IN THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI

TREVOR GODFREY Plaintiff, v. OMEGA PSI PHI, OMICRON KAPPA CHAPTER, Defendant.	)	Case No. 1431-CC00125

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO STRIKE CERTAIN OPINIONS OF RETAINED EXPERT DALE A. HALFAKER

COMES NOW Plaintiff and for his response to defendant Omega Psi Phi. Omicron Kappa Chapter's motion to strike certain opinions of Dale A. Halfaker, states as follows:

I. INTRODUCTION

Dr. Dale Halfaker is a renowned neuropsychologist with extensive experience treating patients throughout Missouri and the Springfield area, whose research and publications have made significant contributions to his field of practice. Plaintiff has retained him as an expert witness in this case to examine him and render his opinion as to the neuropsychological and neurocognitive impairments Plaintiff has suffered and may suffer in the future as a result of the subject assault. In his report, Dr. Halfaker determined that, as a result of the subject assault, Plaintiff has suffered and continues to suffer significant impairment. He also concluded that Plaintiff is at an elevated risk of developing chronic traumatic enecephalopathy (CTE) in the future as a result of the cumulative effect of the assault at issue in this case.

Defendant seeks to strike portions of Dr. Halfaker's opinions on several grounds, each of which are misguided. Because Dr. Halfaker's opinions and conclusions are premised upon sound and reliable medical research, they should be admitted into evidence. To the extent that the scientific and medical research concerning the contraction of CTE is nascent or undeveloped,

these considerations are for the jury to weigh. Thus, Defendant's motion to strike should be denied.

II. ARGUMENT

1. Standard for Expert Testimony Under Missouri Law

Under Missouri law, the relevant standard in determining the admissibility of expert testimony in civil cases is set out in Missouri Revised Statutes section 490.065, which states in pertinent part:

> 1. In any civil action, if *scientific, technical,* or other *specialized knowledge* will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."
> ....
> "3. The *facts or data* in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a *type reasonably relied upon by experts in the field* in forming opinions or inferences upon the subject and *must be otherwise reasonably reliable.*

MO. REV. STAT. § 490.065 (emphasis added). "An expert may testify to an opinion based on his or her personal experience, from the results stated in medical literature, or from information learned at professional seminars or courses of study." *Byers v. Cheng*, 238 S.W.3d 717, 729 (Mo .App. E.D. 2007). The Court in *Whitnell v. State*, 129 S.W.3d 409, 413-414 (Mo. App. E.D. 2004) held that an expert's testimony should be admitted if the witness possesses "some qualifications". *See also Jones v. Grant*, 75 S.W.3d 858 (Mo. App. W.D. 2002) (finding it was reversible error to exclude expert witness on the basis he was not a licensed contractor).

So long as the expert is qualified, any weakness in the expert's knowledge is for the jury to consider in determining what weight to give the expert. *Kivland v. Columbia Orthopaedic Group, LLP*, 331 S.W.3d 299, 311 (Mo. 2011) (overturning the trial court's exclusion of an expert). "The jury will decide whether to accept the expert's analysis of the facts and the data."

Id. (citing *Elliott v. State*, 215 S.W.3d 88, 95 (Mo. banc 2007)) ("any weakness in the factual underpinnings of the expert's opinion… goes to the weight that testimony should be given and not its admissibility.").

Section 490.065(3) applies to "facts or data" that an expert relies upon in rendering an opinion. The purpose of subsection (3) was to bring the legal practice in line with the standard practice exercised by experts in their respective fields. *Goddard v. State*, 144 S.W.3d 848 (Mo. App. S.D. 2004). For example, in life and death situations, a physician routinely relies on numerous sources, including statements from third parties in rendering an opinion or diagnosis. *Id.* Prior to the adoption of § 490.065(3), a doctor could not come into court and testify as to these facts; he or she could only state the ultimate opinion or diagnosis. The previous law that prohibited experts from relying on hearsay out of court was directly refuted by § 490.065(3), which allowed experts to rely on information that is standard practice within the expert's respective profession. *Glidewell v. S.C. Management, Inc.*, 923 S.W.2d 940, 951 (Mo. App. 1996) (recognizing that it was inconsistent to allow experts to rely on hearsay while practicing their profession, but not let them rely on hearsay when rendering their opinion in court).

