Date Submitted: April 2, 2002
Date Decided: June 28, 2002

Edward C. Pankowski, Jr., Esquire
1211 King Street
Wilmington, DE 19801

Donald M. Ransom, Esquire
Casarino, Christman & Shalk, P.A.
800 North King Street, Suite 200
Wilmington, DE 19801

Re: *Tonya M. Gass v. Joseph E. Truax*
C.A. No. 98C-12-153-JRJ
Defendant's Motion for Judgment as a Matter of Law, or in the Alternative, for Reargument – **GRANTED**.

Dear Counsel:

Before the Court in this personal injury case is defendant's motion for judgment as a matter of law, or, in the alternative, for reargument pursuant to Super. Ct. Civ. R. 50 and 59. The plaintiff, Tonya Gass, asserts that she sustained personal injuries in May 1997 as a proximate result of a motor vehicle collision caused by the defendant's negligence. According to the plaintiff, the defendant's vehicle collided with the rear end of her vehicle while she was stopped at an intersection.

Just prior to trial, the defendant filed a motion *in limine* to exclude the testimony of Dr. Karen Carew, a chiropractor and the plaintiff's only expert, claiming that Dr. Carew was not qualified to testify as an expert on the issue of causation or permanency. In support of his motion, the defendant argued:

> There…[is] nothing in her testimony or her reports that states how she went about determining causation or how a chiropractor with her training, whatever that training may have been, determines causation in this case.

> And, in fact, a careful review of her reports shows that she, in fact, expressed no opinion that she was going to testify about causation.[1]

The defendant also argued that Dr. Carew was not qualified to render an opinion on permanency[2]

The Court reviewed the transcript of Dr. Carew's trial deposition and noted that Dr. Carew "never explains how she's qualified to give the opinion that the injuries were directly related to the motor vehicle accident."[3] The Court expressed "serious reservations" about Dr. Carew's qualifications.[4] Notwithstanding this, the Court denied the defendant's motion *in limine* because it was filed on the eve of trial,[5] and further because, "if the Court knocks out the chiropractor's testimony at this point, it will leave the plaintiff without a case…."[6] When the defendant pointed out that Dr. Carew testified that her opinions were rendered to within a "reasonable degree of medical certainty," the Court told counsel it would instruct the jury that when Dr. Carew referred to rendering her opinions to within a "reasonable medical certainty," the jury should substitute "chiropractic" for "medical" and understand that her opinions were actually being stated to within a "reasonable degree of probability for a practitioner of *chiropractic* medicine."[7]

Trial commenced on March 21, 2001. Consistent with its pretrial ruling, before Dr. Carew's videotaped trial testimony was played for the jury, the Court instructed the jury to disregard Dr. Carew's reference to "medical certainty" and consider her opinions

---

[1] Transcript of Hearing on Motion in Limine, March 19, 2002 at 4 (hereinafter "Tr. Mot. Limine at ___")
[2] *Id.* At 5.
[3] Tr. Mot. Limine at 8-9.
[4] *Id.* At 10-11.
[5] *Id.*
[6] *Id.*
[7] *Id.* At 11 (emphasis added).

rendered to within a reasonable degree of probability in the field of chiropractics. On March 22, 2002, the jury returned a verdict in favor of the plaintiff in the amount of $10,000. The defendant then filed this motion.

When determining a motion for judgment as a matter of law under Rule 50, the Court does not weigh the evidence but, rather, views the evidence in the light most favorable to the non-moving party and, drawing all reasonable inferences therefrom, determines if a verdict may be found for the party having the burden.[8] When determining a motion for reargument under Rule 59, the Court must consider whether it "overlooked a precedent or legal principle that would have controlling effect, or that is has misapprehended the law or the facts such as would affect the outcome of the decision."[9]

The question presented is whether Dr. Carew is competent under the Delaware Rules of Evidence to render opinions regarding causation and permanency. Under Delaware Rule of Evidence 702, expert testimony is admissible provided that the expert is qualified to testify by virtue of his or her "knowledge, skill, experience, training or education," and the scientific, technical or other specialized information "will assist the trier of fact to understand the evidence or to determine a fact in issue.... "[10] To determine whether the expert's testimony will assist the trier of fact, the Court must consider the following:

> (1) Is the reasoning or methodology underlying the opinion scientifically valid?
>
> (2) Can that reasoning or methodology be properly applied to the facts at issue?

