

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

CATHY BURKETT-WOOD and)
CALBEL WOOD, her)
husband,)
) C.A. No. 02C-10-263-CLS
)
) **Plaintiffs,**)
)
) v.)
)
) **THERESA HAINES,**)
)
) **Defendant.**)

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

MEMORANDUM OPINION

Michael I. Silverman, Esquire, Silverman McDonald & Friedman,
Wilmington, Delaware, Attorney for Plaintiffs.

Stephen P. Casarino, Esquire, Casarino, Christman & Shalk, P.A.,
Wilmington, Delaware, Attorney for Defendant.

SCOTT, J.

I. INTRODUCTION

On May 2, 2006, the Defendant Theresa Haines (“Haines”) requested that the Court memorialize in a written opinion its ruling with regard to Plaintiffs’ Motion in Limine to Exclude Bradley Probst’s (“Probst”) biomechanical expert testimony. Upon consideration of the evidence presented, review of Plaintiffs’ Motion and Defendant’s response, the Court concluded that Plaintiffs’ Motion should be **GRANTED**.

II. BACKGROUND

Cathy Burkett-Wood (“Burkett-Wood”) commenced this action against Haines as a result of alleged injuries sustained from an automobile accident which occurred on December 10, 2000 at the intersection of U.S. Route 40 and Delaware Route 7. Haines rear-ended Burkett-Wood as she was attempting to merge onto the highway.

Haines identified Probst as an expert witness to testify to the forces upon the vehicles involved in the accident. Haines stated that the purpose of Probst’s testimony was to demonstrate that the forces involved in the accident were no greater than forces Burkett-Wood would have experienced during everyday living. Before trial, Burkett-Wood moved *in limine* to exclude the testimony of Probst, a biomechanical expert. The Court granted Burkett-Wood’s motion.

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*,² the Delaware Supreme Court adopted the interpretation of F.R.E. 702 of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*³ as the interpretation of D.R.E. 702. *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

¹ D.R.E. 702.

² 737 A.2d 513 (Del. 1999).

³ 509 U.S. 579 (1993).

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.*

testimony ‘has a reliable basis in the knowledge and experience of the relevant discipline.’”⁷

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 in 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]

⁷ *Id.*

⁸ The Court in *Daubert* held that the following factors should be considered: (1) whether the reasoning or methodology underling the opinion is scientifically valid; (2) whether that reasoning or methodology can be properly applied to the facts at issue; (3) whether the theory or technique has been tested, subject to peer review and publication; and (4) whether it has been 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 Litigation*, 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.

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 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 was asked to decide whether Probst’s testimony, regarding forces on the vehicles determined using biomechanical principles, met the standards for admissibility of expert testimony.

The Court considered the evidence as a whole in deciding whether Probst had sufficient knowledge to make reasonable conclusions about the accident and whether that testimony would mislead the jury.¹⁶ If the Court concluded that the testimony was reasonable and not likely to mislead, then the testimony would be admissible. 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

¹³ *Id.* (internal citation omitted).

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).

accident; (2) Probst's knowledge of the Plaintiff; and (3) Probst's qualifications. In the present case, the Court concluded that Probst's proposed testimony was inadmissible. Therefore, Plaintiffs' Motion in Limine to Exclude Probst's Testimony was **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; 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 concluded that Probst's conclusions were too speculative and unreliable to be used as a basis for determining any probable injury to Burkett-Wood. In particular, Probst did not personally examine either vehicle. He based his conclusions on the photographs of the vehicles which he discussed in his report, however, he failed to list them as materials relied upon. Furthermore, since Probst was unable to ascertain Burkett-Wood's actual position he could not calculate the total amount of

force or the force applied to a particular part of her body. He merely talked about what typically or possibly occurred and not what occurred to a reasonable degree of scientific probability. Probst was also unable to determine the actual position of the headrest prior to impact. Based on the foregoing, the Court determined that Probst's conclusions were unreliable.

(2) Knowledge of the Plaintiff

The Court also considered Probst's knowledge of Burkett-Wood's pre-existing degenerative condition since biomechanical testimony must provide definitive evidence that the physics of a particular accident did (or did not) cause a particular injury to a particular individual.¹⁷ The court must consider whether the expert considered the effect of pre-existing medical conditions and the unique susceptibility of a particular plaintiff to the injuries claimed.¹⁸ In the present case, Probst's studies failed to account for Burkett-Wood's pre-existing degenerative condition. His testimony did not connect the general biomechanical analysis of the physical forces involved in the accident to the unique medical history that provided the necessary, reliable link to Burkett-Wood. Therefore, the Court concluded that Probst's generalized conclusions were not a trustworthy measure of the critical fact at

¹⁷ *Eskin v. Carden*, 842 A.2d 1222, 1228 (Del. 2004).

¹⁸ *Id.*

issue and would have resulted in juror speculation, confusion and unfair prejudice.¹⁹

(3) Qualifications

24 *Del. C.* Chapter 28 (“Chapter 28”) makes it unlawful for any person to practice engineering in Delaware unless they are registered under that chapter.²⁰ The practice of engineering includes consultation, investigation or evaluation in connection with machines, equipment or processes when such professional services requires the application of engineering principles and data. 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, and do not cover out of state professional engineers temporarily practicing in Delaware.

Other professions including chiropractors,²¹ dentists,²² physicians,²³ and nursing,²⁴ have statutes that provide certain exceptions from registration for those persons temporarily practicing in the state. Chapter 28 does not.

¹⁹ *See Mason v. Rizzi*, 2004 WL 439690 (Del. Supr.); *Eskin*, 842 A.2d 1222 (Del. 2004).

²⁰ 24 *Del. C.* §2802.

²¹ 24 *Del. C.* §713.

²² 24 *Del. C.* §1134.

²³ 24 *Del. C.* §1726.

²⁴ 24 *Del. C.* §1921(a)(6).

The chiropractic statute is the most specific. It provides a specific exemption for examination, recommendation, or testimony in litigation.²⁵

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 concluded that Probst was not qualified to offer engineering testimony as he was not registered pursuant to 24 *Del. C.* Chapter 28.²⁶

V. CONCLUSION

The Court found that Probst was not qualified to testify as an engineer and that his testimony was inadmissible. Therefore, Plaintiffs' Motion to Exclude the Expert Testimony of Probst was **GRANTED**.

IT IS SO ORDERED.

Judge Calvin L. Scott, Jr.

²⁵ See *id.* §713.

²⁶ The Court notes that Probst does not appear to be a registered professional engineer in any state.