

1 IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
2 IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
3 CIVIL DIVISION

3 PATRICIA VANDERGRACHT and
4 DAVID VANDERGRACHT, her husband,

5 Plaintiffs,

Case No.: 02-04552

6 vs.

Division: "E"

7 PROGRESSIVE EXPRESS, USAA INSURANCE
8 COMPANY and TIG INSURANCE COMPANY,

9 Defendants.

10 TRIAL EXCERPT

11 (Frye hearing)

12

13 Before: Honorable Marva L. Crenshaw

14

Date: March 9th, 2005

15

16 Place: George E. Edgecomb Courthouse
17 800 East Twiggs Street
18 Tampa, Florida

19

Reported by: Vickie Hamer, RPR
Notary Public
State of Florida at Large

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1 EXCERPT

2 THE COURT: Mr. Gonzales.

3 MR. GONZALEZ: Judge, may I defer questioning to
4 co-counsel, Dorothy Sims?

5 THE COURT: All right.

6 MS. SIMS: May it please the court?

7 THE COURT: Yes.

8 EXAMINATION

9 BY MS. SIMS:

10 Q. Dr. Larrabee, I think that a motion has been filed
11 with attachments, and that would be this motion. Did you
12 prepare the material contained within this response from the
13 defense?

14 A. May I see that?

15 MS. SIMS: Is it okay?

16 THE COURT: Yes.

17 THE WITNESS: Looks like it's missing the first
18 page. Looks like it contains most of the -- let me
19 just make sure.

20 MS. SIMS: Your Honor, I'm confused. Since the
21 burden falls on the defense to substantiate the science
22 behind our Frey motion, I was under the impression that
23 they would go first to produce a witness to support --

24 THE COURT: What happened was procedurally
25 Mr. Gonzales filed a motion. In response to the

1 motion, they filed an affidavit in response, and based
2 upon what was in the affidavit, the Court indicated
3 that it wanted a live hearing to address the predicate
4 that Frey requires. That's where we are.

5 MS. SIMS: I see. I understand.

6 BY MS. SIMS:

7 Q. Is that the affidavit that you produced?

8 A. Yes, it looks like it is. It has the materials
9 that I provided.

10 Q. Okay, thank you.

11 A. Yes.

12 THE COURT: In particular to focus us, I want to
13 know about his prior experience testifying as to the
14 Lees-Haley Scale in court.

15 MS. SIMS: All right.

16 THE COURT: In addition to the other areas, but
17 I'm particularly concerned about that one.

18 MS. DONOGHUE: Your Honor, I can examine him on
19 that. It doesn't --

20 THE COURT: Go right on back to your seat.

21 Mrs. Donaghue will take the lead on that one.

22 THE WITNESS: If I may --

23 THE COURT: No, sir, no question is pending.

24 Go to the podium.

25 MS. DONOGHUE: I think he was indicating he left

1 something somewhere, a document.

2 THE COURT: If he has documents, someone will hand
3 them to him.

4 EXAMINATION

5 BY MS. DONOGHUE:

6 Q. The motion in limine deals with mostly the
7 Lees-Haley Fake Bad Scale, which was a part of your
8 examination or your interpretation of Ms. Vandergracht's
9 results, is that correct, or your examination of her?

10 A. Correct.

11 Q. And you have explained in your affidavit the
12 Lees-Haley Fake Bad scale and included a number of articles
13 on it; is that correct?

14 A. Yes.

15 Q. Are there any -- is there any other information on
16 the Lees-Haley Fake Bad scale article-wise that we haven't
17 included that would show that it's been subject to peer
18 review or journals or anything like that?

19 A. I think I have hit the key articles that have
20 appeared in the peer review research.

21 Q. And to your knowledge are there -- is that a scale
22 used in neuropsychology?

23 A. Yes.

24 Q. Are there other individuals other than yourself
25 who use that scale to detect the presence of malingering?

1 A. Yes.

2 Q. Are there other tests used in neuropsychological
3 testing to detect malingering?

4 A. Yes.

5 Q. How many tests did you perform that showed a
6 presence of malingering in Ms. Vandergracht?

7 A. There is the Lees-Haley Fake Bad Scale. She
8 exceeded across on the Modified Somatic Perception
9 questionnaire. She failed one of the trials of the Word
10 Memory Test. She failed the Test of Memory Malingering, and
11 she also failed the Reliable Digit Scanning procedure.

12 Q. Are all those tests including the Lees-Haley Fake
13 Bad Scale to your knowledge used by other members of the
14 neuropsychological community?

15 A. Yes.

16 Q. Do you know whether or not they are generally
17 accepted in the neuropsychological community to detect the
18 presence of malingering?

19 A. To my understanding, yes.

20 Q. Now, the judge asked whether or not you have
21 testified in the past concerning the Lees-Haley Fake Bad
22 Scale and it's indication of malingering.

23 A. Yes, I have.

24 Q. Do you have specific cases that you have or can
25 you think of specific cases in which you have testified or

1 been allowed to testify about the Lees-Haley Fake Bad scale?

2 A. I wrote them down. I left them back there in the
3 case.

4 THE COURT: You can get it for him.

5 THE WITNESS: Thank you.

6 MS. DONOGHUE: Uh-huh.

7 THE COURT: Continue.

8 BY MS. DONOGHUE:

9 Q. And if you could talk about the cases in which you
10 have actually given live trial testimony that included the
11 analysis of the Lees-Haley Fake Bad scale.

12 A. Yes, there was a case, the plaintiff is Grossman,
13 and it was a 6th Circuit in Pinellas County, June 5th, 2003.
14 Another case, Willis was the plaintiff, W-i-l-l-i-s. It was
15 20th Circuit in Collier County. That was 3/27/02.

16 Jerry Carter was the plaintiff in another case.
17 That was January 28, 2003. That was the First Circuit,
18 Escambia County.

19 Then there was Javier Lopez. That was the 13th
20 Circuit, Hillsborough County, on February 27th, 2003.

21 I also was involved in a prior Frey hearing. It
22 was a case I did, Gilbert Hernandez v. Ostrow, O-s-t-r-o-w.
23 That was 20th Circuit Collier. I don't have the date on
24 that. I didn't testify at trial. The hearing was in the
25 course of the trial. And after the hearing I wasn't called.

1 But the challenge there was to my not using the
2 Halstead Right Hand Battery. And my examination was upheld.
3 My examination also included the Fake Bad Scale, but I don't
4 think that was specifically challenged in that particular
5 case. I would have been allowed; I just wasn't called by
6 defense counsel.

7 Q. Now, one of the challenges to the Lees-Haley Fake
8 Bad Scale that's been made and it's pretty aware from the
9 research is that the initial report or initial findings by
10 Lees-Haley were not able to be substantiated or
11 peer-reviewed.

12 Subsequent to that initial study done by
13 Lees-Haley, have there been subsequent research and
14 publications on the Lees-Haley Fake Bad Scale?

15 A. Yes. The original publication did undergo peer
16 review. The criticism was that the methodology was such to
17 be difficult to replicate it, but there have been subsequent
18 studies, 13 that I included in the attachments to this
19 affidavit, that have supported the use of the Lees-Haley
20 Fake Bad Scale.

21 Q. Now, the critics of the Lees-Haley Fake Bad Scale
22 that are specifically listed in the motion are individuals
23 named Butcher and Graham. Do you know whether or not those
24 individuals are neuropsychologists?

25 A. Yes. To my knowledge they are not.

1 Q. Is Lees-Haley Fake Bad Scale specifically a
2 neuropsychological test?

3 A. Not necessarily. The research that's been
4 published has been primarily in the neuropsychological area,
5 with a more recent study showing it's use to be effective in
6 traumatic stress disorder.

7 Q. And these peer review studies that are published
8 to neuropsychologists and psychologists, they rely on them
9 for their practice?

10 A. Yes.

11 Q. And there is also a publication that you did
12 author that won an award. Can you just tell the Court about
13 that.

14 A. Yes. The National Academy of Neuropsychology has
15 an official journal. It's called The Archives of Clinical
16 Neuropsychology. And each year they give the award for the
17 best paper published in that journal.

18 And I won that award this past year for my
19 publication in 2003. It was entitled Exaggerated MMPI 2
20 Symptom Report in Personal Injury Litigants With Malingering
21 Neurocognitive Deficits.

22 That was published in the Archives of Clinical
23 Neuropsychology, Volume 18, 2003, 673 to 686. That shows
24 that the Fake Bad Scale worked better at picking up
25 malingering than the traditional MMPI validity scales.

1 Also, that publication criticized a paper that
2 Dr. Butcher himself had published the issue prior to that
3 same year 2003 for methodological weaknesses that precluded
4 his conclusions.

5 Q. Do you have knowledge whether or not through your
6 being on editorial boards of neuro -- or of publications or
7 just your work in neuropsychology that other individuals, be
8 it Lees-Haley, be it the other people authoring these
9 reports use the scale in regular practice?

10 A. Yes.

11 Q. Now, do you have any idea or does it even matter
12 to you what percentage of people use it in practice?

13 A. No. My colleagues that are board-certified that
14 do forensic work routinely use it, and that board
15 certification would be the American Board of Clinical
16 Neuropsychology.

17 Q. Have you been to any seminars or have you put on
18 seminars that are on the Lees-Haley Fake Bad Scale?

19 A. The most recent ones are the ones that I presented
20 on the more general topic of malingering.

21 Q. Are you aware of other seminars or information
22 things or available publications other than the 13 articles
23 that talk about the Lees-Haley Fake Bad Scale and
24 malingering?

25 A. There is one -- I can't think of the exact cite

1 right now -- that was done in a neurotoxic population that I
2 believe supported the use of a scale. There is a -- there
3 is two major textbooks in psychology for the MMPI. One is
4 Dr. Graham's book. The other is by Dr. Roger Green. And
5 Dr. Green has reprinted the Lees-Haley Fake Bad Scale on the
6 back of his book so that people can rely on it.