---

[8] *Lee v. A.C. & S. Co., Inc*., 542 A.2d 352 (Del. Super. 1987).
[9] *Monsanto Company v. Aetna Casualty and Surety Company*, 1994 WL 46726, at *2 (Del. Super..) (citations omitted), *aff'd*, 653 A.2d 305 (Del. 1994).
[10] D.R.E. 702.

(3) Has the theory or technique been tested, subject to peer review and publication?

(4) Is it generally accepted?[11]

Unfortunately, the plaintiff failed to establish through Dr. Carew's testimony that she has sufficient education, training, experience and expertise to render an expert opinion on the issues of causation and permanency. Specifically, the plaintiff did not establish through Dr. Carew's testimony that she has training and experience in determining diagnoses of injuries, including determination of the mechanism and causation of injury. Nor did plaintiff establish through Dr. Carew's testimony that she has training and experience in determining the prognoses of injuries, which, in turn, would in some instances translate into a permanency determination. The Court cannot determine if the reasoning or methodology underlying Dr. Carew's causation opinion is scientifically valid because she failed to explain what reasoning or methodology she employed. Instead, Dr. Carew simply testified that she graduated from Palmer College of Chiropractic where she simultaneously received her Bachelor of Science degree and her Doctor of Chiropractic degree.[12] When asked to define chiropractic medicine, Dr. Carew responded, "chiropractic medicine is the treatment of basically the spine, looking for problems with neuromuscular skeletal movement.[13] Dr. Carew testified she has been licensed as a chiropractor in South Carolina since May 1996 and she devotes "probably less than ten percent" of her practice to treating persons injured in auto accidents.[14] Dr. Carew testified that she testified in court once in South Carolina.[15] Unfortunately, this

[11] *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 593-94 (1993).
[12] See Carew Trial Dep. At 3-7.
[13] *Id.* at 5.
[14] *Id.*
[15] *Id.* at 7.

was about the extent of the testimony she provided on the issue of her education, training, experience and expertise.[16]

Dr. Carew testified that the plaintiff first saw her for evaluation and treatment on August 10, 1998, more than one year after the collision that is the subject of this dispute.[17] At that time, Dr. Carew took the plaintiff's history and performed various physical tests and x-rays of her spine.[18] Based upon this examination, Dr. Carew diagnosed the plaintiff with radiculitis and vertebra subluxation.[19] Dr. Carew testified, without any substantiation or explanation, that in her opinion, plaintiff's injuries were the result of the accident.[20] While it is undisputed that Dr. Carew undertook a history and physical of the plaintiff and made a diagnostic determination, at no time during the course of her deposition did she testify as to the reasoning or methodology she employed to reach the conclusion that the plaintiff's injuries were causally related to the May 3, 1997 collision. Nor did she opine as to how her training and experience qualify her to render such an opinion. Regrettably, these omissions leave the Court no choice but to exclude Dr. Carew's testimony as inadmissible pursuant to Rule 702.[21]

Similarly, with respect to Dr. Carew's opinion on permanency, the Court finds that Dr. Carew failed to demonstrate through her testimony that she is qualified by education or training to render an opinion on permanency or to utilize the American Medical Association Guide to Permanent Impairments to render an opinion on permanency.

---

[16] Carew Trial Dep. at 4.
[17] Carew Trial Dep. at 7.
[18] Carew Trial Dep. at 7-8.
[19] Carew Trial Dep. at 35.
[20] Carew Trial Dep. at 26.
[21] D.R.E. 702.

Although it is a harsh result for plaintiff, the Court finds that the defendant is entitled to judgment as a matter of law. The plaintiff failed to (1) establish the qualifications of her expert to render opinions on causation and permanency, (2) explain or define the reasoning or methodology the expert utilized to reach a diagnosis and prognosis, (3) establish that the reasoning or methodology employed by the expert are scientifically valid, and (4) explain why such reasoning or methodology could be properly applied to the plaintiff's injuries.[22] Because the plaintiff offered no other expert testimony to establish proximate cause or permanency of the plaintiff's injuries, the defendant's motion for judgment as a matter of law must be **GRANTED**. Having granted the motion for judgment as a matter of law, the defendant's motion for reargument is moot.

IT IS SO ORDERED.

_____
Jan R. Jurden, Judge

cc: Honorable Fred S. Silverman

[22] *See Daubert*, 509 U.S. at 593.