

July 23, 2003

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Re: ***Joseph & Emmanuella Charles v. Jonathan A. Lizer***  
***Civil Action No. 02C-03-039 WLW***  
***Decided: July 15, 2003***

Dear Counsel:

The issues before this Court are (1) whether a chiropractor is competent to be the Plaintiff's sole medical expert on the issue of causation, and (2) whether there has been an adequate foundation laid for this chiropractor to testify as to the causation in this case. You will recall that the Court continued this case to allow further development of the qualifications of this expert witness on the eve of trial. This letter will further amplify the decision of the Court.

The recently enacted statute, title 24, section 717 of the Delaware Code, makes it clear that as a general matter chiropractors are competent to offer opinions within the scope of chiropractic practice<sup>1</sup> as to both causation and permanency.<sup>2</sup>

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<sup>1</sup> The scope of chiropractic practice is defined by title 24, section 701 of the Delaware Code which states:

***Charles v. Lizer***

C.A. No. 02C-03-039 WLW

July 23, 2003

Before the enactment of the statute, the Superior Court had divergent opinions as to the admissibility of chiropractic testimony. The four main pre-statute decisions concerning chiropractor's testimony on causation are *White v. Faith*,<sup>3</sup> *Michael v. Eddies's Service & Tire*;<sup>4</sup> *Powell v. Hudson*;<sup>5</sup> and *Gass v. Truax*.<sup>6</sup> In *White v. Faith*, this Court ruled that the Plaintiff's chiropractor could not testify on issues of causation, permanency, or chronicity because "testimony beyond the scope

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(b) The practice of chiropractic includes, but is not limited to, the diagnosing and locating of misaligned or displaced vertebrae (subluxation complex), using x-rays and other diagnostic test procedures. Practice of chiropractic includes the treatment through manipulation/adjustment of the spine and other skeletal structures and the use of adjunctive procedures not otherwise prohibited by this chapter. DEL. CODE ANN. tit. 24, § 701 (b).

<sup>2</sup> DEL. CODE ANN. tit. 24, § 717 (2003) stating:

Opinions and testimony

(a) Any chiropractor who is duly licensed as a chiropractic practitioner under this chapter shall be deemed competent to offer opinions in the courts, administrative agencies and other tribunals of this State as to matters of causation, within the scope of chiropractic practice, provided the testimony is offered to a reasonable degree of chiropractic certainty and there is otherwise an adequate foundation for the admission of this testimony.

(b) Any chiropractor duly licensed under this chapter shall also be deemed competent to offer opinions in the courts, administrative agencies and other tribunals of this State as to matters of permanent impairment or disability, provided the testimony is within the scope of chiropractic practice, is offered to a reasonable degree of chiropractic certainty and there is otherwise an adequate foundation of the admission of this testimony.

<sup>3</sup> C.A. No. 98C-02-003, Witham, J. (Del. Super. Ct. Jan. 11, 2000).

<sup>4</sup> C.A. No. 97C-02-002, Ridgely, P.J. (Del. Super. Ct. June 9, 1998).

<sup>5</sup> 2002 Del. Super. LEXIS 189 (Del. Super. Ct. 2002).

<sup>6</sup> 2002 Del. Super. LEXIS 442 (Del. Super. Ct. 2002).

***Charles v. Lizer***

C.A. No. 02C-03-039 WLW

July 23, 2003

of [the chiropractor's] treatment . . . could create confusion . . . since [the chiropractor's] expertise is limited.”<sup>7</sup> Conversely, after questioning a chiropractor about the statutory definition of chiropractic therapy, President Judge Ridgely allowed the use of chiropractic testimony about matters of causation in *Michael v. Eddie's Service & Tire*.<sup>8</sup> In *Powell*, Judge Stokes, on the morning of trial, determined that the chiropractor in that case would not be competent to testify as to causation and permanency. However, on a Motion for Reargument Judge Stokes allowed the chiropractor to testify as to causation because he found that a letter from a medical doctor which confirmed the chiropractor's testimony was a “sufficient connection to permit testimony of causation, treatment and associated expenses and is consistent with the Delaware chiropractic statute.”<sup>9</sup> Before the trial in *Gass*, Judge Jurden determined that the chiropractor's testimony was admissible although the Court expressed that it had serious reservations about the chiropractor's qualifications. Nevertheless, when determining a Motion for Judgment as a Matter of Law under Superior Court Civil Rule 50, Judge Jurden opined that under Delaware Rule of Evidence 702 and *Daubert*

[T]he plaintiff failed to establish through [the chiropractor's] testimony

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<sup>7</sup> White, C.A. No. 98C-02-003, Witham, J.

