STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	C/A No.: 2018-CP-26-05438
Tara Gurry,	)	
	)	
Plaintiff,	)	**ORDER GRANTING DEFENDANTS' MOTION IN LIMINE TO EXCLUDE DR. SCHIELD WIKAS'S TESTIMONY**
	)	
v.	)	
	)	
Myrtle Beach Dermatology, LLC, Shannon Hussey, and Richard Hussey, M.D.	)	
	)	
Defendants.	)	
_____	)	

This matter came before the Court upon a Motion in Limine by the Defendants to Challenge, Limit, and/or Exclude the testimony from trial of Plaintiff's expert Dr. Schield Wikas. Present at the hearing were counsel for Defendants Marian Scalise, Esquire and Lydia Magee, Esquire, and Plaintiff Tara Gurry represented herself *pro se*[1].

This case involves allegations of medical malpractice against the Defendants, specifically that Defendant Nurse Practitioner Shannon Hussey improperly injected Kenalog into a hypertrophic scar on Plaintiff's thigh (which was a sequela of a melanoma excision), resulting in atrophy and systemic effects.

Prior to the start of trial and selection of a jury, counsel for Defendants sought an Order to Challenge, Limit, and/or Exclude Plaintiff's dermatology expert Dr. Shield Wikas's testimony. The basis for this Motion was that: 1) Plaintiff's expert Dr. Wikas should be excluded as he was not qualified to offer an opinion on any alleged injury outside of the field of dermatology; 2) Dr.

[1] This hearing was held just prior to the selection of a jury in this case, and Plaintiff intended to represent herself *pro se* throughout the course of the trial.

Wikas offered no opinion on how the Defendants breached the standard of care or how such breach caused Plaintiffs' alleged injuries, and therefore, his testimony should be excluded as unreliable; and 3) Dr. Wikas's opinions regarding the occurrence of atrophy were not supported by any research or medical literature and should be excluded by this Court under the Court's gatekeeping function and laws of South Carolina.

After reviewing the pleadings, the Motion in Limine filed by the Defendants with supporting exhibits, listening to the arguments of defense counsel and Plaintiff, and reviewing the entire *de bene esse* deposition of Plaintiff's expert Dr. Wikas, the Court finds the following facts pertinent to Court's decision: On or about January 27, 2016, the Plaintiff had a malignant melanoma on her right thigh excised by dermatologist Dr. Joseph Masessa. This surgical procedure in which a 7.5 cm width and 1 cm depth mass was excised left her with a significant 16 cm scar on her right leg. The Plaintiff came to the Defendants' office on May 3, 2016, for further routine follow-up where the Defendant NP Hussey examined the scar and described the hypertrophic area of the scar as being 7 cm long. NP Hussey also documented that the Plaintiff reported a pulling sensation in the scar and the feeling of stitches being in it. The Defendant injected it with 1 cc of 3.3. mg of Kenalog, an intralesional steroid used by dermatologists for this type of scar, to reduce the appearance of the scar by thinning and flattening it and to alleviate the pulling sensation.

After this visit and as an alleged result of the Kenalog injection, the Plaintiff alleges that she became very ill for 72 hours, but that the illness lasted for two weeks and has continued to the present day, five years later, and included nausea, chills, racing heartbeat, cramps, body aches, headaches, insomnia, and a three-week menstrual cycle. The Plaintiff also alleges that her leg began to atrophy within 24 hours and got worse over several months. She alleges that this caused her to have to stop doing activities she loves like running due to leg pain.

On September 27, 2018, the Plaintiff filed a Summons and Complaint against Defendants alleging gross negligence which allegedly caused her chronic pain and discomfort, humiliation, disability, fear, anxiety, mental anguish and emotional distress, loss of enjoyment of life, otherwise unnecessary medical, and surgical costs which is the subject of the case currently before the Court.

To support her allegations, the Plaintiff identified her sole expert witness, dermatologist Dr. Schield M. Wikas, as an expert witness. Dr. Wikas was deposed by Marian W. Scalise, Esquire for a discovery deposition on June 28, 2019, and Dr. Wikas provided *de bene esse* trial testimony on June 21, 2021, 6 days prior to the first day of trial.

