Reyes v Simonelli
2017 NY Slip Op 30175(U)
January 24, 2017
Supreme Court, Suffolk County
Docket Number: 22634/2012
Judge: Joseph A. Santorelli

[* 1]

PUBLISH

INDEX No. 22634/2012
CAL No. _____

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

----------X

JEFFREY REYES, Infant,

Plaintiff,

-against-

LAURA ANNE SIMONELLI and THERESA WALSH,

Defendants.

----------X

LURIE, ILCHERT, MACDONNELL & RYAN, LLP
Attys. for Plaintiff
475 Park Avenue South
New York, New York 10016

LAW OFFICE OF RUSSO & TAMBASCO
Attys for Defendants
115 Broad Hollow Road, Suite 300
Melville, New York 11747

In this action to recover damages for personal injuries, the defendants have moved for an order precluding the trial testimony of the plaintiff's expert, Dr. Kamran Fallahpour, PhD. On September 15, 2016, and November 30, 2016, a hearing was conducted before this Court at which Dr. Fallahpour testified on behalf of the plaintiff and Dr. Edward Weiland, a neurologist, testified on behalf of the defendants. On the basis of the evidence adduced at the hearing and after reviewing the parties' post hearing memoranda the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Dr. Fallahpour is a licensed clinical psychologist. He was trained at St. Luke's Roosevelt Hospital with a focus on brain mapping and psychophysiology. Thereafter, he had academic appointments at Roosevelt Hospital, Columbia University and Mt. Sinai Medical Center. He is a member of the American Psychological Association and the International Society for Neurofeedback Research. Currently Dr. Fallahpour has academic affiliations with Columbia Presbyterian and Mt. Sinai hospitals.

Dr. Fallahpour is the director and founder of The Brain Resource Center. The Brain Resource Center specializes in, among other things, the diagnosis, assessment and treatment of Traumatic Brain Injury, (hereinafter TBI), utilizing the latest findings in neuroscience, health psychology and clinical psychology. While Dr. Fallahpour does not employ any colleagues at The Brain Resource Center he has psychiatrists and neurologists with whom he collaborates on cases.

Dr. Fallahpour detailed the methods and tools used in the diagnosis, assessment and treatment of patients with TBI. He described an electroencephalogram, (hereinafter EEG), and stated that it is a method of measuring functional brain mapping. He explained that a brain can be looked at with an MRI or CT scan without detecting any abnormalities but looking at that brain with an EEG could evince some problem with it.

Dr. Fallahpour gave the following testimony on the quantitative electroencephalogram (hereinafter QEEG);

Q Doctor, as you know we are here today specifically to talk about quantitative electroencephalogram. First question: Could you tell us what is a quantitative electroencephalogram?

A Yes. So in the old days EEG was measured basically with, you know, these inscriptions on paper as you measure brain activity. So there is a digitized version of that that basically is digitized, but quantitative EEG defers in many ways with traditional EEG. In the traditional EEG, let's say a neurologist would look at the waveforms and would look for certain things such as spikes that may indicate this patient may have seizure or be predisposed to seizure and there would be basically generalities that can be picked up. They can also say maybe there is some slow activity, fast activity, etcetera. So now with quantitative EEG there is a lot more processing and there is actually something called a normative database which means that there are norms that are established, thousands of normal subjects go through this methodology where, and if you look I can go into the details, basically a cap is part on the heart, you have probably seen it in science kind of applications or it's becoming very popular also in many circles. So the cap has many sensors that's picking up brain activity in realtime, that's being recorded by an amplifier, then sent to a computer where that's filtered, analysis is done on the signal and even at that point we can just print out like the old fashioned, you now, raw EEG which are these lines. So, so far we are still talk about digitized EEG, but then what happens is that this person based on their age, their level of education and their sex that data is compared to what we call a normative database which is basically a database that has been established based on norms, validated, standardized and that that database becomes the norm to compare this person's, let's say someone with TBI or someone with ADHD or someone with depression, you compare basically their data to this normative database and then you see how they defer the same way that you may get a blood work and, you know, certain ranges, normal and then after that there are Z scores or, you know, standard deviations of, away from the norm. Some may be up or may be down which indicates, depending on where it is, how it's going to impact the patient.

Dr. Fallahpour explained how the normative database he utilizes is compiled. He acknowledged that other neuropsychologists and doctors that perform the QEEG may use another database. He noted that in the past there has been some criticism about the lack of standardization in the field of brain mapping and the QEEG but to his knowledge all of the issues have been addressed and there has been standardization. On cross examination, Dr. Fallahpour testified:

> A. Yea, there are groups of neuroscientists and there are group of people who do quantitative EEG who have standardized it and are using a standardized method and are recommending it. Whether other clinicians choose to use it or not that's not, you know, my decision or, you know, my decision or, you know, that's their decision, but there are standardized methods that have been validated, published, peer review journals, they're out there and it is standardized today.

To his knowledge there are "a few" QEEG databases that have large enough data "set in it" to be considered useable.

Dr. Fallahpour explained how the QEEG is administered and his training in its utilization. He testified that QEEG technology has been used since the 1970's and is a reliable diagnostic tool. Dr. Fallahpour testified, in detail, what role the QEEG plays in diagnosing TBI. While acknowledging that the QEEG is not a "panacea" and does not diagnose "everything", he stated that it is just another tool that if done correctly and with the right methodology, equipment and interpretation can be very helpful in the diagnosis of TBI.

On cross examination Dr. Fallahpour was asked if a QEEGs were performed with different databases could different conclusions be reached. He responded "I don't know. Depends."