7 Q. That's a text book used to teach individuals in
8 the field of neuropsychology?

9 A. Well, it's a reference text on the MMPI, and I'm
10 assuming it's used in certain graduate programs.

11 Q. And it's obviously used for people to administer
12 the MMPI?

13 A. To interpret the MMPI, yes.

14 Q. And to your knowledge is that book published by
15 Green generally accepted in the scientific community?

16 A. To my knowledge, yes.

17 Q. Do you have any reason to believe that it's not?

18 A. No.

19 MS. DONOGHUE: Your Honor, I don't know how much
20 in detail you want me to get into the articles or the
21 meat of the text. I know that you have read all of the
22 articles.

23 THE COURT: If you have completed your
24 questioning, then if Mr. Gonzales or his co-counsel
25 have questions of him, they can proceed.

1 MS. DONOGHUE: I'll let them question and come
2 back if we have any further questions. Thank you.

3 EXAMINATION

4 BY MS. SIMS:

5 Q. Dr. Larrabee, I want to go through this scale to
6 some extent and go through the specific questions for the
7 judge, some examples so we can understand the questions upon
8 which you were relying for your determination that this
9 individual is malingering. Some of those questions include
10 "much of the time my head seems to hurt all over;" correct?

11 A. Are you reading that from Dr. Butcher's article?

12 Q. Correct.

13 A. Give me a moment. Do you have that handy?

14 Q. Sure.

15 A. I've got a copy here. Okay.

16 Q. It's on Page 475.

17 A. Okay.

18 Q. Is that correct?

19 A. Okay, which one was that again?

20 Q. "Much of the time my head seems to hurt all over."

21 A. That's one of the items.

22 Q. And if someone had for example a craniotomy, they
23 may have head pain; correct?

24 A. That's possible.

25 Q. If someone is on narcotics, they may have an upset

1 stomach; correct?

2 A. That's possible.

3 Q. And one of the other questions is "I have a great

4 deal of stomach trouble;" correct?

5 A. Yes.

6 Q. Let's back up a minute. The MMPI 2 is 567 true

7 false questions; correct?

8 A. Yes.

9 Q. And the MMPI 2 was created by among others

10 Dr. James Butcher and Dr. Jack Graham; correct?

11 A. It was originally created by Hathaway and

12 McKinley. Butcher and Graham were the ones that took over

13 the restandardization.

14 Q. The product of what we now know as the MMPI 2 was

15 created in part by Dr. Butcher and Graham?

16 A. In part, yes.

17 Q. They are the responsible for the creation of this

18 true/false test which is a personality inventory; correct?

19 A. Yes.

20 Q. It's not a test to say if there is brain injury

21 and it's got multiple validity scales built into it, doesn't

22 it?

23 A. Yes.

24 Q. In this particular case, the validity scales that

25 are built into the test this individual passed; correct?

1 A. I believe so. I left my file back there, but I
2 don't recall.

3 Q. Then an individual named Paul Lees-Haley decided
4 that if people answer true or false to some of the questions
5 that he pulled out of that test, in his opinion that could
6 be the basis for a determination of malingering; correct?

7 A. Based on the research he did, and it was specific
8 to personal injury settings, yes.

9 Q. You are of the opinion that that somehow supports
10 your ability to claim that this individual is malingering in
11 either emotional, neurocognitive or physical complaints;
12 correct?

13 A. Not based on his original studies, but based on
14 all the subsequent research that's been done on the scale.

15 Q. Now, if one were to try to reproduce exactly how
16 Dr. Lees-Haley determined the first group of people, how he
17 identified them as malingerers, we couldn't do it, could we?

18 A. It would be difficult to do. He was not as clear
19 as you'd like to see in methodology.

20 Q. So the creation of this scale that he used, these
21 questions he pulled off of somebody else's test and claims
22 if someone answers a certain way, that means malingering, we
23 cannot reproduce his original article that set forth the
24 Lees-Haley Fake Bad Scale because we don't know how he
25 determined these people were malingering in the first place,

1 do we?

2 A. In the original paper he did mention use of
3 surveillance tapes and that sort of thing, but it still was
4 not described in great detail to where you could go in and
5 replicate the study.

6 Q. That original journal was actually a paid journal;
7 he had to pay them to publish it?

8 A. You'd have to ask him.

9 Q. Have you testified in the past that you were aware
10 that it was a paid journal?

11 A. I don't recall how much I said about that. I
12 think I published way back a report that there was a payment
13 involved, but also I got reprints along with it. So you'd
14 have to ask him the original details of his arrangement. I
15 know Butcher published in that same journal as has Graham.

16 Q. His original article that set forth his test
17 contained, what, 13 women who were alleged personal injury
18 malingerers?

19 A. Let me go back and check. Yes. 7 men, 13 women.

20 Q. And the average age was 37 years old?

21 A. Yes.

22 Q. And the plaintiff in this case is 62; is that
23 correct?

24 A. I think she was 59 at the time I examined her.

25 Q. Well, she is 61 today; correct?

1 A. Yes, but the test was performed when she was 59.

2 Q. She's not at the average age for this test; is

3 that correct?

4 A. No.

5 Q. And you're aware of the American Psychological

6 Association Code of Ethics that says when you seek to use an

7 instrument or assessment, then you need to use one that has

8 been established for use with members of the population

9 tested. Do you know how many people in Lees-Haley original

10 sample were even close to her age?

11 A. Well, as a standard deviation of 11.4 and usually

12 98 percent of the population falls between plus or minus 2

13 standard deviations, so it's conceivable she would have been

14 at the top end of the age range.

15 Q. You don't know, do you, if there was anyone over

16 the age of 55, do you?

17 A. I'm assuming there probably was given the size of

18 the standard deviation.

19 Q. You don't know, do you?

20 A. It's an assumption. He didn't report the range of

21 age, no.

22 Q. And Dr. Lees-Haley I think used about 110 people

23 and all of them came from his own patient population;

24 correct? He didn't go out and get a big sample from other

25 doctors?

1 A. There were two samples. There was a personal
2 injury sample with assumed legitimate claims, and then there
3 was the sample that was assumed to be malingering. Then he
4 also had other individuals who --

5 Q. Total number is really my question. We're talking
6 about less than 150 people, all of his own patients;
7 correct?

8 A. Okay, there were -- I'm sorry. There were the 7
9 men, 13 women, so that would have been 25, 45 people from
10 his practice. Then he had 67 medical out-patients that had
11 nothing wrong. He just recruited them to participate in the
12 study and then do what's called dissimulation design where
13 they had to pretend they were in a car wreck.

14 Q. We're talking about less than 150 people, aren't
15 we?

16 A. Total, yes.

17 Q. Dr. Butcher, when he discovered that he had some
18 problems with this, he is one of the people that created the
19 MMPI that Dr. Lees-Haley seeks to use, he started out with
20 100,000 people in his sample, didn't he?

21 A. Yes. He was basing that on profiles that had been
22 sent in for scoring to the scoring service that he ran.

23 Q. And, in fact, one of the criticisms that
24 Dr. Butcher had of this particular test is claiming that it
25 called too many people malingerers, predominantly women;

1 isn't that correct? Women were found to be at a rate of
 2 malingerers greater than men by almost twice as much;
 3 correct?

4 A. If you want to direct me to his particular comment
 5 in here.

6 Q. Well, let's talk about Page 483, first paragraph,
 7 last sentence: Subsequently the issue of gender bias
 8 associated with the Fake Bad Scale warrants further study
 9 and till the issue is resolved, the use of the Fake Bad
 10 Scale should be avoided?

11 A. That's what he said, yes.

12 Q. In fact, this Fake Bad Scale finds women to be
 13 fakers or malingerers at greater rate by as much as five
 14 times convicted felons; isn't that correct?

15 MS. DONOGHUE: Object to form.

16 THE COURT: I can't hear you.

17 MS. DONOGHUE: Objection. It's misstatement of
 18 evidence.

19 THE COURT: Overruled.

20 BY MS. SIMS:

21 Q. Go ahead.

22 A. Are you referring to the personal injury litigants
 23 that he studied?

24 Q. Correct. Actually more than 10 times actually.

25 Women are found to be malingering more than 10 times the

1 convicted felons; is that correct?

2 A. Using -- if you look at a score of 26 or higher in

3 a female correctional facility, it's 2-and-a-half percent.

4 In female personal injury, it's 37.9 percent. But that's

5 what I would expect given where the samples came from.

6 Q. So the answer is yes?

7 A. The F-Scale is going to be more sensitive to

8 picking up in a correctional facility. And on top of that,

9 you don't know why -- the big problem with Butcher's paper

10 was he did not say what the setting of the correctional

11 facility was.

12 You know, if they were being considered for early

13 release, there is going to be a different demand

14 characteristic on the test. And if they are being evaluated

15 for competency to go to trial, the other samples were not

16 screened at all as to whether the people were in litigation

17 or were seeking any type of compensation.

18 In none of the samples at all tested including the

19 person injury sample had data on other malingering measures

20 independent of the MMPI.

21 So even though he had large numbers, there is no

22 way he could reach the conclusions he reached because he

23 didn't know, A, the external incentives, compensation,

24 litigation, and, B, he had no independent measures to screen

25 for malingering. So although he had a large sample size,

1 the results are invalid.

2 Q. Doctor, do you have any reason to believe that

3 just because one is a woman, they are going to lie or

4 malingering more than a convicted felon?

5 A. Well, you're mixing the samples there. Women in

6 general, no. If you're using the Fake Bad Scale as an

7 indication of malingering, I would expect to see greater

8 frequency of failure in personal injury settings than in

9 correctional facility settings or criminal settings, and I

10 have even said that in my published writings. They are

11 different demand characteristics.

12 Q. You were asked about neuropsychologists using this

13 test. You do not have a degree in neuropsychology, do you?

14 A. I don't have a Ph.D. I'm board-certified in

15 neuropsychology.

16 Q. In fact, the organization that you're board

17 certified in, it's not any kind of governmental entity; it's

18 a group of people who created an organization and you became

19 board-certified; correct?

20 A. Yeah, just like the American Board of Medical

21 Specialties.

22 Q. And Florida doesn't even license the practice of

23 neuropsychology, does it?

