

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 04-27220 CA 27

LUZ MAYEA and MELLON PRIVATE
TRUST COMPANY, N.A., as legal guardians
and next friend of CARMEN MAYEA,
individually, and ANTONIA MAYEA and
MELLON PRIVATE TRUST COMPANY,
N.A., as legal guardians and next friend of
REINALDO MAYEA,

Plaintiffs,

v.

THE UNIVERSITY OF MIAMI d/b/a THE
UNIVERSITY OF MIAMI SCHOOL OF
MEDICINE and THE PUBLIC HEALTH
TRUST OF MIAMI-DADE COUNTY, the
governing body of JACKSON MEMORIAL
HOSPITAL, FRESENIUS MEDICAL
CARE EXTRACORPOREAL ALLIANCE
d/b/a FRESENIUS MEDICAL CARE
CARDIOVASCULAR RESOURCES, INC.,
a foreign Corporation, and THE
EXTRACORPOREAL ALLIANCE, L.L.C.,
a foreign limited liability company,

Defendants.

**PLAINTIFFS' MOTION TO STRIKE DEFENSE EXPERT DR. DAY
OR TO LIMIT HIS OPINIONS AT TRIAL**

NOW COME the Plaintiffs, LUZ MAYEA and MELLON PRIVATE TRUST COMPANY,
N.A., as legal guardians and next friend of CARMEN MAYEA, individually, and ANTONIA
MAYEA and MELLON PRIVATE TRUST COMPANY, N.A., as legal guardians and next friend of
REINALDO MAYEA, and move the Court to strike defense expert Stephen Day, Ph.D., as a witness

at trial in this cause, or to limit the opinions he can testify to at trial in this action, and as grounds therefor, state as follows:

1. Defendant, FRESINIUS MEDICAL CARE EXTRACORPOREAL ALLIANCE d/b/a FRESINIUS MEDICAL CARE CARDIOVASCULAR RESOURCES, INC., has hired a statistician, Steven Day, Ph.D., as a retained expert, seeking to have him opine on Carmen Mayea's life expectancy at the trial of this cause.

2. Dr. Day has failed to produce or disclose the underlying data making up his opinions and answer questions about his calculations thereupon, however, and thus should be stricken, as the good doctor on the one hand claims his methods are standard and well tested, but on the other fails to describe them in any meaningful way so as to allow the Plaintiffs to test them independently and to challenge them through effective cross examination of Dr. Day at trial. In addition, it is apparent from Dr. Day's testimony that because he failed to undertake any data compilation himself, and cannot supply any such data in this case, he is merely serving as a conduit to introduce inadmissible hearsay literature before the jury and thus his opinions, to at least that (gutting) extent, should be limited and ruled inadmissible by the Court.¹

¹The Plaintiffs have filed a Frye motion challenging Dr. Day's qualifications and the lack of general acceptance of his methodology for reaching his opinions and are seeking a special set hearing before the division judge pursuant to this Court's Order Setting Jury Trial and Order Setting Case Management Conference, requiring same to be heard by the division judge. We note, however, that Dr. Day has admitted that he has already been excluded twice by courts as an expert witness at trial. Deposition of Steven Day, Ph.D., at 108-09.

3. Dr. Day was deposed twice after several cancellations, once on his “preliminary opinions” on November 8, 2007, and again on January 30, 2007 once his opinions were finalized. Before the first deposition, on August 10, 2006, the Plaintiffs served a Fifth Request for Production on the Defendant, seeking:

1. All mathematical and scientific methodology used by Stephen Day to support his opinion regarding Carmen Mayea’s life expectancy.

2. All raw data and material used to support Stephen Day’s opinion regarding Carmen Mayea’s life expectancy.

3. All data identifying the population group used by Stephen Day to extrapolate Carmen Mayea’s life expectancy, including, but not limited to, a description of the following pertaining to each member of the population group:

a. Disability

b. Onset of disability

c. Symptoms

d. Age

e. Race

f. Gender

4. All mortality data used to support Stephen Day’s opinion regarding Carmen Mayea’s life expectancy.

5. Any and all scientific and technical publications reviewed or considered by Stephen Day in support of his opinions regarding Carmen Mayea’s life expectancy.

