

Pfeifer v. Blake, No. S0236-08 CnC (Toor, J., Oct. 15, 2009)

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STATE OF VERMONT  
CHITTENDEN COUNTY

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BRENDA PFEIFER and JOHN  
PFEIFER  
Plaintiffs

v.

KIMBERLY BLAKE and  
AFFILIATES IN OBSTETRICAL  
AND GYNECOLOGICAL CARE, INC.,  
Defendants

SUPERIOR COURT  
Docket No. S 0236-08 CnC

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RULING ON DEFENDANT'S MOTION IN LIMINE

This is a medical malpractice case in which Plaintiff Brenda Pfeifer (“Pfeifer”) alleges that as a result of a botched surgical procedure in 2007 she has required additional surgeries, has suffered great pain and emotional distress, and has incurred and will incur ongoing medical expenses. The gist of the claim is that Dr. Blake negligently perforated Pfeifer’s bowel, leading to sepsis and subsequently (approximately five months later) to the development of an autoimmune disease. Defendants have filed a motion in limine seeking to exclude on Daubert grounds the testimony of Plaintiff’s medical expert, Dr. Marilyn Pike. *See Daubert v. Merrel Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Relevant Facts

Dr. Pike is a medical doctor with degrees in microbiology and immunology. She is a Clinical Associate Professor at Harvard Medical School. Although not currently

board-certified in internal medicine, she is “sub-certified” in Massachusetts in rheumatology. She sees rheumatology patients one day a week. She has published a number of articles in the areas of microbiology, immunology, and rheumatology, and has been on the editorial boards of two peer-reviewed journals. Apparently most of her current work is doing clinical testing of drugs for pharmaceutical companies.

The opinion that Dr. Pike offers in this case is that Pfeifer “suffers from an autoimmune disease affecting her connective tissue which, to a reasonable degree of medical certainty, was a direct result of exposure to an intense-antigen overload caused by the injury to her bowel during the surgery done by Dr. Blake on April 6, 2007.” Affidavit of Marilyn C. Pike, M.D., ¶ 80 (August 11, 2009). She explains in her affidavit that “my findings are consistent with a diagnosis of Systemic Lupus Erythematosus with features of limited scleroderma,” and that her findings “are not inconsistent with [the treating doctor’s and the Defendants’ expert’s] diagnoses of undifferentiated connective tissue disease (UCTD) also known as undifferentiated systemic rheumatic disease.” *Id.* ¶¶ 55-56.

With regard to the causation issue in this case, Dr. Pike goes on to explain that “[t]he medical community has known of the connection between infection and autoimmune disease in genetically predisposed individuals for decades.” *Id.* ¶ 63. She states that “[t]he methodology I used in this case to determine whether Mrs. Pfeifer had an autoimmune disease is sometimes known as ‘differential diagnosis’ or differential etiology.” *Id.* ¶ 64. In other words, ruling out possible alternative diagnoses. She goes on: “Given the temporal relationship between Mrs. Pfeifer’s life-threatening, prolonged antigen (bacterial and bacterial products) overload and the established fact that bacterial

infection triggers autoimmune disease in genetically predisposed individuals (examples include rheumatic fever, post-streptococcal arthritis, reactive arthritis, and polyarthritis in patients who had a bypass for obesity), there is no doubt but that I should have considered small bowel perforation as a possible cause of Mrs. Pfeifer's autoimmune disease." Id. ¶ 67. The balance of Dr. Pike's affidavit essentially says that (1) we know that infection can cause some autoimmune diseases, although we have no scientific evidence of that with regard to the specific disease Pfeifer appears to have, (2) Pfeifer had infection first and autoimmune disease several months later, (3) we can't figure out any other cause, so therefore (4) the infection must be the cause here. Id. ¶¶ 68-80.

Defendant's medical expert, Dr. Michael Weisman, is Director of the Division of Rheumatology at Cedars-Sinai Medical Center and Professor of Medicine at UCLA. He is also Professor Emeritus of Medicine at the University of California at San Diego. He is board certified in medicine and rheumatology and has an extensive list of publications and memberships related to arthritis and rheumatology. His opinion in this case is that Pfeifer "has what is known as an undifferentiated connective tissue disease" which has "not evolved into diagnosable systemic lupus erythematosus (SLE), scleroderma (SSC), or mixed connective tissue disease (MCTD)." Affidavit of Michael H. Weisman, M.D., ¶ 3 (May 1, 2009). It is also his opinion that her "development of undifferentiated connective tissue disease was not caused by her surgical complication, infection or resulting hospitalization in 2007." Id. ¶ 4. He goes on to say that he is "unaware of any epidemiologic or clinical evidence that supports a causal link between bacterial infections, including sepsis, and Mrs. Pfeifer's condition." Id. Therefore, he concludes

that Dr. Pike's opinion is "unsubstantiated and unreliable and not supported by either the peer-reviewed rheumatology literature or accepted science in the field." Id.

