

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

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| STEVE KAUFMAN, |) | Case No. 7:06cv5017 |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | BRIEF IN SUPPORT OF |
| |) | MOTION TO EXCLUDE |
| THE WESTERN SUGAR |) | TESTIMONY OF BARBARA |
| COOPERATIVE, Inc., |) | WIDOM, M.D. PURSUANT |
| |) | TO DAUBERT/KUMHO TIRE |
| |) | |
| Defendant. |) | |
| |) | |

When it comes to admission of expert testimony under the Federal Rules of Evidence, a trial judge has a gatekeeping responsibility to “ensur[e] that an expert’s testimony rests on a reliable foundation and is relevant to the task at hand.” *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 at 141 (1999) citing *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993) The Supreme Court, in *Kumho Tire* continued “it is the responsibility of the trial judge to determine whether a particular expert has sufficient specialized knowledge to assist jurors in deciding the specific issues in the case.” *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 at 156. According to *Daubert*, “[t]his entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid, and of whether that reasoning or methodology properly can be applied to the facts in issue.” *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 585 (1993). In the instant matter, Dr. Widom issues numerous unfounded conclusions, including ultimately concluding that, with the proper use of his insulin pump, Steve Kaufman could have worked a rotating shift schedule without compromising his ability to control his blood sugars. (Widom depo, 72: 3-7) However, Dr. Widom’s ultimate conclusion is neither relevant nor reliable. The issue at contest is whether Steve Kaufman could work the rotating shift

used at Western Sugar without compromising his blood sugar control. Dr. Widom's testimony simply does not address this issue. Moreover, her generally concluding that Steve Kaufman could work *a* rotating shift schedule is utterly without bas(es) or foundation. Her vague references to unidentified patients who allegedly work rotating shift schedules without compromise to their blood sugar control utterly fails to establish these purported patients as suitable comparators for Steve Kaufman. Furthermore, not only are Dr. Widom's professional conclusions unfounded and inaccurate, even her testimony as to factual matter ranges from dubious to outright perjurious.

As noted directly above, Dr. Widom opines that Steve Kaufman could have worked a rotating shift schedule without compromising his blood sugar maintenance. This conclusion, however, is both unreliable and irrelevant.¹ During her cross-examination, Dr. Widom was asked to identify the type of rotating shift schedule that Steve Kaufman was required to work at Western Sugar which she could not do. Initially, she responded to this inquiry by testifying "I believe that he rotated slowly through day, evening and night. But I'm – I am not sure." (Exh. 1: Widom, depo, 102: 24-25; 103: 1-5) and "Maybe – my impression – again, I don't remember, and I don't know whether I have that information – is that it was something like a week at one shift level and then a week at another." (Exh. 1: Widom depo, 103: 8-11) Shortly thereafter in response to plaintiff's inquiring regarding the specific number of days in Steve Kaufman's shift rotation, Dr. Widom indicated "I do not recall. *And I don't know if I ever did know.*" (*emphasis added*) (Exh. 1: Widom depo, 105: 25; 106: 1-6)²

Dr. Widom attempts to extract selected pieces of studies and vague references to unidentified alleged patients of hers to substantiate her ultimate conclusion. However, neither the study extracts nor the patient references, even if viewed conjunctively, come close to establishing a basis or foundation from which she can conclude that Steve Kaufman could have worked either a rotating shift schedule, generally, or, specifically, Western Sugar's rotating shift schedule without compromising his blood sugar control.

¹ As Dr. Widom was not familiar with the rotating shift schedule employed at Western Sugar, her opinion(s), particularly, her ultimate conclusion, simply cannot address the issue at hand: whether Steve Kaufman could have worked Western Sugar's rotating shift schedule without compromising his blood sugar control.

² Western Sugar's shifts rotated approximately every 3-4 days.

Dr. Widom's efforts to ground her conclusion on outside resources such as a 1992 study abstract examining diabetes control in shift workers (Exh. 3: "Poole Study")³, an unidentified review allegedly conducted by the European Union and a general policy statement issued by the American Diabetes Association do not withstand even casual scrutiny. The Poole Study actually refutes rather than supports Dr. Widom's conclusion(s). Significantly, it expressly indicates that "[i]n those subjects that moved to a more rapidly rotating shift pattern there was a significant deterioration of control". When asked during cross examination "do you think that might make it more difficult to either achieve or maintain stable blood sugar levels the more often that Type 1 diabetic is rotating their schedule?" Dr. Widom, rather, incredulously, replied "I don't think that we have data to support – to know the answer to that question" (Exh. 1: Widom depo, 104: 16-21) and "there's no – there's not literature data in Type 1 diabetes to know"⁴. (Exh. 1: Widom depo, 104: 23-24)