Finally, Dr. Fallahpour stated that he has testified in court as an expert on the issue of TBI on two prior occasions and that he has never been denied the opportunity to testify as an expert.

Dr. Weiland is a board certified neurologist who has previously testified as an expert in the field of neurology.

Dr. Weiland opined that generally neurologists are responsible for diagnosing TBI although there are other medical providers and/or health clinicians who could be involved in the diagnosis or treatment of mild or moderate TBI.

Dr. Weiland explained how the QEEG functions, and while acknowledging no practical experience with its administration, testified that the QEEG is not useful and is not a reliable diagnostic tool. Dr. Weiland based his opinions, in part, upon literature he reviewed that had been provided to him before the hearing by defense counsel. He testified that the American Clinical Neurophysiology Association, the American Psychiatric Association and the American Academy of Neurology have taken the position that the QEEG was not a medically reliable diagnostic tool to assess TBI. Prior to testifying at the hearing Dr. Weiland contacted the American Academy of Neurology and confirmed its position regarding its position on the QEEG as a diagnostic tool.

Dr. Weiland testified:

> I am not a proponent of this procedure. I have no certification in the procedure. I am just indicating my opinion in terms of its clinical appropriateness in treating neurological conditions.

He stated that in the past he has been asked to review the medical necessity of QEEG testing as it relates to personal injury by representatives of insurance companies.

The Court inquired whether, based upon his experience and training as a neurologist, Dr. Weiland was able to render an opinion as to whether a psychologist could render an opinion as to TBI utilizing the QEEG. Dr. Weiland testified that he could not.

The following colloquy took place between Dr. Weiland and defense counsel:

Q Would you accept a QEEG under those circumstances?

A From my knowledge of QEEG, there is no indication that a QEEG in 2016 is going to help me treat an individual with TBI. If the test is not going to help me and assist me in making a diagnosis or assist in treatment plan or therapeutic options, then there is no reason to perform the test. That is why a majority of neurologists do not perform this test because we don't perform tests just for the hell – pardon my expression.

THE COURT: You can say that.

A For having test results. It's nice to have colorful charts and laboratory data sheets, but when I have to treat somebody like Mr. Reyes, it's not going to affect whatever treatment options that I am going to recommend to that particular patient. So that is what a doctor does. They try to help patients, they try to utilize test results to assist them in getting to the end point of care and treatment. If that is not going to help me, I don't need it.

Q And if that test result doesn't help you, could it help anybody else?

A I can't tell you. It must help Dr. Fallahpour who I believe is a Ph.D., but I don't believe in the community that I practice in that it has any efficacy at all.

Q How could it have efficacy for him and not for you?

A I am not a clinical psychologist.

CONCLUSIONS OF LAW

At a *Frye* Hearing the proponent of the evidence must establish that the scientific principles and techniques he advocates, when properly performed, generate consistent results accepted generally as reliable within the relevant scientific community (*see, People v Wesley*, 83 NY2D 417).

> "Under the *Frye* test, "expert testimony based on scientific principles or procedures is admissible but only after a principle or procedure has 'gained general acceptance' in its specified field" (*People v Wesley*, 83 NY2d 417, 422 [1994], quoting *Frye v United States*, 293 F at 1014; *see Ratner v McNeil-PPC, Inc.*, 91 AD3d 63, 71 [2011]). *Frye* is also applied "to assess the reliability of an expert's theory of causation in a particular case" (*Lugo v New York City Health & Hosps. Corp.*, 89 AD3d 42, 57 [2011]). "'*Frye* is not concerned with the reliability of a certain expert's conclusions, but instead with whether the [expert's] deductions are based on principles that are sufficiently established to have gained general acceptance as reliable'" (*Lipschitz v Stein*, 65 AD3d 573, 576 [2009], quoting *Nonnon v City of New York*, 32 AD3d 91, 103 [2006], *affd* 9 NY3d 825 [2007]). "[G]eneral acceptance does not necessarily mean that a majority of the scientists involved subscribe to the conclusion. Rather it means that those espousing the theory or opinion have followed generally accepted scientific principles and methodology in evaluating clinical data to reach their conclusions" (*Zito v Zabarsky*, 28 AD3d 42, 44 [2006] [internal quotation marks omitted]; *see Ratner v McNeil-PPC, Inc.*, 92 AD3d at 71)."
>
> *(Krackmalnik v Maimonides Medical Center*, 142 AD3d 1143, 1144, [2d Dept. 2016]).

Based upon a review of the testimony adduced at the hearing the Court concludes that the plaintiff has failed to establish that the utilization of the QEEG to diagnose TBI has gained general acceptance in the field of clinical psychology. The hearing record lacks sufficient proof that other experts in the field of clinical psychology accept the reliability of the QEEG to diagnose TBI. Further, given Dr. Fallahpour's testimony that different databases could result in different conclusions, the Court concludes that the QEEG does not possess the requisite degree of liability.

The Court credits the testimony of Dr. Weiland but notes that by his own admission, as a neurologist, he could not testify as to the efficacy of the QEEG for a clinical psychologist.

Accordingly, the defendants' motion to preclude the expert testimony of Dr. Fallahpour is granted to the extent that the plaintiff is precluded from proffering evidence that the QEEG was used to diagnose the plaintiff with TBI; and it is further

ORDERED, that the attorneys shall appear in the Calendar Control Part of the Supreme Court, Suffolk County on **March 1, 2017, at 9:30 a.m.** to commence jury selection for the damages phase of this trial.

The foregoing shall constitute the decision and Order of the Court.

Dated: Suffolk County, New York
January 24, 2017

HON. JOSEPH A. SANTORELLI
J.S.C.