

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

LLOYD CHARLES DAVIDSON
Plaintiff,

vs.

STRAWBERRY PETROLEUM, INC. and
ARNOLD L. HADEL
Defendants.

Case No.: 05-4320

Division: A

**ORDER GRANTING PLAINTIFF'S MOTION TO
STRIKE OR LIMIT THE TESTIMONY OF DEFENSE EXPERT HAROLD SMITH OR
IN THE ALTERNATIVE MOTION TO HOLD A HEARING TO DETERMINE IF THE
METHODOLOGY IS "SCIENTIFICALLY ACCEPTED"**

This cause having come before this Court on May 30, 2007, upon Plaintiff's Motion To Strike Or Limit The Testimony Of Defense Expert Harold Smith Or In The Alternative Motion To Hold A Hearing To Determine If The Methodology Is "Scientifically Accepted" and after review of the file, argument of counsel, and the Court otherwise being fully informed it is hereby ordered and adjudged:

The Plaintiff's motion to strike any conclusions as to credibility, honesty, malingering, exaggeration and/or symptom exaggeration, best effort or lack thereof, symptom magnification regarding the fake bad scale or the MMPI2 are hereby GRANTED and shall apply not only to Dr. Smith but to any other witness (Plaintiff or Defense) reviewing the material in question. Further, and specifically as to the Fake Bad Scale:

After reviewing the affidavit of Dr. James N. Butcher expressing concerns as to the scientific validity of the Fake Bad Scale, and considering the fact that there is no hard medical science to support the use of this scale to predict truthfulness or lack thereof, and reviewing the

articles produced by both side I find.

1. Drawing conclusions from such a test which gives points for malingering when a plaintiff answers "true" to questions asking about conditions involving genuine physical pathology has no place in this courtroom.

2. Regardless of defense counsel's reference to articles which may support the use of this test, it is clear that

a. There is genuine controversy surrounding the use of this test.

b. No test can act as a lie detector which is how this test is being used by Dr. Smith or any other doctor.

c. Determining the truthfulness of a witness is the job of the jury and not a psychologist.

3. The Defendants argument and materials obtained from Pearson Assessments' website are not persuasive. *Sybers v. Florida*, 841 So.2d 532, (1st DCA 2003).

DONE AND ORDERED in chambers at Tampa, Florida on this ____ day of

_____, 2007.

ORIGINAL SIGNED
CONFORMED COPY

JUN 14 2007

Sam D. Pendino, Circuit Court Judge

SAM D. PENDINO
CIRCUIT JUDGE

copies to:

Matthew D. Powell, 304 S. Plant Avenue, Tampa, Florida 33606

Mitch Espot, Esq. for Strawberry, P.O. Box 2939, Tampa, Florida 33601

FILED
ALAMEDA COUNTY
JUL 30 2008
CLERK OF THE SUPERIOR COURT By.
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY
OF ALAMEDA

| | | |
|--------------------------------|---|--|
| MEENA ANDERSON, et al., |) | Case No. RG05-211076 |
| |) | Plaintiffs,) ORDER GRANTING PLAINTIFF'S |
| |) | MOTION IN LIMINE NO. 16 |
| v. |) | |
| |) | |
| E&S INTERNATIONAL ENTERPRISES, |) | INC., et al.,) |
| |) | |
| Defendants. |) | |
| ^ |) | |
| AND RELATED CROSS-ACTIONS. |) | |

Plaintiffs Motion in Limine Number 16 is granted. The defendant is precluded from introducing evidence concerning the Fake Bad Scale.

The court finds that the Fake Bad Scale is a "new scientific technique" within the meaning of the *Kelly/Frye* rule. (*Frye v. United States* (D.C.Cir. 1923) 293 F. 1013, 1014; *People v. Kelly* (1976) 17 Cal.Sd 24, 30.) Accordingly, as the proponent of this evidence, defendant must show that the technique is "sufficiently established to have gained general acceptance in the particular field in which it belongs." (*People v. Morris* (1988) 199 Cal.App.3d 377, 386, quoting *People v. Kelly, supra*, 17 Cal.3d 24, 30.) Defendant has not met this burden.

