

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

NORA J. EPP,

Plaintiff,

v.

MARK E. LAUBY and BRAD A. WEBB,

Defendants.

CASE NO. CI01-4292

ORDER



This matter came before the court on September 12, 2003, for hearing on the defendants', Mark E. Lauby and Brad A. Webb, motion in limine to exclude expert and opinion testimony pursuant to Neb. Evid. R. 702. The plaintiff was represented by attorney, John M. Lefler and attorneys, Michael D. McClellan and William E. Gast represented the defendants. Evidence was adduced, the motion was argued and briefs were submitted. The court, being fully informed, now finds and orders as follows:

FACTS

On June 24, 1999, the plaintiff, Nora Epp ("Epp"), was involved in a three vehicle chain collision accident on South 56th Street near Calvert in Lincoln, Nebraska. Epp was driving a 1991 Dodge Stealth which was headed south on South 56th Street. As Epp was slowing down for a traffic light, a vehicle driven by the defendant, Mark Lauby ("Lauby"), struck the rear of the vehicle driven by the second defendant, Brad Webb ("Webb"). Webb in turn, struck the rear of the vehicle that Epp was driving. The police report indicated that both Epp and Webb complained of neck and shoulder pain immediately after the accident, but refused medical treatment at scene.

The next day, June 25, 1999, Epp visited her chiropractor, Dr. Lori Elliott (“Dr. Elliott”). Epp returned to Dr. Elliott for 11 visits over the next two months. After six weeks of visits with Dr. Elliott and no notable improvement, Dr. Elliott referred Epp to Lane Handke, M.D. (“Dr. Handke”). On July 27, 1999, Epp had her first visit with Dr. Handke who continues to treat her presently. The purpose of her first visit to Dr. Handke regarded soft tissue spasms in her neck and a tingling sensation in her left arm and leg that she had been experiencing following the accident. Dr. Handke’s initial assessment was that Epp had a cervical strain, thoracic strain, lumbar strain and a history of asthma.

After Epp’s February 17, 2000 visit with Dr. Handke, his report indicates that Epp was experiencing constant, severe headaches and found myofascial trigger points at the base of the skull, base of the neck and the intrascapular area. Dr. Handke further reported that Epp had shooting pains down the left arm. These symptoms led Dr. Handke to diagnosis her condition as chronic neck pain syndrome and left arm radicular symptoms. Dr. Handke also made note that some of her problems could be from the role of personal stressors and their influence on her condition. It was at this time that Dr. Handke prescribed medications for depression as he believed that the depression was one of the factors of Epp’s pain. According to Dr. Handke this was also the first time that he thought that Epp may have fibromyalgia.

On March 10, 2000, Dr. Handke again met with Epp and noted that she was still experiencing chronic pain in her back and neck. It was at this visit that Dr. Handke first made a written provisional diagnosis of Epp’s condition as fibromyalgia. Fibromyalgia syndrome is described as a group of symptoms that center on pain complaints of patients. In the medical literature, the most characteristic symptoms are defined as fatigue, sleep disturbance, and

morning stiffness. In addition, “pain all over” has been described as a characteristic symptom. (E12, ¶ 3). Its referred to as a syndrome because it’s a set of signs and symptoms that occur together. (E38).

On November 28, 2000, after Epp’s first visit with Dr. Handke in eight months, Epp told him that she had suffered a flare up and in Dr. Handke’s report he noted diffuse trigger points in the neck, upper back and shoulders. Epp told Dr. Handke that her skin was so tender that it hurt even on a gentle touch. After this visit, Dr. Handke diagnosed Epp’s condition as fibromyalgia, disability, major depression and severe asthma.

