

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

LAURA LIVESAY, Individually :
and as Next Friend to :
CHRISTOPHER E. RAWLINS, a :
Minor, :

Plaintiffs, :

v. :

C.A. No. 00C-12-038 CLS

SUE HEAGY and :
EARLINE PERRY :
Defendants. :

Submitted: September 10, 2004

Decided: December 20, 2004

On Plaintiffs' Motion to Exclude the Expert Testimony of Bradley Probst.
GRANTED.

MEMORANDUM OPINION

Joseph J. Longobardi, III, Esquire, Wilmington, Delaware, Attorney for Plaintiffs.

Beth H. Christman, Esquire, Casarino Christman & Shalk, P.A., Wilmington,
Delaware, Attorney for Defendant Earline Perry.

SCOTT, J.

I. INTRODUCTION

Plaintiffs have filed a Motion to Exclude the Expert Testimony of Bradley Probst (“Probst”). Upon consideration of the evidence presented at oral argument, review of Plaintiffs’ motion, Defendants’ response, and additional materials provided at the court’s request concerning the basis for Probst’s report, this court concludes Plaintiffs’ motion should be **GRANTED**.

II. BACKGROUND

This is a personal injury action arising from an automobile accident. Defendant Earline Perry’s (“Perry”) vehicle struck the rear of Defendant Sue Heagy’s (“Heagy”) vehicle, which in turn struck the rear of Plaintiff Laura Livesay’s (“Livesay”) vehicle. Plaintiff Christopher Rawlins (“Rawlins”) was a passenger in Livesay’s vehicle. Heagy has been dismissed as a Defendant.

Perry has identified Probst as an expert witness to testify to the forces upon the vehicles involved in the accident. Perry states her medical expert will rely upon Probst’s report to make conclusions about the injuries, or lack thereof, to Livesay and Rawlins. Plaintiffs have moved to exclude the testimony of Probst.

III. STANDARD OF REVIEW

Under Delaware Rule of Evidence (“D.R.E.”) 702, expert testimony is admissible provided 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. . . .”¹ D.R.E. 702 is identical to its federal counterpart, F.R.E. 702. In *M.G. Bancorporation, Inc. v. Le Beau*, the Delaware Supreme Court adopted the interpretation of F.R.E. 702 of the United States Supreme Court in *Daubert v. Merrell Dow Pharm., Inc.*² as the interpretation of D.R.E. 702.³ *Daubert* established a “gatekeeping” role for the court to “ensure that any and all scientific testimony . . . is not only relevant, but reliable.”⁴ D.R.E. 702 “establishes a standard of evidentiary reliability”⁵ and “requires a valid . . . connection to the pertinent inquiry as a precondition of admissibility.”⁶ If an expert’s opinion is challenged, “the trial judge must decide if the expert’s testimony ‘has a reliable basis in the knowledge and experience of the relevant discipline.’”⁷

¹ D.R.E. 702.

² 509 U.S. 579 (1993).

³ 737 A.2d 513 (Del. 1999).

⁴ *Daubert*, 509 U.S. at 589; *M.G. Bancorporation*, 737 A.2d at 522.

⁵ *M.G. Bancorporation*, 737 A.2d at 523 (internal citation omitted).

⁶ *Id.*

⁷ *Id.*

The factor test mentioned in *Daubert*⁸ is not a definitive checklist or test, rather, it is a guideline for determining whether any particular opinion is based on valid reasoning and reliable methodology.⁹ “The ultimate touchstone is helpfulness to the trier of fact, and with regard to reliability, helpfulness turns on whether the expert’s technique or principle [is] sufficiently reliable so that it will aid the jury in reaching accurate results.”¹⁰

The decision in *Daubert* was explicitly directed to considerations of expert scientific testimony. In *Kumho Tire*,¹¹ the Court held “that *Daubert*’s general principles apply to [all] the expert matters described on Rule 702.”¹² “[T]he trial judge must determine whether the [proffered] testimony has ‘a reliable basis in the knowledge and experience of (the relevant) discipline.’”¹³ “The factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert’s particular expertise, and the subject of his

⁸ The Court in *Daubert* held the following factors should be considered: (1) whether the reasoning or methodology underlying the opinion scientifically valid; (2) whether that reasoning or methodology be properly applied to the facts at issue; (3) Has the theory or technique been tested, subject to peer review and publication; and (4) Is it generally accepted? *Daubert*, 509 U.S. at 593-94.