Defendant's request for an Evidence Code section 402 hearing is
denied. DATED: July 29, 2008 ALAMEDA COUNTY SUPERIOR COURT

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1 IN THE CIRCUIT COURT OF THE 19th JUDICIAL CIRCUIT

IN AND FOR INDIAN RIVER, FLORIDA

2 CASE NO. 2006-0515-CA-10

3

4 JAMES NASON and CLAUDIA NASON,

5 Plaintiff(s),

6 -vs-

7 DARREL SHAFRANSKI, NEIL

SHAFRANSKI and MARIE SHAFRANSKI,

8

Defendant(s).

9 _____/

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TRIAL HAD BEFORE THE

11 HONORABLE JOSEPH T. STRICKLAND AND A JURY

MASTER INDEX

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INDIAN RIVER COUNTY COURTHOUSE

24 2000 16th Avenue

Courtroom 1

25 Vero Beach, FL 32960

0002

1 A P P E A R A N C E S

2

3 Appearing on behalf of the Plaintiff(s):

4 GAUTIER & HSTY, P.L.

BY: John W. Gautier, Esquire

5 370 Minorca Avenue

Suite 21

6 Coral Gables, Fl 33134

305.447.0766

7

BY: Elwood T. Lippincott, Jr., Esquire

8 370 Minorca Avenue

Suite 16

9 Coral Gables, Fl 33134

305.476.8224

10

Appearing on behalf of the Defendant(s):

11

THE TURNER LAW FIRM

12 BY: Scott A. Turner, Esquire

7370 Cabot Court

13 Suite 101

Viera, Fl 32940

14 321.255.5501

16 your differences and come to a common conclusion
17 so that a verdict may be reached and this case may
18 be disposed of.

19 And I can only add this editorial comment,
20 ladies and gentlemen. We have all labored in the
21 vineyard, shall we say, for five days and we will
22 do the best we can do.

23 Mr. Bailiff, if you'll retire the jury.

24 THE BAILIFF: Yes, sir.

25 (Thereupon the jury exited the courtroom at

0930

1 6:11 pm after which the following proceedings were had:)

2 THE COURT: Be seated, please. Typically
3 in about five minutes there's only two
4 possibilities. It ain't going to happen or here's
5 the verdict.

6 MR. TURNER: Okay.

7 THE BAILIFF: Their exact words, Your
8 Honor, were slight, but not much.

9 MR. LIPPINCOTT, JR.: Well, we ordered
10 food. That ought to let them know they're going
11 to be here for the duration.

12 (Talking simultaneously.)

13 THE COURT: I don't want us to interact
14 with them anymore than we have to. What if our
15 bailiff instructs them, Does the judge need to
16 make arrangements to feed you?

17 MR. LIPPINCOTT, JR.: Or the other option
18 is just hand them a menu as if to say no problem.

19 We'll feed you. But you're going to be here until
20 you make the decision.

21 THE BAILIFF: What I'll do is I'll just
22 leave these in there and tell them to call me if
23 they want --

24 THE COURT: Well. Wait. I want to think
25 about how we're going to manipulate this now.

0931

1 MR. GAUTIER: Well, Your Honor, I think
2 it's probably at a time when --

3 THE COURT: Untimely?

4 MR. GAUTIER: No. I think it's at a time
5 when people are very hungry. This is the time
6 people normally eat dinner. And you don't want
7 them being forced into making decisions based upon
8 getting tired and hungry and wanting to go home.

9 So to me this is a nice way of saying let's
10 get it done tonight if we can. We'll order dinner
11 and we can get it done. We did this in a case
12 that I had not too long ago and it worked out
13 perfectly.

14 MR. LIPPINCOTT, JR.: Low blood sugar can
15 be an issue that makes people grumpy and dig in.

16 THE COURT: Yeah, I know. I know.

17 MR. GAUTIER: So why don't we just go ahead
18 and say that we'll go ahead and provide dinner for
19 them and they --

20 THE BAILIFF: When they're ready, they can
21 just call and I'll collect the menus.

22 MR. LIPPINCOTT, JR.: And that we're
23 committed to the process. They're not going to
24 get off easy.

25 THE COURT: You know, I don't get paid
0932

1 overtime. And you -- well, I don't know. You may
2 be on the clock. You're the only one who's making
3 money sitting over here.