To determine what an expert reasonably relies on in their field, the **trial judge is expected to defer to the expert's assessment of what data is reasonably reliable.** *Id.* at 951; *Goddard*, 144 S.W.3d at 854. The trial judge may look beyond the expert's testimony as to what is reasonably reliable in the field, but "[i]t is only in those cases where the source upon which the expert relies for opinion is so slight as to be fundamentally unsupported, that the finder of fact may not receive the opinion." *Id.*; (citing *Keyser v. Keyser*, 81 S.W.3d 164, 169 (Mo. App. 2002)). Generally, questions as to the sources and bases of an expert's opinion affect the weight, rather than the admissibility of the opinion, and are properly left to the jury. *Kivland*, 331 S.W.3d

at 311. Further, "any weakness in the factual underpinnings" of an expert's testimony go to that testimony's weight, not its admissibility. *Am. Eagle Waste Indus., LLC v. St. Louis County, Missouri*, 463 S.W.3d 11, 27 (Mo. App. E.D. 2015).

2. Dr. Halfaker's Opinion Regarding Plaintiff's Neurocognitive Impairment is Admissible

In his assessment of Plaintiff, Dr. Halfaker concluded, in part, that:

> it can be reasonably stated within an appropriate degree of neuropsychological certainty that the assault on January 28, 2012 was of sufficient severity to give rise to the presence of permanent neuropsychological impairment and its occurrence is significant in influencing [Plaintiff's] current state and mild neurocognitive impairment in a cumulative manner.

See Exhibit 1, Dr. Halfaker's Report at 47. Defendant accuses Dr. Halfaker of confusing correlation with causation, and claims that "[a]ny opinion offered by Halfaker that the incident caused permanent neurocognitive/neuropsychological impairment consists of nothing more than unsupported, inadmissible speculation". *See* Def.'s Mot. Strike 6. Defendant's basis for this assertion is, in essence, that because Plaintiff has suffered numerous head injuries, Dr. Halfaker has no way of sussing out whether the one perpetrated by Defendant caused his conditions and impairments. *See id.* at 4-6.

This argument misapprehends the governing standard for causation in Missouri, and therefore seeks to exclude expert testimony that is both medically sound and highly relevant. Under Missouri law, "It is only necessary that the defendant's negligence be **a cause or a contributing cause to the injury, not the exclusive cause.** *Wagner v. Bondex Int'l, Inc.*, 368 S.W.3d 340, 350–51 (Mo. App. W.D. 2012) (emphasis added). "To make a prima facie showing of causation, the plaintiff must show the defendant's negligent conduct more probably than not was *a cause* of the injury." *Id.* at 350 (emphasis added). Further, the Supreme Court of Missouri has held that:

> The general rule is that if a defendant is negligent and his [or her] negligence combines with that of another, or with any other independent, intervening cause, he [or she] is liable, although his [or her] negligence was not the sole negligence or the sole proximate cause, and although his [or her] negligence, without such other independent, intervening cause, would not have produced the injury.

Harvey v. Washington, 95 S.W.3d 93, 96 (Mo. 2003). Thus, the fact that the assault in question was likely not the *sole cause* of Plaintiff's impairments is of no legal import.

