

**Siobhan Brooke BYRUM, Petitioner,
v.
SUPERIOR COURT OF LOS
ANGELES COUNTY, Respondent,
ANGELA JAVIER, Real Party in
Interest.**

B153001

**COURT OF APPEAL OF
CALIFORNIA, SECOND
APPELLATE DISTRICT,
DIVISION FOUR**

February 20, 2002, Filed

NOT TO BE PUBLISHED IN
OFFICIAL REPORTS CALIFORNIA
RULES OF COURT, RULE 977(a),
PROHIBITS COURTS AND PARTIES
FROM CITING OR RELYING ON
OPINIONS NOT CERTIFIED FOR
PUBLICATION OR ORDERED
PUBLISHED, EXCEPT AS
SPECIFIED BY RULE 977(B). THIS
OPINION HAS NOT BEEN
CERTIFIED FOR PUBLICATION OR
ORDERED PUBLISHED FOR
PURPOSES OF RULE 977.

VOGEL (C.S.), P.J., EPSTEIN, J.,
HASTINGS, J.

In this mandate proceeding the court issued a Notice of Intention to Grant Peremptory Writ in the First Instance. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 180, 203 Cal. Rptr. 626, 681 P.2d 893.) Real party in interest filed plenary opposition and petitioner filed a reply brief.

The peremptory writ is granted on the ground it is a clear abuse of discretion to apply the admissibility test of *People v. Kelly* (1976) 17 Cal.3d 24, 31, 130 Cal.

Rptr. 144, 549 P.2d 1240, to the expert opinion testimony of Dr. Wallace concerning causation of fibromyalgia.

It is undisputed that Dr. Wallace based his expert opinion testimony exclusively upon his physical examination of plaintiff using techniques that are generally accepted in the relevant [*2] medical community (applying pressure to areas of the body to detect "tender points"), his own extensive clinical experience, and research papers in peer-reviewed medical journals expressing the view that trauma can cause fibromyalgia. He did not rely upon any "new scientific technique, device or procedure" that has not gained general acceptance in the relevant scientific or medical community.

Real party in interest's primary contention is that an expert medical opinion advancing a theory of causation ("explaining the process by which an event causes a medical condition"), is subject to the reliability/admissibility test of *People v. Kelly* (1976) 17 Cal.3d 24, 31, 130 Cal. Rptr. 144, 549 P.2d 1240, because such an opinion is itself a "novel scientific theory or method" that "creates a misleading aura of certainty" by purporting to relay to the trier of fact a "definitive truth" derived from an unproven scientific technique or procedure. Real party asserts that the causation theory purports to relay a "definitive scientific truth" simply "by the very definition of the word 'cause.'" Real party also asserts that Dr. Wallace's theory of causation is subject [*3] to the *Kelly* test because its "faulty methodology" rests upon "speculative [physiological] mechanisms" and a "misinterpretation of medical science

literature." (Petition Exhibit "5," p. 31' Return to Petition, pp. 15-18.)

Real party's position is directly contrary to California case law.

Under California law, the criterion for application of the "Kelly" rule is that the expert testimony is based, at least in some part, on a new scientific technique, device, procedure or method that is not generally accepted in the relevant scientific community. The criterion is not that the opinion or underlying theory asserted by the expert is itself not generally accepted in the relevant scientific community or is faulty. The rationale underlying the Kelly rule is that juries must be protected from evidence in the form of a new and unproven scientific device, technique or method which "appears in both name and description to provide some definitive truth which the expert need only accurately recognize and relay to the jury. The most obvious examples are machines or procedures which analyze physical data. Lay minds might easily, but erroneously, assume that such procedures [*4] are objective and infallible." "Absent some special feature which effectively blindsides the jury, expert opinion testimony is not subject to Kelly-Frye." (People v. Stoll (1989) 49 Cal.3d 1136, 1155-1157, 265 Cal. Rptr. 111, 783 P.2d 698. Accord: People v. Rowland (1992) 4 Cal.4th 238, 266, 841 P.2d 897; People v. McDonald (1984) 37 Cal.3d 351, 372-373, 208 Cal. Rptr. 236, 690 P.2d 709; People v. Leahy (1994) 8 Cal.4th 587, 606, 882 P.2d 321; People v. Bui (2001) 86 Cal.App.4th 1187, 1195-1196; Wilson v. Phillips (1999) 73 Cal.App.4th 250, 253-257; People v. Ward (1999) 71 Cal.App.4th 368, 373.)

People v. Ward, *supra*, 71 Cal.App.4th at 373, concisely summarizes the point: "California distinguishes between expert medical opinion and scientific evidence; the former is not subject to the special admissibility rule of Kelly-Frye. (People v. McDonald (1984) 37 Cal.3d 351, 372-373, 208 Cal. Rptr. 236, 690 P.2d 709.) Kelly-Frye applies to cases involving novel devices or processes, not to expert medical [*5] testimony, such as a psychiatrist's prediction of future dangerousness or a diagnosis of mental illness. (Citation.)."

The extent to which expert medical opinion testimony is exempted from the Kelly rule is illustrated by our Supreme Court's comment in *People v. McDonald*, *supra*, 37 Cal.3d 351, at 373-373: "We have never applied the Kelly-Frye rule to expert medical testimony, even when the witness is a psychiatrist and the subject matter is as esoteric as the reconstitution of a past state of mind or the prediction of future dangerousness, or even the diagnosis of an unusual form of mental illness not listed in the diagnostic manual of the American Psychiatric Association (Citation.)."

Wilson, *supra*, and *Bui*, *supra*, specifically hold that medical theories of causation are not subject to the "Kelly" rule when they are based entirely upon generally accepted diagnostic methods and tests, including statistical studies that are not definitive. *Bui*, at 1196, reiterates the established principle that disagreement by an opposing party's expert with the conclusions a medical expert witness draws from accepted [*6] methods of scientific research "does not

make [the challenged expert's] methodology a new scientific technique." Bui and other cases point out that opposing parties are free to present contrary expert testimony to refute a medical opinion because juries do not view the subjective thought processes of an expert as having the "aura of infallibility" they tend to attribute to scientific devices, techniques or procedures. (Bui, *supra*, at 1195-1196.)

Under these principles, the medical opinion drawn by Dr. Wallace concerning causation of fibromyalgia clearly does not meet the California criterion for application of the Kelly rule.

Real party's persistent reliance upon the federal "Daubert" rule, which would apply a preliminary admissibility test to a medical opinion concerning causation, is wholly unavailing. California has explicitly rejected the broader federal rule and reaffirmed its adherence to the narrower Kelly rule. (*People v. Leahy* (1994) 587, at 604-605.)

Disposition

Let a peremptory writ of mandate issue directing respondent to vacate its order granting real party in interest's motion to preclude admission of the [*7] expert opinion testimony of Dr. Wallace concerning causation, and to make a new and different order denying real party's motion. Commencement of trial in the underlying action is stayed until respondent complies with the disposition of this opinion.

Petitioner shall have his costs.
(California Rules of Court, rule 56.4.)