

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

MARY V. KAPETANAKIS and	)	
JOHN PALKA,	)	
	)	
Plaintiff,	)	
	)	C.A. No. 06C-03-233 PLA
v.	)	
	)	
JONATHAN K. BAKER,	)	
	)	
Defendant.	)	

**ON DEFENDANTS' MOTIONS *IN LIMINE*
GRANTED in part; DENIED in part**

Submitted: August 11, 2008*
Decided: August 14 , 2008

This 14th day of August, 2008, upon consideration of the Motions *in limine* filed by Defendant Jonathan K. Baker ("Baker"), it appears to the Court that:

1. This case arises out of a car accident that occurred on July 17, 2004 involving plaintiff Mary V. Kapetanakis ("Kapetanakis") and Baker. Baker has admitted that he was negligent in a manner proximately causing the accident and does not contend that Kapetanakis was negligent in any manner.

* The motions were originally filed on January 18, 2008 and responses were received on February 1, 2008, before the first scheduled trial date. Decision on these motions was deferred after trial was rescheduled. Counsel advised the Court at a conference on August 11, 2008 that no additional motions *in limine* would be filed.

2. On January 18, 2008, Baker filed two motions *in limine*. The first motion seeks a ruling from this Court to exclude vehicle photographs, damage estimates and any testimony regarding how the accident occurred, other than evidence of what happened to Kapetanakis in the passenger compartment of the vehicle. Baker argues that, since he has admitted liability, the photos and evidence of how the accident occurred are not relevant and, even if relevant, are unduly prejudicial. Baker also contends that Kapetanakis may not argue the correlation between her injuries and the damage to the vehicle, absent testimony from a biomechanical expert.

3. The second motion seeks a ruling to exclude the testimony of Glen Greenberg, Ph.D. Dr. Greenberg evaluated Kapetanakis on April 20, 2006, nearly two years after the July 17, 2004 accident. Dr. Greenberg's examination of Kapetanakis revealed a "largely normal neuropsychological evaluation." Apparently relying on Kapetanakis's anecdotal history, Dr. Greenberg concluded:

Her cognitive complaints probably involve a mix of mild initial concussive symptoms that eventually resolved in tandem with a number of psychosocial stressors that affected concentration at times. In addition to the MVA [motor vehicle accident] and her physical concerns, these psychosocial events include her divorce, job loss, and impending job change. She is also considering moving to Pennsylvania and returning to school to train for a new job. Under these circumstances, it is easily [sic] to see how her general focus and mental efficiency may be affected at times, but neuropsychologically she seems to be

doing well and should be reassured that her brain is functioning well. Note is made though, of reduced right hand motor efficiency on one test – a problem that is apparently related to the motor vehicle accident.¹

4. Based on this evaluation, Baker contends that, while qualified to comment on Kapetanakis's condition on April 20, 2006, Dr. Greenberg is not qualified under *Daubert v. Merrill Dow Pharmaceuticals, Inc.*² to testify about Kapetanakis's mental condition prior to April 20, 2006. Specifically, Baker notes that there is no evidence to permit Dr. Greenberg to render an opinion that Kapetanakis suffered from any type of mild initial concussive symptoms. Baker highlights that there is no indication that Dr. Greenberg reviewed plaintiff's prior records or interviewed her prior to April 20, 2006, nor is there evidence that Kapetanakis was evaluated prior to April 20, 2006. Baker also notes that, in light of Dr. Greenberg's conclusion that Kapetanakis's evaluation was normal, any testimony of mental issues would be irrelevant. Finally, Baker contends that lay witness opinions regarding any memory deficits Kapetanakis may have had closer to the accident are inadmissible in the absence of competent expert medical testimony supporting those statements.

¹ Docket 44, Ex. 1, at 6.

² 509 U.S. 579 (1993); *see also M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 523 (Del. 1999) (adopting *Daubert* for the interpretation and application of D.R.E. 702).

5. In response to the first motion, Kapetanakis agrees that photographs and damage estimates should be excluded. She also agrees with Baker's concession that evidence of what happened in the passenger compartment may be admitted. Kapetanakis argues, however, that she may discuss how her body was situated at the time of the accident. She further contends that she can discuss the effect that the accident had upon her in terms of the trauma of the accident, including, but not limited to, testimony concerning treatment for removal of broken glass in her body and her extrication from the vehicle.

6. As to the second motion, Kapetanakis contends that Dr. Greenberg's opinion is reliable under *Daubert*. She argues that he can render an opinion that part of her symptoms were due to the car accident because he can rely on her subjective complaints in his ultimate evaluation. Moreover, because Baker's argument more accurately addresses the weight and credibility of Dr. Greenberg's testimony, it is the province of the jury, not the judge, to weigh Dr. Greenberg's testimony. She notes further that Dr. Greenberg can review additional records from now until trial.

