

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT  
IN AND FOR PINELLAS COUNTY, FLORIDA  
CIVIL LAW DIVISION

CATHERINE R. KITCHEN, as  
Personal Representative of the  
ESTATE OF GARY F. KITCHEN,

Plaintiff,

vs.

CASE NO. 12-15460-CI-19

TREE OF LIFE, INC., a foreign corporation,  
PENSKE TRUCK LEASING CO., a limited  
partnership, and BOSWELL S. ENGLAND,  
individually,

Defendants.

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**ORDER ON PLAINTIFF'S MOTION IN LIMINE TO EXCLUDE  
THE TESTIMONY OF DEFENDANT'S EXPERT, BRUCE GOLDBERGER, PH.D.**

THIS MATTER having come before this Court on the Plaintiff's Motion in Limine to Exclude the Testimony of Defendant's Expert, Bruce Goldberger, Ph.D., on August 3, 2015, the Court having considered the motion, the attached exhibits, the file, and testimony from Bruce Goldberger and Ron Bell, and being otherwise fully informed in the premise, hereby finds as follows:

**I. LEGAL STANDARD**

In *Daubert v. Merrell Dow Pharm., Inc.*, the United States Supreme Court held that the adoption of the Federal Rules of Evidence superseded the *Frye* Rule in Federal Courts. 509 U.S. 579 (1993). In 2013, Florida Statute §90.702 was amended to adopt a standard for expert testimony as provided in *Daubert*, and to no longer apply the standard in *Frye v. United States*, 293 F.2d 1013 (D.C. Cir. 1923).

Under *Daubert*, the trial court is initially responsible for determining the admissibility of scientific expert testimony. In fulfilling this gatekeeping function, the trial court must make a factual determination that the scientific evidence supporting the expert opinion is sufficiently reliable to be presented to a jury. *Rider v. Sandoz Pharm. Corp.*, 295 F3d 1194, 1197 (11<sup>th</sup> Cir. 2002).

Florida Statute §90.702 titled “Testimony by Experts” provides:

“If scientific, technical or other specialized knowledge will assist the trier of fact in understanding evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify about it in the form of an opinion or otherwise, if:

- (1) The testimony is based upon sufficient facts or data;
- (2) The testimony is the product of reliable principles and methods; and
- (3) The witness has applied principles and methods reliably to the facts of the case.”

In the case of an expert relying on scientific principles, the trial judge must assess “whether the reasoning or methodology underlying the testimony is scientifically valid and . . . whether that reasoning or methodology properly can be applied to the facts in issue.” *Daubert*, 509 U.S. at 592-93. To assist in making the determination of the reliability of an expert’s testimony, the following factors may be considered:

- “(1) Whether the expert’s methodology has been tested or is capable of being tested;
- (2) Whether the theory or technique used by the expert has been subjected to peer review and publication;
- (3) Whether there is a known or potential error rate of methodology; and
- (4) Whether the technique has been generally accepted in the relevant scientific community.”

*United Fire and Cas.Co. v. Whirlpool Corp.*, 704 F3d 1338, 1341 (11<sup>th</sup> Cir. 2013).

However, “these factors are not exhaustive and are intended to be applied in a flexible manner.”  
*Id.* (Internal quotations omitted). “The burden is on the party offering the expert testimony to  
prove that it is reliable.” *Wagner v. Hesston Corp.*, 450 F.3d 756, 758 (8<sup>th</sup> Cir. 2006).

## **II. BACKGROUND**

Ligation in this case arose from a March 3, 2011 collision between the Defendant’s semi tractor trailer truck and Gary Kitchen while operating a motorcycle. The Personal Representative of the Estate of Gary Kitchen, the Plaintiff, seeks recovery from the driver of the semi tractor trailer, Defendant Boswell S. England, and his employer and owner of the semi tractor trailer, Defendant Tree of Life, Inc., for the wrongful death of Gary Kitchen. The Defendants have raised as an affirmative defense the comparative fault of Mr. Kitchen based on his postmortem blood toxicology screen which was positive for several prescription pain medications. Leading up to his death, it is undisputed that Mr. Kitchen was a chronic pain patient under pain management with prescription medications consistent with those testing positive in the postmortem blood toxicology screen. The issue raised by the Defendants’ affirmative defense is whether, and to what extent, Mr. Kitchen was impaired at the time of this collision, and whether that is causally related to his death. To that end, Defendants retained Bruce Goldberger, Ph.D. from the Division of Forensic Medicine, Department of Pathology, with the University of Florida, College of Medicine. Dr. Goldberger reviewed the medical examiner’s autopsy report, the depositions of witnesses to the collision, and a toxicology report of postmortem blood samples from NMS Laboratories. Defendants seek to introduce the testimony of Dr. Goldberger to give his opinion regarding whether Mr. Kitchen was impaired at the time of the accident. Plaintiff moved this Court to exclude such testimony pursuant to §90.702 of the Florida Evidence Code.

