EFiled: Oct 05 2016 05:53PM EDT
Transaction ID 59655574

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: ZOLOFT LITIGATION **Civil Action No. 14-C-7000**

THIS DOCUMENT APPLIES TO:

D.B., a minor by and through his mother and next friend Nina E Civil Action No. 12-C-164-WNE

ORDER REGARDING DEFENDANTS' MOTION TO EXCLUDE CAUSATION OPINIONS OF PLAINTIFFS' EXPERT ROBERT M. CABRERA, PH.D., AND MOTION FOR SUMMARY JUDGMENT

On September 19, 2016, *Defendants' Motion to Exclude the Causation Opinions of Plaintiffs' Expert Robert M. Cabrera, Ph.D., and for Summary Judgment* (Transaction ID 59425443), filed in the above-captioned action, was scheduled to be heard. The Parties waived oral arguments and agreed to submit the motion for decision on the basis of their briefs.[1] Having reviewed and maturely considered the briefs and evidence submitted by the parties, and having conferred with one another to insure uniformity of their decision, as contemplated by Rule 26.07(a) of the West Virginia Trial Court Rules, the Presiding Judges unanimously GRANT Defendants' motion to exclude the specific causation opinions of Plaintiffs' expert Robert M. Cabrera, Ph.D., DENY Defendants' motion to exclude the general causation opinions of Dr. Cabrera, and GRANT Defendants' motion for summary judgment.

FINDINGS OF FACT[2]

1. On September 30, 2015, Plaintiffs served their Amended Complaint, which alleged that D.B. was born "with a seizure disorder, as well as a cognitive and neurobehavioral disorder, and other bodily injuries." (Transaction ID 57945570 ¶ 76.)

[1] Defendants' Motion to Exclude Specific Opinions of Plaintiffs' Expert Robert M. Cabrera, Ph.D., and Motion for Summary Judgment, together with Defendants' Memorandum of Law in Support and Affidavit of Katherine Armstrong (Transaction ID 59425443); Plaintiffs' Response and Memorandum of Law in Opposition to Defendants' Motion to Exclude Specific Opinions of Plaintiffs' Expert Robert M. Cabrera, Ph.D. (Transaction ID 59487634); Defendants' Reply Memorandum in Further Support of Motion to Exclude Specific Opinions of Plaintiffs' Expert Robert M. Cabrera, Ph.D., and Motion for Summary Judgment (Transaction ID 59517660).

[2] To the extent any Conclusion of Law constitutes a Finding of Fact, the Panel also adopts it as such.

2. On March 1, 2016, Plaintiffs supplemented their expert designations and identified Robert M. Cabrera, Ph.D. as an expert. (Transaction ID 58652731 at 5.) Dr. Cabrera is not a medical doctor but a lecturer and research scientist. (Cabrera Dep. at 97:1-5.)[3] According to Plaintiffs' designation, Dr. Cabrera was expected to testify, *inter alia*, that Zoloft could produce "alterations in the serotonin system [that] can cause deleterious effects both in developmental anatomy, neuroanatomy, and neurological function ***including the development of autism*** and other neurodevelopmental disorders." (Transaction ID 58652731 at 5 (emphasis added).) Dr. Cabrera was also expected to testify that Mrs. s "use of sertraline during pregnancy was a cause of [D.B.'s] seizure disorder, as well as his cognitive and neurobehavioral disorder." (*Id.* at 7.)

3. On June 2 and 3, 2016, Dr. Cabrera was deposed in the four cases pending at that time in this consolidated mass litigation. The first day of his deposition, during which he was deposed regarding the and cases, concluded at 4:04 p.m. (Cabrera Dep. at 275:13). Following the first day of his deposition, Dr. Cabrera met with counsel for approximately three to four hours, after which time he drafted an updated disclosure in , which was provided to Defendants' counsel at approximately 7:15 p.m. (*Id.* at 287:19-288:7.) The new disclosure for Dr. Cabrera omitted all references to autism and removed Dr. Cabrera's opinion that Mrs. 's use of Zoloft was a cause of D.B.'s seizures. (Transaction ID 59090827.) Instead, the new disclosure stated that Dr. Cabrera would testify that "D.B.'s mother's use of sertraline during pregnancy was a cause of his developmental delays." (*Id.* at 3.)