6. All data sets pertaining to adolescent and/or adult patients with traumatic brain injury used by Stephen Day to support his opinion regarding Carmen Mayea’s life expectancy.

4. On September 6, 2006, the Defendant responded for each request:

As this witness has not yet received all relevant materials and has not yet completed his opinion, the requested information and documentation is not yet available. Defendant reserves the right to supplement this response.

5. Dr. Day was then deposed on November 8, 2006. Other than producing some references and articles by supplement, the Plaintiffs were not furnished with Dr. Day's mathematical and scientific methodology, raw data, population data, mortality data, or data sets before his deposition.

6. Dr. Day testified in his preliminary deposition that he estimates Carmen Mayea's "life expectancy to be approximately 15 to 18 years." Deposition of Steven Day, Ph.D., at 28. The Plaintiffs then re-noticed Dr. Day for deposition, again requesting the items sought in their Fifth Request for Production. Again, materials evidencing his methodologies and underlying data for his opinions were not produced. After receiving the additional information he had wished to review at the time of his first deposition, however, his opinion remained the same at his final deposition. *Id.* at 209.

7. Because of the failure to produce records demonstrating his methodology used to reach his opinions, the Plaintiffs questioned Dr. Day in deposition about this. When asked, however, he was completely evasive and unable to give a straightforward answer for how he reaches his "expert" opinion. An initial example:

Q And would you describe for me the methodology you used in coming to this preliminary opinion?

A. Yes, I would be happy to.

Ms. Mayea has two conditions that are significant in terms – at least two conditions that are significant in terms of her life expectancy.

One is her congenital heart defect and the repairs that have been

done on that, and the other is the brain injury that she received.

With regard to the former condition, I reviewed literature on children and young adults who have undergone a Fontan Procedure to repair congenital heart defect and looked at the mortality rates of those persons.

And for a preliminary idea of what impact that might have on long-term survival and life expectancy, I looked at the available studies on that and did standard calculations of life expectancy based on those mortality rates.

With regard to the brain injury, I looked to literature on persons who have sustained various types of brain injury and again looked at the mortality rates there and examined what effect those mortality rates have on life expectancy, again using a standard calculation, using a life table.

Q. Is there more?

A. Well, clearly there is more. And I'm not sure how much detail you would like about any of the steps involved here, but these are – the methodology is described in many textbooks and articles that I could refer you to, or I could begin to explain from very first principles.

And I'm not sure how much detail you are interested in at this point.

Q Well, I'd like to know specifically exactly which theories and techniques you're utilizing and whether or not these theories have been – are able to be tested for validity and whether they have been tested for validity and accuracy.

** * **

THE WITNESS: . . . These methods have been tested, they are standard methods used by researchers in medicine and other areas, demography and other sciences, actuarial sciences and other areas.

** * **

I will assure you that the methods for doing so have been extensively tested and studied for many, many years and these, again, are standard techniques used in any kind of medical research wherein the ultimate outcome of survival or death is of interest; and therefore, when putting these things together, mortality rates being the key input to a calculation of life expectancy, there really is no question of testing there, but it is a standard calculation that's done all the time in

various different sciences, including medicine, life insurance actuarial science, demography, and – other sciences.

Day Depo I, at 23-26 (emphasis added).

8. Yet despite his assurances that he reached his opinions based upon a “standard calculation” and methods that “have been extensively tested,” he continuously refused to disclose or explain them, but without ever acknowledging his evasiveness.

Q Do you have a formula that you, yourself, utilized in coming to your opinions on Carmen Mayea’s life expectancy?

A. I personally don’t have a special formula for doing that. I follow standard methods, standard procedures, for determining mortality rates and calculating life expectancy, as I said, methods that are used constantly in medical research and actuarial science and life insurance pricing and so forth.

