

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ARLANDUS HARVEY,)
)
 Plaintiff,)
)
 vs.) No. 03-2721MLV
)
 ALLSTATE INSURANCE COMPANY,)
)
 Defendants.)

ORDER DENYING PLAINTIFF'S MOTION TO EXCLUDE EXPERT
OPINIONS OF RICHARD J. PACHECO

This action involves an insurance coverage and breach of contract dispute. Plaintiff Arlandus Harvey ("Harvey") filed a complaint on September 23, 2003, against his automobile insurance carrier, defendant Allstate Insurance Company ("Allstate"), alleging common law fraud, breach of contract, violation of Tennessee Consumer Protection Act ("TCPA"), Tenn. Code Ann. §§ 47-18-101, *et seq.* violation of 42 U.S.C. § 1981, and bad faith failure to pay in violation of Tennessee Code Annotated § 56-7-105.¹ In the complaint, Harvey averred that Allstate refused to pay his insurance claim and canceled his insurance policy after receiving notice that Harvey's car was allegedly stolen. Harvey

¹ This court granted partial summary judgment for Allstate on Harvey's TCPA claim because it was barred by the statute of repose contained in Tennessee Code Annotated § 47-18-110.

further claimed that Allstate's decision to deny his claim was made solely on the basis of a report submitted by Allstate's retained expert, Richard Pacheco ("Pacheco").

Presently before the court is Harvey's motion to exclude Pacheco from testifying as an expert witness on behalf of Allstate pursuant to Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The motion seeks to exclude Pacheco and his opinions by invalidating the methodology used by him in analyzing the ignition lock assembly of the car that was allegedly stolen. Harvey claims that Allstate should not be allowed to use the expert opinion of Pacheco because the methodology used to reach his conclusions, as well as Pacheco's credibility, do not meet the criteria for allowing expert testimony set forth by the Supreme Court in *Daubert*. For the reasons that follow, Harvey's motion is denied.

PACHECO'S EXAMINATION

On January 6, 1997, Pacheco traveled to Memphis, Tennessee to examine the vehicle that is the focal point of this litigation. (Report of Richard Pacheco from January 14, 1997.) Pacheco's examination revealed, among other things, that the entire vehicle had been burned, the door locks had not been popped, and that there was no way to rule out entry into the car from the incinerated windows and door gaskets. (*Id.*) The ignition lock assembly had

fallen off the steering column and was found by Pacheco in the debris on the driver's side floorboard. (*Id.*) The locking pin was found in a locked position along with its sector gear spring. (*Id.*) Pacheco collected this evidence and returned to his shop for further analysis. (*Id.*)

Pacheco next performed a "key pathway analysis". According to an extensive report produced by Pacheco's employer, North Eastern Technical Services ("NETS"), "key pathway analysis" is the examination of locks and their respective keys to determine if picking or tampering has occurred with the lock. (Def.'s Mem. of Law in Opp. to Pl.'s Mot. to Exclude Richard Pacheco, Ex. D.) "Key pathway analysis" is performed by microscopically examining the wafers that form part of the vehicle's ignition assembly unit and comparing the striations in the metal on the wafers and other parts of the ignition assembly unit with certain characteristics of keys. As a result of the "key pathway analysis" performed on Harvey's ignition lock assembly and keys, Pacheco ultimately concluded that the lock had not been damaged and nothing other than a key of the proper type, or one in the possession of Harvey, had been used to operate the vehicle. (Report of Richard Pacheco from January 31, 2003.) Allstate subsequently denied Harvey's insurance claim based, in part, on this finding.

ANALYSIS

Harvey contends that the methodology underlying "key pathway analysis" does not meet the standards of Federal Rule of Evidence 702 and *Daubert* for allowing expert testimony; therefore, Pacheco should not be allowed to testify on behalf of Allstate. Allstate counters this argument by claiming that Pacheco's methodology is in fact reliable and relevant to this proceeding.

