COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA
CIVIL DIVISION

MICHELLE GETZ,	:	
	:	
Plaintiff,	:	**2009-C-0517**
	:	
v.	:	
	:	
RICHARD BENNET and BAYLOR TRUCKING, INC.,	:	
	:	
Defendants.	:	

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Appearances:

Patrick J. Reilly, Esquire, and Gross McGinley, LLP
On behalf of Plaintiff

Brent A. Green, Esquire, and Marshall, Dennehey, Warner, Coleman & Goggin
On behalf of Defendants

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OPINION

ALAN M. BLACK, Senior Judge

I. BACKGROUND

This case arises from a motor vehicle accident on September 4, 2007, in which the Plaintiff, Michelle Getz, was injured. The accident occurred at an intersection when the individual Defendant, Richard Bennett, ran a red light controlling the intersection and drove his tractor-trailer into the driver-side of the Plaintiff's vehicle. The impact was so substantial that the Plaintiff had to be extracted from her vehicle with the "jaws of life." Liability is not at issue in this case. However, there is considerable dispute regarding the nature and extent of the Plaintiff's injuries and the

appropriate measure of damages. The case is scheduled for jury trial in March of this year.

The Plaintiff contends that she has developed a syndrome known as fibromyalgia as a result of the motor vehicle accident. Fibromyalgia is a syndrome characterized by widespread chronic pain both above and below the waist, on the right and left sides of the body, with pain when pressure is applied to at least 11 of 18 "trigger points" or potential areas of pain.[1] One of the Plaintiff's treating physicians, Robert Roeshman, D.O., a neurologist designated by her as an expert witness in this case, has opined in his report, to a reasonable degree of medical certainty, that the motor vehicle accident caused the Plaintiff's fibromyalgia. The Defendants contend that there is no causal connection between the vehicle accident and the Plaintiff's fibromyalgia.

II. DEFENDANTS' MOTION *IN LIMINE*

Currently before the Court is the Defendants' Motion *in Limine* to Preclude Expert Medical Testimony Linking Plaintiff's Alleged Fibromyalgia Syndrome to the Motor Vehicle Accident. The Plaintiff filed a written response to the motion, after which the Court held an evidentiary hearing on December 23, 2010. At the hearing the Defendants presented testimony from Robert W. Mauthe, M.D., a physiatrist, and placed in evidence several publications identified by Dr. Mauthe, including a newsletter published by the American Medical Association (Defs.' Ex. 2) and a 1996 publication entitled "The Fibromyalgia Syndrome: A Consensus Report on Fibromyalgia and Disability" (Defs.' Ex. 3).

The Plaintiff placed in evidence at the hearing a transcript of the trial deposition of her expert witness, Dr. Roeshman (Pl.'s Ex. 7), along with various publications

[1] Dep. of Robert Roeshman, D.O., Pl.'s Ex.7, p.47.

identified by him in his deposition. These publications include (1) the December 1997 "Fibromyalgia Consensus Report: Additional Comments" (Pl.'s Ex. 1), clarifying the 1996 report that Defendants' submitted as Defendants' Exhibit 3; (2) a study published in 1992 entitled "Reactive Fibromyalgia Syndrome" (Pl.'s Ex. 2); (3) a study published in 2002 entitled "A Case-Control Study Examining the Role of Physical Trauma in the Onset of Fibromyalgia Syndrome" (Pl.'s Ex. 3); (4) a 1996 study entitled "Increased Rates of Fibromyalgia Following Cervical Spine Injury" (Pl.'s Ex. 4); (5) an article published in 2005 authored by several medical experts affiliated with the University of Michigan Medical Center entitled "Fibromyalgia After Motor Vehicle Collision: Evidence and Implications" (Pl.'s Ex. 5); and (6) an issue of the Journal of Musculoskeletal Pain published in 2003 devoted entirely to fibromyalgia entitled "The Fibromyalgia Syndrome: A Clinical Case Definition for Practitioners" (Pl.'s Ex. 6).