Q And is there a database that you utilize that has information that you rely on in coming to these conclusions?

A. Well “database” is a pretty broad term. And I guess if you think of the world’s literature and literature on scientific methodology as being a database, then in some sense I’m accessing that.

But if you’re talking about raw data on individual patients, I have not accessed any such database in this case....

Id. at 26-27 (emphasis added).

Q . . . [Y]ou said you have calculations. Are these written calculations?

A. I didn’t quite say I have calculations. I said I have done calculations. And this is true, I have done.

I at this point have not saved any of those, I have not printed them in any – in any way.

Id. at 95-96.

Q So is it fair to say that any calculations or computations or formulas

or statistical data that you have considered during the time prior to your deposition is not there? You don't have it?

A. Well, obviously, I – I have the information. It's all contained in studies that I have reviewed and other sources.

I have the knowledge required to reproduce calculations that I have done in the past or do new calculations.

I don't have any of them – I don't have the spreadsheet, the exact calculation I did.... But, of course, that calculation can be done any time a person wants.

Id. at 96-97 (emphasis added).

9. He stated that the “basic method” is “explained in [a textbook by] Brackenridge to some extent. And that methodology – again, very standard – is something I do use all the time.” Id. at 43-44. But when asked if he used it in the exact same form as Brackenridge, he then dodged again, answering, “[w]ell, it depends. He puts things in various ways.... So I may use it as an additive amount sometimes, I may look at it as a multiplicative amount other times. But the standard procedure for adjusting mortality rates is the same.” Id. at 44.

10. The closest Dr. Day ever came to explaining his methodology was to basically acknowledge that he took mortality rate figures he found in various articles, plugged them into spreadsheet, then out popped life expectancies:

Q . . . the life table is sort of a computer program, in a way, and that when you insert data into any of the columns, that the computer program then has to recalculate the other values because you have changed one of the values; is that – is that correct?

A. Very close to correct.

Specifically, one would insert a number in the column of mortality rates, or in some cases, probability of death, and that then would result in all other

columns being recalculated.

If you inserted a number in one of the other columns, unfortunately, you would overwrite a formula and the spreadsheet then would not be able to calculate anything from there.

* * *

Q . . . what you did was identify mortality rates in the literature you reviewed and inserted mortality rates into the life table so that you could get the new calculations; is that fair?

A. It – it is fair.... [I]t’s a bit of an oversimplification, but essentially that is correct. We are looking – I am looking to the literature to find mortality rates for a specific group, applying them to the life table recalculating all the other columns, including the column that gives life expectancy.

Id. at 129-130, 131.

11. We respectfully suggest that Dr. Day made the overstatement of the year in asserting, “[w]ell, I believe there is some basic science here....” Id. at 31.

12. For the information he “input” into the “spreadsheet” was not particularized data based upon his own expert compilations, but instead hearsay numbers he took directly from his own and other authors’ articles, without examining any underlying data for his calculations and opinions in this case. He relied upon some studies and texts done by others, id. at 49, but also some studies he co-authored. Id. Yet in the studies he has been involved with, he did not have direct contact with the subjects and did not personally collect any of the information. Id. at 50-52. He could not name the underlying data set used for one of the articles he co-authored and relied upon, id. at 217, and even denied someone would need to review it to check their conclusions. “[Y]ou could look to other studies of comparable patient populations.” Id. at 304. He testified there was no way to produce another data set, “because data is changed, updated, and additional data are added periodically, and I have been told by the director – the technical director of the project that that data set does not exist the way it did then and we have no way of recreating it at this point.” Id. at 309. But when then

asked if there was “currently a data set, modified though it is from what it once was, that you could get access to?” he answered, “I don’t know. I don’t know. I mean, I know that we work with many different sets of data from time to time, completely different populations of people, and so if you’re looking for something comparable to what was in that study, I don’t know if I can have access to any such thing at this point in time.” Id. at 310.

