

DONTAE WALLACE, et al.
Plaintiffs

v.

**THE KENNEDY KRIEGER
INSTITUTE, et al.**
Defendants

* IN THE
*
* **CIRCUIT COURT**

*
* **FOR**

*
* **BALTIMORE CITY**

* **CASE NO.: 24-C-07-002026**

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ORDER

Upon consideration of the Motions, parties' arguments, applicable case authorities, Maryland Rule 5-702, and for reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that Defendants' Kennedy Krieger/Farfel Request for Hearing as to Motion in Limine (348) to Exclude Expert Testimony of Robinson-Josey, Sweeney, Zuckerberg is **GRANTED**, and the Motion shall be addressed at an evidentiary hearing on September 10-11, 2009; and

ORDERED that Defendants' request for evidentiary hearing as to Kennedy Krieger/Farfel's Motion in Limine (347) to Exclude Cavaliere and McNutts' testimony is **DENIED**. The Court will proceed to determine the substance of the Motion (347) pursuant to Maryland Rule 5-702 (2), (3). It is further

ORDERED that Defendants' Kennedy Krieger/Farfel Motion in Limine (346) to Exclude Conte's testimony is **DENIED**, without the need for a Frye-Reed hearing; and

ORDERED Defendants' Kennedy Krieger/Farfel Motion in Limine (343) to Exclude Harriet A. Washington is **DENIED**, without the need for a Frye-Reed hearing.

August 19, 2009

the Hon. Pamela J. White
Circuit Court for Baltimore City
Judge's original signature appears in the court file.

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MEMORANDUM OPINION

On July 29, 2009, the Court heard both substantive arguments* and requests for evidentiary hearings in respect of the following Motions:

- Defendants' Kennedy Krieger/Farfel Motion in Limine (343) to Exclude Harriet A. Washington, opposed by Plaintiffs.
- Plaintiffs' Motion in Limine (344) and Supplement to Exclude evidence of vacuum dust sampling; the opposition by Defendants Kennedy Krieger/Farfel is joined by Defendants City Homes/Mankowitz.
- Defendants' Kennedy Krieger/Farfel Motion in Limine (346) to Exclude Conte's testimony, joined by Defendants City Homes/Mankowitz, and opposed by Plaintiffs.
- Defendants' Kennedy Krieger/Farfel Motion in Limine (347) to Exclude Cavaliere, McNutt testimony, joined by Defendants City Homes/Mankowitz, and opposed by Plaintiffs.
- Defendants' Kennedy Krieger/Farfel Motion in Limine (348) to Exclude Robinson-Josey, Sweeney, Zuckerberg's testimony, joined by Defendants City Homes/Mankowitz, opposed by Plaintiffs.

The Court has considered the parties' arguments and applicable authorities, including Reed v. State, 283 Md. 374 (1978), adopting the standard set forth in Frye v. United States, 293 F. 1013 (D.C.Cir. 1923); Montgomery Mutual Ins. Co. v. Chesson, 399 Md. 314 (2007); Wilson v. State, 370 Md. 191 (2002); and Maryland Rule 5-702.

* The Court also was prepared to conduct argument as to Plaintiffs' Motion to Strike Defendants' Motions in Limine (352), opposed by Defendants Kennedy Krieger/Farfel. Plaintiffs have withdrawn that Motion.

Motion No. 348 (Robinson-Josey, Sweeney, Zuckerberg)

In order to apply the Frye-Reed test, to determine the reliability of certain scientific evidence by expert testimony, the Court will conduct evidentiary hearings, prior to trial, as to whether the opinions and bases of opinions offered by Alma Robinson-Josey, M.D., Charlene J. Sweeney, M.D., and Aaron Zuckerberg, M.D. are generally accepted as reliable within their particular scientific fields and whether proper scientific tests were used to reach these experts' conclusions. The Court has determined that "it is unclear whether the scientific community accepts the validity of a novel scientific theory or methodology" advanced by Doctors Robinson-Josey, Sweeney and Zuckerberg, and that the reliability of their opinions must be demonstrated. Montgomery Mut. Ins. Co. v. Chesson, 399 Md. 314, 327 (2007).