4. Asked to explain why he revised his disclosure in this case, Dr. Cabrera testified that "after the deposition yesterday going back and over the records in preparation for today," "I felt it was prudent to focus on the developmental delay as opposed to some of the other injuries." (Cabrera Dep. at 361:11-15.) More specifically, autism and epilepsy were removed as injuries caused by Zoloft from his disclosure. (*Id.* at 361:16-20.) Dr. Cabrera further testified that he

[3] Excerpts from Dr. Cabrera's deposition on June 2 and 3 were submitted as Exhibits E and F to Defendants' motion and Exhibit 3 to Plaintiffs' response.

removed autism as an injury from his reports because D.B. had never been clinically diagnosed with autism. (*Id.* at 361:21-362:10.) As Dr. Cabrera testified, "[T]hat's exactly what I'm saying, I haven't seen that as a differential diagnosis." (*Id.* at 363:10-11.) Dr. Cabrera removed references to "neurodevelopmental disorders" and instead referred to "developmental delay." He explained that he did not "want there to be any confusion in regards to behavior or autism, and so I just wanted to make sure that it was very clear that what we're looking for are learning problems and developmental delay milestones." (*Id.* at 374:17-21.)

5. Regarding his decision to remove his opinion that Zoloft caused D.B.'s epilepsy, Dr. Cabrera testified that there was no medical documentation that D.B.'s seizures occurred at the right time to be related to his mother's use of Zoloft while pregnant. (*Id.* at 363:14-364:6.) Dr. Cabrera testified that because there was not "a good differential diagnosis during" the relevant time, he was not able to offer an opinion on epilepsy. (*Id.* at 364:4-6.)

6. Dr. Cabrera also testified: "In light of the deposition where it was – you know, which I understand, but it was made very evident that I shouldn't – and I agree with this, that I shouldn't be offering opinion on things that there's not a diagnosis or medical record indicating that that particular diagnosis was given, and so I wanted to make sure that testimony that I'm giving under oath was consistent with that. And I didn't feel comfortable in light of yesterday's deposition and, you know, the challenge in regards to some of the – some of the, you know, diagnoses in the records, I wanted to make sure that what I was giving was prudent and consistent with the medical record." (*Id.* at 391:5-17.)

7. On June 8, 2016, Plaintiffs also supplemented their expert designations by removing the other experts that they had designated, leaving Dr. Cabrera as Plaintiffs' only causation expert. (Transaction ID 59116178).

8. At his deposition, Dr. Cabrera admitted that, because he is not a medical doctor, he is not qualified to diagnose a patient's medical condition. For example, at his deposition, Dr. Cabrera testified:

- "[P]rofessionally I'm not licensed to practice and, therefore, I did encourage [Plaintiffs' counsel, Mr. Itkin] to have a medical doctor review these in regards to any diagnosis or treatment of the patient and so those are my reservations that I told you. Both my professional and academic work at the hospital, I am not allowed ethically to diagnose or treat and so in regards to any diagnosis for patients or specific opinions on treatment, you really want a medical doctor to – to do that." (Cabrera Dep. at 31:7-16.)

- "[I]n regards to diagnosis, that is, saying a patient has a particular condition or anomaly, then, no, I couldn't render that medical opinion in regards to what their diagnosis or treatment should be." (*Id.* at 32:8-12.)

- Asked "whether it would be appropriate for you to meet directly with a family member and provide them your opinion that Zoloft was the cause of their child's birth defect," Dr. Cabrera responded: "Professionally or academically, no. Because as I mentioned, because of our affiliation both with the medical school and the hospital. . . that's outside of the scope of my ethics guidelines." (*Id.* at 34:7-16.)

- "I'm not allowed to make diagnosis or treat patients or even, to that regard, suggest treatments." (Ex. F, 6/3/16 Dep. at 531:13-14.)

- Dr. Cabrera agreed that "[m]edical doctors make a diagnosis." (*Id.* at 15-17.)

9. Dr. Cabrera also admitted at his deposition that it is beyond the scope of his expertise to perform a differential diagnosis. (*See, e.g., id.* at 362:1-10 (explaining that he must rely on medical records for a differential diagnosis); *id.* at 364:2-6 (same); *id.* at 381:9-10 (same).)

10. Dr. Cabrera further admitted at this deposition that as part of his professional work outside of litigation, he would not normally review neuropsychiatric evaluations. (Cabrera Dep. at 415:8-12.) He admitted that he could not remember an occasion where he had ever reviewed a neuropsychiatric evaluation, explaining: "I'm not a psychiatrist or a psychologist or a neurologist or a medical neurosurgeon or neuro – neuro doctor." (*Id.* at 415:13-18.) When asked if he had received any training in conducting or reviewing psychological evaluations, Dr. Cabrera responded: "As I already mentioned, I am not a psychiatrist nor a psychologist nor have I received training in performing psychology or psychological testing." (*Id.* at 415:19-416:1.)