13. As for other sources he consulted to assist with his opinions, he did not produce the various textbooks he claims to have consulted, id. at 41, and even then could not say which pages he consulted in them. Id. at 42. Quite simply, he admitted, “I – I review the articles. I often do calculations based on the information contained in the articles.” Id. at 30. He testified that “if published studies are available with that information and they have been peer-reviewed and they are reliable and done well, then there would be no need, necessarily, to have a data set, to have access to a data set.” Id. at 215. He does not need to look at any underlying data because “I often look to these studies, and if the results are comparable and agree with my previous knowledge from other studies and I have no reason to suspect that anything funny was done with the data, then I certainly don’t need to have access to the data.” Id. at 216.

14. So we are then left with only his reference to the articles he relied upon, but not his own data compilations or even his own review of theirs, and even then the want of explanation for how he used those articles other than to stick information from those articles in a spreadsheet whose formulas he does not know or about which he will not testify. Whether Dr. Day even uses the scientific method in his apparent literature review and spreadsheet input we leave for a Frye hearing on another day² (assuming arguendo he is not stricken as a result of this motion), but it is clear from

²See, e.g., Jones v. United States, 933 F.Supp. 894, 899 (N.D. Cal. 1996) (“[t]he only articles

this record that Dr. Day's failure to disclose the method of how he reached his opinions requires his exclusion as a witness at trial, and his exclusive reliance upon articles and texts renders him a mere improper conduit for inadmissible hearsay evidence. The Court should strike him as a witness or in the least rule any opinions based upon and references to the literature he consulted inadmissible.

WHEREFORE, the Plaintiffs respectfully request that the foregoing motion be granted.

MEMORANDUM OF LAW

A. Failure to Disclose Methodology, Calculations, and Underlying Data

Fla. R. Civ. P. 90.705 provides:

- (1) Unless otherwise required by the court, an expert may testify in terms of opinion or inferences and give reasons without prior disclosure of the underlying facts or data. On cross-examination the expert shall be required to specify the facts or data.
- (2) Prior to the witness giving the opinion, a party against whom the opinion or inference is offered may conduct a voir dire examination of the witness directed to the underlying facts or data for the witness's opinion. If the party establishes prima facie evidence that the expert does not have a sufficient basis for the opinion, the opinions and inferences of the expert are inadmissible unless the party offering the testimony establishes the underlying facts or data.

that tend to support Plaintiffs' experts are not based on controlled, scientific studies.... Instead, they are all anecdotal case reports, reviews of research done by other people, or studies lacking a control group. As such, they are not derived through the scientific method") (emphasis added), aff'd, 127 F.3d 1154 (9th Cir. 1997), cert. denied, 118 S.Ct. 2359 (1998).

(emphasis added).

Here the Plaintiffs have sought the basis for Dr. Day's opinions, to wit: the specific data relied upon and testimony about the methodology and calculations he used to reach his opinions. He has refused to provide them and should be stricken. This precise discovery violation was at issue in Stewart & Stevenson Services, Inc. v. Westchester Fire Ins. Co., 804 So.2d 584, 587 (Fla. 5th DCA 2002), an indemnification action where the plaintiff's expert attorneys refused to disclose their strategy and evaluation of the underlying claim and refused to produce records making up the basis of their opinions, there citing the attorney client privilege.³ As described by the district court,

S & S chose to use as its experts the attorneys who represented Snell and the ship owner's excess carrier in Snell's negligence action. When Westchester deposed the attorneys and asked them questions regarding their evaluation of the settlement proceedings and their strategy related thereto, they refused to answer on the grounds of attorney-client privilege. The attorneys also refused to produce documents for the same reason. Westchester filed a pre-trial motion in limine seeking to bar S & S's expert testimony based on its inability to fully cross-examine the witnesses. The trial court granted the motion and excluded S & S's expert testimony.