Dr. Handke testified that while the single exact cause of fibromyalgia was unknown, it was his opinion that Epp’s fibromyalgia was caused by the sudden impact she suffered as a result of the June 24, 1999 automobile accident. This opinion was based on the fact that Epp did not have any of the symptoms of fibromyalgia prior to the accident. By means of a motion to continue on July 16, 2003, Epp also identified Robert M. Bennett, M.D. (Dr. Bennett) of Oregon Health Sciences University as an expert witness for purposes of the *Daubert* hearing and to testify as to the relationship between physical trauma and fibromyalgia.

The subject of the motion in limine before this court is to exclude Dr. Handke’s testimony that the onset of Epp’s fibromyalgia was caused by the sudden impact of the automobile accident. This motion also seeks to exclude the expert testimony of Dr. Bennett which was submitted to bolster Dr. Handke’s opinion concerning posttraumatic fibromyalgia for the *Daubert* hearing. No motion in limine was filed against the testimony of Dr. Bennett, however, because the deadline for filing motions in limine with regard to expert opinions had expired on June 1, 2003. Lauby contends that Dr. Bennett’s testimony should be subject to a Motion in Limine even

though one was not filed because Lauby was left without a mechanism to exclude opinion evidence since the expiration date had passed.

## DISCUSSION

In determining whether to grant the defendants' motion in limine to exclude the expert testimony of Dr. Handke and Dr. Bennett, this court must find that the offered expert opinion adheres to the standard for admitting expert opinions embodied in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993), as adopted by Nebraska in *Schafersman v. Agland Coop.*, 262 Neb. 215, 631 N.W.2d 862 (2001). The standards enumerated in *Daubert* and *Schafersman* "require proof of the scientific validity of principles and methodology utilized by an expert in arriving at an opinion in order to establish the evidentiary relevance and reliability of that opinion." *Schafersman*, 262 Neb. at 225, 631 N.W.2d at 872.

The first step in determining the reliability of an opinion is for the district court to determine pursuant to Neb. Evid. R. 702, "whether the expert is proposing to testify to (1) scientific, technical, or other specialized knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Id.* at 232, 631 N.W.2d at 876-877. This process entails a "preliminary assessment whether the reasoning or methodology underlying the testimony is valid and whether the reasoning or methodology properly can be applied to the facts in issue." *Id.* If the validity of the expert's testimony can be established, the remaining questions in which the methodology was applied to a particular case will go to the weight of the evidence. *Id.*

To avoid exclusion of expert testimony, however, "experts must offer the courts more than unsupported assertions; they must offer evidence about the basis of their asserted expertise sufficient to enable a judge to conclude that their expert testimony will provide dependable

information to the factfinder.” *Id.* at 229, 631 N.W.2d at 875.

*Daubert* has been interpreted to equate the district court’s role in regards to expert testimony to that of a “gatekeeper.” *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147, 119 S. Ct. 1167, 1174 (1999). Pursuant to this gatekeeping function, *Schafersman* delineates factors that a trial court may consider in its determination, such as:

(1) whether a theory or technique can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether, in respect to a particular technique, there is a high known or potential rate of error; (4) whether there are standards controlling the technique’s operation; and (5) whether the theory or technique enjoys general acceptance within a relevant scientific community.

*Schafersman*, 262 Neb. at 233, 631 N.W.2d at 877.

Based on the background provided by *Daubert* and *Schafersman* this court must now determine whether the expert testimony offered by Dr. Handke and Dr. Bennett concerning the onset of fibromyalgia from physical trauma is reliable under these standards. To support her claim that the causal relationship between physical trauma and fibromyalgia is reliable Epp has introduced a significant amount of medical literature into evidence.

