



Daubert Downs Another Plaintiff

by: Todd V. McMurtry

tmcmurtry@dbllaw.com

In *Simmons v. Novartis*, 11-5053 (Not Recommended for Full-Text Publication), the Sixth Circuit affirmed the district court's decision granting summary judgment after Plaintiff failed to establish specific causation for claimed injuries. The basis for this failure was the district court's ruling to exclude the expert testimony of Plaintiff's treating physician and retained expert in support of her product liability claims. An abuse of discretion standard applies to a decision to exclude expert testimony. *Id.* (citing *Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665, 668 (6th Cir. 2010)). The Court concluded that the district court had not abused its discretion when it excluded the two experts.

Plaintiff, Clarissa Simmons, claimed FDA-approved bisphosphonate drugs (Zometa and Aredia) used to treat skeletal problems associated with her cancer treatment caused her to develop osteonecrosis of the jaw (ONJ) following a dental procedure. Two experts testified in support of her claims.

Dr. Obeid, her treating physician and head of the Department of Oral and Maxillofacial Surgery at Washington Hospital Center in Washington, D.C., testified "he found a 'very close association' between ONJ and bisphosphonates." Dr. Gutman, Plaintiff's retained expert and an experienced oral surgeon, testified that based upon "what he had read" and within "a reasonable degree of dental certainty" that the majority of people who have invasive dental procedures while on bisphosphonates will develop ONJ.

Relying upon Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993), the district court ruled that Dr. Obeid's opinion of a close association did not establish causation. As well, Dr. Obeid's opinions were not founded upon a reliable methodology and were better characterized as hypotheses.

The district court then turned its attention to Dr. Gutman. It found that he had never treated patients affected by bisphosphonates, never diagnosed ONJ, and never determined the cause of ONJ. Dr. Gutman's knowledge was based upon six articles plaintiff's counsel had given him. The district court concluded that Dr. Gutman's opinion lacked a "sound methodology and foundation required by *Daubert*."

The Sixth Circuit affirmed the district court's decision to excluded the proffered testimony and granting summary judgment. Citing *Johnson v. Manitowoc Boom Trucks, Inc.*, 484 F.3d 426, 434-35 (6th Cir. 2007), the Court noted that it "views with special caution expert testimony prepared solely for purposes of litigation,

rather than flowing from an expert's line of scientific or technical work.”