⁹ *Pfizer Inc. v. Advanced Monobloc Corp.*, 1999 WL 743927 at *3 (Del. Super.) (internal citation omitted).

¹⁰ *In re Paoli Railroad Yard PCB Litig.*, 35 F.3d 717, 744 (3d Cir. 1994) (internal citation omitted).

¹¹ *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999); adopted by the Delaware Supreme Court in *M.G. Bancorporation*, 737 A.2d at 522.

¹² *Kumho Tire*, 526 U.S. at 149.

¹³ *Id.* (internal citation omitted).

testimony.”¹⁴ The trial judge “is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.”¹⁵

IV. DISCUSSION

The court is asked to decide whether Probst’s testimony, regarding forces on the vehicles determined using biomechanical principles, meets the standards for admissibility of expert testimony. The parties agree that Probst’s testimony does not go to what forces Plaintiffs’ bodies were subjected.

In making the decision on the admissibility of Probst’s biomechanical testimony, the court considered evidence in the following three areas: (1) Probst’s knowledge of the accident, (2) Probst’s knowledge of these plaintiffs, and (3) Probst’s qualifications. The court then considered this evidence as a whole to decide whether Probst has sufficient knowledge to make a reasonable conclusion about the accident and whether that testimony will mislead the jury.¹⁶ If the court concludes the testimony is reasonable and not likely to mislead, the testimony is admissible. In the present case, the court concludes Probst’s proposed testimony is

¹⁴ *Kumho Tire*, 526 U.S. at 150 (internal citation omitted).

¹⁵ *Id.* at 152.

¹⁶ *Cunningham v. McDonald*, 689 A.2d 1190, 1193 (Del. 1997).

inadmissible. Therefore, Livesay's Motion in Limine to Exclude Probst's Testimony is **GRANTED**.

(1) Knowledge of the accident.

The court considered Probst's knowledge of the vehicles' mechanical environments and the events surrounding the accident. Mechanical environments include specific knowledge of the external and internal conditions of the vehicles such as damage to the vehicle(s); actual position of the headrest, including how plaintiff's head contacted the headrest; and the particular model of the seat and its physical characteristics. Events surrounding the accident include knowledge of skid marks and other vehicles involved.

In the present case, the court finds that Probst's testimony relies almost completely upon evidence of the damage to Perry's vehicle. In particular, Probst bases his conclusions on photographs of the vehicle and the repair bill. From this evidence, Probst concludes that the difference in speeds of the vehicles involved was less than 5 miles per hour. Probst also concludes that the forces transferred to Livesay's vehicle via Heagy's vehicle must be even less than what was transferred from Perry's vehicle to Heagy's. Nowhere is there evidence of the damage to Heagy's vehicle. Probst apparently makes the conclusion that Heagy's vehicle was merely passive during the entire accident. The court finds that there is no

testimony to support this conclusion.¹⁷ The court concludes that what did or did not occur with Heagy's vehicle is too speculative to support any reliable conclusions regarding injuries to Plaintiffs based on forces on Perry's vehicle.

In addition, the court finds that Probst has provided no basis to support a conclusion that knowledge of the forces on a particular vehicle can be reliably translated to forces on a body within another vehicle. Even if there was reliable testimony relating forces on a vehicle to forces to a person in that vehicle, there is no information provided that is relied upon by experts in the field that could form a basis for relating forces on a vehicle to forces on a person in another vehicle. The court concludes that because Probst's conclusions are based on forces to Perry's vehicle, not Livesay's vehicle, they are too speculative to be used as a basis for determining any probable injury to Plaintiffs. The conclusions are, therefore, unreliable. To the extent that Probst's testimony involves conclusions regarding forces on Livesay's vehicle based on conclusions regarding Perry's vehicle, Probst's testimony is inadmissible.

(2) Knowledge of these plaintiffs.