24 A. No.

25 Q. In fact, in the last four to five years of your

1 forensic practice in which you have given testimony, you
2 haven't had one single plaintiff referral, have you?

3 A. That's not true.

4 Q. You have testified in cases in which you have been
5 referred by the plaintiff within the last four years?

6 A. Oh, testifying in cases?

7 Q. Right.

8 A. I need my testimony list to go over the past four
9 years, but I think I have one in the past four years. Last
10 year I had three cases I can think of right now that are
11 referred by plaintiff.

12 Q. In which you testified, sir, that was the
13 question. Cases in which we actually have a document to
14 confirm -- do you recall testifying that, in fact, in cases
15 in which you have testified, you have not been referred a
16 case by the plaintiff in the last four years?

17 MR. BRASFIELD: Objection to the form of the
18 question.

19 THE COURT: I'll sustain it.

20 MR. BRASFIELD: We may abbreviate that for the
21 hearing, but if we get into this cross-examination
22 during trial, there is no proper predicate to that
23 alleged --

24 THE COURT: Sustained.

25 Counsel, this is not a hearing on merits. This is

1 a very limited focus.

2 MS. SIMS: Yes, ma'am. The case law that

3 discussed --

4 THE COURT: I'm quite aware of the case law.

5 Bring your questioning to a close.

6 BY MS. SIMS:

7 Q. Can we agree that 90 percent of your forensic

8 income comes from the defense and you do not treat patients?

9 A. The majority of my practice, 90 percent of my

10 forensic practice is defense, 10 percent is plaintiff, and I

11 haven't done psychotherapy since I left the V.A. My

12 practice, as in a significant number of neuropsychologists,

13 is an assessment-based practice.

14 Q. You have no publication that you can give us here

15 today that took a poll and can explain or verify what

16 percentage of psychologists or neuropsychologists actually

17 rely on the Lees-Haley Fake Bad Scale; correct?

18 A. For a poll of people using it, no.

19 Q. And, in fact, do you remember testifying that you

20 couldn't even say a majority use it in the Richard Riddell

21 case?

22 A. I don't recall that. If you want to show me that,

23 I'll comment on it. If you can also show me the couple

24 pages before and after that.

25 Q. "We don't have any documentation as to what

1 percentage of neuropsychologists or psychologists agree with
2 your interpretation of this scale." And that's Page 82,
3 Line 18, and then the next page, the answer to the question
4 is no. The answer, "No, I mean we don't know how many
5 people out there are using it." Right there.

6 A. Yeah, just like I just answered your question
7 directly, that's exactly what I just said now.

8 Q. So you can't testify with any degree of certainty
9 that the significant relevant majority of your peers rely
10 upon the Lees-Haley Fake Bad Scale when they use the MMPI 2,
11 can you?

12 A. Without a survey, no. So you have to use the
13 published literature as a proxy to that.

14 Q. Let's talk about the published literature for a
15 moment. I noticed in your response you did not indicate or
16 admit that the individuals who actually published the MMPI 2
17 and the individuals who teach it to psychologists like
18 yourself who actually took this course actually teach people
19 not to use the scale because it calls too many people
20 malingers, and I quote, scale does not work. Now, that
21 was not in your affidavit --

22 A. It's not a published article.

23 Q. Doctor, this is material that's handed out to
24 people who attend courses on how to take the MMPI 2 like
25 yourself, and it teaches people who take the course not to

1 use the test because it calls too many people malingerers,

2 doesn't it?

3 A. Do you want to direct me to where it says that.

4 Q. Sure. It's Tab --

5 A. I'm sorry, I got it.

6 Q. It's right there.

7 A. Yeah, what looks like a power point slide bullet,

8 it says the scale does not work.

9 Q. Calls too many people malingerers, doesn't it?

10 And Dr. Jack Graham also --

11 MR. BRASFIELD: Your Honor, the line of
12 questioning is more weight-based testimony than the
13 admissibility of the testimony.

14 THE COURT: I'm inclined to agree, Counsel.

15 MS. SIMS: These are the people that teach doctors
16 how to use the test. Dr. Larrabee claims it's
17 scientific. He can't prove the significant relevant
18 majority of his peers use it, if people that sell the
19 test say don't use it; the author says not to use it.
20 And if I could just ask a couple of questions about the
21 test itself, I think you'll understand why they say
22 that.

23 THE COURT: I understand perfectly well. Move on
24 to something else. Bring your questioning to a close.

25 BY MS. SIMS:

1 Q. Doctor, isn't it true that you get a point for
2 malingering on this test if you wear glasses and you
3 honestly answer that your eyesight isn't as good as it has
4 been in years?

5 A. First of all, they are not points for malingering.
6 They are points on the scale. And with any MMPI scale,
7 people are going to endorse items on that scale. Now, as
8 part of the documents that I submitted, there was a book
9 chapter --

10 Q. Doctor, my question was real --

11 A. -- that shows -- I can't find it right at the
12 moment, but it shows about on average traumatic brain injury
13 patients answer about 16 of those items. What happens is
14 when you go way beyond what is normal, that's when you get
15 into the realm of exaggeration, which is how the other MMPI
16 scales work as well.

17 Q. Don't you get a point; you total up the points,
18 and in your opinion, when you get a certain cutoff --

19 A. The cutoff I use for traumatic brain injury is 22
20 or higher.

21 Q. Now, Dr. Lees-Haley in 1991 suggested a cutoff of
22 20. Then in '92 he suggested it should be higher because
23 too many people were called malingerers; correct?

24 A. Yeah, the '92 study was one of posttraumatic
25 stress.

1 Q. And Dr. Griffenstein in the article you submitted
2 suggested 24 to 20, and I think you're saying 21. So I'm
3 looking at now four, five different cutoff scales, and in
4 terms of a Frey hearing, can you cite me any article that
5 has either polled psychologists or neuropsychologists to
6 indicate which particular cutoff scale in forensic cases
7 should be used to rule out or in malingering, whether it's
8 physical malingering, psychological malingering or brain
9 injury malingering?

10 A. What you need to understand is when you look at
11 these varying cut scores, you need to be aware of the
12 literature. The strongest evidence supporting a cut score
13 that I use is that Dr. Ross and Dr. Millis, et al did the
14 same exact methodology I did in a different part of the
15 country and came up with the exact same cutting score, 21 or
16 22 or better.

17 Q. That's not my question.

18 A. Now, what you need to know is with any cutoff
19 score, there is a risk of false positive identification. So
20 you need to take that into account, which is why you have to
21 be aware of the other literature.

22 You don't use any of these scores in isolation.
23 You would not use the Fake Bad Scale by itself, just like
24 you wouldn't use the F-Scale by itself or the FB-Scale by
25 itself. So it's a well validated instrument. There have

1 been numerous papers since the original Lees-Haley papers
2 too using the same methodology and the exact same cut score.

3 Q. Doctor, that's not --

4 A. What you need to know is someone using the scale
5 if the scores are in the low 20s are scores which have been
6 found to be sensitive cut scores, but that you do have a
7 risk of false positive. As you move higher up in the 20s,
8 the risk of false positive declines. That's something you
9 need to be aware of by the published literature, and it
10 allows to you make the best interpretation of that scale in
11 context with all the other scales that you're looking at.

12 Q. Dr. Larrabee, I need you to answer my question.

13 There is no journal out there that indicates that the
14 significant relevant majority of your peers use that
15 particular cut score, is there? There is no poll taken,
16 there is no journal that produced -- that indicates that, is
17 there?

18 A. As I said, there is no poll that I know of, nor is
19 there a poll on the F-Scale or Back F-Scale on the MMPI,
20 which is why you have to use the peer review published
21 literature as a proxy to see how acceptable the scale is.
22 And in this case there are 15 papers that I listed that
23 supported it and two that did not support it.

24 Q. My understanding of the case law is there needs to
25 be an expert outside the case to testify.

1 But let me ask you one other question about that
2 scale. You get a point towards being a malingerer, because
3 you total the points and when you get to a certain total,
4 then you decide that person is malingering or not; you get a
5 point towards malingering if you have hot flashes, don't
6 you?

7 A. Okay, again, the points are points on the scale;
8 they are not points towards malingering.

9 Q. Is that how you decide malingering, based on the
10 sum total of the points?

11 A. You sum total the points, and you have a range
12 within an acceptable range and a range outside which the
13 score is not acceptable.

14 Q. Isn't the answer to my question yeah, you get a
15 points towards the malingering end for saying that you have
16 hot flashes --

17 MR. BRASFIELD: Same objection.

18 THE COURT: Sustained.

19 BY MS. SIMS:

20 Q. Now, Doctor, you are being paid in this particular
21 case, are you not?

22 A. I'm paid for my time.

23 Q. And what is your bill to date?

24 MR. BRASFIELD: Objection. This is strictly
25 weight-based inquiry.

1 THE COURT: Sustained.

2 BY MS. SIMS:

3 Q. Doctor, you can answer any way in this particular
4 test true or false and still have a very real brain injury,
5 still have posttraumatic stress disorder and still be
6 depressed?

7 MR. BRASFIELD: Same objection. I know she hasn't
8 been here for three days like us, but these are clearly
9 very clearly weight-based objections, not admissibility
10 -- excuse me, weight-based questions.

11 MS. SIMS: Your Honor, it's novel science -- if
12 someone says they have hot flashes and then you
13 conclude they are lying about a head injury -- that
14 science does not support what he says. The authors of
15 the test, the publishers say it's not appropriate, and
16 he can't prove and has no data to indicate that his --
17 the majority of his peers even use it.

18 In fact, you yourself have admitted that it's
19 controversial, haven't you?

20 THE COURT: Counsel, you need to conclude and have
21 a seat.

22 MS. SIMS: There is two other tests that he relied
23 on for malingerers.

24 THE COURT: The only test that's the subject of
25 the motion was the Lees-Haley test. That was solely

1 what the subject of the motion was.