Whether a Frye-Reed hearing is in order warrants attention to the nature of the theory or methodology challenged by Defendants. In Reed v. State, 283 Md. 374 (1978), the Court of Appeals noted that "Frye was deliberately intended to impose a substantial obstacle to the unrestrained admission of evidence based upon new scientific principles." Montgomery Mut. Ins. Co. v. Chesson, 399 Md. 314, 328 (2007) (quoting Reed, supra, 283 Md. at 386). Applying that standard, the Court in Reed held that testimony based on the novel technique of voiceprint analysis was inadmissible in Maryland because, if a new scientific technique's validity is in controversy in the relevant scientific community, or if it is generally regarded as an experimental technique, then expert testimony based upon its validity cannot be admitted into evidence. Id. at 327.

The Frye standard, as articulated in Reed, is the minimum threshold standard for the admissibility of scientific evidence in Maryland. If expert testimony fails to meet the Frye-Reed standard, it is inadmissible, and the analysis ends. Id. Therefore, “[u]nder the Frye-Reed test, a party must establish first that any novel scientific method is reliable and accepted generally in the scientific community before the court will admit expert testimony based upon the application of the questioned scientific technique.” Id. at 327 (citing Wilson v. State, 370 Md. 191, 201 (2002)). In doing so,

[a] trial court may take judicial notice of the reliability of scientific techniques and methodologies that are widely accepted within the scientific community. A trial court may also take notice that certain scientific theories are viewed as unreliable, bogus, or experimental. However, when it is unclear whether the scientific community accepts the validity of a novel scientific theory or methodology, ... before testimony based on the questioned technique may be admitted into evidence, the reliability must be demonstrated.

Id. (internal citations omitted) (emphasis added).

It is well settled that the preferable practice is for a court to address evidentiary challenges under Frye-Reed before trial and out of the presence of the jury. Id. at 328, (citing Clemons v. State, 392 Md. 339, 347-48 n. 6 (2006)). Montgomery Mut. Ins. Co. v. Chesson, 399 Md. 314 (2007), involved a Frye-Reed challenge to a doctor’s testimony that exposure to toxic mold caused the Plaintiff’s illness. The trial court in Montgomery held that the Frye-Reed test did not apply to the testimony regarding the causal connection between toxic mold and Plaintiff’s illness. The Court of Special Appeals affirmed, holding that “expert opinions concerning the cause or origin of an individual’s condition are not subject to a Frye-Reed analysis.” See Montgomery Mut. Ins. Co. v. Chesson, 170 Md. App. 551, 569 (2006). The Court of Special Appeals had adopted a

narrow view of Frye-Reed as applying only to new scientific techniques such as lie-detector tests and breathalyzer tests, rather than to a doctor's causation opinion.

On certiorari, the Court of Appeals vacated the Court of Special Appeals' ruling and remanded the case for a Frye-Reed hearing. See Montgomery Mut. Ins. Co. v. Chesson, supra, 399 Md. at 336. In so doing, the Court of Appeals noted that the doctor in that case employed medical tests to reach a conclusion regarding toxic mold that was "not as widely accepted as to be subject to judicial notice of reliability" – unlike cases involving non-controversial opinions, such as the opinion that asbestos causes cancer. Id. Given the controversial nature of the doctor's conclusion, the Court held that "both the theories regarding causation and the tests he used to diagnose respondents were subject to Frye-Reed analysis." Id. at 329. In this case, Defendants Kennedy Krieger/Farfel urge that the methodologies employed by the Plaintiffs' experts, so as to calculate Plaintiffs' loss of IQ and thus opine that Plaintiffs' exposure to lead-based paint at the subject property was a substantial, contributing factor in causing the Plaintiffs' IQ loss (Defendants' Memorandum at p.8), are not generally accepted, and that the experts' calculations of IQ loss are speculative. It is unclear to this Court whether the scientific community accepts the validity of the particular methodologies or techniques employed by Plaintiffs' experts, to calculate Plaintiffs' loss of IQ.