11. In another case involving allegations that Zoloft causes birth defects, Dr. Cabrera agreed that he is not a medical doctor and conceded that he has no methodology – much less a generally accepted one – for determining the cause of a particular child's birth defect. More importantly, he testified: "[T]hat's something that a medical doctor would do for individual cases. As far as individual cases goes, I'm not aware, but I don't practice at—you know, at a case level for individuals, like a medical doctor." (Ex. D at 18:16-18:21.)

12. When describing his role in assisting physicians with causation evaluations in individual cases, Dr. Cabrera provided examples in which he performed tests on tissue, blood, or other biologic samples provided to him by a patient's physician. (Cabrera Dep. at 37:13-38:3-8, 39:18-24, 531:17-21, 532:11-16, 533:7-17, 567:2-13.)

13. Dr. Cabrera has not performed any tests to support his causation opinions in this case, nor has he identified any that would be possible or relevant.

14. Dr. Cabrera was unable to identify a diagnosis of "developmental delay" in the Diagnostic and Statistical Manual of Mental Disorders, 4th Edition and conceded that there is no such diagnosis. (Ex. F, 6/3/16 Cabrera Dep. at 376:24-378:24.)

15. Dr. Cabrera referred to D.B.'s medical records for specific developmental delays that had been diagnosed or certain symptoms. He relied primarily on two neuropsychological evaluations conducted when D.B. was 4 years old and 6 years old. The records relied on by Dr. Cabrera as well as the testimony of D.B.'s neurologist, Dr. Jorge Vidaurre, identified several potential causes for any developmental issues that D.B. may have experienced, including: (1) multiple ear infections and resulting loss of hearing, (2) being "knocked kneed," which made D.B. late to walk, (3) D.B.'s epilepsy, (4) chronic asthma and allergies, (5) problems with D.B.'s primary support group, (6) family history of seizures, (7) family history of emotional problems, (8) lack of formal schooling, (9) the anti-seizure medication (Keppra) that D.B. was taking, and (10) normal individual variability. (Ex. N at 101, 104; Ex. T at 77, 80; Ex. W at 129, 131; Ex. Y

at 55-56; Ex. AA at 119-20, 139, 147; Ex. BB at 50; Vidaurre Dep. at 45:19-23, 65:13-21, 81:7-83:18, 91:2-92:3, 92:8-93:13, 95:4-23.)[4]

16. When asked at his deposition about these other causal factors identified by D.B.'s treaters, Dr. Cabrera agreed, with one exception, that they were potential causes. (Cabrera Dep. at 420:3-421:17) (unable to rule out ear infections as cause of D.B.'s phonological disorder); *id.* at 447:4-449:16 (agreeing that D.B.'s anti-seizure medication (Keppra) was associated with behavioral problems in pediatric patients); *id.* at 438:13-439:16 (agreeing that there is an association between seizure disorders and neurocognitive problems); *id.* at 442:17-443:5 (agreeing that normal individual variation cannot be excluded).

17. The only potential causal factor identified by D.B.'s treaters that Dr. Cabrera took issue with during his deposition was the family history of mental health problems, which were identified by D.B.'s treaters as both a possible hereditary factor and a social/environmental factor. To rule out this factor, Dr. Cabrera chose to believe Mrs. and Mr. s testimony in litigation several years later rather than the contemporaneous medical history recorded by D.B.'s treaters. (*Id.* at 439:17-442:16.)

18. In response to Defendants' Motion for Summary Judgment, Plaintiffs submitted an affidavit from Dr. Cabrera. In his affidavit, Dr. Cabrera described the methodology he employed to opine on specific causation as follows:

> Researchers in my field conclude that Zoloft caused a particular individual's condition by considering other known causes of that condition and ruling them out. That type of analysis is the generally accepted means by which professionals in my industry determine whether a specific drug (like Zoloft) caused a specific condition (like developmental delays).

(Cabrera Aff. ¶ 5.)[5]

19. Dr. Cabrera also stated in his affidavit: "In this case, I analyzed the time frame within which D.B. would have been exposed to Zoloft in utero, his mother's dosages of Zoloft,

[4] Excerpts from Dr. Vidaurre's Deposition were submitted as Exhibit P to Defendants' motion and Exhibit DD to Defendants' reply memorandum.

[5] Dr. Cabrera's affidavit was submitted as Exhibit 2 to Plaintiffs' Response.

the family medical history, Ms. s lifestyle, D.B.'s medical records, including his history of seizures, ear infections, and medication, and all of the relevant evidence regarding risk factors for D.B.'s development delays.· I ruled out all alternatives other than Zoloft as a cause of D.B.'s developmental delays." (Cabrera Aff. ¶ 6.)

