IN THE SUPREME COURT OF THE STATE OF DELAWARE

ELEANOR J. FROMAL,	*	No.: 696, 2002
	*	
Plaintiff Below/Appellant,	*	
	*	
v.	*	
	*	
NILES A. GEORGE, JR.,	*	
	*	
Defendant Below/Appellee.	*	

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY IN C.A. NO. 98C-08-256 (CHT)

OPENING BRIEF OF AMICUS CURIAE DELAWARE CHIROPRACTIC SOCIETY

SCHMITTINGER AND RODRIGUEZ, P.A.

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NATURE AND STAGE OF THE PROCEEDINGS

This is the Opening Brief of Amicus Curiae Delaware Chiropractic Society ("DCS") in support of Plaintiff Below/Appellant Eleanor J. Fromal's ("Appellant") appeal from a ruling of the New Castle County Superior Court which precluded her treating chiropractor, Ronald Saggese, D.C. ("Dr. Saggese") from fully testifying at her personal injury trial. Specifically, in response to Defendant Below/Appellee Niles A. George, Jr.'s ("Appellee") Motion in limine, Dr. Saggese was not permitted to testify that: (a) the treatment he rendered to Appellant was causally related to her automobile accident of December 31, 1996; and/or (b) that Appellant sustained permanent injuries as a result of this accident.

After the jury returned a verdict in favor of Appellant but only for $5,000.00, Appellant filed her notice of appeal to the Delaware Supreme Court on December 18, 2002. (A-6) Thereafter, pursuant to Delaware Supreme Court Rule 28, on January 14, 2003 DCS moved for Leave to File a Brief of Amicus Curiae. This motion was granted by the Delaware Supreme Court on January 27, 2003. DCS appears as an Amicus Curiae in this litigation because it asserts that the legal issues presented in this appeal have broad implications for chiropractic care in Delaware, which permeate beyond this isolated case.

SUMMARY OF ARGUMENT

THE SUPERIOR COURT ERRED WHEN IT PRECLUDED RONALD SAGGESE, D.C. FROM TESTIFYING AT TRIAL AS TO ISSUES RELATING TO CAUSATION AND PERMANENCY REGARDING HIS PATIENT, APPELLANT ELEANOR J. FROMAL.

STATEMENT OF FACTS

DCS hereby adopts in its entirety the Statement Of Facts set forth in Appellant Eleanor J. Fromal's Opening Brief, filed this same date.

ARGUMENT I.

THE SUPERIOR COURT ERRED WHEN IT PRECLUDED RONALD SAGGESE, D.C. FROM TESTIFYING AT TRIAL AS TO ISSUES RELATING TO CAUSATION AND PERMANENCY REGARDING HIS PATIENT, APPELLANT ELEANOR J. FROMAL.

A. SCOPE OF REVIEW

"[A]n Appellate Court must apply an abuse of discretion standard when 'it reviews a trial court's decision to admit or exclude expert testimony.'" M.G. Bancorporation, Inc. v. Le Beau, 737 A.2d 513, 522 (Del. Supr. 1999), citing, General Electric Co. v. Joiner, 522 U.S. 136 (1997). This Court has further held that "[t]he abuse of discretion standard applies on appeals when reviewing a trial judge's ruling on either the reliability of an expert's methodology or the reliability of an expert's ultimate conclusion." Id. At bar, this Court is called upon to review Judge Toliver's categorical exclusion of Dr. Saggese's proffered testimony, applying an abuse of discretion standard.

B. ARGUMENT

Delaware Rule Of Evidence 702 ("D.R.E. 702") governs testimony by experts and provides as follows:

> "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."

Id.

D.R.E. 702 is identical to Federal Rule of Evidence 702. In Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), the United States Supreme Court held that Federal Rule of Evidence 702

imposes a special obligation upon a trial judge to decide two issues regarding scientific testimony, i.e., that it is (1) relevant and (2) reliable. In Kuhmo Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999), the Court expanded Daubert to cover all expert testimony on scientific, technical, or other specialized matters within the scope of Federal Rule of Evidence 702.