2 MS. SIMS: Okay.

3 THE COURT: Mrs. Donoghue, do you have any other
4 questions of this witness?

5 EXAMINATION

6 BY MS. DONOGHUE:

7 Q. I would just ask since that first study that we
8 were questioning that's not reproduceable, have there been
9 more publications and more studies that have supported the
10 Lees-Haley Fake Bad Scale?

11 A. Yes. As included in my affidavit, there were 13
12 subsequent studies that supported it.

13 Q. They just happened to keep the same name of the
14 individual -- didn't change the name of the test?

15 A. Yes.

16 MS. SIMS: May I just ask one more question?

17 THE COURT: No.

18 MS. DONOGHUE: I don't have anything further.

19 THE COURT: Is there any further argument that
20 hasn't previously been made as to whether or not --
21 sir, you can go back to your seat -- this particular
22 test meets the professional requirements of Frey?

23 MS. DONOGHUE: No.

24 THE COURT: Mr. Gonzales or co-counsel?

25 MS. SIMS: I'd just like to point out that when

1 you read the articles he has produced, they don't say
2 that it's reliable and reproduceable. In fact, they
3 say there are questions and you shouldn't rely upon it
4 as the significant or sole basis upon which to find
5 malinger.

6 MR. GONZALEZ: May I --

7 THE COURT: These are the rules that govern
8 trials. If you're going to make the argument, that's
9 fine. If she's going to make the argument, that's
10 fine, but not both of you.

11 MR. GONZALEZ: Was that argument?

12 THE COURT: Yes.

13 MS. SIMS: Could I cite the case, though, that I
14 was referencing that indicated they did not produce an
15 expert?

16 THE COURT: You may cite your case.

17 MS. SIMS: Okay. The Sybers, S-y-b-e-r-s, versus
18 the State of Florida found at 841 So. 2d 532. Your
19 Honor, it's a First DCA case. And the case indicates
20 that the expert to support the new or novel test cannot
21 be an individual who has a personal stake in the new
22 theory or is prone to institutional bias.

23 THE COURT: This is my ruling on the very narrow
24 issue which was raised as to whether or not he would be
25 permitted to testify as to the Lees-Haley Fake Bad

1 Scale.

2 Although, the Court would be compelled to conclude
3 based upon the expert's affidavit and testimony that
4 facially he has demonstrated that the Lees-Haley Scale
5 meets the requirements of Frey, when a qualitative
6 analysis is undertaken, a contrary result is dictated.

7 I am giving the special weight to the factors of
8 whether or not there is ample evidence that the test is
9 accepted by his peers.

10 I am further giving special weight to the comments
11 and concerns expressed by Butcher and Graham. So the
12 motion in limine is granted.

13 END OF EXCERPT

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1 COURT CERTIFICATE

2

3 STATE OF FLORIDA)

4 COUNTY OF SARASOTA)

5 I, VICKIE HAMER, Registered Professional Reporter,

6 certify that I was authorized to and did stenographically

7 report the foregoing proceedings and that the transcript is

8 a true and complete record of my stenographic notes.

9 Dated this 21st day of March, 2005.

10

11

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VICKIE HAMER,
Registered Professional Reporter

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**IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA
CIVIL DIVISION**

CHRISTINE WILLIAMS,

Case No.: 04-CA-008892

Plaintiff,

Division: F

vs.

**CSX TRANSPORTATION, INC.,
a corporation,**

Defendant.

_____ /

ORDER ON FRYE HEARING ON MMPI-2 "FAKE BAD SCALE"

THIS ACTION came on before the Court on August 24, 2007, for a "Frye" hearing on the use and acceptance of the "Fake-Bad Scale" (FBS) as a scientific means of assessing effort and malingering. The Plaintiff was represented by James R. Holland II, and Dorothy Clay Sims. The Defendant was represented by Daniel J. Fleming. The Plaintiff presented the Court with two large notebooks with her supporting materials and the Defendant presented the Court with its supporting materials. The Plaintiff called as her expert witness, James N. Butcher, Ph.D., Professor Emeritus, University of Minnesota Department of Psychology. The Defendant called as its expert witness, Yossef Ben-Porath, Ph.D., Professor Kent State University Department of Psychology. Both experts are preeminent in their field and they each have opinions which are diametrically opposed regarding the general acceptance and reliability of the MMPI-2 "Fake Bad Scale". The Court having considered the testimony and other evidence presented, the argument of counsel, and the subsequent submissions from each party, and being otherwise advised in the premises, makes the following findings reaches the following conclusions and therefore Orders and Adjudges:

THE ISSUE

1. Is the "Fake Bad Scale" generally accepted in the psychology/neuropsychological community as a reliable assessment of effort and malingering and does it pass the Frye test for admissibility?

THE FRYE TEST REQUIREMENTS

2. In utilizing the Frye test, the burden is on the proponent of the evidence to prove the general acceptance of both the underlying scientific principle and the testing procedures used to apply that principle to the facts of the case at hand. The trial judge has the sole responsibility to determine this question. The general acceptance under the Frye test must be established by a preponderance of the evidence. Just as important as the burden of proof is the fact that the hearing must be conducted in a fair manner. A hearing on the admissibility of novel scientific evidence is an adversarial proceeding in which conflicting evidence is presented to the trial judge as the trier of fact. Ramirez v. State, 651 So. 2d 1164, (Fla 1995).

3. The principal inquiry under the *Frye* test is whether the scientific theory or discovery from which an expert derives an opinion is reliable. The appellate courts have not hesitated to utilize the *Frye* test to reject expert testimony concerning subjects that have not been proven to be sufficiently reliable. See, e.g., Ramos v. State, 496 So. 2d 121, 123 (Fla. 1986)(testimony of dog-handler and police officer insufficient, by itself, to establish reliability of dog scent-discrimination lineups); Bundy v. State, 471 So. 2d 9, 18 (Fla. 1985)(hypnotically refreshed testimony per se inadmissible), cert. denied, 479 U.S. 894, 107 S. Ct. 295, 93 L. Ed. 2d 269 (1986), modified Morgan v. State, 537 So. 2d 973 (Fla. 1989)(defendant's refreshed testimony may be admissible); Walsh v. State, 418 So. 2d 1000, 1002 (Fla. 1982)("Polygraph evidence is

inadmissible in an adversary proceeding in this state."); Zeigler v. State, 402 So. 2d 365, 373 (Fla. 1981)("The results of a sodium butathol test are not admissible in a criminal prosecution."), *cert. denied*, 455 U.S. 1035, 102 S. Ct. 1739, 72 L. Ed. 2d 153 (1982).

4. In *Ramirez*, *Id* 1166-1167, the Supreme Court stated: "The admission into evidence of expert opinion testimony concerning a new or novel scientific principle is a four-step process. *See generally* Charles W. Ehrhardt, *Florida Evidence* § 702.1 (1992 Edition); Michael H. Graham, *Handbook of Florida Evidence* § 90.702 (1987 Edition). First, the trial judge must determine whether such expert testimony will assist the jury in understanding the evidence or in determining a fact in issue. § 90.702, Fla. Stat. (1993)(adopted by the Florida Supreme Court in *In re Florida Evidence Code*, 372 So. 2d 1369 (Fla. 1979)). Second, the trial judge must decide whether the expert's testimony is based on a scientific principle or discovery that is "sufficiently established to have gained general acceptance in the particular field in which it belongs." *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013, 1014 (D.C. Cir. 1923). This standard, commonly referred to as the "Frye test," was expressly adopted by this Court in *Bundy v State*, 471 So. 2d 9, 18 (Fla. 1985), *cert. denied*, 479 U.S. 894, 107 S. Ct. 295, 93 L. Ed. 2d 269 (1986), and *Stokes v. State*, 548 So. 2d 188, 195 (Fla. 1989). The third step in the process is for the trial judge to determine whether a particular witness is qualified as an expert to present opinion testimony on the subject in issue. § 90.702, Fla. Stat. (1993). All three of these initial steps are decisions to be made by the trial judge alone. *See Johnson v. State*, 393 So. 2d 1069, 1072 (Fla. 1980), *cert. denied*, 454 U.S. 882, 102 S. Ct. 364, 70 L. Ed. 2d 191 (1981); *Rose v. State*, 506 So. 2d 467 (Fla. 1st DCA), *review denied*, 513 So. 2d 1063 (Fla. 1987). Fourth, the judge may then allow the expert to render an opinion on the subject of his or her expertise, and it is then up to the jury to determine the credibility of the expert's opinion, which it may either accept or reject. *Wuornos*

v. State, 19 Fla. L. Weekly S455, S459 (Fla. Sept. 22, 1994)("The finder of fact is not necessarily required to accept [expert] testimony."); *Walls v. State*, 641 So. 2d 381, 390 (Fla. 1994) ("Expert opinion testimony [is] not necessarily binding even if uncontroverted.").

The second step, concerning whether to allow expert opinion testimony on a new or novel subject, is especially important to the process. As Professor Ehrhardt has explained:

When a novel type of opinion is offered, the proffering party must demonstrate the requirements of scientific acceptance and reliability. The most widely adopted test has been that of *Frye v. United States* which involved the admissibility of an early polygraph. The court held the evidence inadmissible because the underlying scientific principle was not "sufficiently established to have gained general acceptance in the particular field in which it belongs."

Ehrhardt, *supra*, § 702.2 (footnotes omitted).

THE BACKGROUND

5. Plaintiff, Christine Williams, underwent a compulsory forensic neuropsychological examination with neuropsychologist Harold H. Smith, Ph.D. on February 22, 2006 and April 5, 2006, which was videotaped pursuant to court order.

6. As part of the examination, Dr. Smith administered the Minnesota Multiphasic Inventory 2 (MMPI-2) to Plaintiff.

7. The MMPI-2 is the most widely used test of its kind for the measurement of psychopathology or personality.

8. The MMPI-2 includes ten (10) clinical scales that assess psychological functioning and numerous validity scales (such as F, L, Fb, K, F-K , Fp and FBS) that assess whether the test-taker is providing full effort in self-reporting her symptoms.

