NOT DESIGNATED FOR PUBLICATION

PAULA SUE PARTLOW PUJOL, INDIVIDUALLY, AS ADMINISTRATRIX OF THE SUCCESSION OF JOHN JOSEPH PUJOL, AND AS THE TUTRIX OF JAMIE MICHELLE PUJOL AND JENNIFER MEGAN PUJOL, AND MICHAEL PARTLOW PUJOL	*	**NO. 2001-CA-1386**
	*	**COURT OF APPEAL**
	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
	*	
VERSUS	* * * * * * *	
STATE OF LOUISIANA, DEPARTMENT OF HEALTH AND HUMAN RESOURCES, MEDICAL CENTER OF LOUISIANA AT NEW ORLEANS, D/B/A CHARITY HOSPITAL, NORMAN E. MCSWAIN, M.D., ROBERT LOVE, M.D., RICHARD FANSLER, M.D., TREG BROWN, M.D., EDWARD JORDAN, M.D., ET AL.		

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 94-17063, DIVISION "E"
Honorable Gerald P. Fedoroff, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray, and Judge Dennis R. Bagneris, Sr.)
MURRAY, J., CONCURS WITH REASONS

Lanny R. Zatzkis
Karen D. McCarthy

Yvette A. D'Aunoy
Andrew N. Lee
ZATZKIS, McCARTHY & ASSOCIATES, L.L.C.
650 Poydras Street
Suite 2750
New Orleans, LA 70130
COUNSEL FOR PLAINTIFF/APPELLANT

Richard P. Ieyoub
Attorney General

Gregory C. Weiss
Terese M. Bennett
WEISS & EASON, L.L.P.
1515 Poydras Street
Suite 1100
New Orleans, LA 70112
COUNSEL FOR DEFENDANT/APPELLEE

AFFIRMED

In this wrongful death/medical malpractice action, the issue before this court today is whether the trial court's refusal to conduct a *Daubert* hearing in response to Plaintiffs' Motion was reversible error. For the

following reasons, we find that the trial court did not err in denying the request for a *Daubert* hearing.

The following facts are undisputed: (1) in June of 1993, Mr. John Pujol was admitted to the Medical Center of Louisiana in New Orleans, F/K/A Charity Hospital, for colon surgery, and (2) Mr. Pujol died on June 29, 1993. However, the parties are in dispute as to what caused Mr. Pujol's death.

Plaintiffs, Paula Pujol, individually, as administratrix of the succession of John Pujol, and as the tutrix of Jamie Pujol, Jennifer Pujol, and Michael Pujol, (hereinafter "Plaintiffs") allege that he died of "overwhelming sepsis." Specifically, Plaintiffs argue that Mr. Pujol's "death was caused by cellulitis, an infection of the soft tissue surrounding his surgical wound, that was never properly diagnosed, monitored or treated."

Defendants, on the other hand, allege that Mr. Pujol developed a post-operative superficial wound infection during his hospitalization. Specifically, Defendants allege that Mr. Pujol "experienced sepsis and an anastomotic leak," which they argue is "a known complication that can result from this type of surgery, absent any negligence of the treating surgeons." Although a second surgical procedure was performed, Mr. Pujol

died thereafter.

After a jury trial, a judgment was rendered dismissing Plaintiffs' action. The Plaintiffs now appeal, limiting the issue as to whether the trial court's refusal to conduct a *Daubert* hearing in response to Plaintiffs' Motion was reversible error.

On appeal, Plaintiffs allege the following specification of errors:

> (1) The trial court erred in failing to conduct an evidentiary hearing and/or develop a record to determine the reliability of the testimony of defense expert, Dr. Ronald Nichols, applying the guidelines of *Daubert/ Foret*;
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> (2) The trial court erred in failing to conduct an evidentiary hearing and/or develop a record to determine if Dr. Nichols should be excluded, under the guidelines established by *Daubert/Foret*, particularly in view of the fact that Dr. Nichols is a known testifying expert for the defense, having participated in 60 trials in his lifetime, 54 of 60 for defendant doctors;
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> (3) The trial court erred in failing to exclude Dr. Nichols – who could not opine on the cause of the decedent's sepsis, from which he died, and thus the appropriate treatment for it, but who could only opine on factors which could possibly have been a cause, but which may not have been a cause.

At the outset we note that although Plaintiffs opposed Dr. Ronald Nichols' testimony by Motion pursuant to *Daubert v. Merrell Dow*

Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), we find no evidence in the limited record before us that they objected to Dr. Nichols' testimony after his acceptance by the trial court in the areas tendered. Thus, we are not certain that Plaintiffs have properly preserved this issue for appeal. Nonetheless, out of an abundance of caution, we will review whether a *Daubert* hearing is required when requested by a party to the suit.

