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**COURT URGED NOT TO PERMIT EXPERTS  
TO BASE TESTIMONY ON "JUNK SCIENCE"  
(Zito v. Zabarsky)**

The Washington Legal Foundation (WLF) this week urged a New York appeals court to rule that expert medical testimony must be excluded from court proceedings when it is based on "junk science."

In a motion filed in *Zito v. Zabarsky*, WLF urged the Appellate Division of the New York Supreme Court to reconsider an earlier decision that permitted questionable expert testimony to be introduced in a medical malpractice case. WLF argued that the testimony should have been excluded because the medical conclusions reached by the "experts" lack support in the medical literature. The American Medical Association also urged the appeals court to reconsider its decision.

"All too often, businesses and professionals are being hit with large tort verdicts in cases in which the only evidence that their conduct caused harm amounts to nothing more than junk science," said WLF Chief Counsel Richard Samp after filing WLF's motion. "Unless so-called experts can demonstrate that their conclusions are based on sound science or sound engineering principals, it is incumbent upon trial judges to perform their gatekeeping function by keeping that kind of prejudicial evidence away from the jury," Samp said.

The case is a medical malpractice claim against a doctor who prescribed an FDA-approved drug, Zocor, to a patient to lower his cholesterol level. The patient later developed polymyositis, an autoimmune disease. The patient then filed suit against his doctor, claiming that Zocor caused his disease and that the doctor was negligent in prescribing an "excessive dosage" of Zocor.

There is no medical literature that suggests that taking Zocor can cause polymyositis. Indeed, although Zocor has been marketed to millions of patients over the past several decades, there is virtually no record of any such patients later developing

polymyositis. Nonetheless, the plaintiff located two doctors who were willing to testify that the disease was caused by the plaintiff having taken Zocor. The trial court ruled that the doctors could not establish any sound scientific basis for their opinions and ordered that they be excluded from evidence. The Appellate Division reversed, holding that the testimony was admissible so long as the doctors were properly credentialed and their conclusions were not wholly implausible. The defendant doctor has asked the Appellate Division to reconsider that decision.

WLF's filing was in support of that reconsideration motion. WLF argued that New York heretofore has followed the "*Frye* test," which permits expert testimony based on scientific principles, procedures, or theories only after the principles, procedures, or theories have gained "general acceptance" in the relevant scientific field. WLF argued that the "expert" opinion that taking Zocor caused polymyositis cannot be said to have gained "general acceptance" when there is absolutely no medical literature that so much as suggests such a causal connection.

WLF said that there might be some basis for relaxing the *Frye* test when a drug is new on the market and doctors' experience with the drug is too limited to permit adverse reaction reports to have made their way into the medical literature. There is, however, no basis for such relaxation with drugs such as Zocor which have been marketed for decades and whose adverse reactions thus are likely to have been well reported, WLF argued.

WLF is a public interest law and policy center with supporters in all 50 states, including many in New York. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. In particular, WLF has appeared before numerous state and federal courts in cases raising tort reform issues, and has regularly urged courts to protect defendants against excessive tort liability by fully enforcing rules against the admission of expert testimony grounded in "junk science."

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For further information, contact WLF Chief Counsel Richard A. Samp, (202) 588-0302. Copies of WLF's motion and brief are posted on its web site, [www.wlf.org](http://www.wlf.org).