Of the most important of this literature is the Consensus Report on Fibromyalgia written by a committee of fibromyalgia experts who submitted recommendations on the diagnosis, testing, assessment and prognosis of fibromyalgia in 1996. (E41). That report found that the “evidence that trauma can cause [fibromyalgia] . . . comes from a few case series or case reports and is insufficient to establish causal relationships.” Frederick Wolfe et al., *The Fibromyalgia Syndrome: A Consensus Report on Fibromyalgia and Disability*, 23:3 *The Journal of Rheumatology* 534, 534 (1996). (Consensus Report). The Consensus Report continued that the question of whether trauma might cause fibromyalgia could only be addressed by “epidemiologic

studies that measure the risk of potential exposures on the development of [fibromyalgia]” and that these kinds of studies that “address potential or predictive causality are currently not available.” *Id.*

In *Black v. Food Lion, Inc.*, 171 F.3d 308 (5th Cir. 1999) the court considered a similar issue regarding the onset of fibromyalgia after physical trauma (the plaintiff slipped and fell on mayonnaise film at a grocery store) and analyzed the Consensus Report in its opinion. The Fifth Circuit found that expert testimony relating to the onset of fibromyalgia brought on by physical trauma was not reliable under the *Daubert* standards. The court noted the expert’s theory had not been subjected to peer review, the expert herself acknowledged that fibromyalgia had no known etiology, and that expert’s testimony had not gained acceptance within the medical profession. *Black*, 171 F.3d at 313.

The court then stated that “[t]he underlying predicates of any cause-and-effect medical testimony are that medical science understands the physiological process by which a particular disease or syndrome develops and knows what factors cause the process to occur” and that in this case neither the expert nor the medical science knows the “exact process that results in fibromyalgia or the factors that trigger the process.” *Id.* at 314. “Absent these critical scientific predicates, for which there is no proof in the record, no scientifically reliable conclusion on causation can be drawn.” *Id.*

Epp contends in her brief that certain medical literature was excluded from the *Black* opinion and if that literature would have been submitted it would have led the court to a different result. Epp explicitly cites in her brief two further studies that, in her opinion, give support to her expert’s opinion that there is a causal relationship between trauma and fibromyalgia.

One of these studies is the Buskila Study. Dan Buskila, et al., *Increased Rates of Fibromyalgia Following Cervical Spine Injury: A Controlled Study of 161 Cases of Traumatic Injury*, 40:3 ARTHRITIS & RHEUMATISM 446 (1997) (“Buskila Study”). In the Buskila Study the authors concluded that their analysis suggested that soft tissue trauma can result in an increased incidence of fibromyalgia, however, the authors cautioned that “[f]uture studies addressing the issue of trauma (especially, neck trauma) and [fibromyalgia]” were needed and that the “present data in the literature [was] insufficient to indicate whether a causal relationship exists between trauma and [fibromyalgia].” *Id.* at 451. Thus, the authors of the Buskila Study admitted that despite their tests, the medical literature was not capable of supporting a causal relationship between physical trauma and fibromyalgia.

In *Vargas v. Lee*, 317 F.3d 498 (5th Cir. 2003), the Fifth Circuit again considered the issue of trauma and the onset of fibromyalgia. The court concluded that even though the plaintiff’s expert witness testified that a high percentage of his fibromyalgia patients stated that their symptoms appeared following traumatic injury, this testimony was “not sufficient to demonstrate the reliability of [the doctor’s] theory that fibromyalgia is *caused* by trauma . . . .” *Id.* at 502. In making this determination the *Vargas* court considered the Buskila Study, the Consensus Report and a 1993 editorial written by Epp’s expert witness, Dr. Bennett. The court found that the studies “only bolster[ed] [the court’s] conclusion in [*Black v. Food Lion, Inc.*, *supra*] that expert testimony on the causation of fibromyalgia is not sufficiently reliable to be admitted under [Fed. R. Evid.] 702.” *Id.*

The other study that Epp cites in her brief is the Al-Allaf Study. A.W. Al-Allaf, et al., *A case-control study examining the role of physical trauma in the onset of fibromyalgia syndrome*,

41: 450-453 *Rheumatology* (2002). (E68) (“Al-Allaf Study”). The Al-Allaf Study concluded that physical trauma in the preceding six months is significantly associated with the onset of fibromyalgia. *Id.* at 452. Again, the authors of the study cautioned that “[f]urther prospective studies are needed to confirm [the association of physical trauma and fibromyalgia] and to determine whether trauma has a causal role or if there are more important factors in the development of [fibromyalgia].” *Id.* at 453. Therefore, the major finding of this study was the fact that trauma and the onset of fibromyalgia are associated with each other, not that trauma causes fibromyalgia.

