Greene v. Troumbley, et al., No. 243-7-05 Bncv (Howard, J., May 21, 2008)

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STATE OF VERMONT
BENNINGTONCOUNTY

THOMAS J. GREENE,
Plaintiff

v. **BENNINGTON SUPERIOR COURT**
DOCKET NO. 243-7-05 Bncv

CHARLES D. TROUMBLEY,
d/b/a C& L MARKETING,
PETRICCA CONSTRUCTION CO.
Defendants

ORDER ON DEFENDANTS' MOTION IN LIMINE

Plaintiff alleges that injuries he sustained as a result of an automobile accident were proximately caused by Defendants' negligence. Currently pending is Defendant Troumbley's, d/b/a C & L Marketing, motion in limine seeking to bar introduction and admission of testimony by David S. Brown, Ph.D. on the grounds that such testimony does not meet the requirements of V.R.E. 702. Since the Court concludes that the expert testimony of Dr. Brown is both relevant and reliable to the extent the court reviews it for purposes of this motion, the Motion in Limine is **DENIED**.

Background

Based upon a review of the filings of the parties, as well as the complaint, the relevant facts are as follows. Plaintiff was injured when a dump truck allegedly operated by Defendant Troumbley hit the vehicle operated by Plaintiff. Among other things, Plaintiff alleges that the

accident caused an emotional injury which he is being treated for by David S. Brown, Ph.D., a clinical psychologist. Dr. Brown submitted a report which stated that Plaintiff suffers from anxiety and cognitive problems stemming from a head injury suffered in 1998 and unrelated to the instant action. Dr. Brown further opined that the head injury suffered in the car accident which is the subject of this litigation caused a continued decline in Plaintiff's ability to function. Dr. Brown's ultimate diagnosis is that Plaintiff suffers from "posttraumatic stress disorder and cognitive disorder, not otherwise specified." Plaintiff proffers that he wishes to have Dr. Brown testify as to his diagnoses and estimates that correcting Plaintiff's disorder will require 150 hours of therapy at a cost of $15,000.00. Plaintiff does not seek to have Dr. Brown testify on the issue of whether Plaintiff's brain functioning has been affected by the head trauma suffered in the collision.

Defendant alleges, however, that Dr. Brown is not competent to testify as an expert witness in the case for the purposes offered, citing various sections of his deposition testimony where Dr. Brown admits that he is not an expert witness forensic psychologist. Dr. Brown additionally testified that he would not serve as an expert in the instant case in any event because in his opinion a neuropsychological testing is necessary to most effectively evaluate Plaintiff. Dr. Brown is not a neuropsychologist and thus cannot make the necessary observations. Moreover, Dr. Brown acknowledges that his role as Plaintiff's therapist differs from his role as an expert psychologist, most significantly in the fact that as a therapist Dr. Brown accepts statements made by Plaintiff as true without investigation, while in an expert role, the psychologist would investigate such statements to ascertain their veracity before making a diagnosis or drawing any conclusions.

Analysis

Defendant's contention that Dr. Brown's testimony be excluded raises the issue of whether such testimony is admissible expert testimony under Vermont Rules of Evidence 702. Under that rule an expert qualified by knowledge, skill, experience, training or education may testify if such testimony will "assist the trier of fact understand the evidence or determine a key fact in issue," and if:

> (1) the testimony 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. V.R.E. 702.

This rule is based upon its federal counterpart, which the Court explicitly adopted. See. F.R.E. 702; *985 Assoc. v. Daewoo Electronics America, Inc.*, 2008 VT 14, ¶ 6, 19 Vt.L.W. 39 (citing *State v. Brooks*, 162 Vt. 26, 30 (1993)). As such, the Vermont Supreme Court holds that federal principles governing admissibility of expert testimony should be applied in Vermont, and therefore, the Court has held applicable the U.S. Supreme Court's conclusion in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its progeny, that the test annunciated in F.R.E. 702 and, by extension V.R.E. 702, supersedes the *Frye* test previously applied in Vermont and elsewhere. See *id.* (holding that Vermont's evidence rules are identical to the federal rules and thus federal principles should be applied in Vermont); *Frye v. United States*, 293 F.1013, 1014 (D.C. Cir. 1923) (novel scientific evidence in the form of expert testimony admissible only if the scientific principles supporting the evidence gained general acceptance in the relevant scientific community).

Under the *Daubert* test the Court applies" a flexible standard requiring only that expert testimony be both relevant and reliable to be admissible, and thus, Vermont trial judges must act

as "gatekeepers who screen expert testimony ensuring that it is reliable and helpful to the issue at hand before the jury hears it." *985 Assoc.*, 2008 VT 14, ¶ 6, 8; *USGen New England, Inc. v. Town of Rockingham*, 2004 VT 90, ¶ 15,177 Vt. 193, 199-200. The Court has described this test as a liberal standard for admissibility aimed at keeping "misleading 'junk science propagated primarily for litigation purposes out of the courtroom while simultaneously opening the door to well-reasoned but novel scientific or technical evidence, and therefore, holds that "the trial court's inquiry into expert testimony should primarily focus on excluding 'junk science' – because of its potential to confuse or mislead the trier of fact—rather than serving as a preliminary inquiry into the merits of the case." *985 Assoc.*, 2008 VT 14, ¶¶ 8-10; see also *USGen*, 2004 VT 90, ¶ 15 (Frye test replaced by the more flexible *Daubert* test which requires only that trial judge ensure that scientific testimony admitted is relevant and reliable). Moreover, "scientific evidence 'does not alone have to meet the proponent's burden of proof on a particular issue' to be admissible", and instead, need only "establish its reliability to present it to the trier of fact for an ultimate determination on the merits." *985 Assoc.*, 2008 VT 14, ¶ 13 (quoting *USGen*, 2004 VT 90, ¶ 19).