7. In this case, Kapetanakis agrees that she will not submit photographic evidence or damage estimates into evidence.³ Similarly, both parties agree that any evidence of how the accident occurred is irrelevant, given Baker's admission of liability. The parties also agree that Kapetanakis may discuss what happened in the passenger compartment at the time of the accident, including her present-sense impressions. To the extent that both parties agree that Kapetanakis may offer testimony that describes her experience in the passenger compartment during and immediately after the accident, that evidence is admissible. This includes a discussion of her treatment for cuts, abrasions, and the removal of broken glass from her body. Thus, since Kapetanakis may not admit photographs of the car or damage estimates, Defendant's Motion *in limine* to Exclude Vehicle Photos, Damage Estimates, and Details of the Accident is **GRANTED in part**; to the extent that Defendant's motion seeks to preclude Kapetanakis from offering details as to what happened in the passenger compartment during and immediately

³ Even if the parties did not agree, the Delaware Supreme Court's holding in *Davis v. Maute*, 770 A.2d 36 (Del. 2001) would bar the evidence. In *Davis*, the Court held that "a party in a personal injury case may not directly argue that the seriousness of personal injuries from a car accident correlates to the extent of the damage to the cars, unless the party can produce competent expert testimony on the issue." *Davis*, 770 A.2d at 40. In other words, "lay arguments that vehicle damage is probative of personal injuries will not be countenanced." *Sloan v. Clemmons*, 2001 WL 1735087, at *2 (Del. Super. Ct. Dec. 17, 2001).

after the accident, Defendant's Motion *in limine* to Exclude Vehicle Photos, Damage Estimates, and Details of the Accident is **DENIED in part**.

8. As to the second motion, Delaware Rule of Evidence ("DRE") 702 controls the admissibility of expert opinions. DRE 702 states:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.⁴

Thus, to be admissible, expert testimony must be both relevant and reliable.⁵

The expert's methodology, as well as his ultimate conclusion, must have "a reliable basis in the knowledge and experience of the relevant discipline."⁶

Evidence is reliable where it is "based on the methods and procedures of science, rather than subjective belief or speculation."⁷

9. The trial judge acts as the gatekeeper to determine whether the evidence is reliable.⁸ The proponent of the proffered expert testimony

⁴ D.R.E. 702.

⁵ *Price v. Blood Bank of Delaware, Inc.*, 790 A.2d 1203, 1210 (Del. 2002).

⁶ *Id.* (citing *M.G. Bancorporation*, 737 A.2d at 522-23).

⁷ *Id.* (citing *In re TMI Litigation*, 193 F.3d 613, 669 (3d Cir.1999)).

⁸ *Id.* (citing *M.G. Bancorporation*, 737 A.2d at 523).

“bears the burden of establishing the relevance [and] reliability . . . by a preponderance of the evidence.”⁹ The trial judge “does not choose between competing scientific theories, nor is it empowered to determine which theory is stronger.”¹⁰ Rather, the trial judge only determines “whether the proponent of the evidence has demonstrated that scientific conclusions have been generated using sound and reliable approaches.”¹¹

10. The parties agree that Dr. Greenberg is qualified to testify as to his evaluation of Kapetanakis on April 20, 2006. The Court will also allow Dr. Greenberg to testify that Kapetanakis suffered from mild concussive symptoms prior to the accident. In his evaluation, Dr. Greenberg concluded that Kapetanakis’s cognitive complaints “probably involve a mix of mild initial concussive symptoms that eventually resolved in tandem with a number of psychosocial stressors that affected concentration at times.”¹² He based this conclusion on (1) the patient’s subjective complaints; (2) her medical history; (3) his observations; and (4) clinical tests.¹³ At this stage,

⁹ *Quinn v. Woerner*, 2006 WL 3026199, at *3 (Del. Super. Ct. Oct. 23, 2006) (citing *Minner v. Am. Mortgage & Guar. Co.*, 791 A.2d 826, 843 (Del. Ch. 2000)).

¹⁰ *Id.* (citing *State v. McMullen*, 900 A.2d 103, 114 (Del. Super. Ct. 2006)).

¹¹ *Id.* (citing *McMullen*, 900 A.2d at 114).

¹² Docket 44, Ex. 1, at 6.

¹³ Docket 44, Ex. 1.

Kapetanakis has demonstrated by a preponderance of the evidence that (1) Dr. Greenberg's testimony is based upon sufficient facts or data; (2) his testimony is the product of reliable principles and methods; and (3) he has applied the principles and methods reliably to the facts of the case.¹⁴ Dr. Greenberg's opinion that Kapetanakis had mild initial concussive symptoms "ha[s] been generated using sound and reliable approaches[]"¹⁵ and is therefore admissible.