9. Plaintiff challenges the use of only one validity scale, the “Lees-Haley Fake-Bad Scale” (FBS), contending that it is not scientifically accepted. The Plaintiff believes, based on the deposition of Harold H. Smith, Ph.D., that he intends to opine at trial that the Plaintiff does not have Post Traumatic Stress Disorder (“PTSD”) or Traumatic Brain Injury (“TBI”) and that the Plaintiff is malingering, exaggerating, or over-reporting her symptoms. Dr. Smith apparently will testify that the “Fake-Bad Scale” indicates that the Plaintiff is malingering or over-reporting her symptoms thus directly or indirectly commenting on the credibility of the Plaintiff and using the “Fake-Bad Scale” to bolster his opinion, according to Plaintiff’s argument

THE FRYE ANALYSIS

10. Will the expert testimony of Harold H. Smith, Ph.D., which is based on the “Fake-Bad Scale”, assist the jury in understanding the evidence or in determining a fact in issue, i.e. whether the Plaintiff has Post Traumatic Stress Disorder (“PTSD”) or Traumatic Brain Injury (“TBI”) and whether the Plaintiff is malingering, exaggerating, or over-reporting her symptoms based upon Dr. Smith’s use of and analysis of the Plaintiff’s score on the “Fake-Bad Scale.”

Plaintiff’s Argument

A. Plaintiff argues that the “Fake Bad Scale”, as the name implies, seeks to judge the credibility of a witness which is the exclusive province of the jury and cites in support of her argument: Davis v. State, 527 So. 2d 962, 963 (5th D.C.A. 1988). Opinion testimony from experts which directly serves to bolster or detract from the credibility of a witness invades the province of a jury and should be excluded. Tingle v. State, 536 So. 2d 202 (Fla. 1988); Davis v. State, 527 So. 2d 962, 963 (5th D.C.A. 1988); (error to admit opinion testimony of clinical psychologist); Fuller v. State, 540 So. 2d 182, 183-184 (5th D.C.A. 1988); (error to admit opinion

testimony of medical director); Luszczuk v. Department of Human Services, 576 So. 2d 431 (5th D.C.A. 1991); (error to admit psychologist and case worker testimony).

No witness is allowed to testify to another witness' "exaggeration or truthfulness." See e.g., Feller v. State, 637 So. 2d 911 (Fla. 1994) (reversible error for expert to state her belief that the victim was telling the truth); Shannon v. State, 753 So. 2d 148, 149-150 (Fla. 3d DCA 2000) (same); Schwartz v. State, 695 So. 2d 452, 455 (Fla. 4th DCA 1997) (same); Hitchcock v. State, 636 So. 2d 572, 575 (Fla. 4th DCA 1994) (same); Williams v. State, 619 So. 2d 1044, 1046 (Fla. 1st DCA 1993) (same); and Sec. 90.702, Florida Statutes (2002); See, e.g., Roules v. State, 613 So. 2d 1335, 1336 (Fla. 2d DCA 1993) (testimony impermissibility addresses and questions credibility of victim) (sexual abuse victim); Page v. Zordan, 564 So. 2d 500, 502 (Fla. 2d DCA 1990) (clinical psychologist barred from testifying that test showing "sexual abuse legitimacy scale" valid in evaluating report of sexually molested child). Florida Courts use the Frye test to determine the admissibility of novel scientific procedures including certain psychological or psychiatric opinion testimony. Stokes v. State, 548 So. 2d 188.

The Plaintiff argues that: The "Fake Bad Scale" (FBS) is unreliable and does not pass the standards set forth in *Frye v. U.S.* for the reasons which are summarized as follows:

- 1) The FBS is biased against women, those with psychological problems and the truly disabled;
- 2) This FBS has been rejected at least twice by courts in Hillsborough County for failing to meet the Frye standards. (*Vandergracht v Progressive*, Case # 02-04552; *Davidson v. Strawberry Petroleum*, Case #, 05-4320 *infra.*);
- 3) The FBS is unreliable and therefore unscientific because there is no uniform agreement as to the appropriate cut-off score to be used;
- 4) The FBS has not been proven to be reliable or scientific because it has not been subjected to independent review by the "Buros Mental Measurement Test Evaluation System" ;

- 5) The FBS is unreliable because it scores points towards malingering or exaggerating when a patient acknowledges true symptoms of physical injury or psychological distress;
- 6) The FBS is unreliable because unlike every other scale in the MMPI-2, there is no scoring or administration manual for the FBS;
- 7) The FBS is highly controversial with no general acceptance reached among the authors of the MMPI-2, the American Psychological Association, or the practicing neuropsychologists who utilize validity tests.

In support of this position the Plaintiff also argues that: The "Fake Bad Scale" as applied in the present case is unreliable because it is biased and over predicts malingering in women, those with true psychiatric problems and those with complex or disabling medical issues.

Plaintiff believes, based upon her review of defense expert Harold Smith's deposition testimony, that he intends to use Ms. Williams' score of twenty-six (26) on the "Fake Bad Scale" to conclude to a jury that she is a malingerer and exaggerates her symptoms. (Smith Deposition, p. 26, ll. 23-25 p. 64, ll. 13-16 p. 76, l. 25 to . 77, l. 3).

The "Fake Bad Scale" should not be used on women since it finds women to be dishonest (malingerer) at a rate of 10 times that of criminals in correction facilities. (See Page 180, Dr. Butcher article, Dr. Butcher testimony, p.112: ll. 7-12) Concern was also expressed by Dr. Arnie Abels, Ph.D., Chair of the Committee on Disability Issues in Psychology wherein, less than 3 months ago he sent a letter to defense witness, Dr. Ben-Porath, (Bates #323 of plaintiff's submission), stating, among other things:

- 1) "Given these, and other problems noted by Dr. Butcher, it seems that use of the FBS **has significant potential to negatively impact persons with disabilities.**"(emphasis supplied)
- 2) "We strongly believe that the FBS has been prematurely disseminated into practice while still lacking evidence of adequate psychometric properties and interpretive guidelines."
- 3) "The potential of the FBS to over-predict malingering in persons with disabilities may result in their being denied necessary and due compensation benefits or treatment."
- 4) "In addition, the current lack of quality and consistency of available FBS related validity research may result in obvious legal and ethical dilemma."
- 5) "There is significant evidence that literature aiming to provide interpretive guidelines for the FBS may take an overly positive view regarding its use. We are disappointed that the

University of Minnesota Press chose to introduce the FBS scale against the recommendation of the MMPI2 scholars such as Dr. Butcher.”

Plaintiff also argues that, while the testimony of Dr. Ben-Porath claims an independent study was undertaken as recommended by the APA committee, this claim was not credible. The “study” described by Dr. Ben-Porath consisted of individuals which the test publisher hand-picked, not independent scientists, when the two authors and creators of the MMPI-2 (i.e., Drs. Butcher and Graham) recommended against including the FBS on the MMPI-2. In fact, the APA committee’s recommendation was that this very “study” decision to include the FBS on the MMPI-2 was what should be examined by the independent organization (“Buros Mental Measurement Test Evaluation System” administered by the University of Nebraska).

Defendant’s Argument

B. On the other hand Defendant argues that:

1) The publisher of the MMPI-2, University of Minnesota Press, has presented guidelines for practitioners using the FBS that are reflected in its announcement of the inclusion of the FBS in the standard scoring materials.

2) The University of Minnesota Press included the FBS within the battery of the validity scales after instituting a review to determine both its scientific reliability and general acceptance. As part of the review the publisher considered the recommendations of a panel of experts and its own consultants, which were as follows:

a. Six out of eight experts consulted by the test publisher recommended that the FBS should be added to the standard scoring materials for the MMPI-2.

b. The publisher's two test consultants, including Dr. Yossef Ben-Porath, who testified in this matter, concluded that the FBS should be added to the MMPI-2 scoring materials.

3). Defendant also argues that the evidence presented demonstrates that the FBS is widely accepted in the field of clinical neuropsychology because:

a. In 2007 a survey was published in the Archives of Clinical Psychology that found that 75.1% of the respondents used the FBS at least some of the time. See M.J. Sharland and J.D. Gfeller, A Survey of Neuropsychologists' Beliefs and Practices With Respect to Effort, Archives of Clinical Psychology, 22: 213-223 (2007).

b. The survey results demonstrate that the FBS is the third most widely used assessment of effort behind only the Test of Memory Malinger (TOMM) (75.3%) and the F-K scale (76.5%).

c. The results of the Sharland and Gfeller survey lead the authors to state:

The results of this current study indicate that frequently used measures like the TOMM, MMPI-2 F-K ratio, MMPI-2 FBS, and Rey 15-item test would all meet Frye standards for admissibility as approximately three quarters of the sample surveyed stated that they used these measures to detect suboptimal effort. As respondents would not use a measure that they considered lacking in clinical utility, one can assume that the majority of neuropsychologists surveyed have some degree of confidence in these measures to detect symptom exaggeration or suboptimal effort. See id. at 221. (emphasis added)

d. The publisher of the MMPI-2 added the FBS to the standard scoring materials based on its conclusion that FBS is a scientifically valid procedure.

e. The scientific validity was corroborated through its process of consulting with the eight experts who were encouraged to review any and all available literature on the FBS.

