

**IN THE DISTRICT IN AND FOR MAYES COUNTY
STATE OF OKLAHOMA**

THE STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
vs.)	Case No. CF-1999-271
)	
JOHN EDWARD SCHOONOVER,)	
)	
Defendant.)	

**MOTION TO EXCLUDE
EXPERT WITNESS TESTIMONY**

The Defendant, John Edward Schoonover, by and through undersigned counsel, requests that the Court enter an order excluding from evidence the expected testimony of Dr. Block, a medical doctor, offering what is believed by the Defense to be opinions lacking a sufficient scientific basis regarding the injuries sustained by Benjamin Schoonover. In the alternative, Mr. Schoonover, requests a hearing to be conducted outside the presence of the jury pursuant to the doctrine of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Company, Ltd. V. Carmichael*, 526 U.S. 137 (1999). In support of the motion counsel shows the Court the following:

I. The Evidence At Issue.

- 1. Dr. Block's opinion that the retinal hemorrhages seen in Benjamin Schoonover are always the result of severe, violent usually rotational forces tearing away the retina and are almost always seen in inflicted injuries;*

On April 23, 2001 during the first trial of this matter Dr. Block testified to the following;

A:When retinal hemorrhages, in the pediatric experience, occur in that area of the eye, they are always the result of, rather severe, not rather severe, of severe, violent usually rotational forces tearing away the retina, which has 10 different layers and causing tiny, tiny points of bleeding of hemorrhages in that part of the eye.

Trial Transcript page 468 lines 5 through 13

Dr. Block goes on to testify On April 23, 2001 during the first trial of this matter to the following;

A: Because of the nature of where his retinal hemorrhages were, at the front periphery of the eye, my opinion, which is based on quite a few conversations with ophthalmologists who do this kind of work and have reported in the literature, the only known cause of that are violent usually somewhat rotational forces and they are almost always seen only in inflicted injuries, injuries that someone else has caused.....

Trial Transcript page 468 lines 18 through 25

2. *Dr. Block's offered his opinion that injuries such as suffered by Benjamin Schoonover could not have come from normal household activities, a child falling off a table or a bench, or a child running and falling down.*

On April 23, 2001 during the first trial of this matter Dr. Block testified to the following;

Q: Doctor, based on your review of the file, would the massive nature of this injury and the effects be consistent with just normal household activities and playing inside a home?

A: No.

Q: How about even if the child climbing on the table, climbing on a bench, something like that, and falling?

A: I don't think so, no.

Okay. Now, Doctor, would it be consistent with a child simply running through the house and falling in a foyer area where there's tile on the floor and maybe hitting the head?

A: I don't think so, no.

Trial Transcript page 478 line 5 through line 17

3. *Dr. Block's opinion that the injuries received by Benjamin Schoonover are not consistent with an accident and "could" be consistent with a purposeful injury.*

On April 23, 2001 during the first trial of this matter Dr. Distefano testified to the following;

Q: Doctor, based on what you earlier said, would it be fair for me to conclude that, absent some type of major automobile accident or some major fall or some major event, the injuries presented by young Benjamin at the hospital is not consistent, in your opinion, with accidental injury.

A: That's correct. They're not consistent with accident.

Q: Okay. Would they be inconsistent with a purposeful inflicted injury to the child?

A: They could be, yes.

Trial Transcript page 479 lines 14 through 24

4. *Dr. Block testified that the injuries that were inflicted on Benjamin Schoonover would be consistent with a severe bout of grabbing the child, shaking, kind of flinging the child around in motion, and then slamming the child up against something.*

On April 23, 2001 during the first trial of this matter Dr. Block testified to the following;

Q: Doctor, would these injuries we've seen in young Ben be consistent with a severe bout of grabbing the child, shaking, kind of flinging the child around in motion, and then slamming the child up against something.

A: Yes

Trial Transcript page 483 lines 12 through 17

5. *Dr. Block gave his opinion that the death of Benjamin Schoonover was likely an incident of child abuse.*

On April 23, 2001 during the first trial of this matter Dr. Block testified to the following;

Q: And, Doctor, finally, would it be your opinion that based on what you're seeing that this is likely an incident of child abuse?

A: Yes, in my opinion it is.

Trial Transcript page 489 line 20 through line 23

II. Basis for Exclusion.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993) the United States Supreme Court determined that in order to be admissible scientific evidence must be reliable and the proffered testimony must "assist that trier of fact to understand the evidence or to determine a fact to understand the evidence or to determine a fact in issue." *Id.* at 340. In *Kumho Tire Company, Ltd. V. Carmichael*, 526 U.S. 137 (1999) the Supreme Court extended the *Daubert* admissibility requirements to include testimony

based upon “technical” and “other specialized” knowledge. In *Taylor v. State*, 889 P.2d 319, 328 (Okla.Cr.1995) the Oklahoma Court of Criminal Appeals adopted the standard set forth in Daubert in areas of novel scientific evidence. The *Daubert* test requires the trial court to consider four factors when determining admissibility of scientific evidence: (1) whether the scientific method at issue has been or can be tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the proffered technique’s known or potential rate of error; and (4) whether the new theory has gained general acceptance in the relevant scientific community. *Daubert*, Id. at 597.

In the instant case, Dr. Distefano’s above listed opinions should be analyzed in terms of the *Daubert* factors prior to admissibility. Counsel for Mr. Schoonover requests a hearing outside the presence of the jury prior to admission of the above listed proposed testimony from Dr. Distefano.

III. Conclusion

For these reasons, Counsel for Mr. Schoonover respectfully requests that the Court enter an order excluding the above listed proffered expert opinion testimony by Dr. block, or in the alternative conduct a *Daubert* hearing outside the presence of the jury to determine whether or not the evidence should be admitted.

Respectfully Submitted,

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CERTIFICATE OF HAND DELIVERY

I hear by certify that a copy of the foregoing instrument was hand delivered on January ____, 2003 to the office of the following:

Charles Ramsey
Assistant District Attorney for Mayes County

Kevin D. Adams