### III. DISCUSSION

Plaintiff argues that Dr. Goldberger's opinions and testimony are based on insufficient facts and data and are not reliable, thereby failing to meet the two prongs of *Florida Statute* §90.702. The Court agrees.

When asked about statements made in a *British Journal of Medicine* article co-authored by Dr. Goldberger in 2004, Dr. Goldberger testified that he still believes that many assume that forensic pathology is as evidenced based as other branches of medicine, but that this assumption is not accurate. He likewise still stands by his statement that most doctors as well as the general public would be surprised to learn that there are few, if any, normals in postmortem toxicology. Bruce Goldberger testified that with chronic use tolerance occurs and tolerance cannot be measured or estimated after death. Dr. Goldberger also testified that he suspects that Mr. Kitchen, because he had been taking the prescription drugs for years, would have developed tolerance to these drugs.

In that same *British Journal of Medicine* article, Dr. Goldberger and his co-authors stated that "the paucity of evidence based science coupled with the pretense that such science exists in regard to postmortem toxicology leads to the abuse of process, almost certainly to the miscarriage of justice, and possibly even to false perceptions of conspiracy and cover-up." Dr. Goldberger testified that he agreed with statements that he co-authored in a 2012 article published in the *Journal of Analytical Toxicology*, *The Mirage of Impairing Drug Concentration Thresholds, Rationale for Zero Tolerance for Safe Driving under the Drug Laws*, which states: "while the idea of establishing impairing concentrations for drugs is compelling, phenomenon such as variable drug tolerances, alcohol and drug combinations, the sheer number of potentially impairing drugs, the increase in blood/drug concentration between the time of the incident and

the time of collection, and other factors, make this task impossible.” In that article, Dr. Goldberger and his co-authors propose future legislation that would include provisions for a valid prescription to constitute an affirmative, although not absolute, defense against a per se standard. An impaired driver with a valid prescription, under the proposed legislation, could be prosecuted under the impairment provision of a drug driving law if they exhibit “clinical signs of impairment.” With regard to Mr. Kitchen, Dr. Goldberger was aware that moments before this fatal accident, Mr. Kitchen had been with his dentist, and in his affidavit the dentist attested that Mr. Kitchen showed no signs of impairment. Dr. Goldberger acknowledged that in light of that affidavit, he was unaware of any clinical signs of impairment observed by Mr. Kitchen’s dentist or any testifying witness to date.

Dr. Goldberger testified that you cannot do any calculation or extrapolation from a postmortem drug concentration back to an antemortem or living blood concentration. Finally, Dr. Goldberger admitted that he cannot say that it is more probable than not that Gary Kitchen was impaired at the time of this fatal accident.

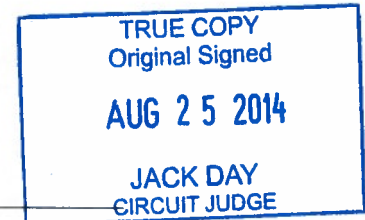
At best Dr. Goldberger’s testimony is that the NMS toxicology report shows the presence of prescription medications prescribed for Mr. Kitchen in his postmortem blood. This is not sufficient information to determine whether or not these medications impaired Gary Kitchen. According to Dr. Goldberg’s testimony, clinical signs and symptoms would be necessary to draw that conclusion, and the record evidence from the dentist’s affidavit is that there were no clinical signs or symptoms of impairment. For Dr. Goldberger to draw any conclusion based on Mr. Kitchen’s operation of his motorcycle would be to allow an opinion that is not supported by any work within his discipline or personal experience.

Further, in that this Court finds that there are insufficient facts and data to support Dr. Goldberger's opinions and testimony, this Order is without prejudice to the Defendants to set a future *Daubert* hearing if additional facts and data are learned which the Defendants believe supports Dr. Goldberger's opinion and testimony.

WHEREFORE, the Court in its gatekeeper role finds that this evidence is not sufficiently reliable and will not be admissible. Based on the foregoing, it is ORDERED and ADJUDGED that the Plaintiff's Motion in Limine to Exclude the Testimony of Defendant's Expert, Bruce Goldberger, Ph.D. is hereby **granted**.

**DONE and ORDER** in Chambers, at St. Petersburg, Pinellas County, Florida this  
\_\_\_\_ day of \_\_\_\_\_, 2015.

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Jack Day, Circuit Court Judge



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