Accordingly, the Court will enter an Order scheduling an evidentiary hearing on September 10-11, 2009, to hear from experts, Doctors Robinson-Josey, Sweeney and Zuckerberg, their methodologies and calculations which purport to identify Plaintiffs' IQ loss so as to offer the substantial, contributing factor causation opinions challenged by Defendants' Motion In Limine (348).

Motion 347 (Cavaliere, McNutt, McNutt)

Defendants challenge the admissibility of opinions by Plaintiffs' experts Shannon Cavaliere, Clark McNutt, and Susan McNutt pursuant to Maryland Rule 5-702 as those opinions may bear on causation. Defendants claim a right to a Frye-Reed evidentiary hearing, urging that the experts' identification of lead hazards during Plaintiffs' tenancy on Booth Street is unsupported by scientific fact or methodology that Plaintiffs were exposed to lead after "Level II" remediation and tests in June 1993.

Defendants' particular concern is to avoid the experts' testimony and opinions on causation "which are based upon a novel application of anecdotal evidence," (Defendants' Memo at p. 10), without "sound data" to support those opinions. Neither the McNutts nor Mr. Cavaliere performed any inspection during the tenancy; Mr. Cavaliere's reliance on photos and the testimony of Plaintiffs' parents, with his own tests following 12 years after the tenancy, allegedly do not satisfy HUD Guidelines for contemporaneous, on-site investigations. Instead, Defendants would rely on Baltimore City Health Department's inspection (by Mr. Herman Douglas) in August 1995 and contemporaneous lead dust test results obtained by cyclone vacuum.

Upon consideration of the Chesson decision and application of authorities already described, supra, and upon close review of the recent Court of Appeals opinion in Brown v. Daniel Realty Co., 2009 Md. LEXIS 560 (July 22, 2009) (2009 WL185584 (Md.)), this Court has determined that no Frye-Reed hearing is necessary in the circumstances. The Court of Appeals' attention in Brown to Mr. Cavaliere's sworn testimony in that case, his testing and consequent ARC Report, the scope of the causation expert's reliance on that Report, Cavaliere's testimony as to the existence of lead paint on the subject property,

and parental recollection of residence conditions, all serve to demonstrate the absence of novel scientific methodology, and that the bases for the Cavaliere and McNutts' opinions appear to be generally accepted in the field.

Accordingly, the Court will deny Defendants' request for an evidentiary hearing and will proceed to determine the substance of the Motion (347) pursuant to Maryland Rule 5-702 (2), (3).

Motion 346 (Conte)

Defendants challenge the methodology and certain factual basis for the opinions of Michael A. Conte, Ph.D., as he calculates Plaintiffs' economic losses. The focus of Defendants' challenge is Dr. Conte's reliance on Plaintiffs' "all disabled" categorization among the "New Work-Life Expectancy Tables" when projecting work-life expectancy with exposure to lead. Dr. Conte uses the Tables as "authoritative study...that relates disability and level of disability to work-life expectancy [by showing] how decrements in work-life expectancy are associated with various levels of disability." (Conte deposition, January 21, 2009, at p. 32, quoted by Defendants' Memorandum at p. 8).^{*} Defendants complain of Dr. Conte's methodology to rely on disability criteria encompassed in the Tables and demand a Frye-Reed hearing as well as analysis under Md. Rule 5-702.

If the Court entertains testimony at a Frye-Reed hearing, "the opinion of an expert witness should be admitted only if the Court finds that the basis of the opinion is generally accepted as reliable within the expert's particular scientific field." Montgomery Mut. Ins. Co. v. Chesson, *supra*, 399 Md. at 327 (quoting Wilson v. State, 370 Md. 191, 201 (2002)). Even if admitted, "an expert's opinion is of no greater

^{*} Defendants also challenge Dr. Conte's data and formula calculations as not reproducible. Plaintiffs have since produced (on August 3, 2009), additional Spreadsheet Calculations which should serve to Moot this argument. Defendants are without prejudice to challenge the weight of Dr. Conte's testimony.

probative value than the soundness of his [or her] reasons given therefore will warrant.” Wood v. Toyota Motor Corp., 134 Md. 512, 525 (2000), quoting Betty v. Trailmaster, 330 Md. 726, 741 (1993). A Frye-Reed hearing is not necessary if the underlying issue is the value or weight to be accorded the evidence absent a question of scientific soundness of the expert’s opinion or methodology.