<sup>8</sup> *Michael*, C.A. No. 97C-02-002, Ridgely, P.J. as reported in *Powell*, 2002 Del. Super. LEXIS 189, at \* 9.

<sup>9</sup> *Powell*, 2002 Del. Super. LEXIS 189 at \*10. However, Judge Stokes did not allow the chiropractor to testify as to permanency or chronicity. *Id.*

*Charles v. Lizer*

C.A. No. 02C-03-039 WLW

July 23, 2003

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 [the chiropractor'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 [the chiropractor'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 [the chiropractor's] causation opinion is scientifically valid because she failed to explain what reasoning or methodology she employed.<sup>10</sup>

Thus the Judge determined that the chiropractor was in fact not qualified to testify as to causation.

In enacting the statute the Legislature stated:

This Bill is intended to eliminate the current debate over whether chiropractors are competent to testify in the Courts of this State on matters relating to causation, permanent impairment, and disability. For many years chiropractors had been permitted to offer opinions on these issues until recent Superior Court rulings called into question this practice.<sup>11</sup>

Given the intent of the Legislature in enacting this statute, it appears that a chiropractor alone may be sufficient to prove causation.

Nevertheless, §717 further provides that there must be “an adequate

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<sup>10</sup> *Gass*, 2002 Del. Super. LEXIS 442 at \*5-\*6.

<sup>11</sup> See Synopsis of DEL. CODE ANN. tit. 24, § 717.

***Charles v. Lizer***

C.A. No. 02C-03-039 WLW

July 23, 2003

foundation for the admissibility of the testimony”<sup>12</sup> thus making it clear that this Court must continue to act as a gatekeeper and evaluate each chiropractor’s competency to testify as to causation on a case-by-case basis in accordance with the standards under Delaware Rule of Evidence 702,<sup>13</sup> and *Daubert*<sup>14</sup> and its progeny.<sup>15</sup>

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<sup>12</sup> DEL. CODE ANN. tit. 24, § 717 (a) and (b).

<sup>13</sup> D.R.E. 702 states:

Testimony by experts

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.

<sup>14</sup> According to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the trial judge must decide at the outset whether the proposed testimony consists of scientific knowledge that would assist the trier of fact to understand or determine an issue. Thus the judge must determine: (1) is the reasoning or methodology underlying the testimony scientifically valid; and (2) whether that reasoning or methodology properly can be applied to the facts in issue. Other useful factors include: (3) has the theory or technique been tested; (4) has the theory or technique been subject to peer review or publication; (5) consider the known or potential error rate of a particular scientific technique; and (6) is the theory or technique generally accepted. *Daubert* at 593-594. Additionally *Daubert* explains that this inquiry is a flexible one and that the focus must be on the methodology rather than the conclusions generated. *Id.* at 595.

<sup>15</sup> In *Kumho Tire Co., LTD v. Carmichael*, 119 S.Ct. 1167 (1999) the United States Supreme Court extended the rationale and requirements of *Daubert* to all expert testimony. *Id.* at 1171. In addition the Supreme Court clarified that the trial judge's Rule 702 inquiry should be flexible. In *Kuhmo Tire* the Court further reiterated that the factors mentioned in *Daubert* do not constitute a "definitive checklist or test" but must be "tied to the facts" of a particular case. *Id.* at 1175 (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. at 593). Thus, the trial judge has broad latitude to determine whether *Daubert's* specific factors are, or are not, reasonable measures of reliability in a particular case. *Id.* at 1176. This case line was specifically adopted by

***Charles v. Lizer***

C.A. No. 02C-03-039 WLW

July 23, 2003

After reviewing the trial deposition of the chiropractor, this Court is not satisfied that there is sufficient information provided to allow this Court to make a determination as to this chiropractor's competency to testify as to causation in an automobile accident case. Therefore, before this witness can testify, the Plaintiff must provide additional information as to methodology employed by this chiropractor in making his opinion and the qualifications of this chiropractor to testify as to causation in automobile cases, so that this Court can make its gatekeeping determination under Rule 702 and *Daubert* as adopted by the Delaware Supreme Court in *MG Bancorporation*. This additional information may include but is not limited to: a curriculum vitae detailing the chiropractor's continuing education concerning injuries related to motor vehicle accidents [this was eluded to but not fully explained in the deposition transcript]; additional deposition testimony as to the chiropractor's qualifications and the methodologies he employed; or this witness may be produced live so that the Court may ascertain the necessary information to make its independent determination mandated by the rules of evidence.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.

J.

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the Delaware Supreme Court in *M.G. Bancorporation, Inc., v. Le Beau*, 737 A.2d 513, 521–22 (1999).

***Charles v. Lizer***

C.A. No. 02C-03-039 WLW

July 23, 2003

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