

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

TINA A. ATWELL and ASHLEY ATWELL, :
a minor by her next friend, TINA A. ATWELL, : C.A. No. 02C-12-003 WLW
:
Plaintiffs, :
:
v. :
:
RHIS, INC. d/b/a RELIABLE HOME :
INSPECTION SERVICE, a Delaware :
corporation, RICHARD DAVIS, and LITITZ :
MUTUAL INSURANCE COMPANY, a :
foreign corporation, :
:
Defendants. :

Submitted: March 8, 2006
Decided: August 11, 2006

ORDER

Upon Defendant Richard Davis' Motion in Limine to
Exclude Expert Testimony of Eckardt Johanning, M.D..
Denied.

William D. Fletcher, Jr., Esquire of Schmittinger & Rodriguez, P.A., Dover, Delaware and
Mary F. Higgins, Esquire, Odessa, Delaware; co-counsel for Plaintiffs.

Robert K. Pearce, Esquire of Ferry Joseph & Pearce, P.A., Wilmington, Delaware; attorneys
for Defendant Richard Davis.

Norman H. Brooks, Esquire of Marks O'Neill O'Brien & Courtney, P.C., Wilmington,
Delaware; attorneys for Defendant RHIS.

Steven P. Casarino, Esquire of Casarino Christman & Shalk, P.A., Wilmington, Delaware;
attorneys for Defendant Lititz Mutual Insurance Company.

WITHAM, R.J.

Defendant, Richard Davis, filed a motion in limine seeking to exclude the testimony of Eckardt Johannig, M.D. (“Dr. Johannig”). Dr. Johannig intends to testify as to the causal connection between Plaintiffs’, Tina and Ashley Atwell, alleged exposure to microbial contamination in their home and their alleged injuries. Defendant asserts that his testimony lacks a sufficient methodological foundation and the bases for Dr. Johannig’s opinions are not reasonably relied upon by experts in the field. Plaintiffs argue that the opinions are admissible because failure to exclude all possible causes goes to the weight of the expert’s testimony, not to its admissibility.

For the reasons set forth below, Defendant’s motion to exclude the testimony of Dr. Johannig is *denied*.

Discussion

The trial judge serves as a gatekeeper in the admissibility of expert testimony and must determine whether such testimony is reliable and relevant. The objective of this gatekeeping function is “to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.”¹ As set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,² the trial judge must determine at the outset whether the

¹*Ward v. Shoney’s, Inc.*, 817 A.2d 799 (Del. 2003).

²509 U.S. 579 (1993).

expert is proposing to testify to scientific knowledge that will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning and methodology can be properly applied to the facts in issue.³ The Delaware Supreme Court has adopted a five-part test to determine the admissibility of expert or scientific testimony which requires the trial judge to decide whether:

- (1) The witness is qualified as an expert by knowledge, skill, experience, training or education;
- (2) The evidence is relevant and reliable;
- (3) The expert's opinion is based upon information reasonably relied upon by experts in a particular field;
- (4) The expert testimony will assist the trier of fact to understand the evidence or to determine a fact in issue; and
- (5) the expert testimony will not create unfair prejudice or confuse or mislead the jury.⁴

Defendant claims that Dr. Johanning's testimony is unreliable because it is based on an insufficient methodological foundation. Specifically, he argues that while Dr. Johanning could properly rely on differential diagnosis under the appropriate circumstances, those circumstances are not present in this case. For

³*Crowhorn v. Boyle*, 793 A.2d 422, 433 (Del. Super. 2002).

⁴*Id.* at 430.

instance, in both Plaintiffs' cases, there was substantial documentation of similar medical problems for several years prior to them moving into the house.

However, Plaintiffs cite *New Haverford Partnership v. Stroot*,⁵ where the Delaware Supreme Court, in determining that the trial court's decision to admit the causation opinion was correct, stated the failure to eliminate other possible causes of plaintiffs' health problems went to "the weight of the experts' opinions, not their admissibility." Therefore, Dr. Johanning's testimony should be admitted.

