
DINO E. SCHOFIELD, *et al.*,

Plaintiffs,

v.

MOTOROLA, INC., *et al.*,

Defendants.

No. 2002 CA 001371 A

Judge Frederick H. Weisberg

DAVID C. KELLER, *et al.*,

Plaintiffs,

v.

NOKIA, INC., *et al.*,

Defendants.

No. 2002 CA 001372 A

Judge Frederick H. Weisberg

ALAN MARKS, *et al.*,

Plaintiffs,

v.

MOTOROLA, INC., *et al.*,

Defendants.

No. 2010 CA 003206 B

Judge Frederick H. Weisberg

SHAWN KIDD, *et al.*,

Plaintiffs,

v.

MOTOROLA, INC., *et al.*,

Defendants.

No. 2010 CA 007995 B

Judge Frederick H. Weisberg

CRISTIN PRISCHMAN,
as Personal Representative of
the Estate of PAUL G. PRISCHMAN,

Plaintiff,

v.

MOTOROLA, INC. *et al.*,

Defendants.

No. 2011 CA 002113 B

Judge Frederick H. Weisberg

BRET KENYON BOCOOK and LAURA
LYNN BOCOOK,

Plaintiffs,

v.

MOTOROLA, INC. *et al.*,

Defendants.

No. 2011 CA 002453 B

Judge Frederick H. Weisberg

MINDY S. KEMP BROWN,
individually and as Special Administrator of
the ESTATE OF DANIEL TODD BROWN,

Plaintiffs,

v.

NOKIA, INC., et al.,

Defendants.

No. 2011 CA 006710 B

Judge Frederick H. Weisberg

MONIQUE SOLOMON, individually, and as
the Special Administrator of the Estate of
ANDREW J. SOLOMON,

Plaintiffs,

v.

MOTOROLA, INC. *et al.*,

Defendants.

ROBERT P. NOROSKI, individually,
and as Personal Representative of
the Estate of HEATHER LYNN NOROSKI,

Plaintiffs,

v.

SAMSUNG TELECOMM AMERICA,
LLC, *et al.*,

Defendants.

No. 2011 CA 008472 B

Judge Frederick H. Weisberg

No. 2011 CA 008854 B

Judge Frederick H. Weisberg

ORDER DENYING DEFENDANTS' MOTION TO EXCLUDE PLAINTIFFS' EXPERTS ON THE BASIS OF PREEMPTION

This matter is before the court on defendants' Motion to Exclude Plaintiffs' Experts on the Basis of Preemption. In *Murray v. Motorola*, 982 A.2d 764 (D.C. 2009), the Court held that the plaintiffs' claims were preempted to the extent they alleged injury from cell phones that complied with the 1996 FCC cell phone safety regulations:

[A]lthough we find no express preemption, we conclude that federal law does impliedly preempt plaintiffs' claims insofar as they seek to hold defendants liable for bodily injuries from cell phones that met the radio frequency ("RF") radiation standard adopted by the Federal Communications Commission ("FCC"). At the same time, we conclude that insofar as plaintiffs' claims are premised on allegations that they were injured through use of cell phones that did not meet the

FCC standard, the claims are *not* federally preempted. We also conclude that plaintiffs' claims alleging violations of the District of Columbia Consumer Protection Procedures Act ("CPPA"), D.C. Code § 28-3904 (2001), may survive the preemption challenge.

Id. at 768. In the instant motion, defendants argue that the testimony of plaintiffs' general causation experts should be excluded because the same conflict preemption prevents them from offering an opinion that RF radiation from *compliant* cell phones has adverse non-thermal biological effects, including causation of glioma and acoustic neuroma.

