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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
CIVIL ACTION
NO. 2008-02243

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RICHARD ZAWASKI,
Plaintiff

v.

GIGS, LLC AND WENDELL LEE ZORMAN,
Defendants

2380

MEMORANDUM AND ORDERS ON THE PARTIES'
DAUBERT/LANIGAN II MOTIONS

On September 13, 2010, the Court held a Daubert/Lanigan II hearing on various motions concerning the admissibility or non-admissibility of various testing, test results and expert testimony. The parties did not request an evidentiary hearing on any of these motions but submitted all matters to the Court on affidavits, medical articles, and memoranda at a non-evidentiary hearing. The documents submitted to the Court were in a sixteen inches high pile and numbered approximately 3000 pages. The trial of this case has been assigned within the next month.

In Commonwealth v. Lanigan, 419 Mass. 15, 26 (1194), the Supreme Judicial Court adopted in part the basic reasoning of the United States Supreme Court in Daubert v. Merrell Dow, 509 U.S. 579, 593-594 (1993). In Case of Canavan, 432 Mass. 304, 310-311,

(2000), the Supreme Judicial Court held as follows:

"Prior to our decision in Commonwealth v. Lanigan, supra, we required that in most circumstances "the community of scientists involved [must] generally accept[] the theory or process" for it to be admitted in evidence. The general acceptance test, or *Frye* test, often proved to be useful because, if there is a general acceptance of a theory or process in the relevant scientific community, the theory or process in question is likely reliable. However, we recognized that "strict adherence to the *Frye* test" could result in reliable evidence being kept from the finder of fact. *Id.* For example, a new theory or process might be "so logically reliable" that it should be admissible, even though its novelty prevents it from having attained general acceptance in the relevant scientific community.

In order to account for this circumstance, we adopted in part the United States Supreme Court's reasoning in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, (1993), and held that "a proponent of scientific opinion evidence may demonstrate the reliability or validity of the underlying scientific theory or process by some other means, that is, without establishing general acceptance." Commonwealth v. Lanigan, supra at 26, 641 N.e.2d 1342. ...Thus, we have concluded that a party seeking to introduce scientific evidence may lay an adequate foundation either by establishing general acceptance in the scientific community or by showing that the evidence is reliable or valid through an alternate means. Commonwealth v. Sands, 424 Mass. 184, 185-186, 675 N.E.2d 370 (1997).

Therefore in Daubert and Lanigan II, the respective courts announced a new test to govern the admissibility of expert testimony based on scientific, technical and other specialized knowledge. A party seeking to introduce scientific evidence may

lay a foundation either by showing that the underlying scientific theory is generally accepted within the relevant scientific community or by showing the theory is reliable or valid through other means. Canavan's Case, supra at 310. In the event that a party cannot prove that the underlying scientific theory is generally accepted, the proponent of scientific opinion evidence may demonstrate the reliability or validity of the underlying scientific theory or process by some other means, that is, without establishing general acceptance. Commonwealth v. Patterson, 445 Mass. 626, 640-641 (2005).

The judge must play the role of "gatekeeper" in determining whether to admit such evidence. In doing so, the judge must preliminarily assess whether that reasoning or methodology underlying the expert testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in the case...The Court in Daubert described several factors bearing on this assessment, namely:

1. Whether the scientific theory or technique "can be [and has been] tested";
2. Whether the theory or technique has been subjected to peer review and publication;
3. The known or potential rate of error...and the existence and maintenance of standards controlling the technique's operation; and
4. General acceptance.

In Daubert, the Court indicated that the above four factors are not meant to provide a definitive checklist or test Daubert,. supra at 592-593.

However, it must be remembered that the determination of the judge whether some expert testimony will be admitted is only a preliminary determination. When the expert evidence is presented to the jury, it is subject to the jury's determination on whether to reject it or to accept it, in whole or in part. The expert witness may be cross-examined in all the usual areas. The jury eventually will be the sole decisionmakers of the expert testimony and all other facts.

