

CHERYL MILLARD and
RICHARD MILLARD

Plaintiffs

vs.

JIFFY MARKET & DELI INC.,
MARVIN H. WILLITS and
ALAN H. WILLITS,

Defendants

: IN THE COURT OF COMMON PLEAS OF
: LYCOMING COUNTY, PENNSYLVANIA

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: NO. 03-00,639

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: MOTION TO EXCLUDE

: EXPERT TESTIMONY

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Date: August 12, 2005

OPINION and ORDER

Before the court for determination is the Motion to Exclude Expert Testimony pursuant to Pa.R.C.P 201.1 of Defendants Jiffy Market & Deli, Incorporated, Marvin H. Willits, and Alan H. Willits filed June 15, 2005. The court will deny the motion.

Background

This is a personal injury case. On May 10, 2001, Cheryl Millard was inside the Jiffy Market & Deli. She alleges that a wet and slippery substance was present on the floor of the Jiffy Market & Deli. Millard further alleges that it was this substance which caused her to slip and fall. As a result of this fall, Millard alleges that she sustained injuries to her neck, back, shoulders, arms, and legs.

Plaintiffs contend that that the fall caused Cheryl Millard to experience a condition called fibromyalgia, or in the alternative, the fall worsened her existing fibromyalgia. Fibromyalgia is a condition characterized by pain in the muscles, ligaments, and tendons of the body. In order to establish the causal connection between the fall and the fibromyalgia,

Plaintiffs will be offering the testimony of Cheryl Millard's family physician, Stephen Goykovich, M.D. In a letter to the Erie Insurance Group dated November 19, 2002, Dr. Goykovich stated:

Regarding Cheryl Millard, I did treat her for injuries sustained from her fall on March 18, 2001, and also for her fall on May 10, 2001. Since the May 10, 2001 fall, Cheryl has had more persistent problems with chronic pain and fibromyalgia. Although I would not be able to say with certainty that the May 10, 2001 fall caused her fibromyalgia, I can say that it made it worse.

Plaintiffs' Response to Motion to Exclude Expert Testimony, Exhibit A. (emphasis in original).
Defendants seek to preclude this opinion of Dr. Goykovich.

Defendants' basic argument is as follows: Expert testimony must be precluded if it relies upon novel scientific evidence. Dr. Goykovich relied upon novel scientific evidence in order to form the opinion that Cheryl Millard's fall worsened her fibromyalgia. Therefore, Dr. Goykovich's opinion that Cheryl Miller's fall worsened her fibromyalgia must be precluded. Defendants argue that Dr. Goykovich's opinion is based upon novel scientific evidence in that it is based upon the alleged causal relationship between trauma and fibromyalgia. Defendants argue that the causal link between trauma and fibromyalgia has not gained general acceptance within the medical community.

Issue

The issue before the court is whether the *Frye* test precludes Dr. Goykovich from offering an expert opinion that Cheryl Millard's May 10, 2001 fall in the Jiffy Market & Deli worsened her fibromyalgia?

Discussion

The opinion will first set forth the general principles of the *Frye* test and the test itself. The opinion will then address the effect of the holding of *Cummins v. Rosa*, 846 A.2d 148 (Pa. Super. 2004) on the *Frye* test. Then the opinion will apply the post-*Cummins Frye* test to the case at hand.

I. The Frye Test

The admission or exclusion of evidence rests with the broad discretion of the court. *Blum v. Merrell Dow*, 705 A.2d 1314, 1317 (Pa. Super. 1997), *aff'd*, 764 A.2d 1 (Pa. 2000). With regard to the admission of expert evidence, that discretion is tempered by the requirement that the proffered evidence meets the requirements of the *Frye* test. *Ibid.* The *Frye* test sets forth an exclusionary rule of evidence. *M.C.M. v. Milton Hershey Med. Ctr.*, 834 A.2d 1155, 1158 (Pa. Super. 2003); *Trach v. Fellin*, 817 A.2d 1102, 1104 (Pa. Super. 2003). Because of this, the test must be narrowly construed so as not to impede the admissibility of evidence that could aid the trier of fact. *Carroll v. Avallone*, 869 A.2d 522, 525 (Pa. Super. 2005). The *Frye* test does not apply every time science enters the courtroom. *Trach*, 817 A.2d at 1109. The *Frye* test only applies when a party seeks to introduce novel scientific evidence. *Cummins*, 846 A.2d at 150.

The proponent of the expert scientific evidence bears that burden of establishing its admissibility under *Frye*. *Grady v. Frito-Lay, Inc.*, 839 A.2d 1038, 1045 (Pa. 2003). Under the *Frye* test, a party seeking to introduce novel scientific evidence must demonstrate that the relevant scientific community has reached general acceptance of the principles and methodology employed by the expert witness before the expert witness will be allowed to

testify as to his conclusions. *Cummins*, 846 A.2d at 150. The *Frye* test does not require that the expert's conclusions be generally accepted. *Carroll*, 869 A.2d at 525. The inquiry under the *Frye* test to determine whether “a particular scientific process is ‘generally accepted’ is an effort to ensure that the *result* of the scientific process, i.e. the proffered evidence, stems from ‘scientific research which has been conducted in a fashion that is generally recognized as being sound, and is not the fanciful creations [sic] of a renegade researcher.’” *Cummins*, 846 A.2d at 151 (quoting *M.C.M.*, 834 A.2d at 1158-59) (emphasis in original).

