

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

MARIE SMITH,)
)
Plaintiff,)
)
v.) C.A. No. N11C-06-098 MMJ
)
HARRY GREIF and HARRY'S)
TRANSPORT, INC., a foreign)
corporation,)
)
Defendants.)

Submitted: February 11, 2013
Decided: February 21, 2013

ORDER

***Upon Plaintiff's Motion for Application for
Certification of Interlocutory Appeal***

DENIED

1. Following a *Daubert* hearing on January 23, 2013, the Court denied Plaintiff's Motion in Limine to Exclude the Testimony of Defendant's biomechanical expert witness.
2. On February 4, 2013, Plaintiff filed a Motion for Application for Certification of Interlocutory Appeal. Plaintiff argues that the Court's ruling meets the following Supreme Court Rule 42(b) criteria:

- (a) The Court’s Order determined a substantial issue by expanding the “already narrowly tailored realm of admissible biomechanist testimony.”
- (b) The issue involves a question of first impression in Delaware in that the Biomechanist will render an opinion regarding medical causation.
- (c) The Court’s order is in direct conflict with settled Delaware law.
- (d) The Court’s decision is in direct conflict with *Amalfitano v. Baker*¹.
- (e) The Court’s order expanded the narrow exception established in *Eskin v. Carden*.²
- (f) An interlocutory appeal will serve considerations of justice because if admission of the expert testimony is found on appeal to be in error, a second trial will be necessary.

3. Defendants respond that the Court correctly applied the well-settled law of *Daubert*, relying on the guidance provided by the Delaware Supreme Court in *Eskin v. Carden*.³

¹794 A.2d 575 (Del. 2001).

²842 A.2d 1222 (Del. 2004).

³*Id.*

4. Supreme Court Rule 42(b) provides the criteria for determining whether an issue should be certified for interlocutory appeal. To consider whether certification is proper, one of the five criteria set forth in Supreme Court Rule 42(b)(i) - (v) must be satisfied. Under Rule 42(b)(i), the Court may look to the criteria established by Rule 41.

5. The Court finds that its ruling – permitting the biomechanical engineer’s expert testimony – is consistent with controlling precedent. Although it appears that this may be the first instance in Delaware in which this Court has permitted the testimony of a biomechanical engineer expert in an automobile accident case, this Court relied on the guidance provided by the Delaware Supreme Court on this precise issue. The *Daubert* hearing was conducted pursuant to accepted procedure and the Court’s analysis was made according to established criteria.

THEREFORE, Plaintiff has failed to demonstrate that any Delaware Supreme Court Rule 42(b) criteria require that the Court exercise its discretion to certify interlocutory appeal. The Motion for Interlocutory Appeal Pursuant to Supreme Court Rule 42 is hereby **DENIED**.

IT IS SO ORDERED.

/s/ *Mary M. Johnston*

The Honorable Mary M. Johnston