

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

NORA J. EPP,	)	CI 01-4292
	)	
Plaintiff,	)	
	)	
vs.	)	MEMORANDUM AND BRIEF
	)	
MARK E. LAUBY and	)	
BRAD A. WEBB,	)	
	)	
Defendants.	)	

This Memorandum is presented to the Court in support of Defendant Lauby's motion to exclude expert testimony of Dr. Robert Bennett in Plaintiff's case in chief. Defendant Lauby had filed a motion that also asked the Court to exclude Bennett's testimony, *in limine*, related to fibromyalgia syndrome. The basis for this was covered in the hearing that was before this Court September 2, 2003, where Defendant Lauby presented evidence that in the medical scientific community the cause or etiology of fibromyalgia syndrome is not understood and no expert should be allowed to testify as to the cause in a particular case. See *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001); *Black v. Food Lion, Inc.*, 171 F.3d 308 (5th Cir. 1999).

In reviewing the note of counsel for Epp dated September 12, 2003, (see copy attached) it appears that Plaintiff in this case concedes that a ruling on the *Daubert* motion in favor of Lauby precludes Dr. Bennett's testimony with regard to Fibromyalgia syndrome. However, Plaintiff desires to provide testimony of Dr. Bennett, regardless of the outcome of the *Daubert* motion, in Plaintiff's case-in-chief at the trial of this matter, even though, Dr. Bennett's testimony and designation as an expert in this case was made necessary only by reason of a motion by Plaintiff made where Plaintiff asked for additional time to prepare for the *Daubert* hearing. Defendant

Lauby provides the following grounds why testimony of Dr. Bennett, except as a rebuttal witness, should be excluded at trial:

1. It is clear that Dr. Bennett was identified as an expert to support Plaintiff's position that an expert witness should be allowed to testify with regard to the cause of Fibromyalgia syndrome. As the Court is aware, appellate court cases have held that medical scientific knowledge with regard to the cause of fibromyalgia syndrome has not advanced to the extent that the cause is known in the medical community and there is no methodology or peer review by which a causal opinion with regard to fibromyalgia syndrome can be evaluated. See *Vargas v. Lee*, 317 F.3d 498 (5<sup>th</sup> Cir. 2003); *Black v. Food Lion, Inc.*, 171 F.3d 308 (5<sup>th</sup> Cir. 1999).

2. Even if Dr. Bennett's testimony may be considered relevant, the testimony will simply be cumulative of the testimony of Dr. Lane Handke. Dr. Handke was the primary treating physician in this case and has made his own opinion with regard to the cause of Fibromyalgia syndrome. Under Nebraska Rules of Evidence, Section 27-403, evidence at trial that would simply be cumulative may be excluded. Thus, even if the Court overrules Defendant Lauby's Motion in Limine on *Daubert* grounds related to Fibromyalgia syndrome, Dr. Bennett's testimony should be excluded at trial. It has been held under Rule 403 that "the power to conduct orderly trials includes the power to exclude or limit expert testimony." *Johnson v. United States*, 780 F.2d 902 (11<sup>th</sup> Cir. 1986) (citing *United States v. Thevis*, 665 F.2d 616, 633-34 (5<sup>th</sup> Cir. 1982) and *Campbell Industries v. M.N. Gemini*, 619 F.2d 624, 27 (9<sup>th</sup> Cir. 1980)).

The reason that Plaintiff went to Oregon to obtain the assistance of Dr. Bennett was because of the internal inconsistencies in Dr. Handke's testimony with regard to the cause of

Fibromyalgia syndrome. The purpose of Plaintiff's June 16, 2003 motion was to attempt to convince the Court that the inconsistencies with regard to fibromyalgia syndrome could be cured by additional expert testimony. However, the naming of an additional expert for purposes of the *Daubert* motion should not allow the expert to testify at trial. Dr. Bennett was not a treating physician of Nora Epp. The testimony of Dr. Bennett will only mirror that of Dr. Handke, especially to the extent it is based on the records review by Dr. Bennett of Dr. Handke's treating records. If Defendant Lauby's motion to exclude evidence related to the cause of fibromyalgia syndrome is overruled, Dr. Bennett's testimony will simply be cumulative of Dr. Handke's.

Under the circumstances of this case, i.e. the Plaintiff had already filed a certificate of readiness for trial and only designated the expert for purposes of a *Daubert* hearing, Dr. Bennett's testimony should be excluded from trial. If Dr. Bennett's testimony is needed to rebut any evidence that Defendant Lauby may or may not present at trial, that issue could be taken up at the appropriate time. However, under the circumstances of this case, Dr. Bennett should not be allowed to testify in Plaintiff's case-in-chief at trial.

MARK E. LAUBY, Defendant.

By:

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served by regular United States mail, postage prepaid on this \_\_\_\_ day of September, 2003, upon the following:

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