IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

MARY LEE, ET AL., **Plaintiff**)) Vs.) UNITED CORPORATION, D/B/A) PLAZA EXTRA)) **Defendant**)	CASE NO. ST-98-CV-0000598 ACTION FOR: DAMAGES - CIVIL

NOTICE OF ENTRY OF MEMORANDUM OPINION AND ORDER

TO: GEORGE MARSHALL MILLER, ESQUIRE
JOHN A. SOPUCH, III, ESQUIRE
JUDGES & MAGISTRATES, SUPERIOR COURT
LIBRARIAN
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ORDER BOOK

Please take notice that on August 18, 2010 a(n) MEMORANDUM OPINION AND ORDER dated August 17, 2010 was entered by the Clerk in the above-entitled matter.

Dated: August 18, 2010

Venetia H. Velazquez, Esq.
Clerk of the Court

Diane Matthew-Turnbull

DIANE MATTHEW-TURNBULL
COURT CLERK II

SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

MARY LEE AND NEVILLE LEE,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	**CASE NO. ST-98-CV-598**
	)	
UNITED CORPORATION, d/b/a PLAZA EXTRA,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OPINION

On February 19, 2009, the Court held a hearing during which it reviewed the deposition testimony of Plaintiffs' expert, Dr. James D. Nelson Jr. ("Dr. Nelson"), and heard oral arguments from the parties as to what portion of Dr. Nelson's testimony should be admitted during trial. The Court then advised the parties that it would determine which portions of the testimony would be allowed. This Memorandum Opinion memorializes that ruling.

FACTUAL AND PROCEDURAL HISTORY

On June 10, 1998, Plaintiff Neville Lee purchased a precooked whole chicken, coleslaw, and rice and peas from the grocery store of Defendant Plaza Extra ("Defendant") on St. Thomas. While Plaintiff Mary Lee ("Plaintiff") was eating the breast of the chicken between the hours of 5:00 pm and 6:00 pm that day, she detected a foul odor coming from the leg and thigh area of the chicken and noticed that the meat was greenish in some parts. Approximately two hours later, Plaintiff began vomiting and experiencing diarrhea. On June 12, 1998, Plaintiff visited the Roy Lester Schneider

Hospital ("RLSH") in St. Thomas to get treatment for her condition and was prescribed medication, including the drug Meclizine. On June 24, 1998, Plaintiff visited the office of Dr. William E. Kuhlman in Campbell, California, and was given Lomitil and Floxin. (Letter of Dr. Kuhlman, at page 1). On July 08, 1998, the Sunrise Pharmacy on St. Thomas "issued" Plaintiff another prescription order of Meclizine. Plaintiff filed a Complaint on August 12, 1998.

On October 15, 1998, Plaintiff was cooking some soup with chicken wings in it.[1] Plaintiff testified that when she tasted a "little bit of the broth [she started] vomiting again. And it—you know, I couldn't eat. You know, my stomach like it sick. You don't want no food. It's like just making me sick. So I had an apple." (Lee Deposition, at page 22). On October 16, 1998, Plaintiff fell at a funeral, an incident that she claims caused injury to her head, left shoulder, arm, back, and left leg. That day, Plaintiff visited the emergency room to receive treatment for her injuries.

On December 6, 1999, Plaintiff was examined for the first time by Dr. Nelson, who diagnosed her condition as food poisoning. Dr. Nelson also referred Plaintiff to Dr. Lawrence Goldman who, in January, 2001, diagnosed Plaintiff as having giardiasis, a parasitic infection of the gastrointestinal tract. Dr. Nelson then generated a report dated January 13, 2001. On February 1, 2006, Dr. Nelson was deposed, and on March 9, 2006, Plaintiffs filed an Amended Complaint to include the damages that Mrs. Lee claims to have incurred as result of the fall. On March 4, 2008, this Court issued an Order granting

[1] Plaintiff does not identify where she purchased the chicken wings.

Defendant's Motion in Limine barring the presentation of any evidence in support of Plaintiff's claim that her giardiasis was caused by anything purchased from Defendant.[2]

On June 28, 2008, Dr. Nelson was deposed again, and on October 8, 2008, the Court issued an Order stating that its March 4, 2008, Order needed to be clarified concerning the admissibility of Dr. Nelson's testimony given in his later trial deposition.