II. Cummins v. Rosa

In *Cummins*, the plaintiff brought a medical malpractice action against her surgeons and hospital. 846 A.2d at 149. The plaintiff alleged that the surgeon negligently damaged her right ureter during an aortobifemoral bypass, which resulted in urine leaking into her abdomen causing the loss of her right kidney and nerve damage in her left leg. *Ibid*. The surgeons and hospital filed a motion to exclude the testimony of plaintiff's expert witnesses with regard to their conclusions as to the cause of her injuries since the conclusions were inadmissible under *Frye* because the medical community had not generally accepted them. *Id.* at 150. The trial court denied the motion and the post-trial motion requesting a new trial which asserted that the trial court committed reversible error by denying the *Frye* motion.

The Superior Court found that the trial court did not abuse its discretion by denying the *Frye* motion. *Cummins*, 846 A.2d at 151. The Superior Court stated that the defendants had not challenged the methodology used by the expert witnesses, but instead challenged their conclusions. *Ibid*. The *Frye* test does not require that the relevant scientific community generally accept the conclusions reached by the expert witness. Therefore, the Superior Court

found that the defendants' challenge to the testimony of the expert witnesses was a challenge to the weight of that testimony and not to its scientific validity. *Ibid.*

In the final substantive paragraph of the opinion, the Superior Court addressed the defendants' argument that " 'in cases that turn on scientific causation, the causal relation itself must be accepted as a general matter in the relevant scientific community before expert testimony of the existence of causality in the particular case may be properly admitted.'" *Cummins*, 846 A.2d at 151. (quoting Appellant/Defendant's Brief, 16). The Superior Court rejected this argument as contrary to the law of the Commonwealth with respect to the *Frye* test. *Ibid.* In reaching this conclusion, the Superior Court noted that the cases relied upon by the defendants to support this argument were specifically disapproved in *Trach*, *supra*.

The cases that the *Trach* Court disapproved of were: *Thomas v. West Bend Co., Inc.*, 760 A.2d 1174 (Pa. Super. 2000), *app. denied*, 781 A.2d 147 (Pa. Super. 2001); *Wack v. Farmland Industries, Inc.*, 744 A.2d 265 (Pa. Super. 1999), *app. denied*, 771 A.2d 1287 (Pa. 2001); and *Blum*, 705 A.2d 1317 (Pa. Super. 1997). In *Thomas*, the Superior Court determined that the expert opinion was inadmissible because the expert's conclusion that a causal connection existed between low voltage electric shock and the plaintiff's cardiomyopathy had not gained general acceptance in the scientific community. 760 A.2d at 1175. In *Wack*, the Superior Court held that the expert opinion was inadmissible under *Frye* because the conclusion that there was a causal link between benzene exposure and plaintiff's adenocarcinoma of the buccal cavity (a rare form of cancer affecting the salivary glands) had not gained general acceptance in the scientific community. 744 A.2d at 271. In *Blum*, the Superior Court held that the expert opinion that the ingestion of the drug Bendectin by the

plaintiff mother during pregnancy caused the plaintiff child's clubfeet was inadmissible under *Frye* because the underlying principle from which the conclusion was reached, that Bendectin caused birth defects, had not gained general acceptance in the scientific community. 705 A.2d at 1322. The *Trach* Court disapproved of these cases because each, but to a lesser extent in *Blum*, applied the "two bases" analysis and required that the conclusion reached by the expert to have gained general acceptance by the relevant scientific community.

In *Trach*, the Superior Court rejected the "two bases" analysis under the *Frye* test. 817 A.2d at 1112. Under the "two bases" analysis, a court would apply the *Frye* test by determining whether the causal relationship and methodology were generally accepted by the scientific community. *Blum*, 705 A.2d at 1322. The *Trach* Court disapproved of the "two bases" analysis because the requirement that the causal relationship must have gained general acceptance in the relevant scientific community had been misapplied so as to go beyond the scope of the *Frye* test. The *Frye* test does not require that the relevant scientific community generally accept the conclusions reached by the expert witness before a court may allow the expert witness to testify. *Trach*, 817 A.2d at 1112. Thus, the rule emerging from *Trach* was that the relevant scientific community did not have to generally accept the conclusion reached by the expert witness in the form of a causal relationship before the expert witness would be permitted to testify as to that conclusion.

