for granting summary judgment. *Id.* It noted that under Wisconsin Statute Ann. § 895.045, which states that a plaintiff may not recover from defendants when he is more negligent than those defendants, Kolesar was more liable than UAP as a matter of law and, therefore, could not prevail against them. *Id.* at 698–99. In his appeal, Kolesar argues that by barring his recovery as a matter of law based on contributory negligence and Wisconsin public policy, the district court usurped the jury's function in deciding fault allocation.

*980 STANDARD OF REVIEW

**3 We review the district court's decision to admit or exclude expert witness testimony for abuse of discretion. *General Electric Co. v. Joiner,* 522 U.S. 136, 143, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997). This is a "highly deferential" standard of review, *Hardyman v. Norfolk & W. Ry. Co.,* 243 F.3d 255, 267 (6th Cir.2001), and "the appellate court will not reverse in such a case, unless the ruling is manifestly erroneous," *Joiner,* 522 U.S. at 142, 118 S.Ct. 512 (quoting *Spring Co. v. Edgar,* 99 U.S. 645, 658, 25 L.Ed. 487 (1878)). However, "[a] district court abuses its discretion if it bases its ruling on an erroneous view of the law or a clearly erroneous assessment of the evidence." *Brown v. Raymond Corp.,* 432 F.3d 640, 647 (6th Cir.2005) (internal quotation marks omitted).

We review summary judgment *de novo,* construing the record in the light most favorable to the nonmovant and resolving all reasonable inferences in the nonmovant's favor. *Turner v. City of Taylor,* 412 F.3d 629, 637 (6th Cir.2005).

DISCUSSION

A. Expert Testimony

[1] Kolesar maintains that under *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and Rule 702 of the Federal Rules of Evidence, the testimony of Dr. Chen is admissible because "her opinions are both relevant and have a reliable foundation in the knowledge and experience of Dr. Chen's medical discipline." The district court disagreed, citing "defects in Dr. Chen's methodology used to reach [her] conclusions, the absence of supporting medical data and scientific literature, the absence of a valid basis for a differential diagnosis and the contrary scientific information and literature in the field." *Kolesar,* 412 F.Supp.2d at 698.

The admissibility of expert testimony is governed by Federal Rule of Evidence 702. In *Daubert,* the Supreme Court described the "gatekeeping role" of trial judges and held that when considering a proffer of expert scientific testimony, Rule 702 requires that the judge "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert,* 509 U.S. at 589, 113 S.Ct. 2786. The *Daubert* Court identified several factors to aid the reliability assessment including: (1) whether the theory or technique can be or has been tested; (2) whether the theory has been subject to peer review and publication; (3) the known or potential rate of error; and (4) whether the theory or technique is generally accepted by the scientific community. *Id.* at 593–94, 113 S.Ct. 2786.

The district court correctly identified these factors and analyzed the reliability of Dr. Chen's testimony pursuant

to each factor. *Kolesar,* 412 F.Supp.2d at 696–98. Kolesar's only explicit challenge to the district court's exclusion of Dr. Chen's testimony is his contention that Dr. Chen conducted a valid differential diagnosis.

A differential diagnosis is "[o]ne appropriate method for making a determination of causation for an individual instance of disease." *Hardyman,* 243 F.3d at 260. In *Hardyman,* the court defined "differential diagnosis" as

> **4 [t]he method by which a physician determines what disease process caused a patient's symptoms. The physician considers all relevant potential causes of the symptoms and then eliminates alternative causes based on a physical examination, clinical tests, and a thorough case history.

Id. (quoting Federal Judicial Center, *Reference Manual on Scientific Evidence* 214 (1994)).

*981 Kolesar claims that Dr. Chen "made her differential diagnosis based on the acute onset of Kolesar's respiratory distress immediately following his exposure to metam sodium and the known symptoms associated with metam sodium exposure," but never explains how this satisfies the definition of "differential diagnosis." Dr. Chen's diagnosis cannot be a differential diagnosis because she failed to consider or rule out alternative causes for Kolesar's illness, including his preexisting asthma and long history of cigarette smoking that he had failed to disclose to her.

