



Kuligoski et al vs. Northeast Kingdom Healthcare Services, Inc.

Decision on Motions to Exclude Experts

The plaintiffs filed their motion to exclude the testimony of the defendant's proposed expert witnesses, Attorney Nancy Corsones, and Dr. Frankle, on February 25, 2021. The defendant Northeast Kingdom Human Services, Inc. (NEKHS) filed its motion to exclude the testimony of the plaintiff's expert witness, Dr. Bernard Katz, on March 11, 2021. Each party opposes the other's motion to exclude expert testimony.

Plaintiff's Motion to Exclude Experts—Corsones and Frankle

The plaintiffs argue that Attorney Corsones should not be permitted to testify because she is a former Vermont Superior Court judge, and, the plaintiffs argue, she is expected to testify that based on her document review, as a judge she would not have granted any treatment orders regarding E.R.'s treatment under any circumstances and neither would any other Vermont judge.

The defendant asserts that Attorney Corsones would in fact testify about the process and standards for seeking orders for involuntary guardianships or treatment in Vermont, and would attempt to apply those standards and process to the facts of this case, and offer a legal opinion as to whether those standards would have been met as to E.R. Based not only on her "document review," but also based on her extensive experience and her consultations with Dr. Frankle and her review of the reports and affidavits of NKHS' other experts, she is expected to testify that the record does not contain evidence of dangerousness during the relevant time necessary to support Dr. Katz' proffered opinion that E.R. could have been involuntarily hospitalized or medicated prior to his assault on Mr. Kuligoski, and that it is therefore highly unlikely that recommending such "legal remedies" to E.R.'s parents would have prevented the assault. She would also testify that E.R. did not meet the established legal standards for involuntary treatment at any point following the dismissal of the AIT on December 7, 2010 until his assault on Mr. Kuligoski on February 26, 2011. Both parties agree that Attorney Corsones should not be addressed as "Judge."

The plaintiffs argue that Dr. W. Gordon Frankle's testimony should also be excluded, both because it is not relevant, and because the disclosure, sent on the very last day before the deadline expired, was incomplete. They argue that the disclosure provided as to his expected testimony relates entirely to response to a witness who is no longer among their experts, Dr. Beck, and to a defendant, the Retreat, that is no longer a party to this case. Also, they complain that the disclosure does not include any information as to fees to be charged and amounts paid to Dr. Frankle. As such, his exclusion is merited at this point. They also complain that Dr. Frankle would be the sixth psychiatric and mental health expert produced by the defendant and assert that "there's simply no reason to allow a sixth

expert to say that NKHS conveyed all the relevant information and that E.R.'s attack was not foreseeable.”

The defendant responded, asserting that plaintiffs' objection to the adequacy of disclosure as to Dr. Frankle is barred because they did not comply with V.R.C.P. 26(h). They argue that Dr. Frankle's opinions are not focused on the Retreat, but include any mental health professional or agency, and that he would testify that “there was no medical basis for NKHS (or any other provider) to apply for, or legal basis to obtain, a court order for involuntary medication or involuntary hospitalization of E.R. before his assault of Mr. Kuligoski in February 2011,” and that “no psychiatric practitioner could have foreseen, predicted, or prevented E.R.'s assault of Mr. Kuligoski,” and that he agrees with defendant's other expert witness, Dr. Swanson. The defendant argues that Dr. Frankle's opinions “relate directly to NKHS' defenses, and are directly responsive to Dr. Katz' opinions.”

Defendant's Motion to Exclude Expert-- Katz

In its motion, the defendant outlined the history of the case in detail, and noted that Dr. Katz is the plaintiff's second expert and that plaintiffs were permitted to name him as an expert over their objections. Defendant has a number of criticisms of his opinions, outlined in detail, and also asserts that he is not qualified, or that his opinions should be excluded because they are based only on “training and experience, and common sense” instead of standards, screening tools, or the like. Defendant also argues that he “simply does not have sufficient relevant training and experience upon which to provide a reliable opinion.” They assert that many of his stated opinions misapply or are based on misunderstandings of the applicable law. They complain that his opinion would not, by itself, be sufficient to establish the elements of the plaintiffs' claims, particularly as to causation.