THE COURT'S CONCLUSIONS AND ORDER

11. The “Fake Bad Scale” as a measure for assessing lack of effort or malingering and/or over reporting of symptoms is a subject of controversy and continuing discussion in the psychology community. The “Fake Bad Scale” was developed by Dr. Lees-Haley in 1991, yet it is only within the last year that the University of Minnesota has decided to include it as one of its scales. Unlike every other scale in the MMPI-2, there is no scoring or administration manual for the FBS, although they have apparently published interpretive recommendations for use in assessing FBS scores. According to the Defendant, the recommendations include the following:

- **Joint use.** Use the FBS and MMPI-2 F-family jointly. They work in complementary fashion to detect multiple forms of misrepresentation. The F scale detects feigned severe psychopathology and the FBS inflated emotional and somatic suffering. The MMPI-2 F-family is more useful in criminal settings and the FBS in civil settings.
- **General FBS threshold.** An FBS score >23 justifies concerns about symptom validity. The risk of false positives declines as scores increase in the 20s. Final conclusions depend on score magnitude and moderator variables. (emphasis added by the court).
- **Gender and history as moderators.** Consider cutting scores of 29 and above in females with pre-injury psychiatric histories. (emphasis added by the court). Keep in mind persons with mental illness can still exaggerate disability in the service of regressive ends.
- **Injury severity as moderator.** In cases with historical or radiological evidence negative for cerebral dysfunction, relatively lower FBS scores (23— 24) are grounds for suspecting exaggeration. With severe brain injury with residual neurological signs (such as anosmia), adjust cut-score to 26 and up. (emphasis added by the court).
- **Medical history as a moderator variable.** In cases of serious, active medical disease, especially diseases with complex and multiple symptom complaints, interpret FBS scores with caution or rely on scores of 30+. Consult with a medical colleague if unsure of disease status. (emphasis added by the court).
- **General prohibitions.** Never use the FBS alone; combine FBS score with behavior observations and other validity test indicators; avoid the original 1991 cut-score of 20 because of false positives; as of this writing, too little is known about FBS in criminal settings for use in insanity pleas (the F scale remains particularly useful in criminal settings); a positive FBS score does not automatically rule out the coexistence of genuine problems, but it does indicate magnification of problems in such cases. (emphasis added by the court).
- Scores of 30 and above have a 99—100% probability (Bayes “posterior

probability”) of indicating promotion of suffering across all settings. FBS scores in this range provide the greatest confidence irrespective of gender, medical, or psychiatric context.

- **Ideal for neuropsychologists.** The FBS is highly recommended for use in forensic neuropsychology contexts, where somatic dysfunction and emotional complaints are evaluated in conjunction with neurocognitive issues.
- **Can be prorated from the MMPI-2 short form.** Fox (2004) demonstrated that a reasonable estimate of the full FBS can be made when only the first 370 items are administered.

12. The fact that, unlike every other scale in the MMPI-2, there is no scoring or administration manual for the FBS, and the above recommendations and cautions published by the University of Minnesota Press for its use, indicate to the Court that FBS is not an objective measurement of effort, malingering, or over-reporting of symptoms. The Court concludes that the FBS is very subjective and dependant on the interpretation of the person using or interpreting it. There is no definitive scoring because the scoring has to be adjusted up and down based on the circumstances and there is a high degree of probability for false positives. Moreover, the scoring assessment has changed over the years from an original cut score of 20 in 1991, with recommended interpretive scores now ranging form 23 to 30; this coupled with the acknowledged bias against women and those with demonstrated serious injuries makes the FBS unreliable.

13. The preponderance of the evidence does not support Defendant’s contention that the FBS is now generally accepted in the psychology community. Moreover, to allow an expert to bolster his or her testimony by reference to an FBS score, as if it were an objective test or evaluation demonstrating malingering, over-reporting, or lack of effort, would be contrary to Florida law. The Court does not believe that a test or scale that cannot reliably determine the existence of malingering or accurately measure the magnitude can be of much probative value and to allow an expert to use the FBS to support his opinion would be prejudicial under the

circumstances. Whatever probative value the FBS may have is substantially outweighed by the danger of unfair prejudice, confusion of issues, and misleading the jury, and should be excluded. See §90.403 *Fla. Stats.* The very name "Fake Bad Scale" is pejorative and derogatory and thus prejudicial. The Court concludes based on the evidence and argument presented that reference to or reliance by the expert on the "Fake Bad Scale" will not assist the jury in understanding the evidence or in determining the facts in issue. The Court having reached that conclusion under the first prong of the Frye Test determines that it is unnecessary to consider the other three prongs of the test.

It is therefore, ORDERED AND ADJUDGED that Plaintiff's Motion to Strike or Limit the Testimony of Defense Expert Harold Smith is GRANTED in that he will be prohibited from using the "Fake Bad Scale" as an objective measure of effort, malingering or over-reporting of symptoms or to bolster his opinion that the Plaintiff is not credible or not truthful or malingering.

DONE AND ORDERED in Chambers at George Edgecomb Courthouse, Tampa,
Florida, this ____ day of _____, 2007.

ORIGINAL SIGNED
CONFORMED COPY

SEP 19 2007

CHARLES ED BERGMANN
CIRCUIT JUDGE

CHARLES ED BERGMANN
Circuit Court Judge

cc: James R. Holland II, Esquire
Dorothy Sims, Esquire
Daniel J. Fleming, Esquire/Stephen N. Gordon Jr., Esquire

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL
CIRCUIT IN AND FOR LEE COUNTY, FLORIDA

JULIE M. LIMBAUGH-KIRKER
and JASON KIRKER,

Plaintiffs,

vs.

CASE NO. 06-CA-000706

JUDITH ANN DICOSTA,

Defendant.

_____/

TRANSCRIPT OF PROCEEDINGS
(Ruling on Frye Hearing)

Before the Honorable Sherra Winesett, Judge of the
Circuit Court, Twentieth Judicial Circuit, at a
hearing held in the above-entitled matter at the
Lee County Justice Center Complex, Fort Myers,
Florida, on February 10, 2009.

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By: Joseph A. Linnehan, Esquire

For the Defendant:
(Appeared via conference telephone.)

CURTRIGHT C. TRUITT, P.A.
12711 World Plaza Lane
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By: Curtright C. Truitt, Esquire

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1 (Thereupon, commencing at 3:04 p.m., the
2 following proceedings were had:)

3 THE COURT: This is Judge Winesett.

4 MR. LINNEHAN: This is Joe Linnehan.

5 MR. TRUITT: This is Curt Truitt, and I'm with
6 the court reporter.

7 THE COURT: Okay. Very well.

8 It took me longer to get through those
9 depositions than I anticipated.

10 The Court will give its ruling in this matter,
11 on the matter heard this morning, and will resume
12 trial tomorrow morning at 9:00 a.m.

13 This cause came before the Court for an
14 evidentiary Frye hearing on Plaintiffs' motion to
15 exclude the testimony of Defendant's expert Dr.
16 Glenn Larrabee, a neuropsychologist, licensed to
17 practice in Florida. The testimony that he wanted
18 excluded is that the Plaintiff is -- any testimony
19 that Plaintiff is malingering, exaggerating or
20 over-reporting her symptoms based upon the results
21 of the Lees-Haley Fake Bad Scale Test contained in
22 the MMPI-2 which Dr. Larrabee administered to the
23 Plaintiff.

24 The Court has considered the trial and
25 deposition testimony of Dr. Larrabee; the deposition

1 testimony of Manfred Greiffenstein, a clinical
2 psychologist licensed in the State of Michigan; a
3 paper that was submitted by Plaintiff entitled "A
4 Construct Validity of the Lees-Haley Fake Bad Scale,
5 Does This Scale Measure Somatic Malingering and
6 Feigned Emotional Distress," which was published by
7 Dr. James Butcher along with three other
8 researchers, Paul Arbisi, Mera Atlis and John
9 McNulty, and it was published in the Archives of
10 Clinical Neuropsychology in 2003. And I was also
11 provided a Wall Street Journal article entitled
12 "Personality Check, Malingerer Test Results
13 Personal -- I'm sorry, Malingerer Test Roils -
14 R-O-I-L-S - Personal Injury Law."

15 And Plaintiff provided copies of three Florida
16 trial court opinions, all of which excluded use of
17 the Fake Bad Scale Test as evidence of malingering,
18 exaggeration or over-reporting of symptoms by
19 Plaintiff. Those cases were Vandergracht and
20 Vandergracht, that's V-A-N-D-E-R-G-R-A-C-H-T, versus
21 Progressive Express, USAA Insurance Company, and TIG
22 Insurance Company. That opinion was rendered March
23 the 9th, 2005 by Judge Crenshaw of Hillsborough County.

24 In that case, Judge Crenshaw excluded the
25 testimony regarding the Fake Bad Scale based upon

1 the lack of acceptance of the test by the peers, the
2 lack of use, or lack of evidence of use, and the
3 concerns expressed by Dr. Butcher and a gentleman
4 with the last name of Graham, who is also a doctor,
5 I believe, referenced by Dr. Greiffenstein.

6 The next case was Davidson versus Strawberry
7 Petroleum, Inc. and Arnold L. Haddle, 05-4320,
8 another Hillsborough County Case. This one was
9 rendered June 14, 2007 by Judge Sam Pendino. In
10 that case, that judge concluded, disallowed it, and
11 he concluded there was general controversy
12 surrounding the use of the test; that the test -- no
13 test can act as a lie detector, which is how the
14 test is being used by the defense's expert; that
15 determining the truthfulness of the witness is
16 solely the job of a jury, not a psychologist. And
17 he also indicated that drawing conclusions from the
18 test which gives a point for malingering when a
19 plaintiff answer true to questions asking about
20 conditions involving genuine specific pathology has
21 no place in the courtroom.

22 The next case provided was Christine Williams
23 versus CSX Transportation, Inc., case number
24 04-CA-8892. This one is from Hillsborough County
25 and this was by Judge Ed Bergmann. That is a very

1 extensive ruling in which the judge sets forth the
2 requirements of a Frye hearing, the plaintiff's
3 position, the defense's position, the facts of the
4 case, and his conclusions in which he disallowed the
5 use of the test citing it would not assist the jury,
6 and also makes several other findings and
7 conclusions; that it would be allowing the expert to
8 bolster his testimony by reference to this test
9 score as if it were an objective test or evaluation,
10 demonstrating the malingering, over-reporting or
11 lack of effort, that that would be contrary to
12 Florida law; that he did not believe the test or
13 scale can reliably determine such existence of
14 malingering or accurately measure the magnitude so
15 it could be of probative value to the jury; and to
16 allow the expert to use this to support his opinion
17 would be prejudicial, and the unfair prejudice would
18 outweigh any probative value.