Ignoring these substantive legal principles, Defendant seeks to hold Plaintiff and his expert to a nearly impossible (and wholly fictitious) standard. It argues that "[t]he only way to determine which of plaintiff's head injuries caused or contributed to cause such alleged impairments would have been to administer evaluations following one or both of the prior head injuries, but before the injury claimed in this case." Def.'s Mot. Strike 4. But this proposed rule is far removed from any recognized by Missouri courts. Instead, Missouri has long imposed liability on the basis of "cumulative exposure" or "cumulative trauma". For instance, in *Wagner v. Bondex Int'l, Inc.*, the plaintiff was exposed to numerous asbestos products attributed to multiple defendants over a period of several decades. 368 S.W.3d 340, 345 (Mo. App. W.D. 2012). There, one of plaintiff's experts testified that "because of the disease's cumulative nature, it is impossible to identify the particular fiber that began or caused the process that resulted in mesothelioma.", and the plaintiff's other expert testimony was to the same effect. *Id.* at 352. No defendant was permitted to escape liability on the grounds that plaintiff's experts could not isolate their product as the one the precipitated the plaintiff's disease.

Similarly, Dr. Halfaker need not conclusively attribute Plaintiff's conditions solely to the assault in question in order for his opinion to be admissible. Rather, the fact that he opines that the assault contributed to cause Plaintiff's current conditions is sufficient. This opinion is well-founded, as it relies upon the voluminous scientific and medical research which has found that

each additional head trauma can contribute to the ongoing neuropsychological and neurocognitive impairments suffered by Plaintiff. Dr. Halfaker's opinion, far from being based on "unsupported speculation", should be admitted into evidence.

3. Dr. Halfaker Should Be Permitted to Testify On the Subject of Plaintiff's Future Increased Risk of CTE

In his report, Dr. Halfaker states that "[t]here is a concern related to chronic traumatic encephalogpathy (CTE) associated with his multiple blows to the head, including the traumatic brain injury (TBI) sustained on January 28, 2012." At trial, Dr. Halfaker seeks to testify that the assault in question placed Plaintiff at an increased risk of CTE in the future. ~~He readily acknowledges that he cannot state within a reasonable degree of certainty that Plaintiff will contract CTE in the future.~~

Defendant takes issue with Dr. Halfaker's methodology in reaching this conclusion, noting the "controversy" surrounding CTE scientific research. *See* Def.'s Mot. Strike 8-9. But under section 490.065, controversial or even heterodox expert opinions may be admissible, so long as they "assist the trier of fact to understand the evidence or to determine a fact in issue". *See* MO. REV. STAT. § 490.065.1; *see also Elliott v. State*, 215 S.W.3d 88, 95 (Mo. banc 2007) ("any weakness in the factual underpinnings of the expert's opinion… goes to the weight that testimony should be given and not its admissibility."); *Scott v. Blue Springs Ford Sales, Inc.*, 215 S.W.3d 145, 176 (Mo. App. W.D. 2006) ("questions surrounding the expert's sources for his opinion affect the weight, rather than the admissibility, of the opinion, and are properly left to the jury."). There is no doubt that, regardless of its controversial nature, methodologically-sound scientific and medical literature had been published that confirms the causal link between mild traumatic brain injuries and CTE. Dr. Halfaker should be able to rely on these findings in proffering testimony that Plaintiff is at an increased risk of CTE in the future.

Indeed, Missouri law clearly holds that that an expert witness may opine on the increased risk of future injury the plaintiff may suffer, even if the expert cannot do so within a reasonable degree of medical certainty. For instance, in *Deck v. Teasley*, the Supreme Court of Missouri held that "expert testimony regarding a plaintiff's increased risk of future consequences is admissible to aid the jury in assessing the extent and value of the plaintiff's present injuries **'even if those future consequences are not reasonably certain to occur.'**" 322 S.W.3d 536, 543 (Mo. 2010) (citing *Swartz v. Gale Webb Transp. Co.*, 215 S.W.3d 127, 131 (Mo. 2007) (emphasis added)).

In *Swartz v. Gale Webb Transp. Co.*, the two medical experts testified that the plaintiff had a risk of future surgery. *Swartz*, 215 S.W.3d at 130. Neither doctor could testify the surgery was more likely than not to be required. One of the doctor's admitted that whether in fact the plaintiff would actually require the surgery "was speculation on his part and could not be stated with a reasonable degree of medical certainty." *Id.* the other expert testified that the risk of one complication was only five percent for any danger, and even more attenuated for any significant risk. *Id.* Over defendant's objection, the trial court admitted testimony about the chance of future complications. *Id.* at 129-130.