Applying the evidence submitted by Epp to the present case, the standards described in *Schafersman* and *Daubert* require more than just evidence that trauma and fibromyalgia are associated with each other as Epp’s medical literature demonstrates. “Evidence of an association may be sufficient for formulation of a hypothesis that can later be tested and confirmed, but it is not proof of causation in the courtroom or scientific community. *Schafersman*, 262 Neb. at 234, 631 N.W.2d at 878. Therefore, just because the medical literature supports the view that trauma and fibromyalgia are associated, it does not establish that the trauma Epp suffered as a result of the vehicle accident caused Epp’s fibromyalgia.

Furthermore, Epp’s differential diagnosis that association proves causation presents improper post hoc propter hoc reasoning. Differential diagnosis “is a standard scientific technique of identifying the cause of a medical problem by eliminating the likely causes until the most probable one is isolated.” *Id.* at 233. If the differential diagnosis is reliable it can provide a suitable foundation for an expert opinion. *Id.* In this case, however, Dr. Handke and Dr. Bennett have arrived at their theory on the basis that Epp was not experiencing symptoms of fibromyalgia

before the accident, but then after the accident started to experience the symptoms, therefore the trauma caused by the accident must have caused her fibromyalgia. *Schafersman* has recognized that this type of reasoning cannot be “said to be helpful to the trier of fact under Neb. Evid. R. 702 . . . .” *Id.*

In sum, since there is a lack of scientific support for the conclusion that trauma causes the onset of fibromyalgia, Dr. Handke’s and Dr. Bennett’s opinion lacks the requisite medical reliability to assist the trier of fact to understand a factual issue under Neb. R. Evid. 702. Dr. Handke’s and Dr. Bennett’s theory, as indicated by the medical research, has not been verified by sufficient testing, therefore not subject to peer review. Dr. Handke even admitted in his deposition that fibromyalgia “does not have a known consistent cause.” (E10, 159:14-24). Dr. Handke also testified that the medical science identifies many different factors as contributing to the onset of fibromyalgia such as “illness, physical trauma, emotional trauma or hormonal changes.” (E10, 160:6-17). Finally, experts in the field of fibromyalgia conclude that the ultimate cause of the syndrome is unknown and as recognized by the Fifth Circuit, “[m]ere conjecture does not satisfy the standard of general acceptance.” *Black*, 171 F.3d at 313.

Therefore, the defendants’ Motion in Limine to Dr. Handke’s expert testimony is granted as is the exclusion of Dr. Bennett’s expert testimony as it relates to a causal connection between physical trauma and the onset of fibromyalgia even though there was no formal motion in limine to exclude it by the defendants. In reaching this decision, this court does not hold that trauma does not cause fibromyalgia or that admission of such evidence is forever barred, only that at the current time the medical science linking such a causal relationship does not exist. *See Vargas*, 317 F.3d at 503.

**CONCLUSION**

**IT IS ORDERED** that there is not sufficient medical reliability surrounding a causal connection between physical trauma and fibromyalgia syndrome. Accordingly, the *Daubert* standards for admissibility of expert testimony has not been satisfied and the defendants' motion in limine as to the expert opinion of Dr. Handke and Dr. Bennett is granted.

Dated this 10 day of November, 2003.

**BY THE COURT:**



**Earl Witthoff  
District Court Judge**

cc **John M. Lefler**, Attorney for the Plaintiff  
**Michael D. McClellan**, Attorney for the Defendant  
**William E. Gast**, Attorney for the Defendant