

**Henderson v Stryker Corp.**

2008 NY Slip Op 31555(U)

May 2, 2008

Supreme Court, New York County

Docket Number: 0110566/2005

Judge: Joan Lobis

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOBIS  
*Justice*

PART 20

*5/9/08*

KAREN HENDERSON

- v -

STRYKER CORP

INDEX NO. 110566105  
MOTION DATE 3/27/08  
MOTION SEQ. NO. 7  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 5 were read on this motion ~~to~~ for Final hearing

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
<u>1-4</u>
<u>5</u>
_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION AND ORDER

**FILED**

MAY 09 2008

COUNTY CLERK'S OFFICE  
NEW YORK

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SUPPORT OFFICE

Dated: 5/2/08 \_\_\_\_\_ *JBT*  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST *M/1/07*  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 20**

-----X  
KAREN HENDERSON, as Administratrix of the Estate  
of JAMES HENDERSON, and KAREN HENDERSON,  
individually,

Plaintiff,

Index No. 110566/05

-against-

**Decision and Order**

STRYKER CORPORATION, EDWIN M. CHANG,  
SAMANTHA TUTTAMORE, SAINT VINCENT'S  
CATHOLIC MEDICAL CENTERS OF NEW YORK  
a/k/a SISTERS OF CHARITY MEDICAL CENTER,  
FRANK MICHAEL ROSELL, JEFFREY MICHAEL-  
NICASTRO, DANIEL ROESLER, DENNIS NG,  
HELEN HYOSUN KIM, ZHENQUING WU, STATEN  
ISLAND UNIVERSITY HOSPITAL, KENNETH J.  
WOOH, M.D., P.C., and HEALTHCARE ASSOCIATES  
IN MEDICINE, P.C.

Defendants.

**FILED**  
MAY 09 2008  
CLERK'S OFFICE  
NEW YORK

-----X  
**JOAN B. LOBIS, J.S.C.:**

In Motion Sequence Number 007, defendant Stryker Corporation ("Stryker") moves, by order to show cause, for an order granting a Frye hearing (Frye v. U.S., 293 F. 1013 [D.C. Cir. 1923]) to determine the reliability of plaintiff's expert, James W. Pugh, Ph.D./P.E.

This is an action for medical malpractice and products liability which arises from the treatment of plaintiff's decedent, James Henderson. Briefly, Mr. Henderson underwent a spinal fusion on May 21, 2003. Six days later, he was experiencing severe pain, swelling in his neck, and difficulty in breathing; he sought emergency treatment, at which time it was determined that one of the screws inserted during the spinal fusion procedure had "backed out," causing a cervical hematoma and damage to his esophagus. Mr. Henderson underwent surgery to remove the screw and to repair the

damage from the backed-out screw, but later experienced complications and, eventually, paralysis. Mr. Henderson died on January 7, 2004.

A review of the complaint from the County Clerk's file indicates that plaintiff alleges, inter alia, that cervical spinal fusion was negligently performed on Mr. Henderson on May 21, 2003, and that the device used to fuse Mr. Henderson's spine—the Reflex Anterior Cervical Plate System manufactured by Stryker (the "Stryker System")—was negligently designed. Discovery has been completed in this case, and a note of issue was filed on January 8, 2008. Stryker filed a motion for summary judgment on January 30, 2008 (Motion Sequence Number 006), which is not yet fully submitted. Stryker's instant request for a Frye hearing derives from the report by Dr. Pugh that was submitted as part of plaintiff's opposition to Stryker's motion for summary judgment.