A. Rule 702 and Daubert

Rule 702 of the Federal Rules of Evidence provides that "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." F.R.E. 702. In *Daubert*, the Supreme Court held that Rule 702 imposes a "gatekeeping" obligation on the trial court to ensure expert testimony "is not only relevant, but reliable." *Daubert*, 509 U.S. at 589. A trial court is required to inquire as to whether the methodology underlying the proffered expert testimony is valid and whether the methodology may be properly applied to the facts at issue in a particular case. *Daubert*, 509 U.S. at 592-93. This "gatekeeping" function applies not only to scientific testimony but also to testimony regarding technical or other specialized knowledge. *Kumho Tire v.*

Carmichael, 526 U.S. 137, 141 (1998).

Essentially, *Daubert* and *Kumho* require a two-step inquiry that involves an analysis of the "relevance and the reliability" of an expert's opinion. *Greenwell v. Boatwright*, 184 F.3d 492, 496 (6th Cir. 1999). The relevance step of the inquiry is designed to ensure that "there is a 'fit' between the testimony and the issue to be resolved by the trial." *Id.* (citing *United States v. Bonds*, 12 F.3d 540, 555 (6th Cir. 1993)). The reliability step focuses on the "methodology and principles" that form the basis for the testimony. *Id.* The trial court must focus only on the reliability of the methodology underlying the testimony, not on the reliability of any conclusions reached by the expert, because "if the principles, methodology and reasoning are scientifically valid then it follows that the inferences, assertions, and conclusions derived therefrom are scientifically valid as well." *Boatwright*, 184 F.3d at 497 (quoting *Bonds*, 12 F.3d at 556). To determine reliability, *Daubert* sets forth five factors the court may consider: (1) whether the expert's technique or theory can be or has been tested, (2) whether the technique or theory has been subjected to peer review, (3) the known or potential rate of error of the technique when applied, (4) the existence and maintenance of standards and controls, and (5) whether the technique or theory is generally accepted in the scientific community. *Daubert*, 509 U.S. at 593-94.

The court's inquiry under *Daubert* is flexible. *Id.* at 594. These factors are not a definitive test or checklist but are merely instructive. *Id.* at 593; *Kumho*, 526 U.S. at 150.

B. Analysis of the *Daubert* Factors

In line with the *Daubert* factors, Harvey first asserts that it is not possible to test the methodology used by Pacheco. Harvey claims that during the "key pathway analysis" no measurements were taken of the striations in the metal, thus precluding independent examination by another expert. Harvey also offers Pacheco's statement that "you may not get the exact same measurement each time to each wafer" to persuade the court that there is an unpredictable nature to the examination and to show that the examination is incapable of replication. Finally, Harvey points out that Pacheco failed to record empirical evidence that would have allowed other experts to perform their own examinations.

In response, Allstate avers that Pacheco has tried to explain to counsel for the plaintiff on two occasions that measurements of the striations were irrelevant, confusing, and not as important as matching the striation to what made the striation. Allstate also confirms that the evidence used by Pacheco in performing his examination has not been altered or damaged in any way; therefore, anyone else, including Harvey's own expert, could check the findings of Pacheco and reach their own conclusions. As for the

argument that Pacheco's failure to record empirical evidence precludes independent examination, Allstate asserts that numerous photos were taken during the analysis and that it should not defeat the whole process because each step in the examination was not recorded.

In light of Allstate's representations, this court finds that Pacheco's methodology is replicable and capable of being tested. This is true particularly because of Allstate's and Pacheco's offers to allow Harvey to review the analysis using his own experts. Allstate asserts that there has been no spoliation of evidence which would prevent the plaintiff from conducting his own examination. Also, the fact that Harvey does not understand why the measurements of the striations are not important to the exam and that Pacheco failed to photograph every step in his analysis does not make this examination incapable of replication.