However, notwithstanding Dr. Widom's refusal to acknowledge those findings of the Poole Study that directly conflict with her ultimate conclusion(s), nothing in the Poole Study meaningfully identifies the diabetic conditions of the subjects of the Poole Study as analogous to the diabetic condition of Steve Kaufman. Steve Kaufman is what is termed a "labile"⁵ diabetic. A labile diabetic is a diabetic who is particularly susceptible to fluctuating or unstable blood sugars. (Exh. 2: Wedell depo, 22: 21-25; 26: 1-5) The Poole Study abstract does not specify whether its subjects are labile diabetics or not. Hence, even if the Poole Study did not specifically indicate that rapidly rotating shift schedules result in the deterioration of blood sugar control, it lacks sufficient factual detail from which its subjects could be legitimately identified with and analogized to Steve Kaufman.

As for the un-cited European Review of guidelines for treatment of Type 1 diabetes and the American Diabetes Association policy statement, neither provide an iota of competent substantiating evidence for Dr. Widom's conclusion(s). Dr. Widom's

³ Poole is the surname of the study's lead author. While Dr. Widom's testimony failed to provide a specific citation for the Poole study, she possessed a 2 page abstract of the study at the deposition and, through defendant's counsel, provided plaintiff's counsel a fax of said abstract which is attached hereto. (Exh. 3)

⁴ Dr. Widom's denial of the existence of such data or literature is a little ridiculous as the abstract was either in her hand or on her desk when she denied its existence. (Exh. 5: Boross affidavit)

⁵ The term "brittle" is often used synonymously with "labile".

reference to an alleged European Review of guidelines for treatment of Type 1 diabetes is evidentiarily worthless and, obviously, inadmissible as evidence⁶. Dr. Widom neither provides a citation that would allow the plaintiff to examine this review nor does she provide the actual review. All the record has is Dr. Widom's characterization of this review's contents. Her allusion to such matter clearly does not comprise admissible evidence.

Dr. Widom's recitation of an American Diabetes Association policy statement is simply irrelevant. (Exh. 1: Widom depo, 78: 19-25; 79: 1-8) The American Diabetes Association's policy position that Type 1 diabetics should be eligible for any employment for which he or she are qualified simply does not even address the issue at hand: whether Steve Kaufman could have worked a rotating shift schedule without compromising his blood sugar control. The former is a political position indicating that the American Diabetes Association believes that Type 1 diabetics qualified to perform specific jobs should not be declared ineligible for such jobs merely by dint of their Type 1 diabetic condition. The latter is a medical assessment of a specific person's medical condition and/or capacity. The comparison is even too off point to characterize it as "apples and oranges" – while apples and oranges are different, at least, they are both fruit. Dr. Widom's attempt to use the aforementioned policy statement as substantiating proof that Steve Kaufman could work a rotating shift schedule is simply non-sensical – it is like comparing apples to windmills.

Nor does Dr. Widom's vague references to patients who allegedly work rotating shifts without compromise to their blood sugar control support her conclusion(s). Even prior to examination of the veracity of Dr. Widom's testimony of patients who allegedly work rotating shifts without compromising their blood sugar control, her testimony of such patients, taken at face value, does not approach providing facts necessary to be able to use such patients as viable comparator(s) to Steve Kaufman. For example, Dr. Widom's testimony does not indicate whether such patients are Type 1 or Type 2 diabetics, nor does it provide information as to the type(s) of rotating shifts allegedly worked by these patients. Moreover, she did not indicate whether any of these unidentified patients were labile like Steve Kaufman. Most significantly, she concludes

⁶ It is hearsay, and, barring, identification of its contents, it is irrelevant and unfounded conclusion.

that her unidentified patients' blood sugars are controlled, however, she provides no underlying, concrete medical documentation such as their respective hemoglobin A1C values to support her conclusion that they are controlled.⁷ Consequently, there is not a shred of foundational evidence to support her preliminary conclusion that her patients' blood sugar level(s)' are controlled. Without such information necessary to be able to reasonably compare these patients to Steve Kaufman, Dr. Widom's reference to them does not assist a fact finder or jury. Indeed, not only is such information not helpful, it is intolerably misleading. However, it is not merely Dr. Widom's conclusions that are utterly unfounded and misleading. Even the expression of her non-expert testimony, that is, her observations and recollections are unreliable, indeed, at times, perjurious.