In this case, Plaintiffs can support their calculations of economic loss with Dr. Conte’s opinion utilizing methods and theories that are generally accepted in his discipline, economics. Whether Dr. Conte is sloppy or incomplete in his undertaking is not the same as being scientifically unreliable.

The Court’s analysis, tracking the criteria of Maryland Rule 5-702, finds that Dr. Conte, as a qualified economist, appropriately offers expert testimony as to his calculations and value of Plaintiffs’ future economic losses, and Dr. Conte has identified a sufficient factual basis, Plaintiffs’ pediatrician-diagnosed disability, and The New Worklife Expectancy Tables (published over a period of years by Doctors Gambua and Gibson) to support his calculated values. The Tables, as published and the subject of accepted expert testimony over the years, are based on and viewed, themselves, as reliable data in various state and federal courts. The factual reasonableness of relying on that data and applying the tables in this case does not become a question of new or novel scientific reliability. And Dr. Conte’s opinion is supported by a sufficient factual basis despite Defendants’ argument of “misuse” of the Tables.

Without need for a Frye-Reed hearing, the Court will enter an Order denying Defendants Motion (346) and recognizing Dr. Conte’s expert qualifications, his appropriate expert testimony on the value of Plaintiffs’ future economic losses, and that

the Gambua tables can be a sufficient factual basis on which to support Dr. Conte's opinions.

Motion 343 (Washington)

Defendants challenge the qualifications of Harriet A. Washington to be an expert medical ethicist and to opine as to the ethics of Kennedy Krieger's "R & M" study and protocols under Maryland Rule 5-702. That Rule enunciates the standard governing admissibility of expert testimony:

Expert testimony may be admitted, in the form of an opinion or otherwise, if the Court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the Court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

On June 26, 2009, Ms. "Harriett [sic] Washington" was designated by Plaintiffs "to testify that the Defendants' inception and conduct of the R&M Study was unethical...." The Court is satisfied, without need for further hearing and upon reviewing the deposition testimony of Ms. Washington (March 13, 2009), and counsel's elaboration of her C.V., that Ms. Washington is reasonably familiar with the subject of medical ethics and the design, testing and protocols determined by Defendants in their Lead Abatement Repair and Maintenance Study in the early and mid 1990's. Ms. Washington's special knowledge is based on a combination of professional research and study, observation, and experience. It is apparent to the Court that Ms. Washington has such special knowledge on the subject of medical ethics as to nontherapeutic human research studies that she can give the jury assistance in solving certain problems presented by the Complaint in this action, for which the average knowledge of a jury is inadequate.

This Court applies the guidance and analysis of the Court of Appeals in Radman v. Harold, 279 Md. 167, 169-70 (1977), and Casualty Ins. Co. v. Messenger, 181 Md. 295 (1943); both cases are cited with approval in Blackwell v. Wyeth, 408 Md. 575, 618-620 (2009). Ms. Washington has gained such experience, and has articulated that experience in her publications and teaching, so as to entitle her experience to credit. Ms. Washington bases her statements and opinions in this case on what she has read and researched and lectured, participated as a visiting professor and as a Research Fellow attending and presenting academic instruction. Ms. Washington has exhibited in her publications, academic participations, and deposition testimony such a degree of knowledge as to make it appear that her opinion, gained from observation and experience, is of some value to the jury. See also Davis v. Goodman, 117 Md. App. 378, 411 (1997).

Accordingly, the Court will enter an Order denying Defendants' Motion (343) and recognizing the expert qualifications of Harriet Washington as a medical ethicist.

Motion No. 344 (Vacuum Dust Sampling)

The Motion of Plaintiffs to preclude Evidence of Vacuum Dust-Sampling (344) is under advisement pending the Court's receipt of certain post-hearing proffers.

August 19, 2009

the Hon. Pamela J. White
Circuit Court for Baltimore City
Judge's original signature appears in the court file.

Cc by Facsimile:
Evan K. Thalenberg, Esq.