In their motion, the Defendants seek to preclude Dr. Roeshman and any other potential witness from testifying that the subject motor vehicle accident was a factual cause of the Plaintiff's fibromyalgia. Defendants claim that any expert opinion purporting to link Plaintiff's fibromyalgia causally to the motor vehicle accident is inadmissible under the standard for the admissibility of scientific evidence first enunciated in *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) and adopted by our Supreme Court in *Commonwealth v. Topa*, 471 Pa. 223, 369 A.2d 1277, 1281 (1977). Defendants contend that there is no general acceptance in the medical community of a causal connection between physical trauma and fibromyalgia.

In support of their position, the Defendants presented the testimony of Dr. Mauthe, who opined that there is no known objective test to determine whether someone has fibromyalgia and that the cause of this syndrome is unknown. He explained that fibromyalgia is classed as a syndrome rather than as an illness or a

disease because the precise physical or biological pathway of this debilitating health problem is undetermined. He stated that because the precise physical pathway is not presently known, it is not possible to ascertain to a reasonable degree of medical certainty that the subject motor vehicle accident was the cause of the Plaintiff's fibromyalgia.

The Plaintiff contends that Dr. Roeshman's opinion is not precluded by *Frye* for several reasons. First, the Plaintiff argues that *Frye* applies only where the expert's opinion is based on novel scientific evidence and that there is no novel scientific evidence involved here. Second, the Plaintiff contends that even if *Frye* applies, under the most recent appellate cases, it is only the expert's methodology, not his or her conclusions, that must find general acceptance in the relevant scientific community and that Dr. Roeshman followed generally accepted methodology in reaching his conclusions. In support of these contentions, the Plaintiff has provided the Court with various published articles noted above indicating a linkage between trauma and fibromyalgia.

III. THE *FRYE* TEST

The Pennsylvania Supreme Court in *Commonwealth v. Topa, supra,* adopted the principle expressed in *Frye* that novel scientific evidence is not admissible unless it has gained general acceptance in the relevant scientific community. However, the *Frye* test as used in Pennsylvania has undergone some changes since its adoption in *Topa* in 1977. First, it is now clear that the requirement of a consensus of the scientific community does not apply to the conclusions reached by the expert, but only to the methodology that the expert utilized to reach these conclusions. *Grady v. Frito-Lay, Inc.*, 576 Pa. 546, 555, 839 A.2d 1038, 1044 (2003); *see also Commonwealth v. Dengler*, 586 Pa. 54, 70 n.6, 890 A.2d 372, 382 n.6 (2005); *Tucker v. Community Med.*

Center, 833 A.2d 217, 224 (Pa.Super. 2003). As stated in *Grady*, "novel scientific evidence is admissible if the methodology that underlies the evidence has general acceptance in the relevant scientific community." 576 Pa. at 555, 839 A.2d at 1043.

This distinction between conclusions and methodology is important in this case because it appears that there is no general acceptance in the medical community as to the etiology of fibromyalgia. Dr. Mauthe's testimony at the *Frye* hearing, as well as the literature submitted by both parties, indicates that the medical community has not yet reached a consensus on the specific cause of fibromyalgia. Some medical experts such as Dr. Roeshman contend that there is a very definite causal connection between a trauma such as a motor vehicle accident and the development of fibromyalgia. Other medical experts such as Dr. Mauthe contend that such a connection has yet to be sufficiently proven. Clearly, there is no consensus in the medical community on this issue. Nevertheless, as noted above, *Frye* requires the trial court to focus not on the expert's conclusions, but on the methodology utilized by the expert in reaching those conclusions. Therefore, the fact that there is no consensus in the medical community on a causal connection between trauma and fibromyalgia does not preclude the admissibility of Dr. Roeshman's opinion on causation so long as the methodology he used to reach his conclusion is generally accepted in the medical community.

