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Motion in Limine to Exclude Expert Testimony of Emanuel Tanay

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CLERK OF COURTS
CUYAHOGA COUNTY

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

ALAN J. DAVIS, Special Administrator
of the Estate of
SAMUEL H. SHEPPARD

Plaintiff

vs.

THE STATE OF OHIO

Defendant

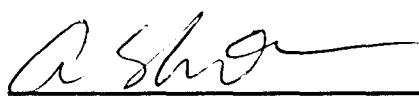
Judge Ronald Suster

Case No. 312322

MOTION IN LIMINE TO
EXCLUDE EXPERT TESTIMONY
OF EMMANUEL TANAY

Defendant moves this court to exclude the testimony and expert report of Emmanuel Tanay for the reasons outlined in the attached brief.

Respectfully Submitted,
William D. Mason
Prosecuting Attorney
Cuyahoga County



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Brief

Introduction and Facts

Plaintiff's proposed expert witness Emmanuel Tanay is a Clinical Professor of Psychiatry at Wayne State University. He submitted a three-page letter dated July 30, 1999 on Wayne State University letterhead as his report. His Curriculum Vitae indicates the same along with his education and training.

His report concludes "...Marilyn Reese Sheppard was murdered in her bed in July 1954 by Richard Eberling...."

Law & Argument

The controlling United States Supreme Court cases on the admissibility of expert testimony are Daubert v. Merrell Dow Pharmaceuticals (1993), 113 S. Ct. 2786, 509 U.S. 579 and Kumho Tire Company v. Carmichael (1999), 119 S. Ct. 1167. Daubert established the primacy of the Rules of Evidence over the previous reliance on the well-known "general acceptance" standard of Frye v. United States, 54 App.D.C. 46, 293 F. 1013 when considering the admissibility of scientific expert testimony. The Kumho case expanded the use of Evidence Rule 702 to the testimony of non-scientific, technical experts.

The Daubert two-step analysis requires that an "expert's testimony both [rest] on a [1] reliable foundation and [be] [2] relevant to the task at hand." Daubert at 2790. An expert's testimony while interesting, or even compelling is not admissible unless it satisfies both of these steps.

Mr. Tanay does not indicate what materials he reviewed to create his report. Before the court even considers his opinion and its relevance, Daubert advises judges to

consider the scientist's principles and methodology in arriving at their opinion. Daubert at p. 2795. The State assumes that Mr. Tanay's testimony will concern the area of psychiatry as it relates to this case. Mr. Tanay's methodology does not involve the review of either Richard Eberling's or Dr. Sheppard's psychiatric histories (if they exist). The conclusions, therefore, of this psychiatrist are not based upon psychiatric information.

Mr. Tanay's report offers opinion in the area of crime scene investigation:

- ✓ "...[the] psychiatrically significant [information]...contradicted the likelihood that this was a spousal type homicide." (Tanay, p.1).
- ✓ "Eberling was able to kill Ethel Durkin because of the *inadequacy of the death investigation* of Marilyn Sheppard." (Tanay, p. 1).
- ✓ "There was not a shred of *evidence* supporting the theory that Marilyn Sheppard was a victim of a spousal homicide." (Tanay, p. 1).
- ✓ "It is my opinion that an unbiased competent investigation would have resulted in the arrest of Eberling and prevented subsequent killings by this man." (Tanay, p. 2).

Mr. Tanay also reaches conclusions outside his purported field of expertise:

- ✓ "The *physical evidence* is consistent with a sexual assault upon Mrs. Sheppard." (Tanay, p. 3). (Emphasis added).
- ✓ "The accusatory unfounded publicity is psychiatrically significant." (Tanay, p. 3). (Emphasis added).
- ✓ "Police disclosures, prosecutor's statements, and the activities of the county coroner Dr. Gerber generated the conviction that Dr. Sheppard was the killer of his wife." (Tanay, p. 3).

Mr. Tanay concludes "it is my firm opinion that the *available information* supports the view that Marilyn Reese Sheppard was murdered...by Richard Eberling..." (Tanay, p. 4). (Emphasis added). He does not specify what he means by the phrase "available information."

This report and proposed testimony are pure unsubstantiated opinion. Mr. Tanay references no documents, testimony, physical evidence or records to support any of his conclusions, psychiatric or otherwise.


Conclusion

Daubert requires that the expert's proposed testimony be both reliable and relevant. Mr. Tanay's report and proposed testimony are neither. Mr. Tanay's report and proposed testimony do not merely rest on a shaky foundation, they rest on no foundation.

The ultimate question is whether Mr. Tanay's testimony, even if the court rules that his methodology is reliable, helps to inform the jury as to whether Sam Sheppard is innocent of the murder of his wife in the early morning hours of July 4, 1954. Mr. Tanay's report and proposed testimony have no bearing on this point.

For the reasons listed above, the State of Ohio requests this court exclude the report and testimony of plaintiff's purported expert, Emmanuel Tanay.

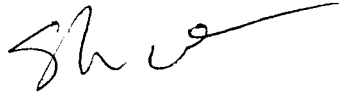
Respectfully Submitted,
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CERTIFICATE OF SERVICE

This Motion to Exclude the Testimony of Plaintiff's Expert Emmanuel Tanay was served upon plaintiffs at 1370 Ontario, The Standard Building, 17th Floor, Cleveland, Ohio 44113, this 15th day of December, 1999 by regular U.S. Mail.



Steven Dever (0024982)
Chief Trial Counsel
Cuyahoga County Prosecutor's Office