20. Dr. Cabrera's affidavit statement that he has excluded all causes other than Zoloft for D.B.'s developmental delays is inconsistent with his testimony that he is not qualified to perform a differential diagnosis as well as the answers he gave when asked about specific alternative causes.

21. The inconsistencies between Dr. Cabrera's deposition and affidavit testimony are not the result of an inadequate opportunity for direct and cross-examination. Counsel for both defendants and plaintiffs extensively questioned Dr. Cabrera about his opinions during his deposition.

22. The inconsistencies between Dr. Cabrera's deposition and affidavit testimony are not the result of Dr. Cabrera's lack of access to pertinent evidence or information prior to or at the time of his deposition. Dr. Cabrera had access to all of D.B.'s medical records and all other relevant information prior to his deposition. Dr. Cabrera's affidavit was not based on newly discovered evidence.

23. Dr. Cabrera's deposition testimony does not reflect any confusion, lack of recollection, or other legitimate lack of clarity that his affidavit justifiably attempts to explain.

CONCLUSIONS OF LAW

I. DR. CABRERA'S QUALIFICATIONS TO TESTIFY AS TO SPECIFIC CAUSATION

24. Courts have recognized that there is a difference between general causation and specific causation. General causation addresses whether a substance is capable of causing a particular illness or injury. But even if, within a population, a substance may cause injury in some individuals, it usually will not cause injury in every member of the exposed population. To demonstrate causation, therefore, a plaintiff must also address the question of specific causation: Did the substance cause the specific plaintiff's injury or illness? Plaintiffs have the burden of

proving both general and specific causation. *See, e.g, Meade v. Parsley*, 2010 WL 4909435, at *5 (S.D.W. Va. Nov. 24, 2010). Accordingly, while reliance on studies may support general causation, specific causation requires that alternative causes of an individual's illness or injury be excluded. *See Roche v. Lincoln Prop. Co.*, 175 F. App'x 597, 602-03 (4th Cir. 2006).[6]

25. Determining specific causation generally involves the method known as "differential diagnosis" or "differential etiology," described by the Supreme Court of Appeals of West Virginia in *San Francisco v. Wendy's International, Inc.*, 221 W. Va. 734, 656 S.E.2d 485 (2007). As the Supreme Court explained: "Differential diagnosis 'is a method that involves assessing causation with respect to a particular individual.'" *Id.* at 748, 656 S.E.2d at 499 (alteration in original, citation omitted). A differential diagnosis "is a standard scientific technique of identifying the cause of a medical problem by eliminating the likely causes until the most probable one is isolated." *Id.* at 746, 656 S.E.2d at 497. In other words, "[i]t is a process of elimination based upon a study limited to an evaluation of the patient alone." *Id.* at 748, 656 S.E.2d at 499.

26. West Virginia Rule of Evidence 702 requires that a trial court determine if an expert is qualified to render an opinion under Rule 702. This involves a two-step inquiry: (1) Does the proposed expert "(a) meet[] the minimal educational or experiential qualifications (b) in a field that is relevant to the subject under investigation (c) which will assist the trier of fact." Second, does "the expert's area of expertise cover[] the particular opinion as to which the expert seeks to testify." *San Francisco*, 221 W. Va. at 741, 656 S.E.2d at 492 (quoting *Gentry v. Mangum*, 195 W. Va. 512, 525, 466 S.E.2d 171, 184 (1995).)

27. Plaintiffs are correct that the West Virginia courts have not held that an expert must have a medical degree to testify regarding specific causation;[7] however, Defendants do not contend that Dr. Cabrera is unqualified merely because he is not a medical doctor. Rather,

[6] The Supreme Court of Appeals of West Virginia has frequently cited to federal decisions as persuasive authority in its own decisions regarding the application of Rule 702. *See, e.g., San Francisco v. Wendy's Int'l, Inc.*, 221 W. Va. 734, 746, 656 S.E.2d 485, 497 (2007).

[7] Pls.' Resp. [Transaction ID 59487634] at 4-10.