4 MR. TURNER: I'll let you know after
5 verdict.

6 THE COURT: Mr. Bailiff, let's phrase it
7 this way. You'll go in with your menu and you'll
8 say that the Court is prepared to order their
9 dinners if they feel that this would be helpful.
10 All right?

11 THE BAILIFF: Yes, sir.

12 (Discussion off the record.)

13 THE BAILIFF: They went right to the menus.
14 We're here for a while.

15 THE COURT: Do you want me to read this
16 question to you? Are we allowed to use a
17 dictionary?

18 MR. LIPPINCOTT, JR.: A dictionary is not
19 evidence.

20 MR. TURNER: I'd say it's no different than
21 a calculator. A lot of times we use calculators.
22 It's not evidence, but if they want to use it, I
23 have no problem. I'll leave it up to you guys.

24 THE COURT: Where in the world do we find a

25 dictionary?

0933

1 MR. LIPPINCOTT, JR.: I ain't got one.

2 MR. TURNER: We'll just have to search --

3 MR. LIPPINCOTT, JR.: You got one?

4 MR. TURNER: What's that red book right at

5 the end there?

6 THE CLERK: Pocket dictionary.

7 THE COURT: Mr. Bailiff, we'll file it with

8 the clerk.

9 MR. LIPPINCOTT, JR.: Thank you, sir.

10 THE COURT: Might declare a mistrial at a

11 certain point.

12 MR. LIPPINCOTT, JR.: Might as well at this

13 point. I mean that wouldn't actually happen,

14 obviously. I haven't been down this road, Judge.

15 THE COURT: Well, the problem, of course,

16 is that it puts somebody under the gun.

17 MR. LIPPINCOTT, JR.: We wouldn't actually

18 mistry the case. It would be a hung jury, I would

19 suppose. We could tell them that, I guess.

20 THE COURT: Could I go so far as to say the

21 case would have to be retried?

22 MR. LIPPINCOTT, JR.: Sure.

23 THE COURT: Mr. Bailiff, see if you can get

24 our defense attorney in for a moment, please.

25 THE BAILIFF: The sergeant summoned him.

0934

1 THE COURT: Okay. They have been out now,

2 what, four or five hours?

3 THE BAILIFF: Six hours.

4 THE COURT: Six hours. I am making a
5 proposal that we bring the jury in and that I
6 inform them that if they cannot come to a decision
7 that the case will be declared a hung jury and
8 will have to be retried period.

9 MR. LIPPINCOTT, JR.: I have no objection
10 to that, Judge.

11 THE COURT: I mean it is a reality
12 statement. But on the other hand, it puts sort of
13 a gun to the head. And I don't want to do that
14 without a mutual stipulation.

15 MR. TURNER: Possibly a lesser burdensome
16 at least starting point would be maybe to get the
17 bailiff to see if they're making progress. I
18 don't know. The last --

19 THE COURT: Stop right there and we'll
20 find.

21 See if they can give us a report,
22 Mr. Bailiff.

23 THE BAILIFF. Yes, Your Honor.

24 THE COURT: I want the record to reflect
25 that the senior judge does not get paid anymore

0935

1 for staying around. You all will remember me in
2 your prayers tonight.

3 THE BAILIFF: They need a word looked up,
4 Your Honor.

5 THE COURT: They need a what?

6 THE BAILIFF: It's not in the book.

7 (Discussion off the record.)

8 THE COURT: Where does that come from?

9 MR. LIPPINCOTT, JR.: That's in one of the
10 medical records from the Cape Cod Hospital record.

11 The diagnosis was this big long word. We can look
12 it up online, Judge. It's like a rash or
13 something. I remember seeing that.

14 THE COURT: Counsel, let's let our court
15 reporter have that and see if she can find
16 anything for us.

17 (Discussion off the record.)

18 THE COURT REPORTER: Disintegration of
19 striated muscle fibers --

20 MR. LIPPINCOTT, JR.: Disintegration of
21 striated muscle fibers with excretion of myoglobin
22 in the urine.

23 (Discussion off the record.)

24 THE COURT: So is this our response to you
25 asking --

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1 THE BAILIFF: They didn't answer me, Your
2 Honor. They asked if I could do this first. Just
3 write it on something I can tear off, though.

4 (Discussion off the record.)