The United States Supreme Court recently pronounced the way that trial judges should handle questions of expert testimony. See *Daubert v. Merrell Dow Pharmaceuticals*, *supra*, and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167 (1999). The Louisiana Supreme Court adopted the standards set out in *Daubert* in *State v. Foret*, 628 So.2d 1116, 1123 (La. 11/30/93).

Prior to *Daubert*, jurisprudence merely required "general acceptance" of a technique in its scientific field before the technique could be considered admissible. See *Frye v. U.S.*, 54 App.D.C. 46, 293 F. 1013 (1923). However, the Supreme Court in *Daubert* decided that the *Frye* test was superseded by the adoption of the Federal Rules and replaced the "general

acceptance" standard with a "gatekeeping" function. *Daubert*, 509 U.S. at 587-588. The *Daubert* standard required that scientific expert testimony had to not only be relevant but also reliable. *Id.* at 590-593, 597. The Supreme Court in *Daubert* required a "preliminary assessment [by the trial court] of whether the reasoning or methodology underlying the [expert's] testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts at issue." *Id.* at 593. The Supreme Court set forth some non-exclusive factors that courts could consider in making a determination as to whether an expert's testimony was relevant and reliable. They included: (1) whether the technique or scientific knowledge is capable of testing or has been tested (the testing requirement); (2) whether the theory or technique has been subjected to peer review and publication (the publication requirement); (3) the known or potential rate of error and the standards for controlling the technique's operation (the control requirement); and (4) whether the technique had gained "general acceptance." *Id.* at 593-594. The Supreme Court warned that the trial court's inquiry was a flexible one and that the factors set forth were not to be considered a "definitive checklist or test." *Id.* at 593.

The Supreme Court's decision in *Daubert* did not settle the entire debate as to how expert testimony was to be handled. Footnote 8 of the *Daubert* opinion states: "[o]ur discussion is limited to the scientific context because that is the nature of the expertise offered here." *Id.* at 590 n. 8; however, the United States Supreme Court in *Kumho* expanded the *Daubert* "gatekeeping" rational to include all expert testimony. Specifically, the Court stated that the "evidentiary rationale that underlay the Court's basic *Daubert* 'gatekeeing' determination [is not] limited to 'scientific' knowledge." *Kumho*, 526 U.S. at 148.

Although a *Daubert* hearing is some times needed for a trial judge to determine the soundness of an expert's opinion, it is not required. *Kumho*, 526 U.S. at 152. As stated in *Kumho*,

> The trial court must have the same kind of latitude in deciding *how* to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides *whether or not* that expert's relevant testimony is reliable. (Emphasis in original)

Id. Our standard of review in reviewing a trial court's decision to admit or exclude expert testimony is an abuse-of-discretion. *Id.* The Supreme Court found that this "standard applies as much to the trial court's decisions about

how to determine reliability as to its ultimate conclusion." *Id.* Otherwise, the Supreme Court added, "the trial judge would lack the discretionary authority needed both to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises." *Id.* The Supreme Court further stated that "the Rules seek to avoid 'unjustifiable expense and delay' as part of their search 'truth' and the 'jus[t] determin[ation] of proceedings." *Id.* at 153 citing Fed. Rule Evid. 102.

In this case, the trial court was supplied with Dr. Nichols' deposition testimony prior to trial. Dr. Nichols testified in his deposition that he is a board certified general surgeon, a specialist in infectious disease, the president of the National Foundation For Infectious Disease, a fellow of the American Society of Microbiology, and a professor of microbiology. He further testified that his "whole life is about preventing, diagnosing, and treating infections in surgical patients." In reviewing Dr. Nichols' curriculum vitae during his deposition, he testified that he has published numerous articles and book chapters on infectious surgical diseases. He testified that article number 111 was his keynote address to the third decennial meeting of the CDC, (Centers for Disease Control) and that the

article discusses all of the aspects he would address in his deposition. Further, he testified that his last two books, Decision Making in Surgical Sepsis, published in 1990, and Problems in General Surgery-Surgical Sepsis, published in 1992, also have a direct relationship to this particular case.

This deposition provides a sufficient evidentiary basis for the trial court to make a pretrial decision that Dr. Nichols' testimony was reliable, methodic, and relevant to the issue at trial. Accordingly, we fail to find that the trial court manifestly erred in its decision to deny Plaintiffs' Motion for a *Daubert* hearing.

For these reasons, we affirm the trial court's decision to deny Plaintiffs' Motion for a *Daubert* hearing.

AFFIRMED