The plaintiffs argue that the motion should be denied because Dr. Katz is an expert whose competency is admitted by the defendant's own expert witnesses, his opinions are based on decades of clinical practice and evaluation of the risks of psychotic patients, and defendant's experts applied essentially the same methodology in coming to their opinions, thereby acknowledging that Dr. Katz's methods are, indeed, within the standard methodology of expert psychiatrists. They argue that Dr. Katz's testimony is not required to establish all the elements of the plaintiffs' claims in order to be admissible, and that the question of causation is an ultimate issue to be determined by the jury. They assert that “a cherry-picked list of supposed flaws identified by an opposing counsel [does not justify] exclusion.” They argue that in expressing his opinions, Dr. Katz applied the appropriate standard in light of the Vermont Supreme Court's decision in this case—which was not and could not be overruled by later statutory changes. The Supreme Court's decision is the law of this case.

The court concludes that both the plaintiffs' and the defendant's motions to exclude these expert witnesses should be denied at this point, without prejudice to the renewal of many of their objections at the time of trial.

Under VRE 702:

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, 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 the principles and methods reliably to the facts of the case.

As our Supreme Court has made clear, under this rule, and following U.S. Supreme Court decisions, in *Daubert* and *Kumho Tire*, “trial judges must now act as gatekeepers who screen expert testimony ensuring that it is reliable and helpful to the issue at hand before the jury hears it.” *USGen New England, Inc., v. Town of Rockingham*, 2004 VT 90, ¶ 19, 177 Vt. 193. The court has “wide discretion to determine the qualifications of an expert witness.” *Id.*, ¶ 38.

Reliable expert testimony is “sufficiently rooted in scientific knowledge,” that is, grounded in scientific methods and procedures rather than mere “subjective belief or unsupported speculation.” *State v. Streich*, 163 Vt. 331, 343, 658 A.2d 38, 47 (1995). In assessing whether an expert's assertion is reliable, a court may be guided by the following factors: (1) whether the applicable theory or technique can be tested; (2) whether it has been subjected to peer review and publication; (3) its known or potential error rate; and (4) whether it has been generally accepted by the scientific community. *Id.* (citing *Daubert*, 509 U.S. at 593–94, 113 S.Ct. 2786).

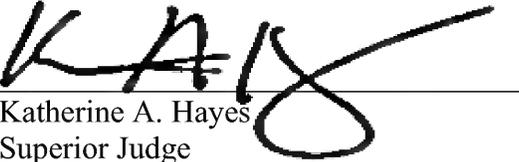
State v. Scott, 2013 VT 103, 195 Vt. 330

Applying these principles here, it is clear that though there are significant questions regarding the admissibility of specific opinions by the experts in question, all of them are sufficient qualified and experienced to be entitled to testify at this trial. Attorney Corsones has many years of experience as an attorney and judge, and is qualified to offer opinions regarding legal questions. The court agrees with the parties that she should not be referred to as “judge.” The two doctors are highly qualified psychiatrists with years of experience. As the plaintiff argues, psychiatrists offer their opinions about dangerousness and risk based on their training, experience, and the specific facts of each case. That is, indeed, how psychiatry works.

The court declines to rule on the issues raised by the parties regarding specific opinions as to particular questions to be offered by any of these experts. The evidence rules, as well as the standards outlined above, will be applied at trial.

As to the late notice regarding Dr. Frankle, the court orders that defendant disclose the missing information as to fees, payment arrangements, and the like within 14 days of this order, if it has not already been provided.

It is so ordered.


Katherine A. Hayes
Superior Judge
Signed electronically May 20, 2021