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: April 15, 2009
Decided: April 30, 2009

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 Exclude Expert Testimony
GRANTED

ORDER AND OPINION

Young, J.

I. DECISION

This decision follows Plaintiff's request to revisit the prior decision of this Court on the basis that Plaintiff had obtained a medical expert in a field different from the specialist whose testimony had previously been rejected. For the following reasons, and based upon the same *Daubert* consideration, and journal authority materials as reviewed in the prior decision, Defendant's Motion is, again, **GRANTED**.

II. ANALYSIS

Plaintiff's new medical expert is Dr. Maged I. Hosny, a licensed rheumatologist. He is board certified, and has an impressive curriculum vitae. His knowledge of rheumatology is extensive. Dr. Hosny, however, cannot state definitively whether the accident caused Plaintiff's fibromylagia. Dr. Hosny offered intelligent opinions concerning various "triggering" factors for fibromyalgia. He also offered his belief that the "triggering" factors that Plaintiff had prior to the accident (admitted by the parties, and referred to on p. 2, item (e), in the Court's Opinion of March 20, 2008) could be ruled out in his causal analysis. Dr. Hosny reasoned that, because Plaintiff suffered from those various other maladies long before the accident, and because those "triggers" did not lead (within an undetermined period of time) to the onset of Plaintiff's fibromyalgia, the accident was the only relevant event that could have "triggered" Plaintiff's fibromyalgia. When questioned about whether Plaintiff's fibromyalgia was caused by the accident, however, Dr. Hosny could not

respond relevantly.

As was the case in the earlier consideration, the appropriate standard to analyze this question is that set forth in D.R.E. 702. Rule 702 allows expert testimony if that testimony (1) "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." In the Rule 702 analysis, the Court must determine whether Dr. Hosny's testimony will be reliable and relevant.

In March 2008, the Court granted a similar motion excluding the testimony of Plaintiff's anesthesiologist. The decision then was that, because Plaintiff's witness could not testify about the cause of Plaintiff's fibromylagia, the testimony was insufficient to present to the jury. The same analysis applies, and the same conclusion must be reached here, even though now the Court considers the testimony of a rheumatologist.

The same obstacles that prevented the Court from allowing the anesthesiologist's testimony one year ago are still present. Of all the material presented to the Court, including Dr. Hosny's testimony, the underlying matter of fact is that the medical community does not know what causes fibromyalgia.[1] The research and experiments that scientists and doctors have conducted have expanded the general information available about fibromyalgia, but none states decisively any

[1] Johns Hopkins Guide to Fibromyalgia, at 3, *available at* http://www.johnshopkinshealthalerts.com/ppc/arthritis/fibromyalgiar_reg_landing.html; FibroAction - Fibromyalgia Syndrome and Physical Trauma, http://www.fibroaction.org/articles/fibromyalgia-syndrome-and-physical-trauma.aspx.

known causes. According to the materials presented to the Court, it is "difficult to diagnose [fibromyalgia] because it produces no objective physical changes that can be used to identify the syndrome."[2]

Directly on point is the Delaware Superior Court's decision in *Minner v. American Mortgage & Guaranty Co*.[3] The *Minner* court refused to allow a doctor to offer testimony concerning her speculation about what caused the plaintiff's fibromyalgia.[4] The crux of that Court's reasoning was that the doctor's testimony was speculative, and did not exclude other causative factors.[5] The court held that this speculation "is precisely the type of testimony that should be kept from the jury under the principles of *Daubert*."[6] Further, she did "not follow a logical, scientific, and deductive process to exclude other possible causative factors."[7]

Dr. Hosny's testimony was similar to that excluded in *Minner*. Dr. Hosny thoroughly addressed the "triggering" factors. He opined that since the factors or symptoms that Plaintiff had before the accident did not lead, directly, in his view, to the onset of her fibroymalgia, he ruled out those factors as the potential causes. Notably, he could not define how much time between a symptom's appearance or

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[2] Johns Hopkins Guide to Fibromyalgia, Pg. 5.

[3] *Minner*, 791 A.2d 826.

[4] *Id*. at 872.

[5] *Id*. at 855.

[6] *Id*.

[7] *Id*.

some event and the onset of fibromyalgia complaints ruled one thing in and another out. After he ruled out the several other symptoms Plaintiff had, Dr. Hosny concluded, based exclusively on temporal circumstances, that the accident alone was the "triggering" factor of Plaintiff's fibromyalgia. Dr. Hosny did not, however, provide any scientific basis as to why those other symptoms were not considered. His sole reasoning was that Plaintiff suffered from the symptoms before the accident, but had not described an onset of fibromyalgia. This conclusion alone is insufficient to present it to a jury under *Minner* and *Daubert*. As stated in *Minner:*

> It is well settled that a causation opinion that is based solely on a temporal relationship is not derived from the scientific method, and is therefore insufficient to satisfy the requirements of Rule 702.