5 THE BAILIFF: Can I tear off the bottom
6 part of?

7 MR. TURNER: Yes.

8 THE COURT: Tell them to bring it with them
9 when they come back. If not, then retrieve it and
10 give it to us.

11 THE BAILIFF: Do you want me to ask again
12 if they're making progress?

13 THE COURT: Does anyone want to guess who
14 the ringer is here?

15 THE BAILIFF: I know. Your Honor, they
16 said if they can't have it in 20 minutes, then --

17 MR. TURNER: All right. Good. We're
18 moving.

19 THE COURT: 20 minutes is 9:20 when the big
20 hand gets to the 4.

21 THE BAILIFF: 9:25.

22 (Discussion off the record.)

23 THE COURT: In utter seriousness see if
24 they're making any headway back there, please.

25 THE BAILIFF: 9:45 they'll have it done.

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1 MR. LIPPINCOTT, JR.: They will have it
2 done. Thank God.

3 (Whereupon, at 9:36 p.m. the jury comes
4 back with a verdict.)

5 THE COURT: Be seated, please. Ladies and
6 gentlemen, have you arrived at a verdict?

7 MR. COBB: Yes, sir.

8 THE COURT: If you'd give that to the
9 bailiff, please, sir. Let me publish the verdict.

10 Ladies and gentlemen, listen closely

11 because when I conclude, I will ask each one of
12 you individually if this is indeed your individual
13 determination.

14 We, the jury return the following verdict:
15 Paragraph 1, was the negligence on the part of
16 defendant, Marie Shafranski, a legal cause of
17 loss, injury or damage to plaintiff, James Nason?

18 Yes.

19 Paragraph 2, what is the amount of any
20 damages sustained by plaintiff, James Nason, for
21 medical expenses and lost earnings in the past
22 caused by the accident of October 29, '05?

23 A, medical expenses, \$150,000. B, lost
24 earnings, 38,000.

25 Paragraph 3, what is the present value

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1 amount of any future damages to be sustained in
2 the future by plaintiff, James Nason, caused by
3 the accident of October 29, '05?

4 A, medical expenses, 50,000. B, lost
5 earnings, lost earning ability, zero.

6 Paragraph 4, did the plaintiff, James
7 Nason, sustain a permanent injury within a
8 reasonable degree of medical probability or
9 permanent and significant scarring as a result of
10 the accident of October 29, '05?

11 Yes.

12 Paragraph 5, what is the amount of any
13 damages for pain and suffering, disability,

14 physical impairment, mental anguish,
15 inconvenience, aggravation of disease or physical
16 defect or loss of capacity for the enjoyment of
17 life?

18 A, in the past, \$50,000. B, in the future,
19 \$50,000. Total damages to James Nason, \$338,000.
20 Signed September 12th and the foreperson's name if
21 you would give it to me, please, sir.

22 MR. COBB: It's Richard Cobb.

23 THE COURT: Thank you, sir. Ladies and
24 gentlemen of the jury, having published this, is
25 this the verdict of each of you individually?

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1 ALL JURY MEMBERS: Yes.

2 THE COURT: Let the record reflect that
3 each juror has confirmed that this is their
4 verdict.

5 For the purpose of a judgment being entered
6 I'm sure that Judge Hawley would be willing to
7 execute that if you gentlemen would supply him
8 with that as soon as possible.

9 Ladies and gentlemen, it is indeed late,
10 but we must compliment you on a conscientious
11 effort. We must compliment you on having
12 concluded your work.

13 A great deal of effort went in the trial
14 and you made a great deal of effort in coming to
15 this decision. It is not a perfect world, but we
16 do the best we can and we're confident that you

17 did the same.

18 I am not going to wax eloquent at this
19 hour, but I do want you to leave with the sense of
20 personal satisfaction in this respect. There was
21 a controversy between these parties, and you
22 settled it for them.

23 In most societies in the world today, the
24 controversy would be settled in the street. So it
25 is meaningful in our system of government that
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1 there are citizens like you who will sacrifice the
2 time to come down and do this job.

3 Some day any one of you may need a jury to
4 make some decisions for you. And hopefully
5 another group of citizens will do a responsible
6 duty.

7 There are two things that are important in
8 our society, voting and sitting on a jury. They
9 are the two areas in which individual citizens can
10 make a substantial impact in the nature of our
11 ongoing government and society. So when you leave
12 today, you must realize that you have performed a
13 very valuable function.

