

# The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2010

PHILADELPHIA, MONDAY, NOVEMBER 22, 2010

VOL 242 • NO. 101 \$5.00 An **ALM** Publication

## Conflict With Medical Literature Fails to Sink Expert's Testimony

BY SHANNON P. DUFFY  
U.S. Courthouse Correspondent

A doctor testifying as an expert witness cannot be excluded solely because his opinion is not supported by or conflicts with medical literature, a federal judge has ruled.

The 38-page opinion by Senior U.S. District Judge William H. Yohn Jr. in *Ellison v. United States* is a major setback for the Justice Department because it clears the way for a plaintiff with catastrophic injuries to go to trial with his medical malpractice suit against the Veterans Administration.

Christopher Ellison suffered a massive stroke just minutes after he left a VA dentist's office where the procedure to extract numerous teeth was interrupted several times because he suffered precipitous drops in blood pressure.

Ellison suffered extensive brain damage because he had the stroke in his car, just a few blocks from the dentist's office, but was

not found for several hours. The suit alleges that the dental procedure should have been aborted because of the seriousness of Ellison's symptoms and that he should have been monitored for several hours rather than discharged.

Justice Department lawyers tried to win dismissal of the suit by challenging two of Ellison's expert witnesses — an oral surgeon who opined on the standard of care and a neurologist who opined on the cause of the stroke and the reasons for the extensive brain damage.

Since both experts were essential to proving the case, the government argued, a ruling that excluded either one would also mandate dismissal of the suit on summary judgment.

Now Yohn has ruled that experts are both "reliable" and that their testimony "fits" the



YOHN

case as those terms were defined by the U.S. Supreme Court in the seminal decision *Daubert v. Merrill Dow*.

The ruling is a victory for plaintiffs attorneys Shanin Specter, Charles L. Becker and Regan S. Safier of Kline & Specter.

The first expert, Stuart Super, has been an oral and maxillofacial surgeon for 37 years and currently serves as chief of oral and maxillofacial surgery at Lenox Hill Hospital in New York. A graduate of the Harvard School of Dental Medicine, he has served as both an examiner and a section leader for the American Board of Oral and Maxillofacial Surgery, which creates and administers the oral examinations given to candidates for certification.

In his expert report, Super found "there was a serious deviation from the standard of care" in Ellison's case because repeated episodes of blood pressure dropping required that the dental procedure be stopped and that Ellison be placed under medical supervision.

Super concluded that Dr. Mark Abel had

violated the standard of care by continuing with Ellison's tooth extractions following his first episode of hypotension and in the face of multiple episodes of hypotension, without obtaining a medical consult, and by failing to place Ellison under medical supervision for several hours in the VA dental clinic or another medical setting, such as an emergency room.

Assistant U.S. Attorneys Thomas F. Johnson and Stacey L.B. Smith argued that Super should be excluded because he cannot establish that his opinions reflect the standard of care generally accepted by other oral surgeons, as opposed to his personal preference.

In his deposition, the government argued, Super conceded that he had no way of knowing whether a significant number of oral surgeons would disagree with him.

The motion also said Super was unable to cite medical literature that supports his opinions regarding the standard of care, and that his opinions should be deemed

*Expert continues on 12*

A doctor testifying as an expert witness cannot be excluded solely because his opinion is not supported by or conflicts with medical literature, a federal judge has ruled.

The 38-page opinion by Senior U.S. District Judge William H. Yohn Jr. in *Ellison v. United States* is a major setback for the Justice Department because it clears the way for a plaintiff with catastrophic injuries to go to trial with his medical malpractice suit against the Veterans Administration.

Christopher Ellison suffered a massive stroke just minutes after he left a VA dentist's office where the procedure to extract numerous teeth was interrupted several times because he suffered precipitous drops in blood pressure.

Ellison suffered extensive brain damage because he had the stroke in his car, just a few blocks from the dentist's office, but was not found for several hours. The suit alleges that the dental procedure should have been aborted because of the seriousness of Ellison's symptoms and that he should have been monitored for several hours rather than discharged.

Justice Department lawyers tried to win dismissal of the suit by challenging two of Ellison's expert witnesses — an oral surgeon who opined on the standard of care and a neurologist who opined on the cause of the stroke and the reasons for the extensive brain damage.

Since both experts were essential to proving the case, the government argued, a ruling that excluded either one would also mandate dismissal of the suit on summary judgment.

Now Yohn has ruled that experts are both "reliable" and that their testimony "fits" the case as those terms were defined by the U.S. Supreme Court in the seminal decision *Daubert v. Merrill Dow*.