The parties have agreed that Probst is not going to testify to the forces on Plaintiffs, even though he makes conclusions about the probability of injury to Livesay in his expert report. Perry has stated that her medical expert will base his

¹⁷ The court notes there is no evidence to contradict this conclusion either.

opinion, in part, on the forces Probst has calculated. The court notes that most of Probst's conclusions are based on calculations of forces on Perry's vehicle. The court finds that the discussion of admissibility applies equally to any calculations of forces on Livesay's vehicle.

The court finds that testimony that relates forces on a vehicle to forces on an occupant's body should be proffered by a biomechanical expert.¹⁸ The court finds a medical expert unqualified to proffer such a conclusion.¹⁹ Even if there were someone qualified to offer such an opinion, the court finds that none of the background information provided to the court by Probst gives any reliable techniques relied upon by experts in the field for calculating how to convert forces on a vehicle to forces on an occupant's body. The closest relevant information provided to this court shows how neck movement correlates to vehicle speed, but the court finds, as noted above, that this does not necessarily provide a reliable linkage between force on a vehicle and injury.

The court notes as well that even if Probst were to testify regarding forces transmitted to Plaintiffs (something that both parties agree he will not do), his

¹⁸ *Eskin v. Carden*, 842 A.2d 1222, 1230 (Del. 2004) (holding "trial judge may admit biomechanical expert opinion that a particular injury did (or did not) result from the forces of an accident. . . where . . . the testimony reliably creates a connection between the reaction of the human body generally to the forces generated by the accident and the specific individual allegedly injured . . .").

¹⁹ After the parties made their initial submissions, the Delaware Supreme Court ruled in *Potter v. Blackburn*, 850 A.2d 294, 300 (Del. 2004) that a medical expert is not qualified to testify "on the

testimony would still be inadmissible. The court finds that even though an expert may calculate a force to be within the limits of what a normal person could withstand, that same force may still be enough to injure a person with a pre-existing back injury.²⁰ The court concludes, therefore, that because Probst's testimony does not, and Perry's medical expert cannot, provide a link between forces on a vehicle and forces on the vehicle's occupants, that testimony is not relevant and must be excluded.

(3) Qualifications

The court asked the parties to submit information regarding how Probst's testimony relates to 24 *Del. C.* Chapter 28 ("Chapter 28"). Chapter 28 makes it unlawful for any person to practice engineering in Delaware unless they are registered under that chapter.²¹

The practice of engineering includes consultation, investigation or evaluation in connection with machines, equipment or processes when such professional service requires the application of engineering principles and data.

sufficiency of the forces generated during this accident and their impact on the cause of the particular injuries claimed . . .”.

²⁰ See e.g. *Eskin*, at 1230-31 (questioning “. . . the reliability of using general biomechanical principles to prove directly that the forces in the accident could not have cause [plaintiff]'s specific injury.”).

²¹ 24 *Del. C.* § 2802.

Consultation and investigation of the forces and stresses employed as a result of an auto accident constitute the practice of engineering.

The exceptions to the registration requirement of Chapter 28 are narrowly tailored,²² and do not cover out of state professional engineers temporarily practicing in Delaware.

Other professions including chiropractors,²³ dentists,²⁴ physicians,²⁵ and nursing,²⁶ have statutes that provide certain exceptions from registration for those persons temporarily practicing in the state. Chapter 28 does not. The chiropractic statute is the most specific. It provides a specific exemption for examination, recommendation, or testimony in litigation.²⁷ The statutes establish minimum requirements for professionals that practice in specific areas that the State has chosen to regulate. The State has chosen to regulate the practice of engineering and has established minimum requirements.

The court concludes Probst is not qualified to offer engineering testimony as he is not registered pursuant to 24 *Del. C.* Chapter 28.²⁸

²² 24 *Del. C.* §2803(7).

²³ 24 *Del. C.* §713.

²⁴ 24 *Del. C.* §1134.

²⁵ 24 *Del. C.* §1726.

²⁶ 24 *Del. C.* §1921(a)(6)

²⁷ See *id.* §713.

²⁸ The Court notes that Probst does not appear to be a registered professional engineer in any state.

V. CONCLUSION

The court concludes that Probst's testimony is inadmissible. The court finds that Probst is not qualified to testify as an engineer. Therefore, Plaintiffs' Motion to Exclude the Expert Testimony of Bradley Probst is **GRANTED**.

IT IS SO ORDERED.

Calvin L. Scott, Jr.
Superior Court Judge