In response to the motion to exclude Dr. Pike's testimony, Plaintiff discusses at length the issue of "differential diagnosis." However, Plaintiff also states that she "now suffers from an autoimmune disease, undifferentiated connective tissue disease..." Brenda and John Pfeifer's Memorandum in Opposition to Defendants' Motion to Exclude the Testimony of Marilyn Pike, M.D., p. 1 (filed Aug. 14, 2009) ("Mem. In Opp."). Thus, both sides agree that Pfeifer has undifferentiated connective tissue disease, so the diagnosis is not the issue. What is at issue is the question of causation.

With respect to causation, Plaintiff argues that Dr. Weisman himself conceded at deposition that certain autoimmune diseases can be triggered by infection, and goes on to describe a "consensus within the medical community that bacterial infection can trigger autoimmune disease." Id. pp. 14-16. Plaintiff also points to the "temporal relationship" between the surgery and sepsis and the development of the disease -- a period of five months. She concludes that all we have here is a difference of opinion between two doctors over causation.

In response, Dr. Weisman states in a second affidavit that that "the environmental factors that trigger [UCTD] are completely unknown" and "there is absolutely no respected, peer reviewed literature which supports Dr. Pike's novel causation theory." Second Affidavit of Michael H. Weisman, M.D., ¶ 3 (filed Sept. 22, 2009). He also states that the other diseases to which Dr. Pike analogizes UCTD "are genetically and clinically different from UCTD, such that it is improper, indeed purely speculative, to rely on the etiology of those diseases in asserting that there is a bacterial etiology for UCTD." Id. ¶

6. Plaintiff fails to respond with any medical literature or other support for Dr. Pike's theory of causation here.

With their reply papers, Defendants submit an affidavit from a Dr. Harley, to which Plaintiff objects. Because the court finds it unnecessary to go beyond the record described above to determine this motion, the court need not consider Dr. Harley's affidavit. The motion to strike it is therefore moot.

### Conclusions

The court's task in assessing a Daubert motion is not to decide which expert is more credible, but to determine whether the expert testimony proffered is sufficiently reliable to be presented to a jury. Generally speaking, although Daubert and its progeny are often cited as if they were iron bars at the door of the courtroom, the Vermont Supreme Court has at times interpreted them more as a welcome sign. "We adopted the Daubert decision precisely because it comported with the 'liberal thrust' of the rules of evidence and broadened the types of expert opinion evidence that could be considered by a jury at trial." 985 Associates, LTD. v. Daewood Electronics America, Inc., 2008 VT 14, ¶ 9, 183 Vt. 208 (citation omitted). Thus, instead of the older test requiring that the evidence be generally accepted in the scientific community, "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." Id. ¶ 10 (citation omitted).

Despite this open door policy, the trial court has an obligation to assess challenged expert testimony. "[T]rial 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. If the judge finds that the evidence meets both Daubert prongs, the proponent may then present its expert.” USGen New England, Inc. v. Town of Rockingham, 2004 VT 90, ¶ 19, 177 Vt. 193 (citation omitted). If both prongs (relevancy and reliability) are not met, the evidence must be excluded. *Cf.* State v. Charbonneau, 2009 VT 86, ¶ 16 n.4 (Mem.)(noting that “the trial court erred in performing its role as gatekeeper” when it allowed expert testimony without considering the Daubert challenge raised).

The issue here is reliability. “To be reliable, expert testimony must be supported by scientific knowledge,” which means that it is “ground[ed] in the methods and procedures of science.” In re Appeal of JAM Golf, LLC, 2008 VT 110, ¶ 8, quoting Daubert, 509 U.S. at 590 (internal citations omitted). The knowledge in question “must be more than a subjective belief or speculation.” JAM Golf, ¶ 8. In determining reliability, courts often consider several factors. These may include, but are not limited to, whether the scientific technique can be tested, whether it has been peer reviewed, what error is associated with the technique, and its acceptance in the scientific community. Id. In this case, Plaintiff offers no evidence to support any of these elements of the analysis. Nor does she offer any other evidence to suggest that anyone in the scientific community other than Dr. Pike believes that the disease here can be causally linked to prior surgery and resulting sepsis.

Plaintiff argues that the motion here “is nothing more than an assertion that ‘my expert is better than yours.’” Mem. In Opp., p. 18. While the court finds that to be a good description of most Daubert motions, it is not so in this case. Here, Dr. Pike has offered no evidence at all that her theory of causation has any scientific support. It basically consists of “well, other things like this can be caused by infection, and I can’t see any

other explanation, so it must be this even though no one has ever studied it or reached any clinically-supported conclusions about it.” This is precisely the sort of unsupported opinion evidence that Daubert directs courts to exclude from jury consideration.<sup>1</sup>

Order

The motion to exclude Dr. Pike’s testimony is granted. The motion to strike the affidavit of Dr. Harley is denied as moot.

Dated at Burlington this            day of October, 2009.

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Helen M. Toor  
Superior Court Judge

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<sup>1</sup> Although Defendant requested a hearing on the motion, Plaintiff expressly waived any right to such a hearing. *See* Brenda Pfeifer’s and John Pfeifer’s Objection to Defendant’s Motion for an Evidentiary Hearing (filed October 5, 2009). Given the detailed affidavits and deposition testimony submitted by the parties, the court sees no need for a hearing.