In South Carolina, with few exceptions, expert opinion is required in medical malpractice actions. See David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). Specifically, a Plaintiff must demonstrate and provide evidence of the following via an expert witness: (1) the generally recognized and accepted practices and procedures that would be followed by average, competent practitioners in the Defendant's field of medicine under the same or similar circumstances, and (2) the defendant departed from the recognized and generally accepted standards. Id. 367 S.C. at 247-248, 626 S.E.2d at 4 (citing Pederson v. Gould, 288 S.C. 141, 143-44, 341 S.E.2d 633, 634 (1986); Cox v. Lund, 286 S.C. 410, 414, 334 S.E.2d 116, 118 (1985)). The Plaintiff must also establish that the Defendants' departure from such generally recognized practices and procedures was the proximate cause of the Plaintiff's alleged injuries and damages. See id. 367 S.C. at 248, 626 S.E.2d at 4 (citing Green v. Lilliewood, 272 S.C. 186, 193, 249 S.E.2d 910, 913 (1978)). While the Plaintiff is *pro se*, she still bears the burden of proof and must establish a duty, breach, and causation via expert testimony to prevail in her medical malpractice action. In South Carolina, medical malpractice actions require a greater showing than generic allegations and conjecture. Id. Importantly, the admissibility of expert opinion requires

more scrutiny than the admissibility of other evidence. See Watson v. Ford Motor Co., 389 S.C. 434, 446, 699 S.E.2d 169 (2010) (holding "expert testimony receives additional scrutiny relative to other evidentiary decisions").

Rule 702 of the South Carolina Rules of Evidence provides, "[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, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE. However, in determining the admissibility of expert opinion under Rule 702, this Court is a gatekeeper and must be satisfied that the opinion testimony meets all three of the following requirements:

(1) the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury;

(2) while the expert need not be a specialist in the particular branch of the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter; and

(3) the trial court must evaluate the substance of the testimony and determine whether it is reliable.

Watson v. Ford Motor Co., 389 S.C. 434, 446, 699 S.E.2d 169 (2010) (emphasis added) (internal citations omitted) (holding that "in executing its gatekeeping duties, the trial court must make [these] three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony").

This Court recognizes that expert witnesses have the potential to be "both powerful and quite misleading," and that the gatekeeper function is critical due to the weight given to experts. Cooper v. Smith & Nephew, Inc., et al, 259 F.3d 194, 199 (4th Cir. 2001) (internal citations

omitted). In fulfilling this Court's Watson gatekeeping function as it applies to the Plaintiff's expert's testimony, and applying the criteria of Rule 702, SCRE, the entire *de bene esse* transcript of Plaintiff's expert Dr. Schield Wikas was reviewed *in camera* to ensure that Dr. Wikas had the requisite knowledge and skill to qualify as an expert and that his opinion was based upon reliable medicine or science. See State v. White, 382 S.C. 265, 270 (2009); see also Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 125 L.Ed. 2d 469, 113 S. Ct. 2786 (1993) (holding trial judges must act as gatekeepers to "ensure that any and all scientific testimony...is not only relevant, but reliable"). As the South Carolina Supreme Court has reaffirmed time and again, "reliability is a central feature of Rule 702 admissibility, and our jurisprudence is in complete accord." White, 382 S.C. at 270. "The familiar tenet of evidence law that a continuing challenge to evidence goes to 'weight, not admissibility' has never been intended to supplant the gatekeeping role of the trial court in the first instance in assessing the admissibility of expert testimony, including the threshold determination of reliability." Id. at 273.

After reviewing the pleadings, the Motion in Limine filed by the Defendants with supporting exhibits, listening to the arguments of defense counsel and Plaintiff, and reviewing the entire *de bene esse* deposition of Plaintiff's expert Dr. Wikas, this Court finds that Dr. Wikas offered no opinion on how the Defendants' alleged breach in the standard of care was the proximate cause of Plaintiff's alleged damages, thereby rending his testimony unreliable and inadmissible.

