

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 18 2008

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

LORRIN WHISNANT, individually,

Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA,

Defendant - Appellee.

No. 06-35927

D.C. No. CV-03-05121-FDB

MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Franklin D. Burgess, District Judge, Presiding

Argued and Submitted April 9, 2008
Seattle, Washington

Before: THOMPSON, W. FLETCHER, and M. SMITH, Circuit Judges.

We conclude that the district court's decision under Federal Rule of Evidence 702 to exclude the testimony of the plaintiff's causation expert was not an abuse of discretion. *See Stilwell v. Smith & Nephew, Inc.*, 482 F.3d 1187, 1191 (9th Cir. 2007). First, the expert's methodology for the intracutaneous tests

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

deviated from the practice parameters of the expert's own professional organization, and the plaintiff failed to provide objective evidence that the methodology was reliable. *See Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1316 (9th Cir. 1995). Second, the expert relied on blood tests after learning from the U.S. Department of Health and Human Services that those results might not be accurate or reliable. The plaintiff failed to provide objective evidence that the blood test methodology was reliable. *See id.* Third, the expert's differential diagnosis failed to account for possible alternate causes of the plaintiff's symptoms. *See Clausen v. M/V New Carissa*, 339 F.3d 1049, 1058 (9th Cir. 2003).

Because the district court did not abuse its discretion in excluding the causation expert's testimony, and because the plaintiff was required to present expert testimony on the causation element of his claim, *Bruns v. PACCAR, Inc.*, 890 P.2d 469, 477 (Wash. Ct. App. 1995), there was no genuine issue of material fact as to the causation element. Therefore, the district court properly granted the defendant's motion for summary judgment. *See In re Syncor ERISA Litig.*, 516 F.3d 1095, 1100 (9th Cir. 2008).

For the foregoing reasons, we AFFIRM the judgment of the district court.