The ruling is a victory for plaintiffs attorneys Shanin Specter, Charles L. Becker and Regan S. Safier of Kline & Specter.

The first expert, Stuart Super, has been an oral and maxillofacial surgeon for 37 years and currently serves as chief of oral and maxillofacial surgery at Lennox Hill Hospital in New York. A graduate of the Harvard School of Dental Medicine, he has served as both an examiner and a section leader for the American Board of Oral and Maxillofacial Surgery, which creates and administers the oral examinations given to candidates for certification.

In his expert report, Super found "there was a serious deviation from the standard of care" in Ellison's case because repeated episodes of blood pressure dropping required that the dental procedure be stopped and that Ellison be placed under medical supervision.

Super concluded that Dr. Mark Abel had violated the standard of care by continuing with Ellison's tooth extractions following his first episode of hypotension and in the face of multiple episodes of hypotension, without obtaining a medical consult, and by failing to place Ellison under medical supervision for several hours in the VA dental clinic or another medical setting, such as an emergency room.

Assistant U.S. Attorneys Thomas F. Johnson and Stacey L.B. Smith argued that Super should be excluded because he cannot establish that his opinions reflect the standard of care generally accepted by other oral surgeons, as opposed to his personal preference.

In his deposition, the government argued, Super conceded that he had no way of knowing whether a significant number of oral surgeons would disagree with him.

The motion also said Super was unable to cite medical literature that supports his opinions regarding the standard of care, and that his opinions should be deemed

unreliable because they are contradicted by a leading text that is used to teach dental students.

But Yohn found that the government was making too much of an isolated deposition answer in which Super said he "would have no way of knowing" whether there are "a significant number of oral surgeons who would disagree" with his opinion.

Instead, Yohn found that Super went on to explain that he does in fact "know of other oral surgeons who would act in [a] similar manner" because he has trained oral surgeons over the years, and "this is what we train these surgeons to do."

As a result, Yohn found that Super's opinions are reliable because, taken as a whole, his testimony shows "that he has formulated an opinion as to the general — as opposed to simply his own, personal — standard of care and that, based on his experience, he had a reliable basis for doing so."

Yohn also rejected the government's claim that Super's proposed testimony was unreliable because it lacks support and is contradicted by the medical literature.

"A standard of care opinion may be reliable even in the absence of medical literature on point," Yohn wrote.

The 3rd U.S. Circuit Court of Appeals, Yohn noted, has "specifically disavowed reliance on the literature cited by the expert in holding that his testimony was reliable."

Yohn also emphasized that his role, as gatekeeper, was not to decide whether Super's opinions are correct, but only whether those opinions are based on "good grounds."

"The record establishes that in his over 37 years of teaching and practicing as an oral and maxillofacial surgeon, Dr. Super has had extensive experience managing ... patients [with blood pressure problems and] teaching dental students and oral surgeons how to respond to emergencies," Yohn wrote.

"Moreover, to the extent that Dr. Super disagrees with some of the relevant medical literature, he has offered a reasonable explanation for his disagreement," Yohn wrote.

Turning to the second expert, Scott Kasner, Yohn rejected the government's argument that his opinion was unreliable because he failed to conduct the necessary tests that would show the cause of the stroke.

Kasner, who served as Ellison's attending neurologist at the Hospital of the University of Pennsylvania, concluded that the stroke was the result of a blood clot stemming from a prior heart attack, and that the drops in blood pressure during the dental procedure contributed to the widespread extent of the stroke.

In his report, Kasner opined that the stroke could have been avoided or at least would have been less damaging if Ellison's symptoms had been treated properly and if he had been monitored for a longer period.

The government argued that Kasner's opinion was unreliable because he conceded that there is no test "to know absolutely where the clot particularly came from" and because he did not use the standardized method for classifying stroke subtype that is described in a textbook that Kasner himself edited.

But Yohn found that the challenge fell short.

"The fact that there exists no test to identify the source of the clot in a stroke victim does not undermine the reliability of Dr. Kasner's opinion," Yohn wrote.

The 3rd Circuit, Yohn noted, has repeatedly recognized that a "differential diagnosis" approach such as Kasner's is "a reliable methodology when appropriately performed."

Kasner defined differential diagnosis as one in which "you look at the facts and the circumstances and you eliminate them until you get down to the one that seems to be the most appropriate."

Yohn found that courts reject a differential diagnosis as unreliable only when the doctor fails to rule out alternative causes by engaging in "very few standard diagnostic techniques by which doctors normally rule out alternative causes" and offers "no good explanation as to why his or her conclusion remained reliable."