Plaintiff argues that, regardless of the *Minner* decision, Dr. Hosny's testimony is sufficient for purposes of D.R.E. 702. Plaintiff contends that Dr. Hosny's testimony is the result of two studies that have been peer reviewed and are accepted in the rheumatology community. Plaintiff continues that, because of these critiques and acceptances, the materials Dr. Hosny relied upon are reliable, and therefore satisfy the D.R.E. 702 criteria.

Plaintiff also relies on the cases of *Marsh* and *Epp*.[8] Those cases, Plaintiff argues, stand for the premise that experts may present their arguments regarding fibromyalgia causation to a jury under the *Daubert* analysis. The Court is constrained to disagree.

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[8] *Marsh*, 977 So. 2d 543; *Epp*, 715 N.W.2d 501.

In the *Marsh* case, that court addressed our issue under the *Frye* test.[9] While it may be argued whether *Frye* may be more or less demanding than *Daubert*,[10] in this instance it is of no consequence. Delaware recognizes the *Daubert* test.[11] Therefore, any analysis pertaining to expert testimony must suffice under *Daubert*. Even in the *Marsh* decision under *Frye*, the dissent convincingly stated the impropriety of the majority's decision, noting the absence of general acceptance of the expert's opinion. Because general acceptance is one consideration this Court makes under *Daubert*, the obvious presence of all of the debate within the scientific community about the association between physical trauma and fibromyalgia precludes satisfactory evidence for jury consideration.

Further, Plaintiff's reliance on *Epp* is not convincing.[12] In *Epp*, the court ruled that the trial court's exclusion of a doctor's testimony was an abuse of discretion.[13] The court, however, reviewed what the doctor's examination and diagnosis consisted of, finding it to be reliable.[14] The doctor in *Epp* not only ruled in the accident as a possible cause of the plaintiff's fibromyalgia, but also ruled out other possible causes by a "differential diagnosis" process, which the *Epp* court considered a reliable

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[9] *Marsh*, 977 So. 2d at 550.

[10] *Id*. at 546 (internal citations omitted).

[11] *See MG Bancorporation Inc. v. Le Beau*, 737 A.2d 513, 523 (Del. 1999).

[12] *Epp*, 715 N.W.2d 501.

[13] *Id*. at 511.

[14] *Id*. at 508-11.

scientific method.[15] Dr. Hosny, on the other hand, testified that his basis for excluding Plaintiff's sleep deprivation and emotional distress and musculoskeletal problems was that she had those symptoms before the accident. Dr. Hosny reasoned that because those symptoms existed prior to the accident, yet did not, by complaint, lead to an onset of fibromyalgia, they must not have factored into her diagnosis for a "trigger" when fibromyalgia was diagnosed. This, really quite vague, temporal approach cannot rule out the other, myriad causative conditions.

Dr. Hosny, again, did not and could not testify that Plaintiff's injury was **caused** by the accident. Rather, his opinion, again, was that the accident was the "triggering" factor. That is insufficient, in this case, to elevate to causation evidence for a jury.

Dr. Hosny attempted to distinguish cause in a medical sense from cause in a legal sense to bolster his opinion. Dr. Hosny identified that "cause" from his perspective referring to pathophysiology. Here we deal with legal requirements. In the legal sense, cause is interpreted in a "but-for" situation. "But-for the accident", would Plaintiff have been free of fibromylagia? That is the relevant question for trial. Did Plaintiff's accident, aside from the sleep deprivation, emotional distress, physical ailments etc., bring about the fibromyalgia? Dr. Hosny's testimony to that effect was deficient. The medical science that he relied upon certainly does not say definitively.

As specifically stated in *Daubert*:

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[15] *Id*. at 511.

> Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly. The scientific project is advanced by broad and wide ranging consideration of a multitude of hypotheses, for those that are incorrect will eventually be shown to be so, and that in itself is an advance. Conjectures that are probably wrong are of little use, however, in the project of reaching a quick, final and binding legal judgment – often of great consequence – about a particular set of events in the past.[16]

The gate-keeping role may result in precluding the jury from hearing certain evidence.[17] That may prevent admission of cutting edge scientific discovery. It conceivably has prevented admission of evidence that is now considered household knowledge. In any event, the Court's function is to allow the jury to hear evidence that suffices, in this moment in time, under the *Daubert* standard and D.R.E. 702. At this point, Dr. Hosny's opinion is insufficient for a final legal determination sufficient to go to a jury for consideration.

Speculation is insufficient for *Daubert* purposes. Because that is the situation here, Dr. Hosny's testimony is not medically sufficiently reliable. It must, therefore, be excluded.

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[16] *Daubert v. Merrell Dow Pharm. Inc.,* 509 U.S. 579, 596-97-(1993).

[17] *Id.*

III. CONCLUSION

For the foregoing reasons, Defendant's Motion to exclude from jury consideration the testimony of Dr. Hosny is **GRANTED**. **SO ORDERED**.

/s/ Robert B. Young
J.

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