Indeed, in *985 Associates*, the Court reversed the trial court's exclusion of expert testimony on the rationale that the opinions of the experts on the cause of a fire which was the only issue of fact in the case were "undeniably relevant", and that the trial court erred in using "the reliability prong of the *Daubert* analysis to make a substantive determination on the merits of plaintiff's case." 2008 VT 14, ¶ 11. According to that Court, by making such substantive determination and excluding the expert testimony, the trial court improperly usurped the jury's function as fact-finder, and instead, should have permitted the jury to assess the credibility of the expert witnesses and determine for itself the weight to be assigned to such testimony. See *Id.* at ¶ 16. ("So long as scientific or technical evidence has a sound factual and methodological basis

and is relevant to the issues at hand, it is within the purview of the trier of fact to assess its credibility and determine the weight to be assigned to it.").

Here, Defendant suggests that Dr. Brown's proffered testimony should be excluded because, while relevant to the issues in the case, Dr. Brown is unqualified to render an expert opinion and his conclusions are not based on sufficient facts or data. In the Court's view, Dr. Brown is unquestionably qualified to testify as an expert in the instant case. Deposition testimony firmly establishes that Dr. Brown is a Vermont licensed psychologist making it appropriate for him to testify in an expert capacity, as proffered in this case, as to his psychological diagnoses of Plaintiff. While Defendant suggests that Dr. Brown's admission that he is not a certified neuropsychologist is fatal to Plaintiff's attempt to call him as an expert witness, there is no evidence that Dr. Brown's testimony would include neuropsychological conclusions, and in fact, Dr. Brown's own admission that he is not certified as such, indicates an understanding by the expert that he cannot testify beyond his own area of expertise. As such, the Court concludes that provided Dr. Brown testifies, as proffered, as to his own diagnosis and psychological conclusions only, he is qualified to testify as an expert.

Defendant additionally avers that Dr. Brown's testimony is inadmissible because it does not have sound methodological and factual bases. In the Court's view, however, Dr. Brown's testimony certainly meets the standards for scientific reliability set forth in V.R.E. 702 and is not based on the type of "junk science" that *Daubert* and its progeny intended to thwart. Indeed, the opinions and conclusions proffered are supported by good grounds based on what is known—the statements of Plaintiff during treatment sessions. Furthermore, no evidence has been presented even suggesting that the methodology used by Dr. Brown in developing his conclusions based on unverified statements from his patient, Plaintiff, are improper, and in fact, Dr. Brown's

uncontroverted deposition testimony establishes that his practices are commonplace in clinical psychology. As such, the Court cannot conclude that the proffered testimony fails to meet the reliability prong of V.R.E. 702's standards for admissibility of expert testimony.

Nevertheless, Defendant suggests that the Court use the reliability prong of this analysis to make a substantive judgment on the credibility of Dr. Brown's testimony. As acknowledged in *985 Associates*, only the jury as fact-finder is entitled to assess credibility of witnesses and determine the weight to be given to each piece of evidence, and thus, it is not the role of this Court to evaluate the credibility of Dr. Brown's testimony. Defendant's concerns regarding the accuracy of Dr. Brown's conclusions do not implicate the admissibility of his testimony, but instead address the weight that such testimony should be given, a subject which can properly be dealt with on cross-examination, and is fully with the province of the jury. Thus, the Court declines Defendant's invitation to consider the substantive value of Dr. Brown's testimony in making the instant admissibility decision, and instead opts to allow the "adversarial process to draw out any deficiencies in the expert testimony." *985 Assoc.*, 2008 VT 14, ¶ 16.

Finally, Defendant alleges that the motion in limine excluding Dr. Brown's testimony should be granted because Dr. Brown's testimony, which is based in part on statements made by Plaintiff, will necessarily repeat testimony or allegations of Plaintiff thus giving such statements or allegations an imprimatur of truth and invading the jury's sole role as fact-finder. Such argument is based on a string of cases involving testimony of evaluating psychologists in child sexual assault cases where the Court held that when the central issue in the case is the testimony of a complaining child witness as to whether abuse occurred, it is improper for a psychologist, or other expert, who evaluated the complainant to testify to the same facts as the child witness because such testimony has the effect of being a "truth detector" and lends an "improper 'aura of

special reliability and trustworthiness' to a complainant's testimony." *State v. Wetherbee*, 156 Vt. 425, 432-33 (1991); see also *State v. Weeks*, 160 Vt. 393, 399-403 (1993). The instant case differs from these truth detector cases, however, because not only is the instant case not a child sexual assault case, but the central issue here is not the credibility of Plaintiff as to whether an event happened, i.e. the accident, but rather, is the alleged liability of the Defendants for the car accident, which can be proven by objective third party evidence. Moreover, Dr. Brown's testimony in this case, while based upon statements made by Plaintiff, will focus on the psychological effects the car accident had on Plaintiff, i.e. Plaintiff's post traumatic stress disorder, and likely will not necessitate much repetition of statements made by Plaintiff, and as such, there is little risk of Dr. Brown serving as an improper truth detector. Cross-examination can certainly deal with these concerns along with cautionary jury instructions on the issue if appropriate. Accordingly, Defendant's motion in limine cannot be granted on these grounds.

ORDER

Defendants' Motion in Limine is **DENIED.**

Dated at Bennington, Vermont, this _____ day of _____, 2008.

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David Howard
Presiding Judge