The *Cummins* case expanded this rule. The rule emerging from the last paragraph of that case is that the relevant scientific community does not have to generally accept the underlying principle of a causal relationship from which the conclusion was reached. Thus, the *Cummins* case holds that the *Frye* test does not require that the causal relationship be generally

accepted by the relevant scientific community, whether that causal relationship is the conclusion reached by the expert witness or the principle from which the expert witness reached that conclusion.¹

III. Application of Post-Cummins Frye Test

Dr. Goykovich's conclusion is that the May 10, 2001 fall worsened Cheryl Millard's fibromyalgia. The underlying principle from which Dr. Goykovich drew this conclusion was that there is a causal relationship between trauma and fibromyalgia. Defendants assert that this underlying principle of a causal relationship has not been generally accepted by the relevant scientific community. On this point, even documents cited by Plaintiffs state that the cause for fibromyalgia is unknown. Plaintiffs' Response to Defendants' Motion to Exclude Expert Testimony, Exhibit F ("FMS (fibromyalgia syndrome) is a widespread musculoskeletal pain

¹ The court believes that the *Cummins* decision's expansion of the *Trach* decision weakens the *Frye* test. In *Trach*, the Superior Court addressed the misapplication of the *Frye* test where courts required the expert witness' conclusions be generally accepted in the relevant scientific community. This is clear in the Superior Court's disapproval of the "two bases" analysis and the *Thomas*, *Wack*, and *Blum* decisions. But, no where in the opinion does the Superior Court state that the underlying principle of causation from which the expert witness derived his conclusion is exempt from the requirement that it be generally accepted by the relevant scientific community. On this point, the Superior Court quoted the Supreme Court stating, " 'While courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, **the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.**' " *Trach*, 817 A.2d at 1118 (quoting *Commonwealth v. Nazarovitch*, 436 A.2d 170, 172 (Pa. 1981)) (emphasis in original). In fact, the *Trach* decision was consistent with the *Frye* test's requirement that both the principle and methodology employed by the expert witness be generally accepted by the relevant scientific community. In its analysis of plaintiff's expert witness, the Superior Court found that both the principle (the Dose-Response Principle) and the methodology (extrapolation) had gained general acceptance.

The rule emerging from the *Cummins* decision erodes the principle prong of the *Frye* test. Relating to causation, the post-*Cummins Frye* test creates a situation where no matter how far fetched and illogical the starting point is so long as the expert witness uses a generally accepted methodology to get from that point to his conclusions then his opinion is admissible. While certainly providing ample fodder for cross examination, this result defeats the purpose of the *Frye* test by permitting junk science to go before the fact finder that in no way aids it in resolving an issue which is supposedly beyond the knowledge possessed by a layperson. However, the court's disagreement with the *Cummins* decision does not relieve it of the obligation to follow that decision. See, *Commonwealth v. Martin*, 727 A.2d 1136, 1141 (Pa. Super.1999), *app. denied*, 745 A.2d 1220 (Pa. 1999) (A decision of the Superior Court is the law of the Commonwealth until overruled by the Pennsylvania Supreme Court).

and fatigue disorder for which the cause is still unknown.”). However, this type of argument was specifically rejected by the Superior Court in *Cummins*. Accordingly, Defendants’ argument must fail and the motion must be denied

But, there is an issue with regard to the methodology employed by Dr. Goykovich to reach his conclusion. Plaintiffs, without any supporting documentation, assert in their brief in opposition to the motion to exclude expert testimony that, “It is further anticipated that Dr. Goykovich will testify that his conclusions are based upon his education and experience as well as clinical assessment of Cheryl Millard.” Plaintiffs’ Brief in Opposition to Defendants’ Motion To Exclude Expert Testimony, 4. This type of methodology is generally accepted. *Cummins*, 846 A.2d at 151 (Doctors’ review of plaintiff’s medical records and reliance upon respective personal expertise to reach a conclusion regarding the source of plaintiff’s injuries is a generally accepted methodology.). The problem is that the record before the court is too vague to determine at this point that Dr. Goykovich’s causal opinion will be or is based upon what Plaintiffs’ counsel has asserted in their brief. Furthermore, the extent of the education and experience Dr. Goykovich is utilizing is not apparent. Dr. Goykovich’s education and experience may or may not be sufficient to allow him to make the causal statement expressed in his November 19, 2002 letter.

Plaintiffs also assert that Dr. Goykovich relied upon additional medical reports in reaching his causal connection conclusion. The court must note that these reports, attached to Plaintiffs’ response to the motion to exclude expert testimony, only support Dr. Goykovich’s conclusion that Cheryl Millard suffers from fibromyalgia. The medical reports do not express

any opinion as to a causal link between the fibromyalgia and Cheryl Millard's May 10, 2001 fall inside the Jiffy Market & Deli.

Therefore, while we cannot grant Defendants' motion to exclude Dr. Goykovich's testimony at this time, it remains an issue to be resolved at trial as to whether Dr. Goykovich will be able to attribute his conclusion to a proper methodology.

Conclusion

Defendant's motion to exclude expert testimony is denied.

ORDER

In accordance with the foregoing opinion it is hereby ORDERED that Defendants' Motion to Exclude Expert Testimony pursuant to Pa. R. C. P. 207.1 filed June 15, 2005 is DENIED, without prejudice to the Defendants may raise at trial the issue of whether Dr. Goykovich has utilized a proper methodology to reach his causal connection conclusion.

BY THE COURT,

William S. Kieser, Judge

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