Id. (emphasis added). The Fifth District affirmed, holding:

Section 90.705(1) of the Florida Statutes (1999) provides that on cross-examination an expert "shall be required to specify the facts or data" which

³Here, of course, Dr. Day asserts no privilege, he simply refuses to give a straight, responsive answer as to his methodology and calculations, and refuses to disclose the precise data he relied upon, or the data underlying his own prior co-authored articles he relies upon now.

underlie his or her opinion. In Dempsey v. Shell Oil Co., 589 So.2d 373, 378 (Fla. 4th DCA 1991), the Fourth District explained that the ability of a litigant to fully cross-examine an expert serves a critical function:

[W]hen the direct examination opens a general subject, the cross-examination may go into any phase, and may not be restricted to mere parts . . . or to the specific facts developed by the direct examination . . . but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut or make clearer that facts testified to in chief.... (Citations omitted).

Cross-examination of experts on relevant and material issues is especially important in view of the rules of evidence that permit experts to testify and express opinions without setting out in detail all of the predicates upon which the opinion or testimony may be based. Those matters are now left largely to be explored on cross-examination. Hence if cross-examination is limited ... an expert's views and the soundness thereof may go largely untested.

Here, the attorney experts' refusal to answer questions and produce documents circumvented Westchester's ability to uncover facts or data underlying the opinions of the experts which could have modified, supplemented, contradicted, rebutted, or clarified those opinions.... [T]he trial court properly excluded testimony of those witnesses.

Id. at 587-88. Cf. Doctors Co. v. State, Dept. of Ins., 940 So.2d 466, 471 (Fla. 1st DCA 2006) (trial court properly excluded expert witness testimony where appellant's failure to properly disclose him and to furnish a summary of his proposed testimony "deprived Appellee of an adequate opportunity to depose [the expert] before trial"), rev. denied, 952 So.2d 1189 (Fla. 2007); Capital Bank v. G & J Investments Corp., 468 So.2d 534, 535 (Fla. 3d DCA 1985) (trial court erred in allowing testimony of undisclosed expert, inter alia, where "the record supports Capital Bank's contention that it was unprepared to cross examine the witness").

B. Conduit for Information in Hearsay Literature

“Although an expert witness is entitled to render an opinion premised on inadmissible evidence when the facts and data are the type reasonably relied on by experts on the subject, the witness may not serve merely as a conduit for the presentation of inadmissible evidence.” Smithson v. V.M.S. Realty, Inc., 536 So.2d 260, 261-262 (Fla. 3d DCA 1988) (citations omitted). Published articles and studies are indisputably hearsay and thus inadmissible on their own or through an expert. See, e.g., Green v. Goldberg, 630 So.2d 606, 609 (Fla. 4th DCA 1993). See also Nixon v. State, 694 So.2d 157 (Fla. 4th DCA 1997) (proposed testimony of expert excluded on other ground “may have been inadmissible as hearsay, insofar as it involved the expert relating the contents of articles that he had read. The expert may not serve as a conduit for placing inadmissible evidence before the jury”) (emphasis added). Nor can such literature be used to bolster the testimony of an expert on direct examination. Quarrel v. Minervini, 510 So.2d 977, 978 (Fla. 3d DCA 1987), rev. denied, 519 So.2d 987 (Fla. 1988).

Because it is apparent Dr. Day’s expert services merely involved his use of information from hearsay literature, then plugging numbers from such literature into a spreadsheet to tell him his opinions, rather than his own research into the life expectancy of those with Carmen Mayea’s conditions, or in the least study and evaluation of data of others who have done so, it is clear that his opinions are solely based upon his review of articles, texts, and literature, and his testimony at trial would render him a mere improper conduit for their content.

CONCLUSION

For the foregoing reasons, and based upon the foregoing authorities, the Plaintiffs

respectfully request that Dr. Day be stricken or excluded as a witness at trial, or that he be precluded from expressing any opinions as a conduit based upon information he obtained from written hearsay sources.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail and fax on August 20, 2007 on all counsel on the attached service list.

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MAYEA v. UNIVERSITY OF MIAMI

Case No. 04-27220 CA 27

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