Dr. Chen conceded that asthma can cause the same type of pulmonary obstruction that she observed in Kolesar and that the symptoms of RADS are similar to those of asthma. After learning of Kolesar's asthma, during her deposition on June 12, 2002, Dr. Chen concluded that the chemical exposure must have exacerbated his preexisting disease. She continued to assert that Kolesar suffered from RADS. Dr. Chen's conclusion was not the result of a careful study of Kolesar's prior medical records, however. Instead, she changed her diagnostic criteria for RADS so that her initial diagnosis could remain intact.[1] As the district court noted, her diagnosis lacks supporting medical data and scientific literature. In light of the methodological deficiencies in Dr. Chen's hypothesis, the district court did not abuse its discretion in excluding her expert testimony.

B. Causation Without Expert Testimony

[2] Kolesar's next argument is that even if the district court correctly excluded expert testimony as to what caused Kolesar's injuries, summary judgment was not proper. Under Wisconsin law, "[e]xpert testimony is required to prove causation if the matter does not fall within the realm of ordinary experience and lay comprehension." *Menick v. City of Menasha,* 200 Wis.2d 737, 547 N.W.2d 778, 782 (1996); *see also Weiss v. United Fire & Cas. Co.,* 197 Wis.2d 365, 541 N.W.2d 753, 758 (1995) (stating that "[t]he lack of expert testimony in cases which are so complex or technical that a jury would be speculating without the assistance of expert testimony constitutes an insufficiency of proof"). Kolesar classifies his case as involving "a simple negligence claim" and emphasizes that a lay jury would be able to understand causation "based on [his] undisputed exposure to metam sodium, the known effects of such exposure, and his treatment and symptoms after he was exposed to metam sodium." Conversely, UAP asserts that this case involves an extraordinary and non-lay matter of causation because the metam sodium to which Kolesar was exposed was in liquid, not gaseous, form. Understanding the effect of the exposure would therefore require intricate knowledge of, among other things, the rate at which liquid metam sodium vaporizes into its more dangerous gaseous form.

**5 Kolesar objects to UAP's argument, contending that elsewhere in its brief UAP admitted that the spilled metam sodium was dangerous without the need for expert testimony to establish as much. In its contributory negligence discussion, UAP essentially argues that because metam sodium is a known hazardous chemical, Kolesar should have known better than to act as he did. However, whether metam sodium is dangerous is not the issue requiring expert testimony in this case. Expert testimony is necessary to explain how Kolesar's *982 exposure to an admittedly corrosive, although nonvolatile, liquid metam sodium resulted in a significant exposure to an inhalable gas or vapor such that a juror could conclude Kolesar's post-incident pulmonary symptoms were caused by the spill, rather than by his preexisting asthma. Without proof of causation, Kolesar cannot succeed on his negligence claim. *See Menick,* 547

N.W.2d at 783. Therefore, the district court correctly granted summary judgment.

C. Contributory Negligence and Wisconsin Public Policy

Kolesar's final argument is that the district court usurped the jury's role in fault allocation when it stated that Kolesar is more liable than Defendants as a matter of law and that Wisconsin public policy supports barring Kolesar's recovery. We need not reach this argument because regardless of whether the district court erred on this point, summary judgment was still proper.

AFFIRMED.

All Citations

246 Fed.Appx. 977, 2007 WL 2492402, Prod.Liab.Rep. (CCH) P 17,823

Footnotes

1 Dr. Chen even provided two definitions of RADS, one that excludes persons suffering from prior serious pulmonary conditions (the medically accepted definition) and one that can include patients with pulmonary conditions (the definition she gave after learning that Kolesar has asthma). *Kolesar*, 412 F.Supp.2d at 697.