

Toby v Meneshian
2025 NY Slip Op 35502(U)
February 24, 2025
Supreme Court, Nassau County
Docket Number: Index No. 610297/2016
Judge: Gregg Roth
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**SUPREME COURT - STATE OF NEW YORK
TRIAL/IAS TERM, PART 29 NASSAU COUNTY**

PRESENT:

Honorable Gregg Roth

Justice

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**LINDA SUSAN WOYST TOBY and MARK
RICHARD TOBY,**

Plaintiff(s),

-against-

Index No.: 610297/2016

Motion Seq. No. 003

Motion Submitted: 2/11/25

**ALEX V. MENESHIAN, D.D.S., M.D. and
LONG ISLAND ORAL & MAXILLOFACIAL
SURGERY, P.C.,**

Defendant(s).

_____x

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X
Affirmation in Opposition/Supporting Exhibits.....X
Reply Affirmation/Supporting Exhibits.....X

Defendants, Alex V. Meneshian, D.D.S (Dr. Meneshian) and Long Island Oral & Maxillofacial Surgery, P.C. (LIOMS), move this court for an order precluding Plaintiffs' experts from testifying in this matter. In the alternative, Defendants move for an order directing a *Frye* hearing, arguing that the theories espoused by Plaintiffs' experts are not generally accepted as reliable in the field of Hyperbaric Medicine (see *Frye v United*

States, 293 F. 1013 (DC Cir.1923). Plaintiffs, Linda Susan Wohst Toby (Linda) and Mark Richard Toby (Mark), oppose the motion.

This matter involves allegations of dental malpractice. Linda alleges that Defendants deviated from the standard of care in removing teeth #19, #20 and #21, and referring Linda for excessive and unnecessary hyperbaric oxygen therapy (HBOT) before and after the extractions. Linda alleges, *inter alia*, that she suffered from cognitive decline as a result of the HBOT. Defendants argue that there is no accepted medical or scientific theory where HBOT causes cognitive decline, and argue that Plaintiffs' experts should not be allowed to testify that HBOT can cause cognitive decline.

Linda suffered from tongue cancer in 1993 which was treated by surgical resection and radiation. In 2014, she began experiencing dental issues on the lower left side of her mouth, which was the area that was exposed to the radiation therapy years earlier. She consulted with Dr. Meneshian who determined the three teeth needed to be extracted. Dr. Meneshian consulted with Linda's oncologist and, according to Dr. Meneshian, both doctors agreed that Linda should have HBOT both before and after the extractions in light of the prior radiation therapy.

To receive HBOT, a person is placed in a pressurized chamber and is fed 100% oxygen, the goal being to increase the amount of oxygen that reaches the blood and tissues. The amount of oxygen fed to the patient is measured in atmospheres absolute (ATA). It is undisputed that when performed correctly and at appropriate levels, this

process has been known to, *inter alia*, grow new blood vessels, improve wound healing, treat serious burns and serious skin conditions and infections, as well as have an ameliorative effect on certain cognitive issues in people who suffered strokes, brain injury, carbon monoxide poisoning and post-traumatic stress disorder. It is noninvasive and, generally speaking, has mild side effects including minor ear discomfort, and blurred vision, both of which eventually resolve on their own. One more serious side effect that can occur is Central Nervous System Oxygen Toxicity (CNS-OT) which can result in seizures. To avoid CNS-OT, HBOT should be performed under supervision, within a therapeutic window with intermittent air breaks. It is also undisputed that large ATA levels can have serious consequences, or result in death.

Linda was originally prescribed 30 HBOT sessions, with 20 before the extractions and 10 afterward. Each session would be 60 minutes, with two five-minute breaks, and she would receive 2.4 ATA. Initially, Linda received treatments from the Hyperbaric Wound Care Center at Plainview Hospital. After 18 treatments she would change providers to Hyperbaric Medical Solutions where her sessions were increased to 90 minutes at 2.4 ATA with the two five-minute air breaks. However, after the 10 post-extraction sessions were completed, she was not healing as expected, and another 10 to 20 sessions were recommended. In total, Linda would receive 52 HBOT sessions. Each session was supervised, and the notes from each facility indicate that Linda did not experience seizures, though she did suffer some other side effects, such as very high

blood pressure, but these things self-corrected.

As far as the papers submitted on this motion in support and in opposition are concerned, the issue of exactly when Linda began experiencing the symptoms of cognitive decline is unclear. Defendants argue that her complaints of cognitive decline did not surface until 2018, three years after she stopped the HBOT. Linda's expert states she began suffering the symptoms right after she stopped the treatments in 2015. It does not directly impact the issues raised in this motion, but is a source of confusion for the court. Regardless of when it occurred, it is Defendants' position, and the position of their experts, that there is no evidence indicating that HBOT can lead to cognitive decline, and that such a claim is a "rogue theory".