19 The last case was Karen Stites and Donald
20 Stites versus Mary Williams and State Farm Mutual
21 Automobile Insurance Company. Case number
22 2003-CA-10945 out of Palm Beach County by Judge Hoy,
23 and again, the evidence was excluded. He found that
24 it was not an objective measurement of malingering,
25 exaggerating, or over-reporting of symptoms, that

1 it's inherently unreliable because it scores points
2 for those malingering, exaggerating, or
3 over-reporting when the patient has true symptoms of
4 physical injury or physical distress; has
5 significant potential to negatively impact persons
6 with true disability; that the evidence presented
7 shows the test biased against women because they
8 tend to score higher on the FBS than men particularly
9 when they have verifiable physical injuries.

10 So, the Court did read all of those cases, the
11 depositions, listened to your arguments. The cases
12 submitted by defense counsel, I've reviewed those.
13 Those cases mainly related to the requirements of
14 Frye and instances in which Frye hearings were held
15 with respect to particular matters.

16 The Court, from the testimony of Dr. Larrabee,
17 and Dr. Greiffenstein, concluded that this FBS test
18 which was designed by Dr. Lees-Haley, a psychologist
19 back in 1991, was essentially designed to assess
20 malingering, exaggeration of symptoms, or
21 over-reporting of symptoms of personal injury
22 claimants; that it consists of 43 true/false
23 questions; that points are scored for each question
24 depending upon the answers given, even though the
25 answer may be truthful, that you still get points

1 for answering in a certain manner; that what the
2 test looks to is, however, the total score that is
3 reached and if the total score of some cutoff is
4 reached, then it is deemed that the plaintiff is
5 malinger, exaggerating symptoms, or there's a
6 high likelihood of that, over-reporting of their
7 symptoms.

8 Now, according to Dr. Greiffenstein, the cutoff
9 may vary for a particular plaintiff depending upon
10 other factors, and that that cutoff has changed over
11 the years. Starting out in 1991, it was about 20
12 and I believe he stated he uses a cutoff now of
13 about 78 (sic), but there may be other factors which
14 need to be considered in determining the cutoff with
15 respect to any particular plaintiff; that the test
16 should be used in conjunction with other validity
17 scales. And those, however, I couldn't determine
18 from the testimony. It appeared that those were not
19 set tests; that basically the test giver could
20 select, and that's what Dr. Larrabee testified to,
21 that he determined whichever test he felt would be
22 appropriate.

23 The Fake Bad Set Scale was added to the MMPI-2
24 by the University of Minnesota Press in September of
25 2006. Dr. Greiffenstein testified it is widely

1 used, that it is widely accepted in the psychology
2 community. However, the evidence shows that even
3 among the psychology community, there does remain
4 considerable controversy regarding the use of the
5 test as a predictor of symptom magnification - which
6 I'm just using as an abbreviation - and that
7 includes the research done by Dr. Butcher. His
8 article was, however, a 2003 article which is
9 pointed out in the testimony of Dr. Greiffenstein
10 and highly criticized by him. It also shows there's
11 controversy through Dr. Graham and Dick Rogers,
12 indicating that the FBS may give false positives,
13 that this is particularly true for women that have
14 physical injuries, particularly in conjunction with
15 physical distress; that there is published research
16 which does not support the validity of the test or
17 its intended purpose.

18 The Wall Street Journal article further
19 supports that there is controversy among the
20 psychology community and the research studies relied
21 on by the University of Minnesota Press when it
22 added the FBS to the MMPI-2, and as to how the test
23 should be used, what the cutoff scores should be.
24 The article reported that the American Psychological
25 Association's committee on disabilities noted the

1 test was controversial.

2 There was some conflicting testimony by Dr.
3 Greiffenstein as to -- he said the ASA would never
4 endorse it. So, it wasn't clear exactly but it does
5 indicate that there is some controversy regarding
6 the test. And in fact, in that article, it was
7 reported that the University of Minnesota Press had
8 written a letter to one of the plaintiff's attorneys
9 in one of the Florida cases stating that the Fake
10 Bad Scale is a subject of significant debate in the
11 academic and professional community.

12 All of the court cases that I reviewed that
13 have mentioned the Fake Bad Scale, none of them
14 found that it was generally accepted.

15 The Court does note that both Dr. Greiffenstein
16 and Dr. Larrabee have an interest in this. They
17 have both been involved in joint studies and
18 publications with Dr. Lees-Haley and in defense
19 work. And I believe the testimony of Dr. Larrabee
20 is that approximately 90 percent of his work is in
21 legal/medical and about 90 percent is in defense work.

22 The Court also notes that notwithstanding the
23 fact that this test was designed in 1991, there is
24 apparently no reported Florida state court cases in
25 which evidence regarding the Fake Bad Scale Test has

1 been allowed.

2 The Court reviewed the trial court cases of the
3 other Florida trial courts. I am persuaded by the
4 reasoning and conclusions of those courts,
5 particularly that of Judge Bergmann because he did a
6 very detailed ruling.

7 The Court does find based on the evidence
8 presented and the argument that to allow the expert
9 to refer and to bolster his testimony with the Fake
10 Bad Scale will not assist the jury in understanding
11 the evidence in this case and deciding the facts
12 that are in issue.

13 Defendant has not shown by the greater weight
14 that the Fake Bad Scale is based upon scientific
15 principle, it's generally accepted in the psychology
16 community as an indicator for malingering,
17 exaggeration, and over-reporting, nor that there is
18 a generally accepted testing procedure, nor a
19 generally accepted cutoff score.

20 For the other factors which should be
21 considered for any given plaintiff, it does not
22 appear to be a reliable objective test. I agree
23 with Judge Bergmann that it would be contrary to
24 Florida law to allow an expert to bolster his
25 opinion by the Fake Bad Scale Test or that the test

1 can be of probative value to the jury; that any
2 probative value is far outweighed by the unfair
3 prejudice to the plaintiffs. The confusion to the
4 jury and distinguishing between the assessment
5 indicator of malingering and over-exaggeration,
6 over-reporting and truthfulness would confuse and
7 mislead the jury.

8 Therefore, the Court on these findings and
9 conclusions does sustain the objection made by
10 Plaintiff to any testimony of Dr. Larrabee using
11 reference to the Fake Bad Scale as a scientific
12 means of assessing malingering, exaggeration or
13 over-reporting of the Plaintiff or any reference to
14 it to bolster his opinion that Plaintiff is
15 malingering, exaggerating or over-reporting, or not
16 truthful or credible.

17 That is the Court's ruling.

18 And counsel, I'm going to file these things
19 that you submitted to the Court, so let's go over
20 those.

21 I have the four cases from the Plaintiff and
22 the two articles. We have the two depositions of
23 Dr. Larrabee and the deposition of Dr.
24 Greiffenstein. Now, what else do I need to file?

25 MR. LINNEHAN: Nothing on behalf of the

1 Plaintiff, Your Honor.

2 MR. TRUITT: I don't think Mr. Linnehan really
3 gave you much. But if you would submit, Your Honor,
4 I would like the entire book that we prepared for
5 the Frye hearing last Friday, if that's what you're
6 referring to, we would like that to be in the record.

7 THE COURT: Is that Mr. Truitt?

8 MR. TRUITT: Yes, ma'am.

9 THE COURT: Are you speaking, Mr. Truitt?

10 MR. TRUITT: Yes, ma'am.

11 THE COURT: Okay. Do we need all of that?
12 Because you've got a lot of stuff that is --

13 MR. TRUITT: We can take it out of the notebook
14 but I certainly request it because that was for the
15 Frye hearing before it was withdrawn last Friday.

16 THE COURT: Okay. Do I need to scanned all of
17 these criminal cases, does the court clerk have to
18 scan those?

19 MR. TRUITT: Considering the importance of all
20 this, I apologize for the inconvenience, but I would
21 appreciate it.

22 THE COURT: Okay. Is there any objection to
23 that Mr. Linnehan?

24 MR. LINNEHAN: None.

25 THE COURT: Okay. That's got some -- it has

1 some court orders and motions in it, too. So, yeah,
2 we're going to treat these as exhibits. We'll call
3 this notebook Defendant's Exhibit A, and we'll call
4 the articles Exhibits 1 and 2, and the four cases as
5 Composite 3.

6 Is that it?

7 MR. LINNEHAN: That's it, Judge.

8 THE COURT: Okay. All right.

9 MR. LINNEHAN: See you in the morning.

10 THE COURT: I'll see you all in the morning
11 then. And did you get the jury instruction or
12 verdict worked out amongst yourselves?

13 MR. LINNEHAN: I haven't received anything from
14 Mr. Truitt yet, so.

15 THE COURT: Well, I know you all have been busy
16 just as I have.

17 Mr. Truitt, try to get that over to him so we
18 can address it first thing in the morning.

19 MR. TRUITT: I certainly will, Your Honor.

20 THE COURT: Okay. See you tomorrow.

21 MR. LINNEHAN: Thank you, Judge.

22 THE COURT: Good-bye.

23 (Thereupon, the proceedings were concluded at
24 3:25 p.m.)

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STATE OF FLORIDA)

COUNTY OF LEE)

I, Margaret W. Miller, Registered Professional Reporter, do hereby certify that I was authorized to and did stenographically report and electronically record the foregoing proceedings consisting of pages 1 through 14 inclusive; and that the transcript is a true record of all proceedings had.

I further certify that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in this action.

Dated this 27th day of February, 2009.

Margaret W. Miller, RPR

BILLING WORKSHEET

REPORTER: Maggie Miller

HEARING BEFORE: Honorable Sherra Winesett - RULING ONLY

JOB NUMBER: ---

CASE STYLE: Limbaugh-Kirker v. Dicosta

DATE TAKEN: February 10, 2009

FORT MYERS

NAPLES

MEDICAL/TECHNICAL/VIDEO

ORIGINAL:

ATTORNEY: MR. LINNEHAN

ATTENDANCE: *Backorder of job #33173 - Ruling*

ORIGINAL PGS.: 15 pages = \$ 84.00

SPECIAL ORDER: E-mail

EXHIBITS: No

POSTAGE: No

COPIES:

ATTORNEY: MR. TRUITT

COPY PAGES: 15 pages = \$ 40.50

SPECIAL ORDER: E-mail

EXHIBITS: No

POSTAGE: Yes

Special Notes:

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division**

CATHERINE KIDD,

Plaintiff,

v.