In M.G. Bancorporation, Inc. v. Le Beau, 737 A.2d at 522, this Court adopted the holdings in Daubert and Carmichael as correct interpretations of D.R.E. 702. Specifically, Justice Holland wrote:

> "In Daubert, the United State Supreme Court identified certain factors for the trial judge to consider in discharging his or her 'gatekeeping' obligation, e.g., 'testing, peer review, error rates, and 'acceptability' in the relevant scientific community, some or all of which might prove helpful in determining the reliability of a particular scientific 'theory or technique'. In explaining the ratio decidendi of Daubert extended to all expert testimony, the United States Supreme Court reaffirmed Daubert's description of the trial judge's Rule 702 inquiry as a 'flexible' one.' The holding in Carmichael 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 521, 522 (citations omitted).

Regarding the role of a trial judge as "gatekeeper", two issues are raised by the proposed chiropractic testimony of Dr. Saggese during the Appellant's personal injury trial. First, is the testimony is relevant, i.e., will it assist the trier of fact to understand the evidence or determine a fact in issue? Secondly, is the evidence reliable, i.e. is a chiropractor qualified as an expert witness to offer opinions as to causation and permanency based on knowledge, skill, experience, training, or education?

It cannot be gainsaid that Dr. Saggese's proposed testimony was relevant and would have assisted the jury in not only understanding

the Appellant's claim that she was injured as a proximate result of her accident on November 31, 1996, but also her assertion that her injuries were permanent in nature. This testimony would have been crucial to the jury as it deliberated as to what sum of money would constitute fair compensation for the Appellant.

The Court's comments below leave no doubt that the trial judge harbored negative personal beliefs about chiropractic care and that he was unwilling to consider the arguments of Appellant's counsel or to explore the basis of Dr. Saggese's proffered opinions. For instance, the trial judge remarked:

> "But I am very much against chiropractors--given the statute, chiropractors giving medical opinions when they are not doctors of medical science. As long as they stay within their area of expertise, and I think that's probably as close as you're going to get until the Delaware Supreme Court rules on the issue, and I might very well be wrong. I've been wrong before. So, but, sometimes right, sometimes wrong, but never in doubt." (A-7) (emphasis added)

Contrary to the trial judge's remarks, the Appellant never suggested that Dr. Saggese be permitted to give testimony as a doctor of medical science. Rather, as Appellant's counsel made abundantly clear, Dr. Saggese's testimony would have been offered to a reasonable degree of chiropractic certainty. (A-7) Unfortunately, the Court below categorically held that a Delaware licensed chiropractor may never be deemed qualified to testify on matters of either causation or permanency. (A-8) This ruling is an abuse of discretion and is contrary to the general acceptance and respect chiropractic enjoys in the health care field and is also repugnant to the legislative intent of the Delaware General Assembly.

Chiropractic is defined in 25 Del.C. §701 (a) and (b) as follows:

> "(a)'Chiropractic' means a drugless system of health care based on the principle that interference with the transmission of nerve impulses may cause disease".
>
> (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 in the use of adjunctive procedures not otherwise prohibited by this chapter." (emphasis added)

Id.

Instantly, Dr. Saggese has been a licensed chiropractor in the State of Delaware for 13 years. 24 Del.C. §707 establishes very rigid qualifications for licensure in this State, including graduation from a fully accredited chiropractic school and successful completion of both National and State practical examinations. Dr. Saggese graduated from Albany State College and Life Chiropractic College in Marietta, Georgia. He serves as an extern doctor for Palmer Chiropractic College in Davenport, Iowa. (A-9, A-10) If fact, defense counsel did not object when Appellant's counsel offered Dr. Saggese as an expert witness in the field of chiropractic medicine. (A-10)

A reasonable reading of 24 Del.C. §701 compels the conclusion that a chiropractor is qualified to testify, to a reasonable degree of chiropractic certainty, as to all reasonable aspects of the chiropractic care he or she is licensed to provide. Logically, this includes offering opinions as to whether an injury is causally related to a particular traumatic event and/or whether such an injury is permanent in nature. A holding to the contrary needlessly restricts the scope of chiropractic in Delaware.

For many years, Delaware licensed chiropractors have been permitted to fully testify as to causation and permanency in the Delaware Courts, provided there was otherwise a foundation for the proposed testimony. E.g., Michael v. Eddie's Service and Tire, Del. Super. Ct., C.A. No. 97C-02-002, Ridgely, P.J., (June 9, 1998); Harris v, State Farm, Del. Super. Ct., C.A. No. 96C-10-026, Lee, J. (March 31, 1999).

