

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2001-CA-001766-MR

LASCHAUN SCOTT

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT  
HONORABLE JEFFREY R. HINES, JUDGE  
ACTION NO. 96-CI-01145

DAVID L. GRIMES, P.S.C.

APPELLEE

### OPINION

### VACATING AND REMANDING

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BEFORE: BARBER and HUDDLESTON, Judges; and JOHN D. MILLER,  
Special Judge.<sup>1</sup>

BARBER, JUDGE: We are asked to decide whether the trial court  
abused its discretion in excluding causation testimony from  
plaintiff's expert witnesses in this medical negligence case. We  
conclude that it did and vacate the order dismissing plaintiff's  
complaint for failure to present sufficient causation evidence.

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<sup>1</sup>Senior Status John D. Miller, sitting as Special Judge by assignment of the  
Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

We shall refer to the record only as necessary to resolve the issue before us. The Appellant, LaSchaun Scott (AScott@), filed a complaint in McCracken Circuit Court against the Appellee, David L. Grimes, M.D., a Paducah gynecologist (ADr. Grimes@). Scott alleged that oral contraceptives he had prescribed as hormone replacement therapy (A~~H~~R~~T~~@) were a substantial factor in causing her to suffer a debilitating stroke. Scott explains that she initially presented to Dr. Grimes with complaints of heavy and irregular menstrual bleeding and pelvic pain. At that time, she was 46 years old, obese, was post-kidney transplant, and for some time had suffered from high blood pressure, high cholesterol and high triglycerides. She alleges that Dr. Grimes did not ascertain her cholesterol or triglyceride levels and did not recognize that she was taking a medication, Pravachol for high cholesterol and triglycerides. Scott claims that she was not informed of alternative treatments or risks of the medication Dr. Grimes prescribed.

Five days prior to the June 4, 2001 trial date, Dr. Grimes filed a motion in limine requesting a *Daubert*<sup>2</sup> hearing to determine the admissibility of evidence from Scott's experts, Robert Young, M.D., a board-certified ob/gyn, and Thomas Dodd, M.D., a board-certified family practitioner. On June 6, 2001, the hearing was conducted outside the jury's presence. Ruling from the bench, the trial court excluded causation testimony from both physicians, leaving Scott ~~A~~admittedly . . . with only

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<sup>2</sup> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct.2786, 125 L.Ed.2d 469(1993).

the somewhat weak causation testimony of John Grubbs, M.D., her treating neurologist. The trial court proceeded to dismiss the complaint and discharge the jury. By written order, entered June 18, 2001, the trial court determined that the evidence to be presented by Plaintiff's expert witnesses, Drs. Dodd and Young, with respect to whether or not Defendant's actions were a substantial factor in causing Plaintiff's injuries, failed to conform to the standards imposed by KRE 702, *Daubert* . . . and *Mitchell v. Commonwealth*, Ky., 908 S.W.2d 100(1995)<sup>3</sup> On June 28, 2001, Scott filed a motion to vacate and set aside the judgment, and to set aside the order granting the motion to exclude Drs. Young and Dodd's testimony. In support thereof, Scott relied upon *Jahn v. Equine Services, Inc.*<sup>4</sup>, and also submitted a newspaper article appearing one week after the *Daubert* hearing about the risks of HRT. The trial court denied Scott's motion.

On appeal, Scott asserts that: The trial judge abused his discretion in excluding the subject causation testimony, and erred in dismissing her complaint for lack of sufficient causation evidence, after granting the *Daubert* motion. Scott seeks reversal and remand with direction that her avowal exhibit, *Guidelines for Women's Healthcare*, a publication of the American College of Obstetricians and Gynecologists (ACOG), be admitted into evidence at the next jury trial.

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<sup>3</sup> Overruled in part by *Fugate v. Com.*, Ky., 993 S.W.2d 931 (1999).

<sup>4</sup> 233 F.3d 382 (6<sup>th</sup> Cir. 2000)

The standard of review of a trial court's evidentiary rulings is abuse of discretion. *Goodyear Tire and Rubber Co. v. Thompson*.<sup>5</sup> Scott explains that for purposes of the *Daubert* hearing, the trial court considered the hearing testimony of Dr. Young, supplemented by his discovery deposition, and Dr. Dodd's deposition. The trial court stated that it:

did not have any doubt on the qualifications of either Drs. Dodd or Young to testify regarding standard of care . . . **The real struggle in a case like this. . . is that in order to get the claim to the jury requires solid scientific evidence on the science. That, not a reasonable degree of medical certainty, that this method of treatment caused it B- caused this stroke but that B- from someone who specifically has scientific evidence that they have created or helped to generate or been a party to a study** I mean most of what I've heard so far B- I mean other than what you've got in your ACOG book is the study that created the warning pamphlet that everybody has read into the record pretty much, and those studies go back to the 70's and the contrary evidence has come, of course, from the Defendant and that is that those studies were done in England by researchers who later found or that he, according to his testimony, the widely accepted in the medical community today is the fact that they didn't take into account smoking on -- in the participants and the ones that smoked stroked and the ones that didn't didn't. And we are talking about much bigger doses according even to Plaintiff's medical professionals, of those drugs, that estrogen and the progesterone, and whatever all it is. I've learned more about ladies problems in this case than I B- than in a few B- and none of it sounds like it's pleasant, but I fail to find in this

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<sup>5</sup> *Ky., 11 S.W.3d 575 (2000)*.

matter that either of the experts for the Plaintiff, and that I would say are certainly competent to testify as to standard of care, I do believe that they fail the *Daubert* test in terms of testifying as to causation in this matter. So as a result of that finding I would -B I would strike any portion of their testimony as to causation.