ANALYSIS

There are three requirements for the admissibility of expert testimony. Federal Rule of Evidence 702. First, in order to qualify as an expert, a witness must demonstrate that he or she possesses specialized knowledge, skill, or training pertinent to the subject matter of the case. *Id.* Second, the witness's proposed testimony must be "reliable," based on the "methods and procedures of science" rather than "subjective belief or unsupported speculation." *Id.* Finally, the witness's testimony must "fit" or have a valid scientific connection to the disputed factual issues in the case. *Id.* The trial judge must act as a "gatekeeper" and assess whether an expert's testimony reflects valid reasoning and a methodology that is properly applied to the facts at issue. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 (1993). The gatekeeper function applies to all expert testimony, not merely to that which is deemed to be "scientific" in nature. *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 147-149 (1999).

a) Qualifications

[2] In that Order, the Court found that Dr. Nelson's opinion that Plaintiff's giardiasis was linked to the food poisoning incident on June 10, 1998, was based on unfounded speculation. Although Dr. Nelson treated Plaintiff for roughly a year, he did not diagnose her with giardiasis. Moreover, he did not use any reliable principles or methods to acquire sufficient data to support his conclusion that Plaintiff's giardiasis and her food poisoning were casually linked.

Rule 702 establishes a liberal policy of admissibility, which extends to the substantive as well as formal qualification of experts and "a broad range of knowledge, skills, and training qualify an expert as such." *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 741 (3d Cir. 1994). Plaintiffs' witness, Dr. Nelson, holds a medical degree from Howard University, College of Medicine, in Washington, D.C. He received two years of training at the D.C. General Hospital in Washington, D.C. and became certified by the American Board of Internal Medicine in 1978. Dr. Nelson spent three years training at McGill University in Montreal, Quebec, and became certified in Neurology by the Royal College of Physicians in Canada in 1980. In 1987, he became certified by the American Board of Psychiatry and Neurology. In 2007, Dr. Nelson became certified in Sleep Medicine by the American Board of Internal Medicine. Moreover, Dr. Nelson has previously qualified as an expert witness in numerous cases in the Virgin Islands. In light of this training and experience, the Court concludes that Dr. Nelson is qualified to testify as an expert with regard to the issues in this case and that the first requirement of Rule 702 is met.

b) Reliability and "Fit"

An expert opinion is reliable if it is based on the methods and procedures of science. *Paoli, supra*, at 744. The eight factors that should be considered when determining whether expert testimony is sufficiently reliable to be admissible under Rule 702 are: (1) whether a method consists of a testable hypothesis; (2) whether the method has been subject to peer review; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; (5) whether the

method is generally accepted; (6) the relationship of the technique to methods which have been established to be reliable; (7) the qualifications of the expert witness testifying based on the methodology; and (8) the non-judicial uses to which the method has been put. *Paoli, supra*, at 742 (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786, 2796 (1993)). A court's focus should be on the principles and methodology the expert used to arrive at his or her conclusions and should not be on the conclusions themselves. *Paoli, supra*, at 744. As long as the expert has "good grounds" to hold a particular opinion, the expert's testimony should be admitted. *Id.* Nevertheless, a court has the discretion to exclude an expert's opinion on specific causation where either: (1) the expert engaged in very few standard diagnostic techniques by which doctors normally rule out alternative causes and the expert offered no good explanation as to why his or her conclusion remained reliable; or (2) the defendants pointed to some likely alternative cause and the expert offered no reasonable explanation as to why he or she still believed that the defendant's actions were a substantial factor in bringing about the plaintiff's injuries. *Magistrini v. One Hour Martinizing Dry Cleaning*, 180 F.Supp.2d 584, 609 (D.N.J. 2002) (citing *Paoli, supra*, at 760).

Dr. Nelson's hypothesis is that Plaintiff was food poisoned on June 10, 1998, which caused Plaintiff to fall four months later on October 16, 1998. Dr. Nelson's conclusions are exhibited in (1) a neurological evaluation report (the "Evaluation") composed on January 13, 2001, concerning an examination he conducted on Plaintiff on December 6, 1999, over a year after Plaintiff fell; (2) a deposition conducted on February

1, 2006, ("Nelson Deposition # 1"); and (3) a deposition conducted on June 28, 2009, ("Nelson Deposition # 2").

