

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

ELLEN H. WARREN, :
 : C.A. NO: 06C-06-030 (RBY)
 Plaintiff, :
 :
 v. :
 :
 JUSTIN TOPOLSKI, :
 :
 Defendant. :

Submitted: March 10, 2008
Decided: March 20, 2008

John C. Andrade, Esq., Parkowski, Guerke & Swayze, P.A., Dover, Delaware for Plaintiff.

Brian E. Lutness, Esq., Silverman, McDonald & Friedman, Wilmington, Delaware for Defendant.

*Upon Consideration of Defendant's
Motion in Limine to Preclude Testimony on Causation
by Eugene E. Godfrey, D.O.*

GRANTED

ORDER AND OPINION

Young, J.

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In this case, Defendant Topolski has requested a “Daubert Hearing” in order to test the admissibility of the testimony of the Plaintiff’s medical expert assessing the causation of Plaintiff’s undisputed condition of fibromyalgia by an automobile accident. Thus, the question presented to this Court is whether or not Plaintiff’s expert, the anesthesiologist and pain management physician, Dr. Eugene Godfrey can show that causal link between the June 21, 2004 automobile accident, which is the subject of this case, and the Plaintiff’s fibromyalgia condition is demonstrated “in the courtroom [with] the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1998), as expressly adopted by *Minner v. American Mortg. & Guar. Co.*, 791 A. 2d. 826, 843 (Del. Super. Ct., 2000).

As suggested above, for purposes of this issue, the parties agree and the Court accepts the following:

- a) Plaintiff was involved in an automobile accident on June 21, 2004;
- b) the vehicle in which she was located was rear-ended;
- c) she now suffers from the medical condition of fibromyalgia;
- d) prior to the accident, she had not been diagnosed as having fibromyalgia;
- e) prior to the accident, her medical history included varying levels of thyroid treatment, back discomfort, sleep disturbances, left knee injury, cervical disc disease, and depression;
- f) Dr. Eugene Godfrey is a Board Certified anesthesiologist, who is qualified to render opinions in that field in trials;

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g) Dr. Godfrey believes that Plaintiff's fibromyalgia condition was "triggered" by this automobile accident.

Counsel have referred the Court to a variety of cases and medical articles, many of which will be mentioned herein.

At the outset, it should be noted that, while the issue has not yet been presented in argument in this case, Dr. Godfrey's position as an anesthesiologist gives rise to some concern. From a review of the medical journal materials submitted by both sides in this matter, it would appear that, perhaps, a rheumatologist ought to be discussing this matter, if anyone at all. Dr. Godfrey's anesthesiologist background and clinical observations can be seen as qualifications to treat the symptoms, but not necessarily to discuss causation in an area where that is in dispute.

That aside, however, we need to examine the presently available medical information and the arguments presented to determine whether or not a causal link between fibromyalgia and an automobile accident can be made by anyone.

Both sides presented the same article, prepared by the Mayo Clinic¹, each emphasizing the reputation of that organization. The Plaintiff's utilization of the article was for causation support based upon the statement: "An injury or trauma, particularly in the upper spinal region [which the Plaintiff's was not], may trigger the development of fibromyalgia in some people. An injury may affect your central nervous system, which may trigger fibromyalgia." (Emphasis added.)

That one selected passage, as inconclusive as it is on its face, is even more

¹ At <http://www.Mayoclinic.com/health/fibromyalgia/DS00079/D> Section =3

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diluted by its context. The injury as a possible trigger is one of five conjectures on the topic (the other four being: sleep disturbances, infection, nervous system problems, and metabolic changes – from some of which the Plaintiff suffers). More importantly, though, is the import of the article. It lists those five “possible triggers” following this passage: “It’s likely that a number of factors contribute to the development of fibromyalgia. Other theories as to the cause include...”

Thus, the statement relied upon by Plaintiff and by Dr. Godfrey is a highly conjectural rumination posited as little more than a theoretical possibility.

To the contrary, in very positive terms, the article commences by saying without equivocation that: “Doctors don’t know what causes fibromyalgia.” Accordingly, this Mayo Clinic article can only support the contention that the Plaintiff cannot submit to a jury for factual determination a claim that the motor vehicle accident which caused the fibromyalgia condition. That article decidedly rejects the proposition that trauma as the cause of fibromyalgia is scientifically established.

The other articles submitted by one side or the other are consistent with the Mayo Clinic’s original position. The National Center for Disease Control (CDC)², notes that (among a wide variety of other things) a traumatic event “has been loosely associated with disease onset,” but that “fibromyalgia is a disorder of unknown etiology.” The American College of Rheumatology³, observing that genetics appear

² At <http://www.cdc.gov/arthritis/fibromyalgia.htm>

³ At http://www.Rheumatology.org/public/factsheets/fibromyalgia__new.asp

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to play a role in its development, definitively states: “No one knows what causes fibromyalgia.” The British Society for Rheumatology⁴, in a study specifically designed to “examine the role of physical trauma in the onset of fibromyalgia”, with the limited stated objective “to investigate whether physical trauma may precipitate the onset of fibromyalgia”, could say merely that about 1/3 of the patients reported “significant trauma” (which, incidentally, Dr. Godfrey testified was not this Plaintiff’s situation) prior to the disease onset. Moreover, even there: “There was no significant difference” between patients who did and those who did not sustain trauma. That report, on those findings, nevertheless, found an “association” between fibromyalgia onset and recent trauma. Whatever is intended by “association,” it would appear that “significant” in the context of this study has a meaning dramatically different from any concept of medical probability recognized in law. In any event, that is a review of the findings in articles presented by the Plaintiff.