(Emphasis added).

*Daubert*, adopted in *Mitchell, supra*, requires that the trial judge determine whether the expert is proposing to testify to scientific knowledge that will assist the trier of fact to understand or determine a fact in issue. The trial court must make a *preliminary assessment* of whether the reasoning or methodology underlying the testimony is scientifically valid and whether it can be applied to the facts in issue. Lower courts should look at whether the scientific knowledge has been tested, whether it has been subject to peer review and publication, the known rate of error, and whether the evidence has a particular degree of acceptance in the relevant community.<sup>6</sup>

Scott submits that the trial courts requirement regarding the *Science* was applied without the appropriate *Daubert* flexibility. Scott explains that Dr. Young, a practicing board certified ob/gyn, was familiar with published studies B although unable to recall their exact names B which supported his opinion. Dr. Young also relied upon three *Peer reviewed* medical authorities, namely Richard P. Dickey, *Managing Contraceptive Pill Patients*; the ACOG *Guidelines for Women's Health Care*; and Leon Speroff, Robert H. Glass and Nathan G.

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<sup>6</sup> *Mitchell, supra*, N.3, at 101-02.

Kase, *Clinical Gynecologic Endocrinology and Infertility*. Dr. Young believed that the oral contraceptives were a substantial causative factor in Scott's stroke.

Dr. Dodd, Scott's other expert, is a board-certified family practitioner with experience treating stroke patients as well as obstetric/gynecological patients. Dr. Dodd's reviewed literature<sup>7</sup> with respect to the prescribing of oral contraceptives that assisted him in forming his opinion in this case. Questioned about his opinion that oral contraceptives contribute to the risk of stroke, Dr. Dodd explained that there is universal knowledge of the subject which he obtained from his entire education, all the way from medical school through residency and practice, conferences that you attend, literature that we read. **This isn't new. It is in the P.D.R.** (Emphasis added).

Dr. Dodd was familiar with various studies dealing with the use of oral contraceptives. He was questioned about higher dosage pills used in past studies, in particular about a comment<sup>9</sup> that there were reasons to re-examine the association between cardiovascular effects and oral contraceptive use, because dosages of estrogen and progesterone were higher in the 60's and 70's, when the studies were carried out. The trial court appeared to have considered this when ruling on the

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<sup>7</sup> As outlined in Appendix A to Scott's brief.

<sup>8</sup> Physicians-Desk Reference

<sup>9</sup> Appearing in *Lancet*, *Ischemic Stroke and Combined Oral Contraceptives, Results of an International Multi-Center Case Control Study.*

matter, but does not appear to have considered Dr. Dobbs=  
response --

The statement as far as it goes is okay.  
What we are omitting in this case is that is  
not what she was given. She was given the  
highest dose of Ovrал available. She was  
given the highest dose of Provera available.  
It wasn't until the last month she was given  
the lower dose pill.

I think what I don't want to leave unstated  
is that the progesterone is a thromboembolic  
medication, as well as the estrogenic pills.  
That starting back in September she [Scott]  
was started on a daily dose, high dose of  
progesterone. Then to the Ovrал, not only  
the highest dose, three a day and two of  
them for nine days . . . These are maximum  
doses.

Dr. Dodd was asked if, within a reasonable degree  
of medical probability, the birth control pills prescribed for  
Scott were a substantial factor in causing her stroke. He  
testified that birth control pills by themselves have been  
shown to have an increased risk factor for stroke. So when you  
add risk factors to someone who already has risk factors [as did  
Scott], collectively it gets pretty high and the probability  
increases with each of . . . those numerical multipliers. Yes,  
I think birth control pills were a contributor to her embolic  
phenomenon.

Scott draws our attention to *Jahn v. Equine Services,  
PSC*,<sup>10</sup> a case involving a claim of veterinary medical negligence  
in particular, the death of a horse several hours after surgery

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<sup>10</sup> 233 F.3d 382 (6<sup>th</sup> Cir. 2000).

to correct a palate displacement. According to the autopsy report, the animal was in shock and had hemorrhage of the brain and spinal cord, etiology uncertain. The specific cause of death was not ascertained. A pre-surgery evaluation reflected the presence of nasal discharge and a fibrinogen level of 600.