Basically, what the two parties have done here is present to the Court a pile of approximately 3000 pages (including many very technical articles) on very complicated and highly contested medical matters and ask the Court, on its own, to determine the reliability or non-reliability of various esoteric experts and theories. The parties have neither provided nor offered to provide any "live" expert testimony to support their respective positions. There are obvious partisans on each side of the issues as to whether the medical or scientific opinions should be admitted - depending on who has hired them and on which party their testimony supports.

Without having live evidence and witnesses to be examined by the parties and the Court, this Court stands in a difficult

position to make the very important decisions as to which evidence may be "junk" expert testimony and which expert testimony is or may be legitimate medical science. Such decisions could or may well be outcome determinative in this case.

Apart from the Court's order of exclusion on Motion #5 below, that is, Plaintiff's motion to exclude any reference to the 1997 AAN position paper and to exclude any testimony which relies on said position paper (which motion has been allowed), the Court has crafted the balance of the orders individually to the particular motion involved. The parties are expected of course to rely on their cross-examination of the expert witnesses to limit or discredit their testimony. The Court will prepare and file a decision later that gives the reasons for the Court's decision in this matter.

Therefore, based on this Court's review of all documents submitted by both parties, the Court makes the following orders on the subject six motions:

- (1) Motion in Limine of the Defendants, GIGS, LLC and Wendell Lee Zorman to Preclude Murdo Dowds, Ph.D. from Offering Medical Opinion Testimony Concerning the Plaintiff's Alleged Acute Concussive Brain Injury, with Plaintiff's Opposition.

ORDER: The testimony of Doctor Murdo Dowds, Ph.D. depends on her experience and expertise. There is no hard and fast rule that only a physician may give medical testimony. In this day and time, science, including medical science, is advancing so

fast that different areas of expertise overlap. It will depend on the witness' expertise. From the Court's reading of her education, training and experience, and from the substance of her opinion, it appears that the expert witness is qualified to render opinions in the areas discussed in the plaintiff's opposition to this motion, and the motion is DENIED.

- (2) Motion of the Defendants, GIGS, LLC and Wendell Lee Zorman, to Preclude any and all Evidence, Testimony, Reports and/or References Relating to Diffusion Tensor Imaging because DTI is Neither Reliable Nor Accepted in the General Medical Community as Required Under Daubert and Lanigan Standards, and Opposition.

ORDER: Defendant's Motion to Preclude Evidence (et cetera) relating to Diffusion Tensor Imaging is DENIED.

- (3) Plaintiff's Motion for Limited Time (One Hour Each) Attorney Conducted Voir Dire and Opposition.

ORDER: ALLOWED. The Court will hold a conference to set up the ground rules.

- (4) Plaintiff's Motion in Limine to Exclude the Result of the TOMM Test and Opposition.

ORDER: The Court will hold a hearing (evidentiary) out of the presence of the jury to determine whether the TOMM test's administration followed proper procedure.

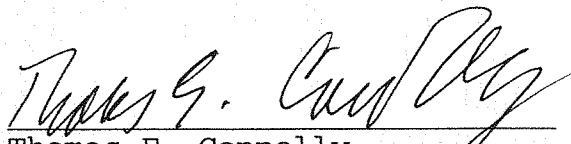
- (5) Plaintiff's Motion to Exclude Any Reference to the 1997 AAN Position Paper and to Exclude any Testimony Upon Which Relies on the Position Paper and Opposition.

ORDER: ALLOWED. This Court has closely reviewed all the submissions concerning this paper written some 13 years ago. It is replete with errors as pointed out in the many other articles submitted.

- (6) Plaintiff's Motion to Exclude the Purported Tractor Inspection Report dated March 20, 2006 and Opposition.

ORDER: The defendants will be expected to lay a proper foundation for the introduction of said report by the person who authored said report and performed said inspection.

By the Court,


Thomas E. Connolly
Justice of the Superior Court

Date: *November 4, 2010*

Notice Sent
11.08.10
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