Defendants argue that, based on Dr. Cabrera's own admissions, he lacks the professional background and experience to eliminate the alternative potential causes for D.B.'s developmental delays and, therefore, cannot render an opinion on specific causation.[8]

28. Decisions of the Supreme Court make clear that the focus should be on the proposed expert's experience and training and whether there is a "match" between his experience and his opinions. *See Gentry*, 195 W. Va. at 525, 466 S.E.2d at 184. For example, in *Harris v. CSX Transp., Inc.*, 232 W. Va. 617, 753 S.E.2d 275 (2013), the plaintiffs called three experts: an epidemiologist, a toxicologist and a physician. *Id.* at 620, 623, & 627, 753 S.E.2d at 278, 281, and 285. Each of the plaintiffs' experts drew upon his professional experience to render his opinion. Plaintiffs' epidemiologist had significant experience evaluating workplace exposures to toxic substances. *See Id.* at 635-36, 753 S.E.2d at 293-94. Plaintiffs' toxicologist provided an analysis of the dose to which the plaintiff had been exposed. He performed specific dose calculations (something that toxicologists do)[9] to determine that the plaintiff was exposed to high levels of diesel exhaust. *See Id.* at 638-39, 753 S.E.2d at 296-97.[10] The plaintiffs' third expert was a medical doctor who had "treated thousands of patients with multiple myeloma." *Id.* at 640, 753 S.E.2d at 298.

29. The Supreme Court has also made clear that where an expert's opinion is not based on his or her professional training and experience, it is properly excluded. For example, in *Kiser v. Caudill*, 215 W. Va. 403, 599 S.E.2d 826 (2004), the plaintiffs sought to offer the testimony of a medical doctor in a malpractice action, who had been board certified in neurological surgery and practiced pediatric surgery during the first fifteen years of his practice. He had even performed the type of surgery at issue in the litigation. *See id.* at 411, 599 S.E.2d at

[8] Defs.' Br. [Transaction ID 59425443] at 10-11; Defs.' Reply [Transaction ID 59517660] at 3-7.

[9] *See Harris*, 232 W. Va. at 627, 753 S.E.2d at 285 (observing that "'the science of toxicology can help understand whether the dose of a substance achieved following a particular exposure has any relationship to toxicity or disease'")(citation omitted).

[10] Similarly, in *Kitzmiller v. Jefferson Supply Co.*, No. 2:05-CV-22, 2006 WL 2473399 (N.D.W. Va. Aug. 25, 2006), the expert in question was a defense expert, a toxicologist whose testimony concerned the absence of evidence of sufficient exposure to the toxic substance at issue. *See id.* at *2.

834. However, the trial court found that he "was not qualified to testify because his deposition showed that he has no more than a casual familiarity with the standard of care." *Id.* The Supreme Court agreed. *See id.* As in *Kiser*, Defendants' challenge to Dr. Cabrera is not based on his lack of a specific degree, but on his own admissions regarding his lack of relevant experience.

30. Likewise, in *State ex rel. Jones v. Recht*, 221 W. Va. 380, 655 S.E.2d 126 (2007), the plaintiffs had offered a single expert, a neurological surgeon, to testify that the impact of a collision had caused the plaintiff to suffer neurological problems. *Id.* at 382, 655 S.E.2d at 128. The plaintiff's expert's opinions rested both on his medical assessment of the plaintiff and his opinions regarding the force of impact. As the Supreme Court explained, while it might have been difficult to separate the doctor's "neurological testimony from his opinion regarding the biomechanical components of the accident . . . , such separation [was] absolutely essential in this case." *Id.* at 385, 655 S.E.2d at 131. While wholesale exclusion of the expert's testimony was not appropriate, the Supreme Court held that the trial court should have analyzed the expert's opinions and excluded those that exceeded the scope of his expertise. *Id.* at 386, 655 S.E.2d at 132. The Supreme Court made clear that its decision was fully consistent "with [the] Court's prior applications of the Rules of Evidence regarding admissibility of expert testimony and the liberal thrust of those rules." *Id.* at 386, 655 S.E.2d at 132.[11] In this case, for the reasons discussed below, Dr. Cabrera is qualified to opine on general causation, but he stepped beyond the scope of his expertise when he offered an opinion on specific causation.[12]

31. Dr. Cabrera's description of his methodology in his affidavit – considering and ruling out potential causes of a plaintiffs' condition other than the Defendants' product (Cabrera

[11] *See also Ventura v. Winegardner*, 178 W. Va. 82, 86-87, 357 S.E.2d 764, 768-69 (1987) (vocational expert should not have been allowed to testify regarding tennis salaries).