One of the plaintiff's expert witnesses, Dr. Mundy, a practicing vet with extensive experience treating and diagnosing horses, had never performed the surgery in question. The plaintiff's other expert, Dr. Robbins, was a practicing vet specializing in horse medicine, who had taught large animal surgery. Both Dr. Mundy and Dr. Robbins testified that the nasal discharge and fibrogen level were signs of infection or inflammation, and provided cause for delaying the surgery. Both vets agreed that anesthesia, given to a horse with an infection, could lead to shock and death. Dr. Robbins believed that the horse had been given an overdose of anesthesia; Dr. Mundy believed that the animal had gone into shock following the surgery and had fallen and hit his head, causing the hemorrhage in the brain

The district court ruled, *sua sponte*, that the testimony of Drs. Mundy and Robbins was inadmissible under *Daubert*, leaving the plaintiff without causation testimony, and the case was dismissed. The U.S. Court of Appeals for the Sixth Circuit concluded that exclusion of the proffered testimony was improper. Noting that proximate causation must be established by expert testimony in a medical negligence case in Kentucky,

the Court examined Federal Rule of Evidence 702<sup>11</sup> and the trial court's role in insuring that the proffered testimony is relevant and reliable.<sup>12</sup>

Quoting from *Daubert* and *Kumho Tire Co., Ltd. v. Carmichael*,<sup>13</sup> the Court explained that an expert is not required to testify what is known to a *certainty*; rather, an expert must only state an inference or assertion derived from scientific method. The reliability threshold is satisfied where the expert uses the same level of intellectual rigor in the courtroom as used in practice in his or her field, whether the testimony is based upon professional studies or personal experience. Experts are granted wide latitude in their opinions, *including those not based upon firsthand knowledge*, so long as those opinions have a reliable basis in the knowledge and experience of the discipline.<sup>14</sup>

In *Jahn*, the lower court had determined that expert testimony from a vet who had never performed the surgery in question was inadmissible. On appeal, the Court held that the lack of hands-on familiarity with the surgery was not relevant to a ruling on the admissibility of the expert's testimony

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<sup>11</sup> The federal rule is identical to KRE 702, and provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, expertise, training, or education, may testify thereto in the form of an opinion or otherwise."

<sup>12</sup> *Jahn*, *supra*, N.10, at 388.

<sup>13</sup> 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).

<sup>14</sup> *Daubert*, *supra*, N.2, 509 U.S. at 592.

regarding pre-operative and post-operative monitoring. The central issue was whether the defendant had caused or failed to prevent the animal's untimely death. In order to be admissible on the issue of causation, the expert is not required to eliminate all other possible causes of the injury. Although the experts admittedly did not know the cause of death, both identified what they believed to be the probable cause of death. The lower court had found the experts' testimony suspect, because it contradicted that of the pathologist. On appeal, the Court stated that comparing two pieces of evidence to determine which is the more credible should not be considered when ruling on Rule 702 admissibility.<sup>15</sup> Whether [the horse] . . . was suffering from an undiagnosed infection and whether . . . [the defendant] negligently failed to conduct further tests . . . are questions for the trier of fact, not for the district court to answer when ruling on admissibility of expert testimony.<sup>16</sup>

We are not persuaded by Dr. Grimes' attempt to distinguish *Jahn*. To the contrary, we find the Sixth Circuit's analysis applicable to the case *sub judice*. Both Drs. Young and Dodd concluded, based upon Scott's medical records, that she was at risk for stroke. Based upon their education and experience, and recognized medical authorities, both physicians believed that the oral contraceptives prescribed by Dr. Grimes were an additive risk and a substantial factor in causing the stroke.

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<sup>15</sup> *Jahn, supra, N.10*, at 391.

<sup>16</sup> *Id.* at 392.

Medical opinions need not be unchallengeable in order to be admissible. Medical experts are just witnesses, and they need not be purveyors of ultimate truth in order to be allowed on the stand.<sup>17</sup>

Accordingly, we hold that the trial court erred in ruling that the causation testimony of Drs. Young and Dodd failed to meet the *Daubert* test. In light of our determination, we do not reach Scott's second argument.

Scott has requested remand with direction that the ACOG publication be admitted into evidence at the next jury trial. KRE 803 (18) provides that learned treatises are not excluded by the hearsay rules, even though the declarant is available as a witness:

Learned treatises: To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

Dr. Young laid a sufficient foundation to establish the ACOG publication as a reliable authority. Dr. Grimes has not made any argument in his responsive brief to the contrary. Upon remand, the ACOG *Guidelines for Women's Health Care* shall be

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<sup>17</sup> *Id.*, at 393.

admissible as a learned treatise to the extent called to the attention of an expert witness upon cross-examination, or to the extent relied upon by Dr. Young, or other expert witnesses in direct examination, and statements contained therein may be read into evidence in accordance with 803 KRE (18).

We vacate the order of the McCracken Circuit Court dismissing the plaintiff's complaint, and remand this case for a new trial.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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