In affirming the introduction of this evidence, the court held a risk of possible future surgery or possible future complications "is admissible to aid the jury in assessing the extent and value of the plaintiff's present injuries, even if those future consequences are not reasonably certain to occur." *Id.* at 131. This is not just the rule in Missouri, but in numerous states. *Id.* at 132. The fact a person has some future risk of additional surgeries, or could suffer possible future consequences from an injury "makes it a worse injury" than one that has a lesser chance of future consequences, or one which has fully healed. *Id.* at 132-133. That the injury "brings with

it this increased risk of future injury is information the jury should have in the difficult task of trying to give plaintiff's condition a dollar value." *Id.* at 133. "Missouri courts have long held that such testimony is admissible to aid the jury in assessing the extent and value of the plaintiff's present injuries, even if those future consequences are not reasonably certain to occur." *Id.* at 131 Such testimony properly establishes the nature and extent of a plaintiff's injuries, and is therefore admissible, despite the fact it cannot be said it will occur with reasonable certainty. *Id.* at 133. The jury is therefore entitled to consider the estimated cost of any contingent surgery or care. *Id.* at 131.

Defendant attempts to sidestep the Supreme Court's rulings in *Deck* and *Swartz* by arguing that the experts in those cases were "able to attach some sort of quantification" to increased risk of future injury. Def.'s Mot. Strike 9. But this purported distinction is purely illusory. Neither case premised their holding on the ability of the expert witness to attach a numerical value to the increased risk, and Defendant cites no language suggesting that such a quantification is necessary. Indeed, in Swartz, one of the experts testified that his opinion "was speculation on his part and could not be stated with a reasonable degree of medical certainty." *Swartz,* 215 S.W.3d at 130. As such, there is no basis for excluding Dr. Halfaker's testimony regarding Plaintiff's increased future risk for CTE.

4. Dr. Halfaker is Qualified to Opine of CTE

Dr. Halfaker is a licensed, practicing neuropsychologist. In *Landers v. Chrysler Corp.*, the "central issue" addressed by the court was "whether a neuropsychologist is qualified to testify as to causation of an organic brain injury." 963 S.W.2d 275, 280 (Mo. App. E.D. 1997) (overruled on other grounds). In a lengthy and well-reasoned opinion on the question, the court, considering other jurisdictions' resolution of the issue, held that neuropsychologists are so

qualified. *Id.* at 282. It also favorably cited *Valiulis v. Scheffels*, 191 Ill.App.3d 775, 138 Ill.Dec. 668, 675–676, 547 N.E.2d 1289, 1296–97 (1989), where the court stated that "it would be somewhat anomalous to conclude that [a neuropsychologist] would not be qualified to testify about [the cause of plaintiff's injury] when the neurologists and psychologist who sought out his expertise and assistance in diagnosing the disease would most likely be qualified to do so." *Id.* at 281. Thus, because Missouri law holds that a neuropsychologist such as Dr. Halfaker is qualified to testify about causation of serious brain injuries, he should be permitted to testify about Plaintiff's elevated risk for CTE.

III. CONCLUSION

Dr. Halfaker is a qualified and well-credentialed neuropsychologist who has assessed the effects of Defendant's assault on Plaintiff's current and future neuropsychological and neurocognitive functioning. His opinions regarding these matters will assist the trier of fact, and they are premised upon sound scientific research. As such, for the reasons stated *supra*, the Court should permit them into evidence.

WHEREFORE, Plaintiff Trevor Godfrey requests that the Court deny Defendant Omega Psi Phi, Omicron Kappa Chapter's Motion to Strike Certain Opinions of Dale Halfaker.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon the following attorneys of record via **ECF** and **U.S. MAIL**, as prescribed by law, on this 6th day of January, 2017

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