"A reliable expert opinion must be based on scientific, technical, or other specialized knowledge and not on belief or speculation, and inferences must be derived using scientific or other valid methods." Oglesby v. General Motors Corp., 190 F.3d 244, 250 (4th Cir. 1999) ("expert" mechanical engineer's speculation about whether plastic inlet connector contained defect

lacked reliability, foundation, and relevance necessary for admissibility). "An expert's opinion should be excluded when it is based on assumptions which are speculative and are not supported by the record." Collier v. Varco-Pruden Buildings, et al., 911 F.Supp. 189, 192 (D. S.C. 1995) (citing Tyger Constr. Co. v. Pensacola Constr. Co., 29 F.3d 137, 142 (4th Cir. 1994), cert. denied, 130 L. Ed. 2d 633, 115 S. Ct. 729 (1995)). In a medical malpractice action, it is impermissible to speculate that an injury is the result of negligence "in the absence of any evidence as to how [a medical provider] deviated from the standard of care." Fletcher v. Medical Univ. of S.C., 390, S.C. 458, 464 702 S.E.2d 372, (S.C. Ct. App. 2010). The Supreme Court of South Carolina in King stated the following:

> In this State it is well settled that the burden rests upon the party to prove negligence. This burden cannot be met by relying upon the theory that the thing speaks for itself or that the very fact of injury indicates negligence... In order, therefore, for a plaintiff to recover damages, she must prove by the greater weight or preponderance of the evidence not only the injury but also that it was caused by the actionable negligence of the defendant.

King v. J. C. Penney Co., 238 S.C. 336, 339–40, 120 S.E.2d 229, 230 (1961) (internal citation omitted). Watson v. Ford Motor Co., 389 S.C. 434, 452-3, 699 S.E.2d 169, 178-9 (2010), is particularly instructive because, after it was decided that Plaintiff's expert would be excluded, the court noted that South Carolina does not follow the doctrine of *res ipsa loquitor*, and that Plaintiff's case could not rely solely on the fact an accident occurred to prove negligence.

In Cooper v. Smith & Nephew, Inc., et al, 259 F.3d 194, 196-7 (4th Cir. 2001), the Fourth Circuit Court of Appeals affirmed a trial court's granting of summary judgment dismissing a Plaintiff's claim for personal injuries based upon allegedly defective pedicle screw fixation devices to treat spinal injuries. Plaintiff's expert testified that his determination of whether a device was defective or not was based simply on whether the surgery was successful. Id. at 201. The court stated, "Daubert requires more than an assertion that if there is a lack of surgical success, there is

ipso facto a product defect, and hence causation is established." Id. In affirming the trial court that Plaintiff's testimony was unreliable, the court found that Plaintiff's expert failed to provide any medical evidence as to what caused Plaintiff's injuries, but rather inferred causation because the surgery in question ultimately was not successful. Id. Similarly, although South Carolina does not explicitly follow Daubert, the courts of this state do require the expert's testimony to be reliable. Just as in Cooper, the inability to testify as to proximate cause renders Dr. Wikas's opinion to be unreliable.

"It is well settled under our decisions that where medical testimony is relied on to show a causal connection between an accident and a certain result, it is not sufficient for the doctors to say simply that the ailment in question 'possibly' or 'might have' resulted from the accident, but the medical experts must go further and testify at least that in their professional opinion the result in question 'most probably' came from the alleged cause." Windham v. City of Florence, 221 S.C. 350, 358, 70 S.E.2d 553, 556 (1952). Dr. Wikas's testimony indicates that he has testified as an expert on behalf of Plaintiffs in medical malpractice actions on numerous occasions. He admitted to owning expert witness books and attending various expert witness courses. As such, he would understand the exacting standard that South Carolina law requires for a medical malpractice expert to testify to a reasonable degree of medical certainty that the injury complained of was "most probably" caused by the alleged conduct. Despite having this foundational knowledge, this Court finds that Dr. Wikas did not once testify to a reasonable degree of medical certainty that the Kenalog injected by Defendant Nurse Practitioner Hussey was most probably the cause of the Plaintiff's atrophy or other alleged side-effects.