Frye stands for the proposition that for expert testimony to be admissible, it must be based upon scientific principles that are generally accepted in its specific field (*see Krackmalnik v Maimonides Med. Ctr.*, 142 AD3d 1143 [2d Dept 2016]). The inquiry is not whether the conclusion is reliable, but whether it is based upon principles that are generally accepted as reliable (*see Id.*) "[G]eneral acceptance does not necessarily mean that a majority of the scientists involved subscribe to the conclusion. Rather it means that those espousing the theory or opinion have followed generally accepted scientific principles and methodology in evaluating clinical data to reach their conclusions" (*Id.* at 1144, quoting *Zito v Zabarsky*, 28 AD3d 42, 44 [2d Dept 2006]).

To be clear, the parties do not disagree over whether HBOT can be an effective

treatment, or whether excessive ATA can be dangerous. The issue is whether it can cause this one series of symptoms generally referred to in these papers as “cognitive decline”. According to Linda, the HBOT sessions caused her short-term memory deficits and an inability to focus and concentrate. As a result, she was unable to hold her job in banking, an industry in which she had been very successful pre-HBOT.

According to Defendants, the only side-effects of HBOT that is administered at the levels Linda received are of the kind that self-correct over time. The most serious, perhaps, would be the CNS-OT, something from which Linda did not suffer.

Plaintiffs argue that this motion should be denied because it is, in essence, a rehash of a summary judgment motion that was previously made and denied, and that denial was upheld by the Appellate Division, Second Department (*see Toby v Meneshian*, 222 AD3d 1029 [2d Dept 2023]). The court disagrees with this interpretation of the within motion. First, the issues and burdens are different in *Frye* and summary judgment motions. Second, while the HBOT issues were raised in the summary judgment motion, the Appellate Division, Second Department decision does not address them.

Though Defendants attack three of Linda’s experts, in opposition to the within motion Linda only offers the affirmation of Hal S. Gutstein, M.D., a board certified neurologist who has been in practice for over 40 years. Defendants argue, *inter alia*, that the court should not consider Dr. Gutstein’s affirmation and opinions because he has no expertise in Hyperbaric Medicine. However, a doctor does not have to be a specialist in a

particular field to offer expert testimony (*see Bodensiek v Schwartz*, 292 AD2d 411 [2d Dept 2002]). The lack of expertise would go against the weight of the opinion, not its admissibility (*see Id.*). Herein, Dr. Gutman is a neurologist and is clearly qualified to opine on the extent and potential sources of Linda's cognitive decline.

According to Dr. Gutman, opining that HBOT caused Linda's injuries is not some rogue theory but has, in fact, been studied. One such study- *Acute and Chronic Central Nervous System Oxidative Stress/Toxicity During Hyperbaric Oxygen Treatment of Subacute and Chronic Neurological Conditions*, by Paul G. Harch and Stacey Rhodes- was published as recently as 2024. Defendants attack the methodology of this study and the studies it relies upon, some of which are 80 years old and relied upon experimentation upon certain animals. But these criticisms are fodder for cross examination and not grounds to preclude the expert. Harch and Rhodes even acknowledge deficiencies and limitations in their methodology and results, but they do not go so far as to claim they are worthless. Further, Defendants appear to argue that because the exact phrase "cognitive decline" is not used in any studies relied upon by Dr. Gutman, then these studies are irrelevant and do not address Linda's alleged injuries. The court disagrees. "Cognitive decline" is not a precise diagnosis, and Harch's study references "chronic neurological conditions", a broad term that can cover things like short-term memory loss and inability to concentrate and focus. The court therefore finds that Defendants have failed to establish that Plaintiffs' experts should be precluded from testifying, or that their theories

should be subject to a *Frye* hearing.

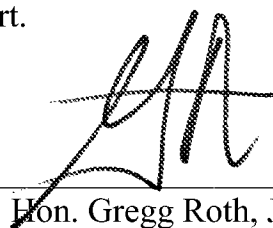
Accordingly, it is hereby

ORDERED, that Defendants' motion to preclude Plaintiffs' expert, or for the court to conduct a *Frye* hearing, is DENIED in its entirety; and it is further

ORDERED, that all parties appear for a conference on March 5, 2025 at 9:30am. before this Part to schedule a trial in this matter and to address any other outstanding pre-trial issues.

The court has considered the parties' remaining arguments and finds them to be without merit. This constitutes the order of the court.

Dated: February 24, 2025
Mineola, N.Y.


Hon. Gregg Roth, J.S.C.

ENTERED

Feb 27 2025

NASSAU COUNTY
COUNTY CLERK'S OFFICE