[12] In prior litigation where Dr. Cabrera was designated only as a general causation expert, he agreed that specific causation was beyond the scope of his expertise, stating: "[T]hat's something that a medical doctor would do for individual cases. As far as individual cases goes, I'm not aware, but I don't practice at—you know, at a case level for individuals, like a medical doctor." (Def.'s Motion, Ex. D at 18:16-18:21)

Aff. ¶ 5) –is the same as the methodology described by the Supreme Court of Appeals in *San Francisco v. Wendy's International, Inc.*, 221 W. Va. 734, 656 S.E.2d 485 (2007):

> "Differential diagnosis involves 'the determination of which one of two or more diseases or conditions a patient is suffering from, by systematically comparing and contrasting their clinical findings.'" "Differential diagnosis, or differential etiology, is a standard scientific technique of identifying the cause of a medical problem by eliminating the likely causes until the most probable one is isolated."
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> Differential diagnosis is not a scientific method which lends itself to establishing a direct link between an activity and an illness or injury. Instead, it is a method by which a physician "considers all relevant potential causes and then eliminates alternative causes. . . ." It is a process of elimination based upon a study limited to an evaluation of the patient alone.

Id. at 746, 748, 656 S.E.2d at 497 (2007) (citations omitted, ellipses in original).[13]

32. However, while Dr. Cabrera claims to have performed a differential diagnosis to rule out alternative causes of D.B.'s developmental delays (without using that terminology), he admitted in his deposition that he is not qualified to perform a differential diagnosis. (*See* Cabrera Dep. at 362:1-10 (explaining that he must rely on medical records for a differential diagnosis); *id.* at 364:2-6 (same); *id.* at 381:9-10 (same).) As noted in the Panel's findings of fact, *supra*, neither medical diagnosis nor differential diagnosis is part of Dr. Cabrera's professional experience.

33. Plaintiffs argue that Dr. Cabrera is qualified because he "is the person that treating physicians call for assistance in determining what caused a particular condition that their patient is suffering from." (Pls.' Resp. [Transaction ID 59487634] at 11.) However, Dr. Cabrera provided very specific examples of the assistance he provides so that physicians can reach a decision on causation. Each example involved performing tests on biological samples provided to him by a patient's physicians. (*E.g.*, Cabrera Dep. at 37:22-38:15, 532:11-16, 533:6-17,

[13] In *San Francisco*, the Supreme Court recognized that differential diagnosis is a reliable methodology to reach a specific causation opinion. *See* 221 W. Va. at 748, 656 S.E.2d at 499. Defendants do not dispute that a differential diagnosis, if reliably performed, is an accepted methodology for determining specific causation. (Defs.' Reply (Transaction ID 59517660) at 6-7.)

567:2-13.) But that is not what Dr. Cabrera did here. Here, he claims to have performed what is usually referred to as a differential diagnosis, something that he admits is beyond his qualifications and professional experience. As the Supreme Court described it in *Gentry*,[14] there is no "match," between his opinions and his professional experience and training.

34. In his affidavit, Dr. Cabrera claims to have "ruled out all alternatives other than Zoloft as a cause of D.B.'s developmental delays." (Cabrera Aff. ¶ 6.) However, he does not describe his method for doing so, or how his professional education and experience enabled him to do so. Nor have Plaintiffs identified anything in Dr. Cabrera's education, training, or background that allows him to exclude any of the numerous potential alternative causes of D.B.'s development delays that were identified by D.B.'s treating doctors. Indeed, outside of litigation, Dr. Cabrera does not even review neuropsychiatric evaluations. (Cabrera Dep. at 415:8-416:1.)

35. Moreover, Dr. Cabrera's affidavit is inconsistent with his deposition testimony in response to questions about specific developmental delays and their causal factors. During his deposition, Dr. Cabrera did not identify any means by which he was able to exclude other likely causal factors identified by D.B.'s treaters, or how he drew upon his expertise to do so. To the contrary, he agreed that D.B.'s ear infections, epilepsy, and anti-seizure medicine were potential causes of D.B.'s developmental delays. (Cabrera Dep. at 420:3-421:17; 438:13-439:16; 442:17-443:5; 447:4-449:16.)

36. Thus, Dr. Cabrera's affidavit statement that he has excluded all causes other than Zoloft for D.B.'s developmental delays is inconsistent with his testimony that he is not qualified to perform a differential diagnosis and with the answers he gave when asked about specific alternative causes.

37. Whether a party may avoid summary judgment by submitting an affidavit that contradicts prior deposition testimony was addressed by the Supreme Court of Appeals of West Virginia in Syllabus Point 4 of *Kiser v. Caudill*, 215 W. Va. 403, 599 S.E.2d 826 (2004):

[14] 195 W. Va. at 525, 466 S.E.2d at 184.

> To defeat summary judgment, an affidavit that directly contradicts prior deposition testimony is generally insufficient to create a genuine issue of fact for trial, unless the contradiction is adequately explained. To determine whether the witness's explanation for the contradictory affidavit is adequate, the circuit court should examine: (1) Whether the deposition afforded the opportunity for direct and cross-examination of the witness; (2) whether the witness had access to pertinent evidence or information prior to or at the time of his or her deposition, or whether the affidavit was based upon newly discovered evidence not known or available at the time of the deposition; and (3) whether the earlier deposition testimony reflects confusion, lack of recollection or other legitimate lack of clarity that the affidavit justifiably attempts to explain.