In contrast, Dr. Wikas testified on multiple occasions that the injury itself is evidence of negligence and an injection in an improper location/of improper concentration and/or of improper

volume by Defendant Nurse Practitioner Shannon Hussey. Specifically, Dr. Wikas's testimony was in relevant part:

> Q: Dr. Wikas, as I understand your opinion in this case, your opinion is that you see a depression or atrophy on Tara Gurry's leg, correct?
>
> A: Correct.
>
> Q: And your opinion is that something must have been done wrong to have caused that atrophy, correct?
>
> A: Correct.
>
> Q: You don't know exactly what, but something had to have been done wrong, correct?
>
> A: I thought it was due to the injection of excessive concentration, excessive volume of Kenalog.
>
> Q: All right. Because I think the way you explained in your deposition is the thing speaks for itself.
>
> A: Correct.
>
> Q: Okay. Basically, a res ipsa loquitur….In fact, it's kind of a legal term, res ipsa loquitur, that the fact that there's been an injury, somebody must have done something wrong to have caused that, correct?
>
> A. In this case, yes.

[Dr. Wikas *de bene esse* Dep. 59: 23-25; 60: 1-23]

Portions of Dr. Wikas discovery deposition were attached to the Motion in Limine, and it in relevant part reads as follows:

> A: Well, all I can tell you is it really doesn't matter in this case because the results speak for themselves.

[Dr. Wikas Discovery Dep. 107:21-23].

Moreover, in Dr. Wikas's *de bene esse deposition*, he testified as follows:

> Q: All right. And you would agree though that if Nurse Practitioner Hussey had administered 3.3 milligrams per CC of an intralesional steroid for a hypertrophic scar, that would be an appropriate amount and concentration, correct?

A: Correct.

Q: So, based on the medical record of May the 3rd, 2016, that was the amount and the concentration of intralesional steroid that was documented in the record, correct?

A: Correct.

Q: So, what Nurse Practitioner Hussey documented as far as what she injected, that would be acceptable and that meets the standard of care, but you just don't believe that she did that, correct?

A: Correct.

[Dr. Wikas *de bene esse* Dep. 60:24-25; 61: 1-15]

Q: So, Doctor, you would agree that the amount of approximately 1 cc of a 3.3 milligram of intralesional steroid, that should not cause the depression like what you see in Ms. Gurry's leg, correct?

A: Yes, you're correct.

Q: Okay. So the amount, you would not expect that to cause the depression or atrophy if you're giving 1 CC of about 3.3 milligrams of Kenalog?

A: That's correct.

Q: And, in fact, you've never seen, you've never heard, you've never even seen it anywhere in the literature that approximately 1 cc of 3.3 milligrams of an intralesional steroid would cause a depression like what Ms. Gurry had, correct?

A: Correct.

[Dr. Wikas *de bene esse* Dep. 62:6-22; 63: 1-15]

Q: You've never seen ever that 1 cc of 3.3 milligrams of Kenalog is going to cause what you see in Tara Gurry's leg, correct?

A: Correct.

Q: You've never heard of something like that happening, correct?

A: Correct.

Q: You've never seen anything in any literature that would describe that type of result with about 1 cc of 3.3 milligrams of Kenalog, correct?

A: Correct.

Q: And you yourself, as you've testified, you give intralesional steroid Kenalog in your patients, correct?

A: Yes.

Q: And you've done that hundreds of times, correct?

A: Yes.

Q: And you've given that medication in doses that could even be higher than 3.3 milligrams, correct?

A: Yes.

Q: And you have never had any depression ever, correct?

A: Correct.

Q: Now, with the Kenalog injection, this intralesional steroid, the purpose is to soften and flatten any kind of raised area on a scar, correct?

A: Yes.

Q: And so is that caused -- is that called atrophy…. With an intralesional steroid, is the goal of utilizing an intralesional steroid to flatten or soften the appearance of the scar?

A: Yes.

Q: And by flattening or softening that scar, is that in itself atrophy?

A: Technically, yes.

Q: Okay. But what we're talking about here is a greater amount of atrophy; is that fair to say?

A: Yes.

Q: And you would agree that injecting 1 cc of 3.3 milligrams of Kenalog, it would not be foreseeable that that's going to cause the depression that Tara Gurry has, correct?

A: Yes.

Q: That would not be a natural or probable consequence of injecting that amount of steroid into a scar, correct?

A: Correct.