Our appellate courts have developed another limitation on application of the *Frye* doctrine. It has been held that *Frye* applies only if the methodology utilized by the expert is "novel scientific evidence." *See, e.g., Commonwealth v. Puksar*, 597 Pa. 240, 251, 951 A.2d 267, 275 (2008). Some earlier cases had stated that *Frye* applies whenever science enters the courtroom, but it is now clearly established that *Frye* applies only where the expert's testimony consists of "novel scientific evidence." *See,*

e.g., Commonwealth v. Dengler, 843 A.2d 1241 (Pa.Super. 2004), *aff'd*, 843 A.2d 1241, 1243 (Pa. 2004) (expert psychiatric or psychological testimony offered at a proceeding to determine whether defendant is a sexual predator held not subject to *Frye* because it was not novel science); *M.C.M. v. Milton S. Hershey Med. Center*, 834 A.2d 1155 (Pa.Super. 2003) (*Frye* held not applicable to opinion of plaintiff's causation expert that MS/MS test was medically necessary because the expert's conclusions were not "novel scientific evidence"); *Haney v. Pagnanelli*, 830 A.2d 978 (Pa.Super. 2003) (*Frye* not applicable to neurosurgeon's opinion that plaintiff's injuries incurred by plaintiff during back surgery were attributable to defendant's negligence because the testimony involved only deductive reasoning, not novel scientific evidence); *Commonwealth v. Passarelli*, 789 A.2d 708 (Pa.Super. 2001) (*Frye* held not applicable to medical doctor's opinion as to the timing of injuries to a child with shaken-impact syndrome because this was merely opinion evidence, not novel scientific testimony).

There has been some confusion in the case law as to what is meant by "novel scientific evidence." Recently, in *Betz v. Pneumo Abex LLC*, 998 A.2d 962 (Pa.Super. 2010), the Superior Court clarified this issue. The Court stated that to determine whether proffered evidence is "novel scientific evidence" so as to implicate *Frye*, the trial court

> must consider, *inter alia*, the proffered basis for excluding the evidence and the evidence presented in support of that basis, and decide whether the moving party demonstrated that there is a legitimate dispute regarding the reliability of the expert's conclusions.

Id. at 972 (internal citations omitted). If there is a legitimate dispute as to the reliability of the expert's conclusions, then the expert's opinion is "novel scientific evidence" and the court must apply the *Frye* standard to determine whether the expert's *methodology* (but not his conclusions) has general acceptance in the relevant scientific community. *Betz*, 998 A.2d at 972.

Therefore, it is clear under the most recent case law that *Frye* has a limited reach. It does not apply every time science enters the courtroom; nor does it require that the conclusions of the expert be generally accepted in the relevant scientific community. Where the expert's conclusions are not generally accepted, novel scientific evidence is still admissible so long as the methodology utilized by the expert in reaching his conclusions is generally accepted in the relevant scientific community. Moreover, because *Frye* is an exclusionary rule of evidence, "it must be construed narrowly so as not to impede admissibility of evidence that will aid the trier of fact in the search for truth." *Trach v. Fellin,* 817 A.2d 1102, 1104 (Pa.Super. 2003) (*en banc*).

Novel scientific evidence, to which *Frye* applies, is not limited, as Plaintiff contends, to evidence based on new scientific technology such as the systolic blood pressure deception test (*see Frye,* 293 F. 1013) or voiceprint analysis (*see Topa,* 471 Pa. 223). A *Frye* analysis is required whenever the expert's conclusions are subject to legitimate dispute in the relevant scientific community. *Betz,* 998 A.2d at 972. If so, the proponent of the expert's testimony must establish that the expert's methodology in reaching his conclusions is generally accepted in that community.

In the instant case, it seems clear from the evidence produced at the *Frye* hearing that (1) trauma of a physical or emotional nature is potentially a cause of fibromyalgia, but that (2) there remains a substantial difference of opinion in the medical community as to whether a causal connection between trauma and fibromyalgia has been sufficiently proven. Some medical experts say that a trauma such as a motor vehicle accident can cause fibromyalgia; others say that further studies are needed before such a conclusion is established. Therefore, we believe that Defendants have met their burden of showing that Dr. Roeshman's opinion is "novel scientific evidence," as that term is used in the most recent case law. *See Betz et al.*

Accordingly, we must next examine the methodology that Dr. Roeshman used in arriving at his opinion to determine if his methodology comports with the *Frye* rule.