In the instant motion, Stryker, by way of attorney's affirmation only, argues that Dr. Pugh's report does not satisfy the standards of reliability for expert witnesses, in that he fails to cite support from scientific literature for his conclusions, and that he fails to provide any methodology for his analysis.<sup>1</sup> Stryker asserts that Dr. Pugh's report contains "unsupported, wholly conclusory statements." In response, plaintiff's attorney asserts that Dr. Pugh relied on Stryker's own records regarding the Stryker System as the scientific and reliable basis for his opinion. Dr. Pugh's report sets forth the materials he reviewed in this case, including Mr. Henderson's medical records; the papers from Stryker's motion for summary judgment and memorandum of law in support thereof; deposition testimony; and, documents produced in discovery by Stryker, including surgical technique

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<sup>1</sup> The argument that Dr. Pugh has been found by the Seventh Circuit Court of Appeals to offer totally unfounded conclusions (See Fuesting v. Zimmer Inc., 421 F.3d 528 [7th Cir. 2005]) is not relevant to the issue herein. There is no similarity in the devices.

guide operating instructions, premarket documents, and other documents. Dr. Pugh further states that he is an expert in biomedical engineering, which is the application of engineering techniques to the medical field, including medial device design, and metallurgy, which is the science of the production, properties, and application of metals and alloys. In his report, Dr. Pugh opines on the design and safety of the Stryker System and the adequacy of the instructions and warnings given by Stryker regarding this system. He points out, inter alia, that the Stryker System does not meet the minimum or recommended safety factor for dynamic applications; that Stryker's claims that the system's drill guide prevents a screw from being overangulated (and thus unable to be fully locked) are contradicted by the deposition testimony of Stryker's witness, Charles Bush, Jr. (senior engineering manager at Stryker); and, that Stryker's representations about the ease of use and safety of its design as contained in the surgical technique guide and instructions are misleading and inadequate

With respect to the test for admissibility of expert testimony derived from Frye v. U.S., supra, (the "Frye test"), the New York Court of Appeals has held:

[t]he introduction of novel scientific evidence calls for a determination of its reliability. Thus, the *Frye* test asks 'whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally.' . . . *Frye* holds that 'while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.' . . . It 'emphasizes "counting scientists' votes, rather than on verifying the soundness of a scientific conclusion."'

Parker v. Mobil Oil Corp., 7 N.Y.3d 434, 446-47 (2006) (citations and footnote omitted). There is a distinction between the Frye test for novel scientific evidence and the test for determining the "adequacy of the specific procedures used to generate the particular evidence to be admitted," or the foundation for the evidence. People v. Wesley, 83 N.Y.2d 417, 422 (1994).

Although Stryker may have a basis for challenging Dr. Pugh's opinion at trial, a pretrial Frye hearing will not be granted at this time. "The law does not support subjecting experts' views to pretrial hearings in every situation to ensure that they are based on sufficiently established principles; such a hearing should be held only if the basis for the expert's conclusions is novel." Marsh v. Smyth, 12 A.D.3d 307, 308 (1st Dep't 2004) (Saxe, J., concurring); see also, C ex rel Williams v. St. Luke's-Roosevelt Hosp. Center, 16 Misc. 3d 688 (Sup. Ct. N.Y. Co. 2007). Defendant does not claim that Dr. Pugh is relying on novel science or a "newly minted procedure or test" (Marsh v. Smyth, supra, at 311); nor does Stryker question the general acceptance of the specified field of biomechanical engineering or metalurgy. Rather, Stryker takes issue with the specific reliability of the procedures and methodology employed by Dr. Pugh in reaching the conclusions in his report. The issues Stryker raises "are actually matters going to trial foundation or the weight of the evidence, both matters not properly addressed in the pretrial Frye proceeding." People v. Wesley, 83 N.Y.2d 417, 426 (1994). Further, "[t]hat plaintiff may not be able to prove a prima facie case because of conclusory expert testimony may be a basis for a summary judgment motion . . . but it is not a basis for a Frye hearing." Taveras v. St. Luke's Roosevelt Hosp., 6 Misc.3d 1016(A) (Table), 2005 WL 236416 (Sup. Ct. N.Y. Co. 2005).

Stryker's motion for an order granting a Frye hearing is denied. The parties are directed to appear for a conference on May 13, 2008, at 9:30 a.m., in Courtroom 345 at 60 Centre Street, New York, New York. This constitutes the decision and order of the court.

Dated: May 2, 2008

FILED  
 JOAN B. LOBIS, J.S.C.  
 MAY 09 2008

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 NEW YORK