Q: It would be highly unusual, would it not?

A: Yes.

Q: Very abnormal, correct?

A: Correct.

Q: Because if that amount of injection is used, you would not have the result that she has, correct?

A: Yes.

Q: And your opinion is that you find no other possibility, no other reason for this depression other than Nurse Practitioner Hussey must have done something wrong, correct?

A: Correct.

[Dr. Wikas *de bene esse* Dep. 63:10-25; 64: 1-25; 65: 1-25; 66: 1-2]

A: I felt that [NP Hussey] fell below the standard of care because [Plaintiff] had catastrophic thinning of the skin, a depression, accentuation of blood vessels, there was sensitivity to touch, so I felt that her activities were well below the standard of care.

[Dr. Wikas *de bene esse* Dep. 14:22 – 15:2]

A: It was my impression that she injected too much corticosteroid, probably too deeply, too high a concentration, too large a volume.

[Dr. Wikas *de bene esse* Dep. 15:7-10]

A: I think the results speak for themselves. I've never seen – Ms. Hussey said she injected 3.3 milligrams of the corticosteroid into the incision site. I've injected that amount of concentration many, many times, literally at least hundreds of times, and I've never seen a wound implode.

[Dr. Wikas *de bene esse* Dep. 21:10-16]

A: The amount Ms. Hussey said she injected really doesn't jive with the results....

[Dr. Wikas *de bene esse* Dep. 31:17-18]

Q: Your opinions as to the cause of Mr. Gurry's injuries are solely based on the fact that she's got this atrophy, and now you've backtracked and tried to come up with some explanation as to what could have caused that. In essence, the thing speaks for itself; something must have been done wrong, correct?

A: Correct.

[Dr. Wikas *de bene esse* Dep. 87:16-23].

Q: Yes, because you have no evidence to truly say that there was a wrong concentration or the wrong dose or the wrong site, correct?

A: There's no concrete evidence.

[Dr. Wikas *de bene esse* Dep. 88:4-7].

Q: And as we've discussed, you've not seen and you're not aware of any literature that supports your opinion, correct?

A: Correct.

Q: And you've not performed any testing or any kind of methodology to see if your hypothesis is correct, correct?

A: Correct.

[Dr. Wikas *de bene esse* Dep. 88:13-20].

This Court finds that Dr. Wikas's testimony is purely supposition and does not pass the requirements imposed upon the Court and its gatekeeping function. Clearly, this case involves medical issues which are outside the ordinary knowledge of the jury, thus, requiring an expert to explain the matter to the jury. Watson, 389 S.C. at 446, 699 S.E.2d at 175. While the Court acknowledges that Dr. Wikas may be qualified by his education and training to testify as an expert in the field of dermatology and may testify as to matters specifically related to dermatology, the Court does not make a determination on the qualification of Dr. Wikas to testify as to his expertise in matters outside the field of dermatology. However, this Court finds that the substance of his

testimony is not reliable, in part because he does not perform the type of melanoma excision which Plaintiff had in the months prior to the Kenalog injection at issue, but primarily because he cannot causally relate the Plaintiff's alleged injuries to any breach in the standard of care.

As detailed above, Dr. Wikas testified that the alleged negligence in this case is evidenced by the injury to the Plaintiff (atrophy), and that it is a known side effect of the injection given, which he assumes was caused by too high of a concentration of Kenalog, too much volume injected, and/or improper injection location. Dr. Wikas admitted that he has never experienced, heard, or even read about an injection given as documented in the medical record in this case (1cc 3.3 mg intralesional steroid) causing the type of atrophy which the Plaintiff alleges. This demonstrates that his speculative opinion is completely unreliable as he has failed to locate any literature to support his supposition. Furthermore, Dr. Wikas conceded that if Nurse Practitioner Hussey gave the injection as she documented, she met the standard of care in doing so. "When the injury complained of is not reasonably foreseeable, in the exercise of due care, there is no liability." Eadie v. Krause, 381 S.C. 55, 64, 671 S.E.2d 389, 393 (Ct. App. 2008). If the atrophy the Plaintiff alleges truly occurred as the result of Nurse Practitioner Hussey injecting the amount of Kenalog that is reflected in the medical records, it would truly be a catastrophic, unforeseeable event. Because such a result would be unforeseeable based on the evidence, there could be no liability. See Kennedy v. Carter, 249 S.C. 168, 153 S.E.2d 312; Stone v. Bethea, 251 S.C. 157, 161, 161 S.E.2d 171 (1968) ("Foreseeability of some injury from an act or omission is a prerequisite to its being a proximate cause of the injury for which recovery is sought); McQuillen v. Dobbs, 262 S.C. 386, 204 S.E.2d 732 (1974) (stating that the standard by which foreseeability is determined is that of looking to the "natural and probable consequences" of the complained of

