SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
Judge

August 27, 2002

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RE: ***Elizabeth Powell and Robert Powell v. Jamie L. Hudson***
C.A. No. 99C-07-039

ON PLAINTIFFS' MOTION FOR REARGUMENT.
GRANTED.

Dear Counsel,

This case stems from an automobile accident that occurred on October 16, 1997. Elizabeth and Robert Powell ("Plaintiffs") sustained injuries as a result of the accident. On July 26,1999, Plaintiffs sued Jamie L. Hudson and Wade E. Hocker ("Defendants"). To help her recovery, Elizabeth Powell visited two chiropractors, Dr. Richard W. Merritt and Dr. B.E. Morrison. Defendants objected to the use of their deposition testimony on the grounds that chiropractors are not qualified to testify on matters of causation, treatment, permanency, or chronicity.

On the morning of trial, the issue was presented. Following argument, this Court barred Plaintiffs' chiropractors from rendering an Opinion as to the causation, treatment, permanency or chronicity of Mrs. Powell's injury. At that time, this Court believed those areas to be beyond the chiropractor's scope of expertise, based in large part on a prior Superior Court bench ruling and a reported North Carolina decision. Considering the impact

on the damage claim, a continuance was granted to determine whether Mrs. Powell's treating medical doctor would provide a "bridge" to the chiropractic testimony. The orthopedic surgeon was Francis C. Drury, M.D.

Thereafter, Plaintiffs filed a Motion for Reargument with this Court. The Plaintiffs also submitted a copy of another Superior Court bench ruling allowing a chiropractor to testify on matters of causation. After conducting its own research, this Court further determined that North Carolina law has substantially changed and would now permit a chiropractor to opine on causation issues. *See Winston v. Brodie*, 571 S.E.2d 203 (N.C. App. 1999) (holding that testimony regarding causation and permanency of injuries to bodily extremities was within the scope of chiropractic therapy).

The parties have carefully argued their respective positions, and no further information is necessary. Consequently, in the interests of justice, this Court grants, on a limited basis, Plaintiff's Motion for Reargument and will modify the *in limine* ruling as later discussed. Nevertheless, chiropractic testimony concerning permanency or chronicity of an injury will not be permitted.

DISCUSSION

Expert testimony is admitted if the specialized knowledge of the expert "will assist the trier of fact to understand the evidence or to determine a fact in issue." D.R.E. 702. Medical testimony is required in most instances to prove issues of causation, permanency, and reasonable and necessary treatment. *Lee v. A.C. &S. Co., Inc.*, 542 A.2d 352, 354 (Del, Super. Ct. 1987). This Court has previously recognized that "opinions involving diagnosis, cause and effects of disease will be confined to those who are skilled in medical science."

Id. Traditionally, the scope of "medical science" exclusively pertained to physicians. More recently, that field has been expanded to recognize chiropractic treatment. *See* 52 A.L.R.2d 1384.

However, a chiropractor's area of expertise is not necessarily coextensive with that of a physician. The chiropractor's scope is defined by statute. *See 24 Del. C*, § 701, If a chiropractor's opinion is within the statutory parameters and is otherwise admissible under the rules of evidence, the weight of such testimony is for the jury. An opinion given to a reasonable degree of chiropractic certainty would provide a firm basis for consideration. This satisfies the principle that damages cannot be awarded speculatively.

As indicated, the Court of Appeals of North Carolina has been confronted with the same question at issue in this case. In 1971 that Court examined the statutory definition of chiropractic therapy to determine the scope of testimony. In *Allen v. Hinson*, the Court held that permitting a chiropractor to give an opinion regarding causation and permanency issues was improper. 185 S.E.2d 852 (N.C. App. 1971). The Court began its analysis with an examination of the statute defining chiropractic medicine.[1] The Court concluded that, according to the statute, "by definition and exclusion" the practice of chiropractic therapy "is limited." *Id.* at 855. Furthermore, the Court stated that "'[d]octors with unlimited licenses are competent to give expert testimony in the entire medical field. Chiropractors, on the other hand, are limited in their testimony to their special field as defined and limited by

[1]In 1971. N.C. Gen. Stat. § .90--143 defined chiropractic therapy as "the science of adjusting the cause of disease by realigning the spine, releasing pressure on nerves radiating from the spine to all parts of the body, and allowing the nerves to carry their full quota of health current (nerve energy) from the brain to all parts of the body."

statute." Id. The Court in its prior ruling substantially relied on *Allen*.

However, in 1977, the North Carolina General Assembly enacted a new statute defining the scope of chiropractic testimony.[2] The effect of the new legislation became clear as a series of court decisions enlarged the range of chiropractic testimony. *See Winston v. Brodie*, 571 S.E.2d 203 (N.C. App. 1999) (holding that testimony regarding causation and permanency of injuries to bodily extremities was within the scope of chiropractic therapy); *Thomas v. Barnhill*, 403 S.E.2d 102 (N.C.App. 1991) (holding that chiropractor could testify about strain or sprain of muscles that complemented spine); *Smith v. Buckhram*, 372 S.E.2d 90 (N.C. APP. 1988) (holding that chiropractor's testimony regarding ligaments of the spine was within the scope of chiropractic therapy); *Mitchem v. Sims,* 285 S.E.2d 839 (N.C. App.1982) (holding that chiropractors are allowed to testify as to diagnosis, prognosis, and disability). Taking the General Assembly's lead, chiropractic testimony was expanded to conform with the statutory parameters. Consequently, the *Allen* decision has become more of historical interest than precedent.