Id. at 405, 599 S.E.2d at 828. Accordingly, the Panel must examine the contradiction between Dr. Cabrera's deposition and his affidavit testimony in light of the three questions posed in *Kiser*.

38. First, was there an adequate opportunity for direct and cross-examination? The answer to this question is "Yes." Counsel for both Defendants and Plaintiffs extensively questioned Dr. Cabrera about his opinions during his deposition.

39. Second, did Dr. Cabrera have access to pertinent evidence or information prior to or at the time of his deposition or was the affidavit based upon newly discovered evidence not known or not available? The answer to that question is also "Yes." The record shows that Dr. Cabrera had access to all of D.B.'s medical records and all other relevant information prior to his deposition. Dr. Cabrera's affidavit was not based on newly discovered evidence.

40. Third, does Dr. Cabrera's deposition reflect confusion, lack of recollection, or other legitimate lack of clarity that the affidavit justifiably attempts to explain? The answer to that question is "No." To the contrary, Dr. Cabrera's affidavit does not state that he was confused, that he did not recall facts or testimony, or that he was unclear in any way.

41. Dr. Cabrera's affidavit can be contrasted with the affidavit from the expert in *State ex rel. Krivchenia v. Karl*, 215 W. Va. 603, 600 S.E.2d 315 (2004) (per curiam). In that case, the defendant's expert testified at his deposition that he was not going to render an opinion on the standard of care used by the defendant. Based on this testimony, the trial court granted the plaintiff's motion to preclude the expert from testifying as to the standard of care. The

defendant moved for reconsideration, supported by an affidavit from his expert. *Id.* at 606, 600 S.E.2d at 318. In his affidavit, the expert explained that the answer given during his deposition was based on that fact that he did not understand the legal definition of standard of care. Afterwards, the expert was provided with the definition under West Virginia law and, having received that information, was of the opinion that the defendant did not deviate from the standard of care. Significantly, the expert's opinion had not changed; it was always his opinion that the defendant had acted as a reasonably prudent physician under the circumstances. But after his deposition, he learned that was sufficient to satisfy the legal standard of care. *Id.* at 607-08, 600 S.E.2d at 319-20. The Supreme Court held the affidavit was sufficient to show that the expert's prior testimony was the result of confusion and, therefore, the defendant's motion for reconsideration should have been granted. *Id.* at 608; 600 S.E.2d at 320.

42. In *Calhoun v. Traylor*, 218 W. Va. 154, 624 S.E.2d 501 (2005) (per curiam), the Supreme Court of Appeals of West Virginia affirmed the trial court's decision not to consider a supplemental expert affidavit. Writing separately in order to clarify the proper use of what is sometimes referred to as the "sham affidavit rule," Justice Davis explained: "As opposed to precluding an expert from clarifying or changing his or her opinion, the true purpose of the sham affidavit rule is to prevent a party from resisting summary judgment by filing an affidavit that directly contradicts earlier deposition testimony when there is no satisfactory explanation for the change of opinion." *Id.* at 160, 624 S.E.2d at 507 (Davis, J., concurring). Justice Davis further explained: "If the expert's experience changes, resulting in a change in the expert's opinion or other deposition testimony, then the party offering the expert is entitled to amend the expert's testimony through use of an affidavit. But that affidavit had also better list some pretty good reasons for the change in the expert's testimony." *Id.* at 163, 624 S.E.2d at 510 (Davis, J., concurring, quoting Justice Starcher's concurring opinion in *Kiser*, 215 W.Va. at 411-12, 599 S.E.2d at 834-35).

43. The Panel has carefully considered Dr. Cabrera's deposition and affidavit testimony. In contrast to the expert in *Krivchenia*, Dr. Cabrera fails to offer any explanation for the inconsistency between his deposition testimony and his affidavit.

44. Accordingly, while the Panel finds, pursuant to *Harris v. CSX Transp., Inc.*, 232 W. Va. 617, 753 S.E.2d 275 (2013), and *Gentry v. Mangum*, 195 W. Va. 512, 466 S.E.2d 171 (1995), that Dr. Cabrera is qualified to render an opinion on *general* causation, he is not qualified, by his own admissions, to render an opinion on *specific* causation. His affidavit fails to cure the admissions made during his deposition. Therefore, the Defendants' motion to exclude the testimony of Robert Cabrera, Ph.D. is granted as to any opinion as to specific causation and denied as to Dr. Cabrera's opinions regarding general causation.