In the Evaluation, Dr. Nelson refers to Plaintiff's fall as having occurred on three separate dates. On page one of the Evaluation, Dr. Nelson concludes that "on or about 10/20/98" Plaintiff passed out "because of not eating properly since 6/10/98 and struck her head as she fell. As result of the fall, [Plaintiff] sustained multiple trauma, including injuries to her head, face, left shoulder, left arm, back, and leg." On page seven of the Evaluation, Dr. Nelson writes that Plaintiff "sustained multiple trauma as result of a fall on or about June 20, 1998, which was related to food-poisoning-induced weakness that began on or about June 10, 1998." On page eight of the Evaluation, Dr. Nelson opines that Plaintiff's "current complaints are directly and positively related to the traumatic incident which began on or about June 10, 1998, and led to the fall of June 20, 1999." In his deposition, Dr. Nelson attempts to address the discrepancies in the Evaluation by stating that the fall actually occurred on October 16, 1998, and that all the dates describing Plaintiff's fall in the Evaluation were "typographical errors." (Nelson Deposition # 2, at page 30).

Dr. Nelson, however, does not address the many other discrepancies in the Evaluation. The Evaluation states that Plaintiff visited Dr. Kuhlman in California "on or about 10/18/98,"[3] while the record indicates the visit actually occurred on June 24, 1998. (Dr. Kuhlman letter, at page 1). In addition, the Evaluation incorrectly states the date when Plaintiff went to the emergency room following her fall. The Evaluation states that

[3] Evaluation, at page 1.

on "10/20/98," Plaintiff suffered several injuries to her head, face, left shoulder, left arm, back, and left leg and was driven to the emergency room at RLSH. (Evaluation, at page 1). "On or about 6/21/98 [Plaintiff] returned to the [RLSH] emergency room ... because of swelling of the left shoulder." (Evaluation, at page 2). "Approximately one week later, [Plaintiff] was evaluated at the Community Health Outpatient Clinic ... [and she] was examined and x-rays of her left shoulder, left knee and ankle were ordered and [were] read as negative." (Id).[4]

The plethora of errors in the Evaluation indicates that Dr. Nelson failed to perform the simple diagnostic technique of taking an accurate history of his patient, and this omission seriously puts into doubt his understanding of the circumstances surrounding Plaintiff's injuries. This conclusion is supported by Dr. Nelson's response in a deposition to a question regarding the allegations in the Complaint as he understood them to be:

> Well, to paraphrase what's going on [,] it seems as if [Plaintiff] ate this meal; she got sick; she continued to be sick for a period of a *month* [(emphasis added)]. Because of being sick and not eating too well and being weak, she fell. She fell and hurt herself. And then she came to me about a little over a year later, saying that she was still having pain ever since she fell, which *she felt* [(emphasis added)] was the result of having eaten this bad food which made her weak. So that's basically the way *I feel* [(emphasis added)].

(Nelson Deposition # 1, at page 28). Taking Dr. Nelson's deposition testimony that the symptoms of Plaintiff's food poisoning only persisted for a month, together with his statement in the Evaluation that Plaintiff fell "because she had not eaten properly since

[4] The Evaluation also indicates that Plaintiff visited the emergency room of the Roy Lester Schneider Hospital on or about June 11, 1998, following her ingestion of certain food that she purchased from Defendant on June 10, 1998. The record reflects that Plaintiff actually visited the emergency room on June 12, 1998.

06/10/98" indicates that Dr. Nelson does not have an accurate grasp of the time period between the day Plaintiff ate the food from Defendant's grocery store and the day Plaintiff fell at the funeral. In addition, the essence of Dr. Nelson's opinion is that because Plaintiff felt that the October 16, 1998, incident was casually linked to the June 10, 1998, incident, Dr. Nelson felt the same way. However, it was incumbent upon Dr. Nelson to come to this conclusion independently by employing various diagnostic techniques and not simply adopting Plaintiff's speculative opinions *carte blanche*. Dr. Nelson should have compiled a thorough history of Plaintiff and questioned her about her symptoms on the day of the fall and during the week or month leading up to the fall in order to rule out alternative causes for the fall.[5] Had he conducted a thorough history, Dr. Nelson would have discovered that Plaintiff suffered what appeared to be a second food poisoning incident on October 15, 1998, the day before she fell at the funeral. Given that the October 15, 1998, incident could very well have contributed to Plaintiff's fall on the following day, Dr. Nelson's failure to consider this incident and his failure to employ basic procedures and methods to acquire this information makes his opinion unreliable.

