

Supreme Court No. _____

IN THE SUPREME COURT OF CALIFORNIA

DANIEL JENNINGS,

Plaintiff and Appellant,

Court of Appeal Case No.: D040393

Superior Court Case No.: GIC 768563

v.

**PALOMAR POMERADO HEALTH
SYSTEMS, INC., et al.,**

Defendants and Appellants.

AFTER A PUBLISHED DECISION BY THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION ONE

PETITION FOR REVIEW

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TO THE HONORABLE CHIEF JUSTICE OF CALIFORNIA AND THE
ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

I.

ISSUE PRESENTED

Whether it is for the trial judge or the jury to reject the reasoning of a qualified expert whom opines it is more probable than not that a 14-inch, contaminated ribbon retractor left in the plaintiff's abdomen for 19 days was a substantial factor in causing a massive abdominal infection?

II.

STATEMENT OF POSITION

Within a period of two weeks, the Court of Appeal, Second District, Division Four and the Court of Appeal, Fourth District, Division One rendered opinions reaching the opposite conclusion regarding whether it is for the trial judge or for the jury to assess a qualified medical expert's reasoned opinion regarding causation. Whether a trial judge can or should scrutinize expert testimony and determine whether the explanation for the opinion is reasonable is a significant question that will arise frequently in this state. The contradictory opinions of *Roberti v. Andy's Termite & Pest Control* (2003) 113 Cal.App.4th 893 and *Jennings v. Hammill, et al.* herein present an important question requiring resolution by this Court.¹

In affirming the trial court's order striking Jennings' medical expert, the Fourth District conceded that Dr. Miller was qualified and that his testimony included matters sufficiently beyond common experience to assist the trier of fact to decide what may have transpired during the 19 days a contaminated metal retractor was closed within Jennings' abdomen. [Opinion at 13] However, the Fourth District disagreed with Dr. Miller's conclusion that it was more probable than not that the contaminated retractor was a substantial factor in causing or contributing to Jennings' abdominal infection. Instead, the court sanctioned the

¹ On January 6, 2004, a petition for review was filed in the *Roberti* decision, Case No. S121728.

Daubert-style² preliminary fact-finding analysis performed by the trial court striking the expert testimony as speculative.

By contrast, the Second District in *Roberti* refused to conduct a *Daubert*-style analysis under the guise of determining whether the challenged testimony was supported by the proper foundation. *Roberti* at 905. “Unless and until our Supreme Court determines that the *Daubert* analysis is applicable in California, we will adhere to the rule of *People v. Kelly* and its progeny, and refuse to apply a more extensive preliminary admissibility test as in *Daubert* to expert medical opinion concerning causation.” *Roberti* at 906. Thus, the Second District held it was for the jury to determine if plaintiff’s autism was caused by the exposure to pesticide applied to his home.

Regardless of whether these decisions are framed in terms of *Daubert* or simply as a matter of foundation under Evidence Code section 801, the same issue is presented: Can a trial court strike a qualified expert’s testimony which is based on matters reasonably relied upon by experts in the field because the trial judge disagrees with the expert’s reasoning for their opinion. Jennings submits that once Dr. Miller (1) established his qualifications to render an opinion; and (2) opined to

² See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, (1993) 509 U.S. 579. The Fourth District’s opinion does not specifically address the applicability of a *Daubert* or *Kelly* analysis despite that the underlying motion to strike Jennings’ testimony and Respondents’ brief was largely premised on these authorities. [13 AA pp. 95-99; Respondents’ Brief, Section II.E.].

a substantial degree of medical certainty regarding his opinions, any further challenges to his testimony went to its weight instead of its admissibility.

Considering the diversity of experience and background of a typical jury, the jury's capacity to evaluate evidence on a factual basis is no different or inferior to that of a judge. Even if a judge's evaluation was arguably superior, it is a small price to pay for the advantages of the democratic participation fostered by the jury system. While the trial court can appropriately ensure experts with proper credentials are before the jury, and that the experts have relied upon proper matter, trial judges should not be permitted to overstep this role, as occurred in *Jennings*, by excluding testimony that should properly be weighed by a jury.