II. SUMMARY JUDGMENT

45. Summary judgment is appropriate if "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W. Va. R. Civ. P. 56(c); *accord Fleet v. Webber Springs Owners Ass'n*, 235 W. Va. 184, 188, 772 S.E.2d 369, 373 (2015) ("[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify application of the law") (internal citation omitted). "A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law." Syl. Pt. 5, *Jividen v. Law*, 194 W. Va. 705, 461 S.E.2d 451 (1995).

46. "If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure." Syl. Pt. 3, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995).

47. "[T]he party opposing summary judgment must satisfy the burden of proof by offering more than a mere 'scintilla of evidence,' and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor." *Painter v. Peavy*, 192 W. Va. 189, 192-93, 451 S.E.2d 755, 758-759 (1994).

48. "Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." *Id.* at 193, 451 S.E.2d at 759 (citations omitted). The nonmoving party may not rely on speculation and unsupported allegations to oppose summary judgment, but must offer "'significant probative evidence tending to support the complaint.'" *Id*. (citations omitted).

49. The parties dispute whether the Plaintiffs' claims are governed by Ohio or West Virginia law. The Panel need not resolve this choice of law question because, both Ohio and West Virginia law require that Plaintiffs present competent evidence of specific causation in order to satisfy their *prima facie* burden. *See Meade v. Parsley*, 2010 WL 4909435, at *5, at *6-8 (S.D.W.Va. Nov. 24, 2010) (applying West Virginia law); *Terry v. Caputo*, 875 N.E.2d 72, 77, 79 (Ohio 2007); *Valentine v. PPG Indus., Inc.*, 821 N.E.2d 580, 588 (Ohio Ct. App. 2004), *aff'd sub nom. Valentine v. Conrad*, 850 N.E.2d 683 (Ohio 2006).

50. Whether a medicine can cause developmental delays is not within the common experience of the average layperson; therefore, expert testimony is required. *See Darnell v. Eastman*, 261 N.E.2d 114, 116 (Ohio 1970) ("Except as to questions of cause and effect which are so apparent as to be matters of common knowledge, the issue of causal connection between an injury and a specific subsequent physical disability involves a scientific inquiry and must be established by the opinion of medical witnesses competent to express such opinion."); *Strahin v. Cleavenger*, 216 W. Va. 175, 180, 603 S.E.2d 197, 202 (2004) (observing that expert testimony is required "where the injury is obscure, that is, the effects of which are not readily ascertainable, demonstrable or subject of common knowledge"); *Addair v. Island Creek Coal Co.*, 2013 WL 1687833, at *3 (W. Va. Apr. 17, 2013) (finding "expert testimony to be necessary" to establish

causation because the injuries have not "resulted from common causes familiar to the average layperson").

51. Dr. Cabrera is the only expert that Plaintiffs have designated to testify regarding specific causation. Without his testimony on specific causation, Plaintiffs will be unable to meet their *prima facie* burden of proof. Accordingly, the Panel finds that summary judgment should be entered in favor of the Defendants.

CONCLUSION

In light of the foregoing, the Panel unanimously GRANTS Defendants' Motion to Exclude Causation Opinions of Plaintiffs' Expert Robert M. Cabrera, Ph.D., as to Dr. Cabrera's specific causation opinions and DENIES such motion as to Dr. Cabrera's general causation opinions.

Further, the Panel unanimously GRANTS Defendants' Motion for Summary Judgment. Judgment is entered in favor of Defendants and the claims of the above-captioned Plaintiff Family are hereby DISMISSED WITH PREJUDICE. Any exceptions or objections are noted and preserved for the record.

The Court FINDS upon EXPRESS DETERMINATION that this is a final order available for the proper application of the appellate process pursuant to Rule 54(b) of the Rules of Civil Procedure and the Rules of Appellate Procedure. Accordingly, this order is subject to immediate appellate review. The parties are hereby advised: (1) that this is a final order; (2) that any party aggrieved by this order may file an appeal directly to the Supreme Court of Appeals of West Virginia; and (3) that a notice of appeal and the attachments required in the notice of appeal must be filed within thirty (30) days after the entry of this Order, as required by Rule 5(b) of the West Virginia Rules of Appellate Procedure.

The Clerk is directed to close this case and place it among the cases ended. A copy of this order is this day served on the parties of record via File & Serve*Xpress*.

It is so ORDERED.

ENTER: October 5, 2016.

/s/ James P. Mazzone
Lead Presiding Judge
Zoloft Litigation