Similarly, although Dr. Nelson included in the Evaluation that Plaintiff was placed on medication and her diet was restricted following the June 10, 1998, incident, it does not appear that he inquired about the effect the medication and diet restrictions had on Plaintiff. When Plaintiff was asked how long she was sick following the June 10, 1998, incident, she responded as follows:

Q. So you had daily vomiting and diarrhea?

[5] While the Court certainly will not substitute its opinion for that of Dr. Nelson, it is significant to note, for example, that Plaintiff fainted and fell at a funeral, but Dr. Nelson does not consider whether emotional distress could have been a factor in her fall.

A. Yes.
Q. And this went on for six months?
A. Well it had checked out, you know, but it depends on what you eat. Like if you eat greasy food or milk or juice, you know, you have a diarrhea maybe about twice a day or so.
Q. And would you --- would it be often that you would eat greasy food, milk or juice?
A. No.
Q. But even when you didn't eat greasy food, milk or juice, you would have vomiting and diarrhea during a part of any one day?
A. Well, after I started taking the medication it slowed down.
Q. And it slowed down to what?
A. Twice a day. Then it go (sic) down to once a day. Back to normal.

(Lee Deposition, page 27). Plaintiff's testimony seems to indicate that, after taking the medication and restricting her diet, she gradually ceased to exhibit any symptoms related to the June 10, 1998, food poisoning incident. Other than avoiding "greasy foods" or milk or orange juice, Plaintiff's diet appears to have been relatively unrestricted. This is evidenced by the fact that after Plaintiff vomited on October 15, 1998, she ate an apple. Moreover, when Plaintiff was weighed at the emergency room on June 12, 1998, she weighed 250 lbs, and she weighed 254.5 lbs when she was weighed in the hospital shortly after she fell on October 16, 1998. (Nelson Deposition # 1, at page 18). However, because Dr. Nelson did not inquire about Plaintiff's diet around the time of the fall, or whether she was taking her medication at that time, or whether she was exhibiting any specific symptoms of the illness in the days or hours leading up to the fall, he was unaware of these facts, which undermines his hypothesis that Plaintiff was undernourished from June 10, 1998, to October 16, 1998, thereby causing her to become faint and to fall. Accordingly, Dr. Nelson's opinion does not take into consideration all of the available data on the issues presented and is not sufficiently reliable to satisfy the

second requirement of Rule 702.[6] Moreover, if Dr. Nelson is allowed to present his unfounded and speculative opinions about Plaintiff's fall at trial, it would present a danger of confusion of the jury that would outweigh any evidentiary value the testimony may provide.

An Order consistent with this Opinion shall follow.

Dated: August 17, 2010

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

ATTEST: Venetia H. Velazquez, Esq.
Clerk of Court ____/____/____

by: Diane Matthew-Turnbull per
Rosalie Griffith
Court Clerk Supervisor 8/18/10

CERTIFIED A TRUE COPY
Date: 8/18/10
Venetia H. Velazquez, Esq.
Clerk of the Court
By: _____
Court Clerk

[6] Because the Court finds Dr. Nelson's opinion to be unreliable, it does not need to discuss whether Dr. Nelson's testimony "fits" or has a valid scientific connection to the disputed factual issues in the case pursuant to Rule 702.

SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

MARY LEE,	)	
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Plaintiff,	)	
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vs.	)	**CASE NO. ST-98-CV-598**
	)	
UNITED CORPORATION, d/b/a PLAZA EXTRA,	)	
	)	
Defendant.	)	
	)	

ORDER

Having issued a Memorandum Opinion on this date, it is

ORDERED that Plaintiffs' expert Dr. Nelson is prohibited from testifying that Plaintiff Mary Lee's fall on or about October 16, 1998, was casually connected to the ingestion of chicken purchased from Defendant on June 10, 1998, and any related testimony in his depositions in this matter shall be excluded; and it is

ORDERED that copies of this Order shall be directed to counsel of record.

Dated: August 17, 2010

HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

ATTEST: Venetia H. Velazquez, Esq.
Clerk of Court ____/____/____

by: Oriane Matthew-Turnbull for
Rosalie Griffith
Court Clerk Supervisor 8/18/10

CERTIFIED A TRUE COPY
Date: 8/18/10
Venetia H. Velazquez, Esq.
Clerk of the Court
By: _____
Court Clerk