act, and that while it is not necessary that the actor must have contemplated or could have anticipated the particular event which occurred, liability cannot rest on mere possibilities).

Moreover, Dr. Wikas testified and admitted that there is no evidence that there was an injection in an improper location, of improper concentration, and/or of improper volume other than the injury itself, which is a theory of causation that has been rejected by South Carolina Courts. This type of speculative testimony is unreliable and, therefore, under this Court's gatekeeping function, this testimony is inadmissible trial.

Dr. Wikas further testified that atrophy is a known side effect of an intralesional steroid such as Kenalog and is the purpose of the drug. Specifically, he stated as follows:

Q: Now, with the Kenalog injection, this intralesional steroid, the purpose is to soften and flatten any kind of raised area on a scar, correct?

A: Yes.

Q: And so is that caused -- is that called atrophy…. With an intralesional steroid, is the goal of utilizing an intralesional steroid to flatten or soften the appearance of the scar?

A: Yes.

Q: And by flattening or softening that scar, is that in itself atrophy?

A: Technically, yes.

[Dr. Schield Wikas *de bene esse* Dep. 64: 11-25; 65: 1]

This Court finds the Fletcher case on point and, thus, requires granting Defendants' motion to exclude Dr. Wikas's testimony as unreliable. In Fletcher, the Plaintiff had subclavian bypass surgery. Fletcher, 390 S.C. at 461, 702 S.E.2d at 373. Fletcher brought a medical malpractice claim alleging that the doctors were negligent in performing the procedure and that she was not properly advised of the risks associated with the procedure. See id. at 390 S.C. at 461-62, 702

S.E.2d at 373. Similar to the Plaintiff in this case, the Plaintiff in Fletcher testified that she would not have undergone the procedure had she known of the potential risks and outcome. See id. at 390 S.C. at 462, 702 S.E.2d at 373. During cross-examination, the Plaintiff's expert testified that "complications … could have occurred during this procedure even in the absence of any surgical negligence." Id. at 390 S.C. at 463, 702 S.E.2d at 374.

Analogously to the expert in Fletcher, Dr. Wikas testified that atrophy and pain are known side effects of a Kenalog injection. The expert in Fletcher testified "Q: Do you see anything in there [the operative note and records] that indicates that Dr. Brothers used any improper technique to do this operation? A: No." Id. (brackets in original). Similarly, Dr. Wikas testified that the amount of Kenalog Nurse Practitioner Hussey documented to have injected was an appropriate amount, and with that amount, you would not expect to see any atrophy.

Based on the testimony in Fletcher, the Court of Appeals held the following:

> Essentially, [the Plaintiff] asks us to conclude that the occurrence of a complication is itself evidence of negligence. However, South Carolina does not recognize the doctrine of *res ipsa loquitur*. Simply no evidence establishes how [the Defendants] deviated from the standard of care. Unfortunately, two of the risks associated with this procedure did befall [the Plaintiff]. Nevertheless, we are not permitted to speculate that misfortune was the result of negligence in the absence of any evidence as to how the physicians deviated from the standard of care.
>
> Bowie v. Hearn, 292 S.C. 223, 355 S.E.2d 550 (Ct. App. 1987) (*Bowie I*), addresses this very point. This case was reversed based on the particular facts presented, but the reasoning employed by the court of appeals is instructive. Bowie sued the physician who delivered him via cesarean section because he was cut on the cheek during the procedure, resulting in a scar. Bowie's expert testified the standard of care required the physician not to cut the baby. In analyzing the sufficiency of this testimony, the court alluded to another oft-cited medical malpractice case [Cox v. Lund, 286 S.C. 410, 334 S.E.2d 116 (1985)] and stated: Under the plaintiff's reasoning in this case [Bowie I] the doctors in Cox could simply have testified that normally colons are not perforated during colonoscopies, the standard of care, therefore, is a doctor should not perforate the colon, and to do so violates the standard of care. Such reasoning would, in effect, make a doctor an insurer of perfect result in every surgical procedure. A doctor is not an insurer of health and negligence may not be inferred.