III.

NATURE OF THE CASE AND PROCEDURAL HISTORY

A. Defendants' Malpractice.

Jennings filed a medical malpractice action against Defendants Palomar Pomerado Health Systems ("Palomar Hospital"), Fred Hammill, M.D., and Paul Polishuk, M.D. (collectively "Defendants") as a result of Defendants' negligence in failing to remove a 14-inch metal ribbon retractor from his abdomen following surgery. [1 AA pp. 9-10 ¶ 31]³ Nineteen days after surgery, the retractor was discovered in a post-operative x-ray. [8 RT p. 1396: 1-28] The technique and placement of the retractor during Jennings' surgery were not documented by the

³ Defendant Palomar Pomerado was dismissed prior to a decision on the appeal. [Opinion at 2]

defendant doctors; in fact, both doctors denied having handled the retractor. [5 RT p. 820: 3-14; 5 RT p. 811: 2-10] There was no evidence that the retractor was ever sterilized, since none of the Defendants admitted to it being used. [5 RT p. 797]

Not surprisingly, during a second surgery to remove the retractor from Jennings' abdomen, Defendants encountered a massive infection. [5 RT pp. 779-781] As a result, the doctors cut away a huge amount of infected tissue and Jennings' abdomen was left open to heal by secondary closure for the following seven months. [4 RT p. 280: 4-8] Dr. Miller noted that the Operative Report prepared by Defendants was generally silent as to what the surgeons visually found below the peritoneum where the retractor was located, including the quality of the peritoneum wall. [5 RT p. 781: 6-13; 5 RT pp. 784-785]. Moreover, the report did not specify from where the culture used to diagnose infection was taken. [5 RT pp. 764-765: 24-28; 5 RT p. 812: 18-27]⁴

B. Dr. Miller Opines That The Retained Retractor Was A Substantial Factor in Causing To Jennings' Massive Infection.

Dr. Herman Howard Miller II was designated to offer expert testimony regarding the cause of Jennings' infection. Dr. Miller has specialized in infectious diseases for 22 years and generally treats within the hospital setting. [5 RT p. 757:

⁴ No cultures were taken of the retractor. [5 RT p. 766: 8-9; Trial Exhibit 41] No cultures were taken of the omentum. The report simply indicates that a single "abdominal" culture was taken. [5 RT p. 766: 5-9; 5 RT pp. 791-795] Having stipulated to liability, the Defendant doctors were able to avoid testifying at trial. [5 RT pp. 831-837; 5 RT p. 847: 17-24]

3-28] Dr. Miller has privileges at Scripps Memorial Encinitas and Scripps Memorial La Jolla, in addition to other hospitals. [5 RT p. 758: 13-21] He is the Chairman of the Infectious Control Committee at Scripps Memorial in La Jolla. [Id. at 6-12] Dr. Miller's credentials and expertise in the area of infectious diseases were undisputed. [6 RT p. 1000: 18; Opinion at 5]

In preparing to provide his opinions in this matter, Dr. Miller reviewed and relied on the same hospital records and deposition testimony as the defense expert Dr. Gay. [5 RT p. 760: 7-14.] Dr. Miller opined that the retractor substantially caused or contributed to Jennings' infection. [5 RT P. 765: 15-18] In Dr. Miller's expert opinion, the retractor was contaminated at the time it was placed into Jennings' abdomen during the initial surgery and could not have been irrigated given the doctors did not know it was left in the abdomen. [5 RT p. 761: 6-16; 5 RT p. 865: 3-22; 5 RT pp. 877-878] Although the retractor was ultimately encased in omentum, the seal was not impenetrable. [5 RT p. 767: 2-24; 5 RT pp. 857-858: 19-12]⁵ As a result, the omentum probably protected the intra-abdominal from infection, however, the skin was subject to a soft tissue infection because no omentum exists on the outside of the abdominal cavity. [5 RT pp. 766-768: 26-6]

⁵ The trial court disregarded or discredited Dr. Miller's testimony on this issue. [5 RT p. 837: 6-11; 8 RT p. 1361: 4-23 ("The encasement of the retractor also prevented the spread of the infection through the barrier of the peritoneum. Therefore, even if the retained retractor had been contaminated when placed inside Mr. Jennings, the testimony is unanimous that the infection did not spread from the retractor. . . .")]