Harvey next argues that Pacheco's opinions should be excluded because there has been no peer review of the "key pathway analysis". Pacheco admitted that there was no board, journal or publication or scientific body that accepted the analysis as a valid scientific study. Pacheco also stated that besides commercial entities there were marketing the analysis for profit, there has been no independent review. However, attached to Allstate's response to Harvey's motion are three letters showing

that there has indeed been peer review of the "key pathway analysis". (Def.'s Memorandum of Law in Opposition to Pla.'s Mot. to Exclude Richard Pacheco, Ex. E.) In particular, one report states in regard to Pacheco's methodology that "[w]e find your processing of evidence to the examination stage follows all of the proper procedures that are used to handle evidence obtained in any criminal investigation. We also find that your methods of examination of the lock and key components follow all of the proper techniques that are used in a scientific examination." (*Id.*) Another report compiled by a highly qualified engineer states that "[t]he key-path analysis techniques are founded on sound physical principles that can be understood by any intelligent layman." (*Id.*) Based on these exhibits, it is clear to the court that "key pathway analysis" has been subjected to peer review. Harvey's argument to the contrary is thus not well taken.

Following the *Daubert* factors, Harvey next questions the potential rate of error involved in Pacheco's analysis. Again, Harvey bases his argument on measurements of the striations present on the lock and keys. Harvey claims that a high rate of error would have been revealed had measurements been taken. As explained by Pacheco, the visual comparison of the striations is the key factor in the "key pathway analysis", not the measurement of the striations. Therefore, Harvey's claim regarding the potential rate

of error is irrelevant to the determination of whether Pacheco's methodology is reliable.

Relying on another *Daubert* factor to support his motion, Harvey claims that Pacheco's methodology is not consistent with generally accepted methods for gathering relevant scientific evidence. Harvey's most convincing argument for such a proposition is that the vehicle from which Pacheco retrieved the ignition lock assembly had been consumed almost entirely by fire. Pacheco even admitted that one of the wafers that he examined had suffered fire damage. Nevertheless, Pacheco stated that in some cases the evidence is sufficient to perform a "key pathway analysis", despite the damage caused by fire. This case, as Pacheco has apparently tried to explain, is one of those cases.

Finally, Harvey attempts to discredit the reliability of Pacheco's methodology by attacking Pacheco's personal credibility. For whatever reason, Pacheco has had trouble remembering events that occurred in his past when speaking with plaintiff's counsel. The court sees no reason why this would effect the reliability of the "key pathway analysis". The true test of reliability should focus not on Pacheco's memory. Rather, it should be focused on Pacheco's methodology. There is no better indication that Pacheco's methodology is sound than by looking to the number of trials that Pacheco has testified in concerning these issues.

While it is true that this court is unaware of any challenges to Pacheco's methodology in these cases, Allstate represents to the court that "[n]o court has ever refused to qualify Mr. Pacheco as an expert witness, or disallowed his findings or opinions." (Def.'s Memorandum of Law in Opposition to Pla.'s Mot. to Exclude Richard Pacheco, pg. 2.) Furthermore, Allstate's assertions that Pacheco has had extensive training in the forensic examination of vehicles is backed by numerous affidavits attached to Allstate's response to Harvey's motion.

CONCLUSION

Based on the factors set forth by Harvey in support of his motion to exclude the testimony of Richard Pacheco, this court, in its role as a "gatekeeper" to exclude unreliable expert testimony, finds that Harvey is not able to establish that Pacheco's methodology is unreliable or irrelevant. While Harvey bases his argument primarily on factors announced by the *Daubert* court, it must be noted that *Daubert* sets forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. This court finds that the affidavits attached to Allstate's response, as well as Pacheco's extensive trial experience, provide the necessary foundation to hold that Pacheco's methodology is sufficiently reliable to be considered by the trier of fact.

Accordingly, the motion of the plaintiff is denied.

IT IS SO ORDERED this 4th of October, 2004.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE