

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

SHAWN D. CONWAY, individually	:	
as the Executor of the Estate of SHERRI	:	
LYNN CONWAY, and as Next Friend	:	C.A. No. 99C-06-039 WLW
of TYLER SCOTT WINTER and	:	
BRYCE JOSEPH CONWAY, their children,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
BAYHEALTH MEDICAL CENTER, INC.,	:	
d/b/a KENT GENERAL HOSPITAL and	:	
SOUTHSIDE FAMILY PRACTICE,	:	
	:	
Defendants.	:	

O R D E R

In this medical negligence action, Shawn Conway ("Plaintiff") moves to exclude two parts of Dr. Chervenak's, a defense expert, testimony: first, the doctor's testimony addressing the issue of the standard of care required of a family practitioner in referral of a patient to the Emergency Room, and second, the doctor's testimony concerning the increased risk of pulmonary embolism for an individual on birth control pills.

STATEMENT OF LAW

Expert evidence falls under the province of *D.R.E. 701-706*. Delaware's standard for determining the admissibility of expert testimony is consistent with the federal standard in *Daubert V. Merrell Dow Pharmaceuticals, Inc.*¹ Under

¹*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, U.S. 579 (1991), consistent with, *Nelson v. State*, 628 A.2d 69, 73 (1993).

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Daubert and its progeny such as *Kumho Tire Company, Ltd. v. Carmichael*,² the judge acts as a gatekeeper in determining the admissibility of expert evidence.³ In *Nelson v. State*, the Delaware Supreme Court identified five factors the Court must weigh when determining the admissibility of expert evidence:⁴

1. The witness is qualified as an expert by knowledge, skill, experience, training or education (D.R.E. 702);
2. The evidence offered is otherwise admissible, relevant and reliable (D.R.E. 401 & 402);
3. The expert's opinion is based upon information "reasonably relied upon by experts in the field" (D.R.E. 703), [this is the *Daubert* part⁵];

²*Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137 (1999).

³*Id.* at 1174.

⁴*Nelson* at 74.

⁵*Daubert* at 592-594.

- a. Whether a "theory or technique ... can be (and has been) tested;"
 - b. Whether it "has been subjected to peer review and publication;"
 - c. Whether, in respect to a particular technique, there is a high "known or potential rate of error" and whether there are "standards controlling the technique's operation;" and
 - d. Whether the theory or technique enjoys "general acceptance" within a "relevant scientific community."
4. The specialized knowledge being offered will assist the trier of fact to understand the evidence or determine a fact in issue (D.R.E. 702);
 5. The expert testimony will not create unfair prejudice, confuse the issues or mislead the jury (D.R.E. 403).

The court in *Kumho* also determined that the *Daubert* standard applies to all expert testimony and not only to scientific experts.⁶

APPLICATION

1. Dr. Chervenak's Testimony on Standard of Care When Referring Patients to the Emergency Room.

Dr. Chervenak, a defense expert in family practice, testified that there is not duty to contact the emergency room physician and discuss the referred patient's medical history after referring a patient to the emergency room. The

⁶*Kuhmo* at 1171, 1173-1175.

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doctor testified that he acquired this knowledge by practicing medicine for 12 years, and that he is aware of no literature that contradicts this opinion. Dr. Chervenak also apparently asked other doctors what their practice was in developing his opinion. Plaintiffs claim that Dr. Chervenak's opinion is inadmissible on the standard of care for two reasons: first, it is not scientific testimony that complies with *Daubert*, and second, the doctor's opinion is based on hearsay. Therefore, Plaintiffs argue that Dr. Chervenak should not be allowed to testify about his opinion on the standard of care when referring patients to the emergency room. Defendants argue that the law draws a distinction between scientific and non-scientific based opinions, the testimony in question falling into the latter category. According to the Defendants, the doctor is stating his opinion on the "practice of the medical profession," but is not giving a scientific opinion about the "practice of medicine." Further, the Defendants claim that the doctor's basis for his opinion is appropriate because an expert may base his opinion on facts and data that might not be admissible evidence at trial such as hearsay.

The distinction drawn by the Defendants between scientific and non-scientific evidence is incorrect because *Kuhmo Tire Co., Ltd.* applied *Daubert* to all expert testimony, not just scientific expert testimony. In *Kuhmo*, the Supreme Court stated that:

Neither is the evidentiary rationale that underlay the Court's basic *Daubert* "gatekeeping" determination limited to "scientific" knowledge. *Daubert* pointed out that Federal Rules 702 and 703

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grant expert witnesses testimonial latitude unavailable to other witnesses on the "assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline." *Id.*, at 592, 113 S.Ct. 2786 (pointing out that experts may testify to opinions, including those that are not based on firsthand knowledge or observation). The Rules grant that latitude to all experts, not just to "scientific" ones.⁷

⁷*Id.* at 1171.

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Delaware law has adopted both *Daubert* and *Kuhmo Tire Co., Ltd*; therefore, "the basic gatekeeping obligation that had been described in *Daubert* applies to all expert testimony on "scientific," "technical" or "other specialized" matters within the scope of Federal Rule of Evidence 702."⁸ While Dr. Chervenak's opinion on emergency room referral practice may not be a "scientific" matter, it is a "specialized" matter which is relevant and helpful to the fact finder. The reliability of Dr. Chervenak' testimony is also questioned by the Plaintiffs. In this respect, it is important to note that the means of establishing a witness as an expert range from knowledge, skill and experience to training or education. Dr. Chervenak's 12 years of experience including contact with other physicians and his academic credentials not only establish him as an expert but also allow him to opine on the standard of care for referring a patient to the emergency room. The fact that Dr. Chervenak bases his opinion, in part, on hearsay such as asking other doctors what they did recently does not change the admissibility of his opinion. Expert opinions do not have to be based solely on admissible evidence.⁹ Therefore, Plaintiffs' motion in limine is denied and Dr. Chervenak may testify to his opinion concerning the standard of care applicable to doctors referring patients to the emergency room.

⁸*M.G. Bancorporation, Inc. v. Le Beau*, Del. Supr., 737 A.2d 513, 521-522 (1998).

⁹*D.R.E. 703.*

2. Dr. Chervenak's Testimony Concerning any Increase in Risk of Pulmonary Embolism Caused by Birth Control Pills.

Dr. Chervenak testified in his deposition that there was no good evidence to show that birth control pills produce any increase in the risk of pulmonary embolism. Plaintiffs proceed through many exhibits of medical journals, dictionaries and sections of other expert's depositions to demonstrate that Dr. Chervenak has no sound medical basis for his opinion and essentially argue that this opinion is wrong. Defendants argue that the doctor's testimony was referring to the decedent in this case and her specific circumstances. The Defendants also argue that it is the province of the fact finder to weigh the credibility of the evidence, specifically, Dr. Chervenak's opinion. While the fact finder does weight the credibility of evidence, the Court acts as an initial gatekeeper for expert testimony. The Court must evaluate the expert testimony in light of the standards from *Nelson* and *Daubert*. Upon review of the deposition transcript, Dr. Chervenak appears to be stating his opinion based on his perception of the decedent and his knowledge from his years of medical practice. While Dr. Chervenak's opinion may be weak, poorly stated or even ultimately wrong, as long as the witness qualifies as an expert and the opinion is based upon "information reasonable relied upon by experts in the field", the testimony will be admissible. In this case, Dr. Chervenak testified that his opinion is based upon his knowledge, skill and experience pertaining to the use of birth control

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pills and the changes that have occurred with respect to birth control pills throughout his practice of medicine. The fact that Dr. Chervenak did not have any supporting literature in his deposition will not disqualify his opinion. Plaintiffs will have the opportunity through cross-examination to expose any weakness or error in Dr. Chervenak's methodology, reasoning or opinion. As noted by the *Daubert* court, "Vigorous cross-examination, presentation of contrary evidence and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."¹⁰

Therefore, Plaintiffs' motions in limine are *denied*. IT IS SO ORDERED this 26th day of March, 2001.

Judge

dmh

oc: Prothonotary

xc: Order Distribution

¹⁰*Daubert* at 596.