It was Dr. Miller's expert opinion that the presence of the colonized retractor in Jennings' abdomen was a substantial cause of Jennings' infection. [5 RT p. 769: 7-20 ("So I view this as . . . contiguous, that is, everything is connected."); 5 RT pp. 824-826: 16-3 ("It's all in the same continuum."); 5 RT p. 860: 1-9 ("I think that because [] the foreign body was contaminated and left in place, that when the area was closed up, the germs were left in the tissue because the foreign body was colonized, had germs on it, and I think strongly contributed to the infection that ensued"; 5 RT p. 868: 14-18; 5 RT p. 770: 7-9 ("It just sort of makes sense. We have that ribbon retractor and it's contaminated, he's infected."); 5 RT p. 860; 5 RT p. 866: 19 ("It's a matter of degree."); 5 RT pp. 785-786: 3-6 ("I'm saying that based on the records I reviewed, there appeared to have been an infectious inflammatory process.")]

Dr. Miller testified that he found no evidence to support the conclusion that anything other than the retractor caused Jennings' infection. [5 RT p. 871: 2-24; 5 RT p. 806: 17-19 ("He had a certain risk of infection but he may not have had any infection if it was all done sterilely.")] Dr. Miller's opinion was that had the retractor not been left in Jennings' abdomen for 19 days, the infection would not have occurred, *or at the very least* would not have been as severe:

Q Based upon your skill and training in the area of infectious disease and your review of the records in this matter, have you formed an opinion as to whether the retained 14-inch ribbon retractor caused or contributed to the

nature of the extent of Daniel Jennings' infection?

A Yes.

Q In your professional opinion, to a reasonable degree of medical certainty, did the retained 14-inch-ribbon retractor cause or contribute to the nature and extent of Daniel Jennings' infection?

A I believe it did. [5 RT pp. 760-761: 21-5]

* * *

Q Its your opinion that the infection tracked down to the retractor?

A Essentially, yes. [5 RT p. 767: 12-14]

* * *

Q Based upon the assumed facts I've just given you, do you agree that the presence of a foreign body had no effect whatsoever on the infectious process itself?

A I believe it had some effect.

Q Explain your reasoning.

A . . . there were some germs associated with the retractor, and then when the wound was closed up, there were still germs in the tissue which were closed up. So I view this as a – the term is contiguous, that is, everything is connected. It's just that the peritoneum was just closed off with retention sutures, and the omentum is left to do its job in the abdomen, and then the skin part of the infection then blossomed over the next couple of weeks. [5 RT p. 769: 3-20]

* * *

Q Alright. Then the fact that it was left in you think caused the wound infection on the other side of the barrier?

A I believe that it contributed to the problem. You have already stated everybody had dirty gloves, so to speak. And to what role, you know, bloody contaminated fluid, you know, contributed to it, I can't say either. It contributed to it and the retractor contributed to it. [5 RT pp. 824-825: 22-2]

* * *

Q Doctor, true or false: The retention of the contaminated ribbon retractor was a substantial factor and cause of Daniel Jennings' infection?

A Yes.

* * *

Q Any evidence in the record that suggests that something other than the retractor caused this infection? When I say the retractor, I mean the contaminated retractor, not the fact of the retractor itself.