Like the North Carolina Court of Appeals, this Court will look to the statutory

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[2]That statute was later amended in 1989, when section (2) was added. Presently, N.C. Gen. Stat. 90-157.2 reads as follows:

> A Doctor of Chiropractic, for all legal purposes, shall be considered an expert in his field and, when properly qualified, may testify in a court of law as to:
> (1) The etiology, diagnosis, prognosis, and disability, including anatomical, neurological, physiological and pathological considerations within the scope of chiropractic, as defined in G.S. 90-151; and
> (2) The physiological dynamics of contiguous spinal structures which can cause neurological disturbances, the chiropractic procedure prepatory to, and complimentary to the correction thereof, by an adjustment of the articulations of the vertebral column and other articulations.

definition enacted by this state's General Assembly, The Delaware Legislature defined the practice of chiropractic medicine in 24 *Del. C.* § 701(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.

The statute not only defines the practice of chiropractic medicine, it also sets the scope of a chiropractor's expertise, *See Rosenthal v. State Bd. Of Chiropractic Examiners*, 413 A.2d 882 (Del. 1980). More to the point, it sets the limits of chiropractic testimony. Only chiropractic testimony that falls within the statutory parameters will be admitted.

The Delaware Code definition is more limited than its counterpart in the North Carolina Code.[3] Section 701 does not list the topics about which a chiropractor may testify. Furthermore, it makes no mention of a chiropractor's ability to assess the permanency or chronicity of an injury. Yet, the term "diagnosing" read with the treatment provisions should permit a chiropractor to explain the causes of injury.

The statutory parameters are applied with evidential considerations as well. *Daubert v. Merrill Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993); *Nelson v. State*, 628 A.2d 69 (Del. 1993). Factors such as education or training, skill, experience and the information that the chiropractor has obtained may constrict or expand the scope of testimony. Any expert

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[3]This Court is aware that a bill expanding the scope of chiropractic testimony is pending in the General Assembly. It would permit a chiropractor to use the American Medical Association ("AMA") Guidelines to determine impairment. At the present time, the bill has not been enacted into positive law.

must pass muster under D.R.E. 702.

This background also explains the differing opinions of Superior Court judges regarding this issue. In White Y. Faith, Del. Super., 98C-02-003, Witham, J. (Jan. 11, 2000), Judge Witham ruled that the Plaintiff's chiropractor could not testify on issues of causation, permanency, or chronicity The particular chiropractor's education, skill and experience were not sufficient under the circumstances of that case.

Conversely, President Judge Ridgely allowed the use of chiropractic testimony about matters of causation in *Michael v. Eddie's Service & Tire*, C.A, No. 97C-07-002, Ridgely, P.J. (June 9,1998). President Judge Ridgely questioned the chiropractor about the statutory definition of chiropractic therapy. He then asked whether the chiropractor's testimony would be within this field. Satisfied that the testimony would fall within the statutory range, the chiropractor was allowed to testify.

As discussed in the bench ruling, the methodology employed to determine permanency is too speculative. Plaintiff's attorney admitted as much during this Court's bench ruling:

> Your Honor, I don't have any quarrel with the permanency issue and that would be a simple thing to strike out. I certainly think you are absolutely correct on that because there is no reliance, the chiropractor couldn't rely upon the AMA Guidelines and Dr. Merritt did not attempt to do that. He did it based upon his practice. Dr. Drury relates her problems as being caused by the accident. Dr. Drury is an orthopedic surgeon. All the chiropractors do is echo that. They said the same thing, what they treated her for, in their opinion, was caused by accident. I really don't -- in light of your Honor's opinion, I don't know how I can correct that, I mean the causation.

(Hr'g Tr. at 25).

Simply stated, a proper evidentiary foundation was not presented nor could have been.

Therefore the proposed expert opinion fails. *See Gass Y. Truax*, Del. Super., C.A. No. 98C-12-153, Jurden, J. (June 28, 2002).

Following the continuance, a letter from Dr. Drury was reviewed. He opined that "…it would appear reasonably medically probable that the chiropractic treatment given is helpful to Ms. Powell, and it is reasonably medically probably related to the automobile accident of October 19, 1997." This is a sufficient connection to permit testimony of causation, treatment and associated expenses and is consistent with the Delaware chiropractic statute. *See also* D.R.E. 104(a).

Finally, in this litigation, evidence about permanency and chronicity remain excluded. However, testimony regarding causation, treatment, and associated expenses is permitted. Case scheduling will set another trial date.

IT IS SO ORDERED.

Very truly yours,
(signature)
Richard F. Stokes

cc Prothonotary