Civil Action No. 3:09CV264

WAL-MART STORES, INC., et al.,

Defendants.

MEMORANDUM OPINION

Before the Court is Plaintiff Catherine Kidd's Motion in Limine to Exclude Testimony on the Part of Defendants' Experts. (Docket No. 38). On November 5, 2009, Defendant Wal-Mart Stores, Inc. ("Wal-Mart"), responded to Kidd's Motion. (Docket No. 57). Kidd raised additional issues during a November 6, 2009 hearing. On November 9, 2009, Wal-Mart filed a Supplemental Memorandum in Opposition to Plaintiff's Motion in Limine to Exclude Testimony on the Part of Defendants' Experts ("Wal-Mart's Supp'l Opp'n"). (Docket. No. 66). After additional argument on November 10, 2009, the matter is ripe for disposition.

For the reasons that follow, the Court will GRANT Kidd's Motion in Limine to Exclude Testimony on the Part of Defendants' Experts. (Docket No. 38).

I. Factual Background

Kidd alleges that on June 24, 2007, she was injured when a Wal-Mart employee negligently operated a commercial car lift at the tire and lube department of Wal-Mart Supercenter #1486. (Notice of Removal Ex. A., Compl. Count 1, ¶ 3 ("Compl.")).¹ Kidd alleges that the commercial car

¹ Kidd's Complaint consists of two Counts, each of which contain numbered paragraphs 2 through 4. Therefore, the Court cites both the Count and the numbered paragraph in which the information appears.

lift descended on her foot, resulting in “severe and permanent injuries” and causing her to suffer, and to “continue to suffer in the future great pain of body and mind . . . [and] future large expenses for medical, hospital and doctors’ bills in an effort to be cured of her injuries and be relieved of her pain and suffering.” (Compl. Count 2, ¶¶ 3-4.) Kidd further alleges that Wal-Mart “negligently caused, permitted and allowed to exist certain dangerous, hazardous and unsafe conditions . . . and negligently failed to warn the plaintiff of the dangerous, hazardous and unsafe conditions” in the Wal-Mart. (Compl. Count 1, ¶ 4, Count 2, ¶ 3.) She seeks \$3,000,000.00 in damages.

II. Challenged Testimony

Wal-Mart designates Dr. Mark Ross as “an expert in physical medicine and rehabilitation.” (Wal-Mart Supp’l Opp’n 1.) Dr. Ross initially opined that Ms. Kidd did not evince objective signs or symptoms of Reflex Sympathetic Dystrophy (“RSD”). (Wal-Mart Supp’l Opp’n 2.) He later opined as to six potential causes for her pain, including symptom magnification and somatoform disorder. (Wal-Mart Supp’l Opp’n 2.) Symptom magnification encompasses malingering and secondary gain. (Wal-Mart Supp’l Opp’n 4.) Wal-Mart designates Dr. Leon Ensalada as an “expert in the field of pain management.” (Wal-Mart Supp’l Opp’n 2.) Dr. Ensalada proffers only a brief mention of Kidd’s “propensity for somatization.” (Wal-Mart Supp’l Opp’n 2.)

III. Plaintiff Catherine Kidd’s Motion in Limine to Exclude Testimony on the Part of Defendants’ Experts

Kidd moves this Court to exclude testimony from Wal-Mart’s experts, Drs. Ross and Ensalada, because the testimony each will present constitutes the “type of opinion testimony [that] goes to the truthfulness of the plaintiff and invades the province of the jury.” (Pl. Br. in Supp. of Pl. Mot. in Limine to Exclude Testimony on the Part of Defs.’ Experts (“Exclude

Experts Mot. in Limine”), at 1.) (Docket No. 39.) Kidd argues that the proposed testimony of the doctors “that the plaintiff is untruthful and is magnifying her symptoms either consciously or unconsciously . . . goes beyond the scope of proper expert testimony and allows the expert to comment on the plaintiff’s reliability in the guise of a medical opinion.” (Exclude Experts Mot. in Limine 1-2.)

Wal-Mart responds that the doctors’ “written reports are clear that they do not intend to opine that the plaintiff is a liar or being untruthful.” (Defs.’ Mem. in Opp’n to Pl.’s Mot. in Limine to Exclude Testimony on the Part of Defendants’ Experts (“Exclude Experts Opp’n”), at 3.) (Docket No. 57.) Rather, Wal-Mart asserts that Dr. Ross’s opinion that Kidd might suffer from symptom magnification or somatoform disorder provide “an explanation for the subjective complaints of pain in the left lower extremity.” (Exclude Experts Opp’n 3.) In addition, Wal-Mart argues that there exists no indication that Dr. Ensalada intends to testify that Kidd is a liar or untruthful. (Exclude Experts Opp’n 3.) Wal-Mart argues that Dr. Ensalada made reference to somatoform disorder to explain Kidd’s subjective feelings of pain because he found no objective evidence to support those symptoms. (Exclude Experts Opp’n 3.)

During oral argument on November 6, Kidd’s argument shifted emphasis, suggesting that Drs. Ross and Ensalada did not derive their opinions regarding symptom magnification and somatoform disorder from sufficient principles and methods, and that the record did not sufficiently suggest that the methods and principles had been applied reliably to the facts of this case. *See* Fed. R. Evid. 702. Kidd now seeks the exclusion of the doctors’ testimony on this basis as well.²

² During oral argument on November 6, 2009, counsel for Plaintiff also raised some question as to whether somatoform disorder is a recognized medical condition. The parties

Federal Rule of Evidence 702 provides that “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue,” the Court may permit the testimony of an expert witness. Fed. R. Evid. 702. Whether the evidence sufficiently helps the trier of fact to understand evidence or to determine an issue of fact falls within the sound discretion of the trial court. *Scott v. Sears, Roebuck & Co.*, 789 F.2d 1052, 1055 (4th Cir. 1986); *Persinger v. Norfolk & W. Ry.*, 920 F.2d 1185, 1188 (4th Cir. 1990). Proffered expert testimony within the common knowledge of the jurors, “almost by definition, can be of no assistance to a jury,” and therefore should be excluded. *United States v. Harris*, 995 F.2d 532, 534 (4th Cir. 1993); see *United States v. Dorsey*, 45 F.3d 809, 814 (4th Cir. 1995); *Chalifa v. Mayor & City Council of Baltimore*, No. 92-1112, 1993 WL 50514, at *3 (4th Cir. Feb. 25, 1993) (refusing to admit expert testimony where the proposed expert “did not possess any ‘scientific, technical, or other specialized knowledge’ that would have elevated his opinion over [] garden variety knowledge, which an average juror reasonably gains from everyday experience”).

Where expert testimony seeks to comment on the credibility of a witness, such testimony answers “the very question at the heart of the jury’s task.” *Nichols v. Am. Nat’l Ins. Co.*, 154 F.3d 875, 883 (8th Cir. 1998). Thus, an expert may not testify as to a witness’s veracity because such testimony “improperly invades the province of the jury to determine the reliability of the witness.” *Pritchett v. Commonwealth*, 557 S.E.2d 205, 208 (Va. 2002); see *Jackson v.*

thereafter supplemented the record with excerpts from the *Diagnostic and Statistical Manual of Mental Disorder IV* (“*DSM IV*”) which define both somatoform disorder and malingering, and referenced the *DSM IV* during the November 10, 2009 hearing. (See Wal-Mart Supp’l Opp’n Ex. A.) Because both parties appear to agree that the *DSM IV* defines somatoform disorder, the Court deems this argument moot and decides the motion on other grounds.

Commonwealth, 587 S.E.2d 532, 544 (Va. 2003) (“Expert witnesses may not, however, render an opinion on the defendant’s veracity or reliability of a confession because whether a confession is reliable is a matter in the jury’s exclusive province.”); *see also United States v. Lester*, 254 F. Supp. 2d 602, 608 (E.D. Va. 2003) (“[T]rial courts should be extremely reluctant to allow testimony under Rule 702 as to conclusions that are consistent with the common knowledge of juries.”). An expert may, however, “testify to a witness’s or defendant’s mental disorder and the hypothetical effect of that disorder on a person in the witness’s or defendant’s situation, so long as the expert does not **opine on the truth of the statement at issue.**” *Pritchett*, 557 S.E.2d at 208.

The record before the Court does not establish whether Dr. Ross, an expert in physical medicine and rehabilitation, or Dr. Ensalada, a pain management specialist, possess sufficient psychological expertise to offer expert testimony as to whether Kidd evinces symptom **magnification or somatoform disorder**. Even if they possess the requisite expertise, the Court will not permit these doctors to opine as to whether Kidd has such disorders. **Such testimony far too easily invades the province of the jury or comments on the credibility of the Plaintiff.**

Either doctor may testify as to the medical evidence, or lack of medical evidence, supporting Kidd’s physical complaints in this case. They also, upon proper foundation, may testify as to the existence of somatoform disorder as a recognized medical condition.³ Neither doctor, however, may opine as to whether or not Kidd herself has somatoform disorder because such testimony could comment on Kidd’s veracity and such testimony extends beyond the area of

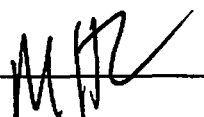
³ While a doctor may testify about experience with patients who overstate symptoms, symptom magnification, or malingering, may not raised as a medical condition in the guise of expert testimony here. Such subject matter is more properly addressed through argument of counsel.

expertise identified for these doctors. *See Pritchett*, 557 S.E.2d at 208. Therefore, Kidd's motion to exclude the expert testimony described above will be GRANTED.

IV. Conclusion

For the foregoing reasons, the Court shall GRANT Kidd's Motion in Limine to Exclude Testimony on the Part of Defendants' Experts. (Docket No. 38.)

An appropriate Order shall issue.

_____/s/ 
M. Hannah Lauck
United States Magistrate Judge

Date: November 12, 2009
Richmond, Virginia