14 With those comments the Court will stand
15 adjourned.

16 THE BAILIFF: All rise. Circuit court is
17 now adjourned.

18 (Thereupon, the jury was excused from the
19 courtroom at 9:45 p.m.)

20 (End of Volume VI.)
21 (Thereupon, the proceedings were concluded.)

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1 C E R T I F I C A T E

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4 I, ROBYN BARRERA, Registered Professional

5 Court Reporter, State of Florida at Large, certify that I

6 was authorized to and did stenographically report the

7 foregoing proceedings and that the transcript is a true

8 and complete record of my stenographic notes.

9

10 Dated this 30th day of December 2008.

11

12

13

14 _____

ROBYN BARRERA, COURT REPORTER

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IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION

CASE NO: 2003 CA 010945 AG

KAREN STITH and DONALD STITH,

Plaintiff(s),

vs.

MARY WILLIAMS and STATE FARM
MUTUAL AUTOMOBILE INSURANCE COMPANY,
Defendant(s).

ORDER ON PLAINTIFF'S FRYE MOTION REGARDING MMPI-2

THIS CASE was heard on the motion by the plaintiffs not to allow testimony regarding the so-called "Fake Bad Scale" (FBS) in the Minnesota Multiphasic Inventory-2 test because it does not satisfy the requirements of Frye v. United States, 293 F.1013 (D.C. Cir. 1923). The defendant, State Farm, wishes to present the testimony of Laurence Levine, Ph.D. which includes an opinion that, based upon Karen Stith's performance on FBS, Ms. Stith has overstated her physical symptoms in this case. Dr. Levine testified for the defense. The defendant also presented the testimony of Manfred Greiffenstein, Ph.D. The plaintiff relied on the testimony of James Butcher, Ph.D. Based upon the testimony of the witnesses and the other evidence presented, I conclude that the FBS is not generally accepted in the psychological or neuropsychological community as a reliable assessment of effort and malingering, and does not satisfy the FRYE test applied in the particular circumstances of this case.

The Minnesota Multi phasic Inventory-2 is the most widely used test of its kind for the measurement of psychopathology or personality. The plaintiff challenges the use of one validity scale, the "Lees-Haley Fake Bad Scale". The plaintiff contends that the Fake Bad Scale is not scientific, accepted or reliable. The Fake Bad Scale was developed by Dr. Lees-Haley in 1991. The purpose of the scale was to determine whether personal injury claimants were malingering or exaggerating their emotional symptoms. In 2007, the University of Minnesota included the FBS as one of its scales on the MMPI-2. No norms have been established for scoring and interpreting the Fake Bad Scale.

PAGE TWO

CASE NO: 2003 CA 010945 AG

STITH v. WILLIAMS, ET AL.

The evidence presented at the hearing supports the conclusion that the FBS is not an objective measurement of malingering, exaggerating or over reporting of symptoms. The FBS is inherently unreliable because it scores points in malingering, exaggerating or over reporting when a patient has true symptoms of physical injury or physical distress. The FBS has the significant potential to negatively impact persons with true disabilities. The evidence presented showed that the test is biased against women because they tend to score higher on the FBS than men, particularly when they have verifiable physical injuries.

Accordingly, it is

ORDERED AND ADJUDGED:

1. The plaintiffs' motion is granted.
2. Laurence Levine, Ph.D. will be prohibited from using the "Fake Bad Scale" as evidence of malingering, exaggerating or over reporting of symptoms both in general and with respect to the plaintiff.

DONE AND ORDERED at West Palm Beach, Florida, this ____ day of August, 2008.

SIGNED & DATED
JOHN J. HOY
AUG 28 2008
CIRCUIT JUDGE
JUDGE JOHN J. HOY

copy furnished:

Steven B. Phillips, Esq.

LITTKY SMITH ET AL.

Citizens Building, Suite 800
105 South Narcissus Avenue
West Palm Beach, Fl. 33401

Edwin Mortell, Esq.

PETERSON BERNARD

416 Flamingo Road
Stuart, Fl. 34996

Dorothy C. Sims, Esq.

SIMS STAKENBORG

118 SW Fort King Street
Ocala, Fl. 34471