IV. DR. ROESHMAN'S METHODOLOGY

The Plaintiff, as the proponent of Dr. Roeshman's opinion, has the burden of showing that his methodology comports with the *Frye* rule. *Grady*, 576 Pa. at 558, 839 A.2d at 1045. At the *Frye* hearing held in this case, Dr. Roeshman's methodology was explained through his trial deposition as follows: He has been a practicing neurologist specializing in pain management for 29 years, and 20% of his practice consists of treating fibromyalgia patients. He first saw the Plaintiff on May 14, 2009, approximately a year and eight months after her motor vehicle accident. She was referred to him by another physician. Dr. Roeshman diagnosed the Plaintiff as having post-traumatic fibromyalgia arising from the September 4, 2007, motor vehicle accident. In reaching this conclusion he exercised his clinical judgment based on his long experience in treating fibromyalgia patients. He conducted physical and neurological examinations of the Plaintiff. He considered the history provided to him by the Plaintiff as well as information from her prior medical records. He took into account the sequence of events leading to the onset of the Plaintiff's fibromyalgia symptoms. He also relied on what he described as "the growing body of literature that has come out surrounding trauma of a physical and emotional nature that links that type of problem to the evolution of fibromyalgia."[2] He considered it important that the Plaintiff did not have many of the symptoms of fibromyalgia prior to the motor vehicle accident and that shortly after the accident these symptoms appeared or substantially increased. He did not find any other plausible explanation for her fibromyalgia

[2] Dep. of Dr. Roeshman, Pl.'s Ex. 7, p.54.

syndrome. Based on his analysis, he concluded that her current fibromyalgia was caused by the accident.

What is striking about Dr. Roeshman's testimony is that he did not rely on any novel scientific methodology to reach his conclusion. His methodology, sometimes referred to as a differential diagnosis, is quite standard in the medical profession. Every day medical professionals make clinical judgments in diagnosing the cause of a patient's condition and determining the proper course of treatment by using exactly the same methodology as that employed by Dr. Roeshman here. For example, in *Cummins v. Rosa*, 846 A.2d 148, 151 (Pa.Super. 2004), the Superior Court analyzed the methodology of the Plaintiffs' expert witnesses on causation as follows:

> [T]he methodology employed by Dr. Phillips and Dr. Weingarten in reaching their conclusions consisted of analysis of Wife's medical records and reliance upon their personal expertise to reach a conclusion regarding the source of her injuries. Clearly, this type of methodology is accepted generally among the medical community for diagnosis and treatment. Accordingly, *Frye* was not applicable in this case.

Id. For the same reasons we find that the methodology that Dr. Roeshman employed to reach his conclusion on causation in the instant case is generally accepted in the medical community.

Defendants criticize Dr. Roeshman for relying in part on the concept of *post hoc ergo propter hoc* ("after this, therefore because of this"). However, this concept is far from novel science. Anyone who has ever been examined by a medical doctor knows that an important part of the examination is reviewing the history or sequence of events preceding the medical problem being evaluated. Obviously, if Dr. Roeshman had based his opinion *solely* on the fact that the Plaintiff's fibromyalgia syndrome manifested itself after the motor vehicle accident, then his opinion would be deficient. But that is not the case. As noted above, Dr. Roeshman considered much more than that fact in reaching his conclusion.

Dr. Roeshman referred to the growing body of literature linking fibromyalgia and trauma. The studies identified in Plaintiff's Exhibits 1 through 6 have demonstrated a strong association between trauma and fibromyalgia. Although a temporal association does not in and of itself establish causation, where the association occurs with frequency and there is a plausible biologic mechanism for causality, it is important evidence to be considered. The literature submitted by the Plaintiff does show a strong frequency of association. This includes Plaintiff's Exhibit 1, the "Fibromyalgia Consensus Report: Additional Comments," approved by numerous medical experts listed on page 3 of the report, which also asserts a plausible biologic connection and concludes:

> Based on a consistent clinical pattern, case-control or descriptive studies, and biologic plausibility of central nervous system plasticity, it seems **more than 51% likely that trauma does play a causative role** in some [fibromyalgia syndrome] patients, as agreed by other independent observers.[3]

Similarly, Plaintiff's Exhibit 2, a publication entitled "Reactive Fibromyalgia Syndrome," summarizes a study in which a "precipitating event" occurred prior to the onset of fibromyalgia in 23% of consecutive patients. The study concludes: "The occurrence of fibromyalgia following an initiating event may represent the onset of a longstanding pain syndrome that results in considerable physical, social, and financial disability."[4] Another study of the role of physical trauma in the onset of fibromyalgia also concludes that "physical trauma in the 6 months before the onset of symptoms is significantly associated with the onset of [fibromyalgia syndrome] symptoms in patients attending a rheumatology out-patient clinic."[5]

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[3] Plaintiff's Ex. 1 at 2 (emphasis added; internal page references omitted).
[4] Plaintiff's Ex. 2 at 3 (internal page references omitted).
[5] Plaintiff's Ex. 3 at 4 (internal page references omitted).

Dr. Mauthe testified, and Dr. Roeshman acknowledged, that the medical community has been unable to agree on the precise mechanism by which fibromyalgia can be derived from a trauma. However, this argument goes to the weight of Dr. Roeshman's opinion, not its admissibility under *Frye*.

Defendants argue that there is no consensus in the medical community that fibromyalgia can be caused by a trauma such as a motor vehicle accident. However, the notion that fibromyalgia can be caused by a trauma is a *conclusion,* which does not require general acceptance in the medical community. It is only Dr. Roeshman's methodology, not his conclusions, that must pass the *Frye* test of general acceptance.

To our knowledge, no appellate court decision in this Commonwealth has directly addressed the admissibility of expert testimony causally relating fibromyalgia to trauma. However, this precise issue was adjudicated recently by the Lackawanna Court of Common Pleas in *Crossman v. Delisi*, 2009 WL 221941 (C.P. Lackawanna 2009) (Nealon, J.). In that case the plaintiff's treating physician, like Dr. Roeshman here, also opined that the plaintiff's fibromyalgia was causally related to a recent motor vehicle accident. The defendant moved to preclude the physician's opinion testimony on the basis of *Frye*. The Court denied the motion, stating at page 4:

> It is well settled that *Frye* applies only to the methodology employed by an expert in reaching a conclusion and does not act to bar "a qualified expert's conclusion so long as the methodology is generally accepted." *Puksar, supra.* ...[T]he expert testimony submitted for our review and the relevant medical literature discovered during our own research, *see Marsh, supra,*[6] reflect that it has gained the requisite level of acceptance in the medical community.

We are aware of several other Common Pleas decisions reaching a different conclusion, including a prior decision of this Court in *Tibensky v. Krempel*, 50 Lehigh Law Journal 922 (C.P. Lehigh 2003) (Lavelle, S.J.), as well as the decisions in *Heilman*

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[6] *Marsh v. Valyou*, 977 So.2d 543 (Fla. 2008).

v. Ford, No. 1999-C-2169 (C.P. Northampton Nov. 13, 2002), and *Riccio v. S & T Contractors*, 56 Pa.D.&C.4th 86 (C.P. Chester 2001). However, these cases all predated the decision of our Supreme Court in *Grady v. Frito-Lay, Inc., supra*, on December 31, 2003, holding that the conclusions of an expert need not be generally accepted in the relevant scientific community so long as his methodology is. These cases also predated some of the studies that were made a part of the record of this case, such as Plaintiff's Exhibits 5 and 6. Consequently, these earlier pre-*Grady* Common Pleas decisions are of limited precedential value.

V. CONCLUSION

For the reasons stated above, we find that the methodology employed by Dr. Roeshman in concluding that there was a causal connection between the Plaintiff's fibromyalgia and her motor vehicle accident is generally accepted by the medical community. Hence, the Defendants' Motion *in Limine* to bar Dr. Roeshman's testimony of such a causal link must be denied.

BY THE COURT:

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ALAN M. BLACK, S.J.