A No. [5 RT p. 871: 19-24]

C. The Trial Court Conducts Preliminary Fact-Finding And Strikes Dr. Miller's Testimony.

Prior to the close of evidence, the trial court granted Defendants' motion to exclude Dr. Miller's testimony. [8 RT pp. 1360-1362] In short, the trial court weighed the evidence and accepted the defense expert's "eye of the volcano" theory and rejected Dr. Miller's theory that the infection tracked down to the retractor. [5 RT pp. 767-768: 12-16; 6 RT p. 1017: 2-26; 6 RT p. 1027] Because

the majority of economic damages suffered by Jennings arose from his massive infection, the jury was prevented from considering a substantial portion of Jennings' case. The jury returned a verdict in favor of Jennings, awarding \$255,000.00 in non-economic damages and \$5,000.00 in past economic loss. The \$255,000.00 award was reduced to \$250,000.00 under MICRA. [10 RT pp. 1588-1599] and judgment was entered. [22 AA pp. 152-159]

D. Jennings' Appeal And Petition For Rehearing

Jennings filed a partial appeal challenging the severable, economic portion of the judgment. [23 AA pp. 160-167] Defendants filed a Respondents' brief arguing, in part, that a *Daubert*-style analysis should be applied by California courts. [Combined Respondents' Brief Sec. IIE (1) "Application of *Daubert* Principles To Exclude Expert Testimony Is Appropriate Under Current California Law" and (2) "The *Kelly/Frye* Approach Can Be Applied To Medical Testimony On The Issue Of Causation."] Defendants also filed a "protective" cross-appeal contending that if a new trial is granted, it should be on both economic and non-economic damages. [Op. at 2]

In an initially unpublished decision, the court of appeal affirmed the judgment. Although the Fourth District did not specifically reference whether it was applying *Daubert*, as urged by Defendants, the net effect was the same: the court performed a preliminary fact-finding analysis and rejected the reasoning of Dr. Miller. Jennings then filed a Petition for Rehearing which was denied. After

receiving multiple requests to publish from the California Hospital Association, California Medical Association, California Dental Association, Lockheed Martin Corporation, and the American Chemistry Council, the Fourth District certified its decision for publication.⁶

IV.

**IT IS CONTRARY TO CALIFORNIA LAW FOR A TRIAL COURT
TO STRIKE AN EXPERT’S OPINION AS LACKING FOUNDATION
BECAUSE THE COURT DISAGREES WITH THE REASONS
GIVEN FOR THE OPINION.**

California courts recognize a distinct difference between development of a “new scientific technique” and expert medical testimony. *People v. McDonald* (1984) 37 Cal.3d 351, 372-373, *overruled on other grounds*, *People v. Mendoza* (2000) 23 Cal.4th 896, 912-914. Specifically, expert medical testimony is generally not subject to the *Kelly* test. See *People v. Kelly* (1976) 17 Cal.3d 24.

When a witness gives his personal opinion on the stand -- even if he qualifies as an expert -- the jurors may temper their acceptance of his testimony with a healthy skepticism born of their knowledge that all human beings are fallible. But the opposite may be true when the evidence is produced by a machine: like many laypersons, jurors tend to ascribe an inordinately high degree of certainty to proof derived from an apparently “scientific” mechanism, instrument, or procedure. Yet the aura of infallibility that often surrounds such

⁶ In the event review is not granted herein, Jennings has filed a separate letter requesting that the decision be depublished.

evidence may well conceal the fact that it remains experimental and tentative.

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.

Id. at 372-373 (emphasis added; internal citations omitted).⁷

In the absence of first hand observation of a patient, medical expert opinion based on a review of medical records does not represent a “new scientific technique” either. An expert may testify in the form of an opinion:

Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

California Evidence Code section 801(b). Medical experts commonly rely on descriptive evidence such as medical records, physician reports and x-rays to

⁷ Similarly, in *People v. Stoll* (1989) 49 Cal.3d 1136, this Court reaffirmed its earlier holdings that the *Kelly* analysis is generally not applicable to limit admission of expert medical testimony. The Court held that “absent some special feature which effectively ‘blindsides the jury’” expert medical testimony based on the expert’s personal opinion is not subject to the *Kelly* analysis. *Id.* at 1157.

formulate their expert opinions. See e.g. *Kelley v. Bailey* (1961) 189 Cal.App.2d 728, 737-728 (physician may rely on reports of other physicians as part of information testifying physician used to base his own opinion); *Pogetto v. Owen* (1960) 187 Cal.App.2d 128, 137 (Doctor not required to be expert in photography to rely on x-ray for medical opinion).