Articles submitted by the Defendant are of two general approaches. One is the series of quite a few articles showing the coincidence, at least, or interworking, at best, between thyroid disease (of which this Plaintiff has some history, but which Dr. Godfrey felt was “cured”) and fibromyalgia. The other is a series regarding the etiology of fibromyalgia. These latter articles consistently state that cause is “unknown”— not “disagreed upon”, but “unknown”, (See articles 5, 6 and 7 of Defendant’s exhibits).

Looking next at the primary cases to be examined, Defendant refers to *Black*

⁴ At <http://www.Rheumatology.oxfordjournals.org/cgi/content/abstract/41/4/4.50>

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v. Food Lion, Inc., 171 F.3d 308 (5th Cir., 1999) and *Vargas v. Lee*, 317 F. 3d 498 (5th Cir., 2003). As Defendant has noted, in regard to the application of the federal decisions of *Daubert* and *Kumho*, Delaware considers federal interpretations as having authority. Plaintiff, on the other hand, refers this Court to the Wyoming case of *Reichert v. Phipps*, 84 P. 3d 353 (Wyo.2004). That case is later than *Vargas*, and it cites *Black*, upon which *Vargas* builds. *Reichert*, incidentally, mentions *Minner v. American Mortg. & Guar. Co.*, 791 A. 2d 826 (Del. Super. Ct., 2000).

Since all of those decisions, the District Court in Minnesota decided *Maras v. Avis Rent A Car System, Inc.*, 393 F. Supp 2d 801 (D. Minn. 2005). That case, in fact, specifically refers to *Reichert*.

A preview of Plaintiff's cited case of *Reichert* is most interesting. It describes at great length the standards by which expert testimony is to be permitted pursuant to *Daubert*: methodology utilized to come to the offered conclusion; testing of the concept by the relevant scientific community; acceptance of the position taken; logical relationship between accepted research and opinion; and so forth. It, then, refers to many treatises, just as the parties and this Court did, as earlier indicated. The *Reichert* Court, using the same or very similar citations, quoted identical conclusions: "There is no evidence that a single event causes FM;" "Neither the cause nor the pathogenesis of FM is known in medicine;" "The medical literature evidences the lack of scientific foundation for the theory that trauma may case FM;" "No one knows what causes FM; Researchers [merely] speculate;" "There is no evidence that a single event causes fibromyalgia. Rather, many...stressors may trigger or aggravate symptoms;" "The causes of FM are incompletely understood;" and on and on.

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Then, in spite of a reference to our *Minner* case, holding that temporal relationship is insufficient to establish causal link, *Reichert* concludes that the offered opinion was sufficient because of the proferor's "differential diagnosis" that nothing else was seen to fit, so the trauma would be opined to be the "cause" or the "trigger." The dissent in *Reichert* very nearly expresses astonishment, in that it agrees with the legal and medical analysis by which it is driven to the opposite conclusion. It notes that science cannot establish a "cause-effect connection between trauma and fibromyalgia." Referring to the "differential diagnosis" idea, the dissent prudently observes that an expert needs to do more than "rule out" a variety of possibilities; he needs to "rule in" the cause he suspects.

Following *Reichert*, then, we have *Maras*. Evidently confronted with the same disconnect between analysis and conclusion seen by the said dissent, *Maras* says: Plaintiffs rely [as in the instant situation] upon *Reichert v. Phipps*, which the Court finds unpersuasive."

That sublime understatement expresses the sentiment of this Court.

Daubert and its federal and Delaware progeny describe the "gate keeping" functions of the Court to permit expert opinion only to the effect that it has scientific validity. The medical analysis relative to the cause of fibromyalgia is overwhelmingly consistent. No one, at least at this point in time, in the scientific community can say that trauma causes fibromyalgia. The etiology of this strangely debilitating disease is unknown. While it may be associated with any one or any combination of factors, it is not demonstrably associated with anything, let alone trauma.

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So, while the clinician can find the symptomatology of fibromyalgia, and hopefully increasingly treat it, he cannot, on the basis of the essentially unanimous and overwhelming scientific authority extant, present to the jury an opinion about its cause.

Accordingly, the opinion of Plaintiff's anesthesiologist, who is not a rheumatologist, relative to the Plaintiff, who has a history of several symptoms also recognized as frequently concomitant with fibromyalgia, suggesting a differential diagnosis, based upon a temporal self-reporting by the Plaintiff, that the instant automobile accident "caused" or "triggered" Plaintiff's fibromyalgia cannot be admitted.

Defendant's Motion in Limine to preclude Dr. Godfrey's testimony on causation of the Plaintiff's fibromyalgia is GRANTED.

SO ORDERED.

/s/ Robert B. Young

J.

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