At this stage of the proceedings, defendants' arguments are limited to the admissibility of plaintiffs' expert witnesses based on the methodology they used to reach their opinions, not the validity of plaintiffs' underlying claims. The experts offer factual, scientific evidence to support plaintiffs' legal claims; they do not make legal claims themselves. As the Court of Appeals explained in *Murray*, preemption stems from the Supremacy Clause of the Constitution, which states "the Laws of the United States . . . shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the contrary notwithstanding." U.S. Const. art. VI, cl. 2; *Murray*, 982 A.2d at 771-72 (federal law, including federal regulations, can supplant state law, including common law, through express, field, or conflict preemption). Federal law is the supreme *law* of the land, but there is no constitutional provision that says federal facts are the supreme *facts* of the land. Federal law can preempt state law, but it cannot preempt scientific fact. The scientific truth, whatever it may be, lies outside of the FCC's regulations about what is "safe" or "unsafe." The experts have offered their opinions on the state of the scientific knowledge and general causation. They have testified about the methodology they used to reach those opinions. Their testimony on these points, at this stage of the case, is not subject to preemption.

If an expert's testimony were limited solely to a preempted claim, it would be excluded not because the testimony is "preempted," but because the evidence would not be relevant to a claim properly before the court. In this jurisdiction, admissibility of expert testimony is determined solely by the application of the *Dyas* test, which includes an examination of the relevance of the testimony and consideration of whether its probative value is substantially outweighed by the risk of unfair prejudice. *In re L.C.*, ___ A.2d ___, slip op. at 11-15 (D.C. June 5, 2014); *Dyas v. United States*, 376 A.2d 827, 832 (D.C. 1977). The court has addressed the admissibility of plaintiffs' experts, including the relevancy of their opinions, in a separate order.

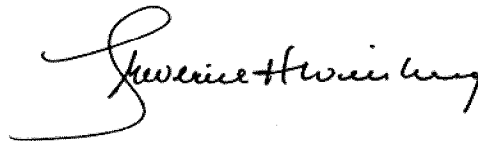
Whether the admissible testimony of plaintiffs' experts will be capable of proving non-preempted claims is a question more appropriate for the specific causation phase of this litigation.¹ The Court of Appeals held that preemption in these cases turns on the specific phone at issue; claims alleging injuries from phones manufactured before 1996 or from non-compliant phones manufactured after 1996 are not preempted. 982 A.2d at 782. In the specific causation phase, plaintiffs will be required to show that specific cell phones caused specific tumors. At that point, defendants will be free to argue that plaintiffs do not have sufficient evidence to prove a non-preempted claim. If necessary, an expert's trial testimony can also be limited in scope in order to confine it to claims that are not preempted. *See Benn v. United States*, 978 A.2d 1257,

¹ On the issue of general causation, plaintiffs' experts are of the opinion that RF radiation from *all* cell phones, including FCC compliant phones, has adverse non-thermal biological effects. Some go farther to say that one of those adverse effects is to cause or promote glioma and acoustic neuroma and perhaps other tumors of the brain. At least some of the experts also believe that the FCC SAR standards based solely on the thermal effects of RF radiation are inadequate to protect against the harm caused by the non-thermal effects. To the extent that these opinions are based on phones that are FCC compliant, they do little to advance plaintiffs' non-preempted claims, which must be based on non-compliant phones. However, if plaintiffs can show that non-thermal radiation from any commercially available cell phone (including FCC compliant models) is capable of causing or promoting brain tumors, then it is likely that non-compliant phones, which presumably emit at least as much radiation as compliant phones, are capable of causing or promoting brain tumors. Hence, defendants' arguments that plaintiffs' experts should not be able to base their opinions on data from compliant cell phones at the general causation stage are without merit. Although plaintiffs cannot recover for any alleged injuries caused by compliant phones, their experts should not be categorically barred from presenting scientific facts derived from compliant and non-compliant phones in an attempt to prove the scientific probability of general causation.

1275 (D.C. 2009). But at this stage in the litigation, before fact discovery on general causation has occurred, any further discussion of preemption is premature.

For the foregoing reasons, it is this 8th day of August, 2014,

ORDERED that defendants' Motion to Exclude Plaintiffs' Experts on the Basis of Preemption is denied.

A handwritten signature in black ink, appearing to read "Frederick H. Weisberg", written in a cursive style.

Judge Frederick H. Weisberg

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