In the present case, Dr. Miller utilized no new scientific technique, unusual methodology, or novel method of proof as the basis for his expert medical opinion. He reviewed medical records, operative reports, deposition transcripts, and x-ray films just as any medical professional asked to render an expert opinion would. [5 RT p. 760: 7-14] Dr. Miller then applied his medical knowledge and experience to the medical facts and rendered his professional medical opinion regarding whether the retractor was a substantial factor in causing Jennings' massive infection. His "technique" or "methodology" represents a long-accepted method of observing physical items, applying medical knowledge to those observations, and deriving a medical opinion therefrom. Nothing about Dr. Miller's methodology would "blindsided" the jury or impart an "aura of infallibility" preventing a jury from accurately weighing and assessing his professional credibility and medical opinion.

In *Roberti v. Andy's Termite & Pest Control, Inc.* (2003) 113 Cal.App.4th 893, the Second District recognized the inconsistency of striking an expert as lacking foundation because a trial court disagrees with the reasons given for the

expert's opinion, yet at the same time adhering to California precedent holding that courts should refrain from evaluating the credibility and weight of expert testimony. See *People v. Leahy* (1994) 8 Cal.4th 587, 605. The issue in *Roberti* was whether plaintiff's autism was caused by defendant's application of pesticide.⁸ In reversing the trial court's order granting defendant's motion in limine to exclude expert testimony on causation, the Second District held that the trial court erred in applying a threshold admissibility test to plaintiff's expert testimony, akin to the federal rule of *Daubert*, which is not applicable under California law. *Id.* at 905.

Further, in rejecting defendant's contention that the expert's opinions asserted only the possibility of causation and were unsupported by peer-reviewed scientific and medical literature, the Second District held that even though the theory that Dursban caused plaintiff's autism has not gained general acceptance in the relevant medical community, the testimony should have gone to the jury for a determination.

What defendant would have us do, under the guise of determining whether the challenged testimony was supported by the proper foundation, is conduct a *Daubert*-style analysis, . . .there is no authority or rationale to support the notion impliedly promoted by defendant that on the one hand, the *Kelly* rule retains viability as to new scientific methodology, techniques,

⁸ The defendant in *Roberti* argued that the expert opinions were properly excluded because they were based on unreliable foundational matters, or upon no foundation at all. It contended the experts presented no foundation for their testimony on "general causation" that Dursban is capable of causing plaintiff's autism. Further, neither plaintiff nor his mother displayed the toxic symptoms typically seen following exposure. *Id.* at 899.

or devices, but on the other hand California courts may apply a *Daubert* threshold reliability analysis to everything else, including expert medical testimony....

Id. at 905. It was error to apply an extensive preliminary admissibility test, as in *Daubert*, to expert medical opinion concerning causation. *Id.* at 906.

In *Jennings*, Dr. Miller's medical opinion that the retained retractor was a substantial factor in causing Jennings' infection was no more speculative than whether plaintiff's exposure to Dursban caused the *Roberti* plaintiff's autism. The testimony offered by Dr. Miller had the tendency in reason to prove causation, and was based on Dr. Miller's 22 years of experience following the review of medical records and testimony. Both experts testified that a contaminated metal retractor can cause infection; the only disagreement was each expert's reasoning for reaching opposite conclusions on the issue of causation. Therefore, the jury should have been permitted to accept or reject the experts' divergent points of view.

V.

CONCLUSION

The opinions of *Jennings* and *Roberti* leave the question of just how far a trial court can go in evaluating expert testimony uncertain. Jennings submits that the Fourth District has permitted trial courts to go too far in striking expert testimony. Cross-examination undertaken by defense counsel and jury instructions provided by the trial judge provide the jury information and a framework to weigh expert testimony. An expert's opinion, even if uncontradicted, may be rejected if

the reasons given for it are unsound. This Court should grant review and reaffirm that under California law it is for the jury, not the trial judge, to conduct this fact-finding analysis.

Respectfully submitted,

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Certification Pursuant to Rule 14(c)(1)

Appellant certifies that this brief consists of 3,857 words, including footnotes, as calculated by Corel 10 (“Word Perfect”) word count.