> The analysis in Bowie I is precisely on point with this case, and we discern no factual basis that would cause the reasoning in that case to be inapplicable to the facts presented here. Therefore, we affirm the circuit court's granting of a directed verdict as Fletcher presented no evidence, only speculation, that MUSC's agents deviated from the standard of care.

Fletcher, 390 S.C. at 463-65, 702 S.E.2d at 374-75 (some internal citations and quotation marks omitted).

The reasoning in Fletcher is on point, and Dr. Wikas readily admitted that he was relying on the doctrine of *res ipsa loquitur* to opine that the injury itself demonstrates negligence. This reasoning, and Dr. Wikas's reliance on *res ipsa loquitur*, warrants excluding his testimony at trial.

Plaintiff contends that Dr. Wikas's testimony should not be excluded because Dr .Wikas did testify as to a breach in the standard of care regarding informed consent; however, Dr. Wikas agreed that informed consent can be verbal and that if a result or side effect of a Kenalog injection was not anticipated, there would be no need to inform the patient of that particular potential side effect. Specifically, he testified to the following:

Q: Now, we talked about informed consent, and you contend that Nurse Practitioner Hussey did not give informed consent; is that accurate?

A: Correct.

Q: And you would agree that informed consent can be oral; it doesn't have to be in writing; is that correct?

A: Correct.

Q: And you agree that informed consent is educating the patient about the procedure that's about to occur and telling them that you can have some pain, and potentially what some of the most common adverse reactions or side effects are; is that correct?

A: Correct.

Q: As part of informed consent, you're not required as a medical provider to tell a patient of every possible thing that could potentially happen to them; is that accurate?

A: Yes.

Q: And in fact, as you've explained, what ultimately occurred with Ms. Gurry would not be something that you would expect. You would not expect to have this large depression; is that, correct?

A: Correct.

Q: So that would not be something that you would advise a patient of because it wouldn't be something that would be expected?

A: Correct, if the proper therapy was given.

Q: All right. And do you agree that in the medical record, it is documented that there was a discussion about the procedure, that they reviewed causes, options, and the treatment that was recommended was an intralesional steroid to decrease hypertrophy, side effects were reviewed.

A: Correct.

Q: And that would be appropriate; is that correct?

A: Yes.

[Dr. Wikas *de bene esse* Dep. 88:21-25; 89: 1-25; 90:1-10]

Moreover, as previously noted, Dr. Wikas agreed that it would not be foreseeable that injecting 1 cc of 3.3 milligrams of Kenalog would cause the depression that Tara Gurry had, and in his discovery deposition, he testified that there was no evidence that had the Plaintiff been told about the potential for atrophy that she would have chosen not to get the injection. [Dr. Wikas *de bene esse* Dep. 65: 6-10; Discovery Dep. 111:23-25; 112:1-4]

In totality, this Court finds that Dr. Wikas's opinions are pure speculation solely relying on the doctrine of *res ipsa loquitur* and are impermissible under South Carolina law. See Watson, 389 S.C. at 452-453 (S.C. 2010) (noting that "Respondents may not rely solely on the fact that an accident occurred to prove their products liability case under a negligence theory since South Carolina does not follow the doctrine *of res ipsa loquitur*.") (citing Snow v. City of Columbia, 305

S.C. 544, n.7, 409 S.E.2d 797, n.7 (Ct. App. 1991) (noting that South Carolina does not recognize the rule of *res ipsa loquitur*)); see also Fletcher v. Med. Univ., 390 S.C. 458, 463-465, 702 S.E.2d 372 (S.C. Ct. App. 2010) (refusing to apply *res ipsa loquitur* in a medical malpractice action).