Defendant's second argument is that Dr. Johanning's opinions are not based on information reasonably relied upon by experts in his field. For this issue, there are four additional, nonexclusive factors that the Court may consider in assessing the reliability of expert opinions. They are:

- (1) whether the opinion at issue is susceptible to testing and has been subjected to such testing;
- (2) whether the opinion has been subjected to peer review;
- (3) whether there is a known or potential rate of error associated with the methodology used and whether there are standards controlling the technique's operation; and
- (4) whether the theory has been accepted in the scientific community.⁶

It should be noted that these factors are simply things that this Court may

⁵772 A.2d 792, 800 (Del. 2001).

⁶*Long v. Weider Nutrition Group, Inc.*, 2004 Del. Super. LEXIS 204, *15.

consider. “These factors do not function as a ‘definitive checklist or test.’ Rather, courts should apply the factors . . . in a flexible manner that takes into account the particular specialty of the expert under review and the particular facts of the underlying case.”⁷ In an effort to be thorough, I will address each factor below.

As for the first factor, Defendant argues that there are no tests linking either of Plaintiffs’ injuries to any mold and/or bacteria in their home. However, Plaintiffs mention that Defendant’s arguments all go to the weight of the opinions, not their admissibility, because they attack the conclusions of the test, not the methodology. In fact, Plaintiffs assert that the same tests performed by Dr. Johanning (i.e. the blood tests) were performed by Defendant’s experts. This Court views the validity of the test “solely on principles and methodology, not on the conclusions that they generate.”⁸ Thus, because Defendant’s contentions address the conclusions of Dr. Johanning’s tests, rather than his principles or methodology, this factor is satisfied.

The second factor is whether the opinion has been subjected to peer review. Defendant claims that the theories Dr. Johanning espouses have only been published in journals edited by himself. Conversely, Plaintiffs specifically mention two national publications, wherein Dr. Johanning published peer-reviewed articles. In total, they assert that five of Dr. Johanning’s articles have been subjected to the

⁷*State v. McMullen*, 900 A.2d 103, 113 (Del. 2006) (citations omitted).

⁸*State v. Hammons*, 2002 WL 484645, *7 (Del. Super.).

rigorous peer-review process. Thus, this Court finds that Dr. Johanning's opinions have been subjected to peer review.

The third factor concerns error associated with the methodology. Neither party specifically explains Dr. Johanning's methodology. Defendant cites to an article from a doctor asserting that the controls Dr. Johanning and his colleagues used in a prior study were problematic because its impossible to have someone who is "a mold unexposed or a mycotoxin unexposed person." However, Plaintiffs provide four articles that purport to substantiate Dr. Johanning's conclusion that exposure to mold increases the risk of certain health effects, mainly respiratory symptoms.

Defendant also cites to two cases, both of which are distinguishable from this case. First, *Crowhorn v. Boyle*⁹ is different because the Court found that the doctor's methodology was unsupported by scientific data and was factually flawed. In the case *sub judice*, there is no information that would support either of those two conclusions. As for the second case Defendant cited, *Minner v. American Mortgage and Guaranty Company*,¹⁰ the Court did not allow the expert to testify for a number of reasons, one of which was that she was unable to provide any scientific support for her opinion, so the Court determined that it would not rely solely on her word. Here, Dr. Johanning does have scientific support for his opinions. Thus, Dr.

⁹793 A.2d 422, 431 (Del. Super. 2002).

¹⁰791 A.2d 826, 851 (Del. Super. 2000).

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Johanning is not disqualified under this factor.

The final factor is whether the theory has been accepted in the scientific community. Defendant characterizes the standard as “generally accepted.” He then cites to articles that have concluded that mold does not cause health problems unless the person has an impaired immune system. Plaintiffs contend that the correct standard is “reasonably reliable” and cite to four articles that have determined that damp buildings cause adverse health effects. According to Plaintiff, the relevant theory in this case is that exposure to damp environments can cause allergic reactions and respiratory illnesses. The articles Plaintiffs provide support that theory. Conversely, the articles Defendant mentions deal more specifically with mold. Consequently, I find that Dr. Johanning’s theory has been accepted in the scientific community.

Based on the foregoing, Defendant’s motion to exclude the testimony of Dr. Johanning is *denied*. IT IS SO ORDERED.

/s/ William L. Witham, Jr.
R.J.

WLW/dmh
oc: Prothonotary
xc: Order Distribution