However, this practice was initially called into question by Judge Witham's bench ruling in White v. Faith, Del. Super. Ct., C.A. No. 98C-02-003, Witham, J. (Jan. 11, 2000). Although Judge Witham held that the proposed chiropractic testimony was relevant and that it would have assisted the trier of fact in understanding the evidence, he nevertheless refused to allow the chiropractor to testify beyond merely explaining the scope of the treatment rendered. Judge Witham held that the chiropractor was "not qualified to testify as to the causation or the standard of care of a doctor of medicine, nor give an opinion concerning any permanency, or for that matter, the chronic condition of the Plaintiff." Id.

In a subsequent decision, Judge Stokes allowed a chiropractor to testify as to matters of causation but refused to allow the chiropractor to testify as to permanency. Powell v. Hudson, 2002 WL 31082090 (Del. Super. Ct.) These decisions erroneously reason that chiropractic testimony as to causation and permanency is beyond the licensing authority granted to Delaware chiropractors.

Nothing in 24 Del.C. §701 corroborates such a conclusion. In the Court's comments below, it is apparent that the trial judge felt that only a medical doctor can offer testimony on causation and permanency.

(A-8) It is interesting to note that chiropractors are called upon on a daily basis to opine as to the cause of a particular injury or treatment when they submit billing claims to either personal injury protection insurance, worker's compensation insurance or some other form of health or medical insurance. So long as the chiropractor's treatment relates to the diagnosis and location of misaligned or displaced vertebrae using x-rays or other diagnostic test procedures, a chiropractor is authorized to express opinions as to causation and permanency as a rational extension of chiropractic treatment he or she is licensed and qualified to render.[1]

The General Assembly purposely included the phrase "not limited to" in 24 Del.C. §701(b) as a manifestation that the licensing statute was not an all encompassing definition of chiropractic. To the contrary, the inclusion of this phrase reflects the General Assembly's intention that this statute be broadly constructed.

As further evidence that DCS' position is correct with respect to legislative intent, Governor Minner recently signed into law Senate Bill No. 2, with amendments passed by the Senate on January 12, 2003. (A-11) This legislation was specifically enacted to eliminate the debate over the parameters of the chiropractic licensing statute. Senate Bill No. 2, now 24 Del.C. §718, unequivocally states that chiropractors shall be deemed competent to testify as to causation and

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[1] DCS recognizes that if an adequate foundation for a chiropractor's testimony is otherwise not established, a Court has the authority to exclude such testimony. See, Gass v. Truax, 2002 WL 142653 (Del. Super. Ct.)

permanency, assuming an adequate foundation for the testimony. In fact, the bill's synopsis explains that:

> "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 such issues until recent Superior Court rulings called into question this practice." Id.

The enactment of 24 Del.C. §718 has hopefully resolved this debate, at least prospectively. Unfortunately, the instant Appellant's trial was unfairly prejudiced by the Court's erroneous ruling below that misapplied the chiropractic licensing statute, thereby depriving the jury of the benefit of Dr. Saggese's opinions.

If the Superior Court's ruling below is affirmed, an anomaly would exist for many injured parties in litigation. To-wit, if a patient exercises his or her right to treat only with a chiropractor, that person would not be able to present testimony to a jury that their injury was related to a particular incident or that they sustained permanent injuries. This scenario would needlessly require lawyers and litigants to retain a medical doctor in such a case merely for the purpose of presenting testimony on issues relating to causation and permanency. Not only would this unnecessarily inflate the cost of medical care and litigation, but it would also depreciate and disparage the qualifications of Delaware licensed chiropractors and the valuable service they render to the health care industry and the citizens of this State.

CONCLUSION

For the reasons set forth herein, the Delaware Chiropractic Society prays that the Superior Court's ruling below be reversed and that a new trial be granted wherein Ronald Saggese, D.C. may fully testify as to matters of causation and permanency on behalf of his patient, Appellant Eleanor J. Fromal.

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	*	

CERTIFICATE OF SERVICE

I hereby certify that I have caused copies of the following:

OPENING BRIEF OF AMICUS CURIAE
DELAWARE CHIROPRACTIC SOCIETY

AND

APPENDIX TO AMICUS CURIAE'S OPENING BRIEF

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