This Court has reviewed the entire *de bene esse* transcript of Dr. Wikas, and portions of his discovery deposition which were attached to Defendants' Motion in Limine, and based upon that review, this Court finds that his entire opinion is based on a theory of *res ipsa loquitur*. Dr. Wikas repeatedly testified that Plaintiff's condition alone indicates that there was a breach in the standard of care. Dr. Wikas had no evidence that the Kenalog was injected improperly, that an excessive dose was used, or that an excessive concentration of medication was used. Additionally, Dr. Wikas had no evidence that the injection of Kenalog actually caused the Plaintiff's alleged atrophy, and because Dr. Wikas could not explain the Plaintiff's atrophy other than that it had to have occurred because of something wrong the Defendants did and that there had to be a breach because the condition of atrophy exits, Dr. Wikas has failed to offer any proof of negligence. Dr. Wikas's testimony was essentially that the element of causation was based on the existence of an injury, which is in fact, the very definition of *res ipsa loquitur* which is not recognized in South Carolina. As the case law in South Carolina has borne out, it is not enough to opine that because a medication has a known side effect, and the Plaintiff allegedly experienced that known side effect, that the result must have been due to the medication/Kenalog.

Dr. Wikas's opinions regarding the occurrence of Plaintiff's alleged injury from an intralesional Kenalog injection are not based upon reliable medicine or science making them unreliable. To be reliable, Dr. Wikas's opinions must be based upon reliable medicine or science. See State v. White, 382 S.C. 265, 270 (2009); see also Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 125 L.Ed. 2d 469, 113 S. Ct. 2786 (1993) (holding trial judges must act as

gatekeepers to "ensure that any and all scientific testimony...is not only relevant, but reliable"). As our state supreme court has reaffirmed time and again, "reliability is a central feature of Rule 702 admissibility, and our jurisprudence is in complete accord." White, 382 S.C. at 270. "The Court suggested four factors to consider in deciding reliability in scientific evidence cases: (1) scientific methodology; (2) peer review; (3) consideration of general acceptance; and (4) the rate of error of a particular technique." State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999) (internal citation omitted). Dr. Wikas's singular reliance on his own hypothetical depiction of this event is too speculative, and therefore, is inadmissible under Rule 702, SCRE. Dr. Wikas personally gives these types of injections in the same amount/volume and has never experienced this type of result. However, he has suggested that the intralesional steroid being injected by NP Hussey was in an improper location, in an improper concentration, and/or in improper volume and caused the Plaintiff's atrophy. However, he has failed to conduct any research to establish that such an improper location, concentration, or volume would even create the alleged injury. Similarly, he has not identified any peer review literature which indicates such is even a possibility. See Daubert, 509 U.S. at 593 (stating that whether there is peer-reviewed and published literature on a theory is "pertinent consideration" because "submission to the scrutiny of the scientific community is a component of 'good science,' in part because it increases the likelihood that substantive flaws in methodology will be detected."). "[I]n order to qualify as 'scientific knowledge.' An inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation, i.e., 'good ground' based on what is known." Id.

Furthermore, under a Rule 403, SCRE analysis, this Court finds that his opinions are inadmissible on the basis that any probative value is substantially outweighed by the danger of unfair prejudice and would only confuse or mislead the jury as he testified that he gives the exact

same injection which was used in this case without any problems, yet when NP Hussey gave the injection, it inexplicitly caused Plaintiff's alleged atrophy with no basis for his reasoning other than that an injury occurred.

Because Dr. Wikas's opinions are based purely on speculation, and he has failed to provide any research or medical literature to suggest that what the Plaintiff complains of is even a possibility, his opinions are wholly unreliable and his testimony is excluded from the trial of this case.

Accordingly, the Court hereby grants the Defendants' Motion to Exclude Dr. Wikas's testimony from trial and finds that the testimony of Plaintiff's expert Dr. Wikas is not reliable and is not admissible at the trial of this case.

IT IS SO ORDERED.

[*Electronic Signature Page to follow.*]

Horry Common Pleas

Case Caption: Tara Gurry VS Myrtle Beach Dermatology LLC , defendant, et al

Case Number: 2018CP2605438

Type: Order/Exclude

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148