11. Although Baker contends that Dr. Greenberg has not indicated that he relied on previous medical records or that he interviewed Kapetanakis prior to her April 20, 2006 evaluation, Baker's argument goes more to the weight and credibility of Dr. Greenberg's testimony than to its admissibility. The issues raised by Baker are similar to those in *Debernard v. Reed*.¹⁶ In that case, the plaintiff offered doctors' opinions, supported by x-rays, that a car accident aggravated injuries to plaintiff's lower back. On cross-examination, the physicians acknowledged that their opinions were based solely on the plaintiff's representations to them. The defendants also offered expert medical opinions that the plaintiff's injuries could not have

¹⁴ D.R.E. 702.

¹⁵ *Price*, 790 A.2d at 1210 (citing *McMullen*, 900 A.2d at 114).

¹⁶ 277 A.2d 684 (Del. 1971).

resulted from the accident. Nonetheless, the Court permitted the evidence of the plaintiff's medical experts to go to a jury:

It is thus apparent that, of necessity, the jury had to decide an issue of fact raised by the conflict in the medical opinions given by the expert witnesses. In addition, since the plaintiff's experts relied upon the oral representations made to them by the plaintiff, it is apparent that the jury had to determine the credibility of the plaintiff's oral representations. If it found them not to be trustworthy, then there was no evidence for the plaintiff on the issue of damages for personal injury. The resolving of such a question lies solely within the province of a jury.¹⁷

12. In accordance with *Debernard*, the jury should be allowed to determine the trustworthiness of the plaintiff and the accuracy of Dr. Greenberg's opinion. Baker will have the opportunity at trial to offer his own medical experts to rebut Dr. Greenberg's claim that Kapetanakis suffered from mild initial concussive symptoms after her accident. He will also have the opportunity to cross-examine Dr. Greenberg, to challenge his opinion based on his reliance on Kapetanakis's subjective complaints, and to emphasize that Dr. Greenberg found Kapetanakis's test results to be normal. At this stage, Kapetanakis has shown that Dr. Greenberg is qualified to testify as to his findings, including his finding that Kapetanakis suffered from mild initial concussive symptoms. The doctor correctly relied on a combination of her subjective complaints, her medical history, and objective

¹⁷ *Debernard*, 277 A.2d at 686.

findings in arriving at his conclusion. Thus, the weight that should be given to Dr. Greenberg's opinion is for the jury to determine.

13. Concerning testimony about Kapetanakis's alleged memory deficits after the accident, a lay witness may testify about anything "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702."¹⁸ To the extent that a lay witness testifies about her *observations* of and *experiences* with Kapetanakis's memory deficit after the accident, that testimony is admissible under D.R.E. 701. Whether someone had difficulty remembering is something "within the common knowledge of a lay person" and thus admissible lay witness testimony.¹⁹

14. The lay witnesses may not, however, give an *opinion* that Kapetanakis suffered from a memory deficit because the determination of whether Kapetanakis suffered from a memory deficit is a medical diagnosis that must be established by competent medical testimony.²⁰

¹⁸ D.R.E. 701.

¹⁹ See *Seward v. State*, 723 A.2d 365, 373 (Del. 1999).

²⁰ See D.R.E. 702.

15. In *Seward v. State*,²¹ the Delaware Supreme Court held that a police officer could not testify as a lay witness because “the officer’s testimony identifying the substance as crack cocaine was not within the common knowledge of a lay person and therefore the officer improperly testified as an expert.”²² In this case, Kapetanakis has not offered any competent medical testimony supporting a finding of a memory deficit immediately after the accident. Indeed, despite Dr. Greenberg’s findings that Kapetanakis may have suffered from mild initial concussive symptoms, he has never provided his opinion that Kapetanakis suffered from a memory deficit. Under the circumstances, a lay witness may not offer an opinion that Kapetanakis suffered from a memory deficit.

16. Based on all the foregoing, Defendant’s Motion *in Limine* to Exclude Vehicle Photos, Damage Estimates and Details Regarding How the Accident Occurred is hereby **GRANTED in part; DENIED in part**. Defendant’s Motion *in Limine* to Exclude the Neuropsychological Testimony of Glen Greenberg, Ph.D. and Any Lay Testimony Regarding Alleged Memory Deficits is hereby **GRANTED** to the extent that no lay witness may testify that Kapetanakis suffered from a “memory deficit”; to

²¹ 723 A.2d 365 (Del. 1999).

²² *Seward*, 723 A.2d at 373.

the extent that a lay witness may testify as to her observations of Kapetanakis's memory deficits, the motion is **DENIED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary

cc: Gary S. Nitsche, Esq.
Donald Ransom, Esq.