Specifically, Dr. Widom testifies that she treats diabetic nurses and workers at Budweiser and Wal-Mart that work rotating shift schedules without compromising their blood sugar control (Exh. 1: Widom depo, 63: 18-20; 64: 1-25; 66: 19-25; 67: 1-25) However, Fort Collins' Anheuser-Busch Human Resource Officer, Vicki Miller indicated to plaintiff's counsel that, except for "operational workers", who comprise approximately 5% of the workforce at Fort Collins' Anheuser-Busch production facility, Anheuser-Busch does not utilize a rotating shift schedule at its facility⁸. (Exh. 5: Boross affidavit) Teresa Gallaher, a Department Manager at a Wal-Mart Super Center for over sixteen (16) years testifies by affidavit that Wal-Mart simply does not use a rotating shift schedule. (Exh. 4: Gallaher affidavit) Moreover, common sense and Dr. Widom's penchant for prevarication strongly suggest that she does not treat any nurses with Type 1 diabetes that work rotating shift schedules. While nurses often work extended shifts and irregular hours, it is not common that they work shifts that regularly rotate. Given the fact that Dr. Widom cannot have a patient working rotating shifts at Wal-Mart and almost certainly does not have a patient working rotating shifts at Anheuser-Busch, it is highly improbable that she has a Type 1 diabetic nurse(s), indeed, a labile Type 1 diabetic nurse(s) working

⁷ Hemoglobin A1C values provide a recorded numerical value for blood sugar levels over a period of time. A physician concluding that blood sugars are being controlled without providing the underlying hemoglobin A1C value is like a physician concluding that a person's blood pressure is considered high, normal or low without actually indicating the underlying numerical blood pressure reading.

⁸ Admittedly this is hearsay, however, counsel's statement is sworn and Ms. Miller has no interest in this action and, hence, no apparent reason to have misrepresented to counsel.

rotating shift schedules. Moreover, it is overwhelmingly unlikely that she would have so many diabetic patients working rotating shift schedules.

Dr. Widom makes numerous other factual misrepresentations. The mendacious tenor of Dr. Widom's testimony is presaged early in her deposition by her attempts to characterize her expert witness fee as a "reimbursement". (Exh. 1: Widom, depo, 19: 21-25; 22: 1) Dr. Widom also profoundly mischaracterizes the medical notes and records of Maria Rodebaugh, M.D. by testifying that Dr. Rodebaugh stated that Steve Kaufman did not diligently comply with his physicians' instructions and that he did not cooperate with doctors (Exh. 1: Widom depo, 107: 25; 108: 1-25; 109: 1-25). In fact, Dr. Rodebaugh's notes state no such things. (Exh. 1: Widom depo, 107: 25; 108: 1-25; 109: 1-25) and (Exh. 5: Boross Affidavit) Dr. Widom also states that Steve Kaufman fails to use the sensor apparatus on his MiniMed 712 insulin pump when she knows full well that the MiniMed 712 does not have a sensor apparatus. (Exh. 1: Widom depo, 37: 21-25; 38: 1-13; 40: 7-13) It's not merely Dr. Widom's conclusion(s) that are unreliable, it is her testimony, generally, including the alleged underlying facts purportedly substantiating her conclusion(s). Her testimony is not merely a "spinning" of the facts. Rather, far too often, she fabricates the facts and "spins" the interpretation or characterization of those fabricated facts. Rather than assist the jury, such "evidence" could only mislead a jury and obstruct it from successfully discharging its responsibility.

While the anticipated presentation of expert medical testimony from the plaintiff suggests that the defendant should be permitted to offer its own expert medical view(s), the Court need not, indeed, should not allow a scientific or medical expert to provide utterly unfounded opinions. Nor should the Court allow the presentation of clearly false testimony, be it from a lay or expert witness. Dr. Widom's ultimate conclusion⁹ that Steve Kaufman could have controlled his diabetes despite working a rotating shift schedule is irrelevant as she does not indicate that he could have worked the particular rotating shift schedule at issue, Western Sugar's rotating shift schedule. Moreover, her opinion stating generally that he could have controlled his blood sugars despite working a rotating shift schedule is utterly without basis or foundation. Dr. Widom's testimony

⁹ Widom depo, 72: 3-7.

fails to identify even one specific aspect of Steve Kaufman's medical condition that would suggest that he could control his blood sugars despite working rotating shifts generally or, more specifically, Western Sugar's rotating shift schedule. Accordingly, plaintiff requests that the Court preclude presentation of the video deposition of Barbara Widom, M.D.

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CERTIFICATE OF SERVICE

The foregoing brief was filed electronically on or before November 9, 2007 via the cm/ecf system and, consequently, served by email on defendant's counsel, Howard P. Olsen, Jr., 1502 2nd Ave., Scottsbluff, NE 69361

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