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 PLAINTIFFS' MOTION TO AMEND TRIAL SCHEDULING ORDER/CONTINUE TRIAL DATE
GRANTED
ON DEFENDANT'S MOTION *IN LIMINE*
GRANTED in part; DENIED in part

Submitted: December 21, 2007
Decided: January 18, 2008

This 18th day of January, 2008, upon consideration of the Motion to Amend the Trial Scheduling Order/Continue the Trial Date filed by Plaintiffs Mary V. Kapetanakis ("Kapetanakis") and John Palka ("Palka") (collectively "Plaintiffs"), and the Motion *in Limine* filed by Defendant Jonathan K. Baker ("Baker"), it appears to the Court that:

1. Kapetanakis alleges that she sustained various injuries as a result of a car accident between herself and Baker on July 17, 2004. Kapetanakis treated with Michael Rosenthal, D.O. for facial and skin abrasions and cuts, David Sowa, M.D. for neck and right elbow problems

that have improved over time, and Keith Sokoloff, D.O. for prior accident-related neck and back injuries.

2. According to Baker, Kapetanakis had no wrist or hand complaints following the accident until late 2005 or early 2006, when a February 2, 2006 EMG (the "EMG") was requested. The EMG reportedly showed bilateral mild carpal tunnel syndrome.

3. Kapetanakis, in fact, complained of pain in her wrist as early as July 20, 2004, just days after her accident. By way of example, during her visits with Woodlyn Physical Therapy, Kapetanakis made complaints of (1) "intermittent numbness and tingling into her bilateral upper and lower extremities"; (2) "bruising on the volar aspect of her right wrist"; and (3) "soreness in the right lateral epicondyle [elbow] extending to the wrist with a burning sensation in the same region."[1] In response to the motions, Kapetanakis also presented a report from Dr. Sowa, dated September 2, 2004, in which he documented complaints of pain and tenderness with resisted wrist extension.[2]

4. Dr. Sokoloff, another physician who treated Kapetanakis, evaluated her on at least three different occasions in 2006 and submitted

[1] Docket 41, Ex. A.

[2] *Id.*, Ex. C.

three reports.[3] The first report, dated February 22, 2006, mentions complaints of numbness and tingling below her elbows in both arms. The second report, dated April 17, 2007, is almost identical to the first report and states that Kapetanakis continues to have numbness in her hands. This report also recommends surgery to relieve symptoms related to carpal tunnel syndrome. The third report, dated November 6, 2007, restates that her symptoms resulted from her July 17, 2004 car accident.

5. Kapetanakis has also included a supplement of her condition from Dr. Sowa, dated November 29, 2007, in which he addressed her carpal tunnel syndrome. Although the report was submitted after the expert report deadline established in the Trial Scheduling Order (the "Order"), the Court's ruling on the request for continuance, *infra*, will rectify any prejudice to Defendant that this late opinion may have caused.[4]

6. To refute her complaints of carpal tunnel syndrome, Ali Kalamachi, M.D. performed a defense medical exam of Kapetanakis on October 7, 2007. Dr. Kalamachi concluded that any carpal tunnel syndrome complaints by Kapetanakis could not be related to the car accident based on

[3] All three of the expert reports by Dr. Sokoloff were included with Defendant's Motion *in Limine*. *See* Docket 39, Ex. 1.

[4] *See* Docket 14 (Trial Scheduling Order).

the considerable time lapse between the accident and the onset of symptoms. He specifically noted:

> I personally cannot attribute her recent symptoms of carpal tunnel in 2006 to be related to her motor vehicle accident of July 17, 2004. She had mentioned that her carpal tunnel syndrome was secondary to her cervical spine injury. This obviously was not accurate nor consistent with symptoms of carpal tunnel disease. At present, this patient does have very little symptoms at best and was not a surgical candidate.[5]

7. In accordance with her treating physicians' findings and recommendations, Kapetanakis has recently decided to undergo surgery with Dr. Sowa to treat her carpal tunnel syndrome. At this time, however, Kapetanakis has not yet scheduled a date for the surgery.

8. Before the Court are two motions. The plaintiffs filed the first motion, a Motion to Amend the Trial Scheduling Order/Continue the Trial Date, wherein they argue that, even if Kapetanakis underwent surgery within the next month, she would not be fully recovered by the March 17, 2008 trial date. To present the issue of damages resulting from Baker's alleged negligence, Plaintiffs request a continuance so that the record may be supplemented with an opinion from Dr. Sowa regarding the extent of her carpal tunnel syndrome following her surgery and recovery.

[5] Docket 39, Ex. 2.

9. In response, Baker notes that discovery has been completed and experts have been identified. To permit a postponement of the case, Baker argues, would create additional costs for Baker, including reexamination of Kapetanakis, additional reports by experts, and additional discovery of Kapetanakis's employment situation. In the alternative, Baker requests that, should the Court continue the case, the Court limit the extension of time solely for discovery relating to evidence of the need for surgery, costs, and any residual permanent injury or impairment. Baker also requests that he be permitted additional discovery regarding any causal determination of Kapetanakis's carpal tunnel syndrome and need for surgery.

10. The defendant filed the second motion, a Motion *in Limine*, to preclude any testimony – specifically that of Dr. Sokoloff – of Kapetanakis's carpal tunnel syndrome. Baker argues that Dr. Sokoloff's opinion that Kapetanakis's carpal tunnel syndrome is causally related to the July 17, 2004 accident is not based on a reliable methodology and is inadmissible under *Daubert v. Merill Dow Pharmaceuticals, Inc.*[6] Baker contends that Dr. Sokoloff's opinion is not based on objective tests, measurements, or any other scientific basis to support a finding that Kapetanakis developed her

[6] 509 U.S. 579 (1993). Delaware has explicitly adopted the *Daubert* standard for determining the admissibility of expert testimony. *See M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 521 (Del. 1999).

condition one and a half years after her accident. If the Court finds that Dr. Sokoloff's testimony is inadmissible, Baker submits that any reference to Kapetanakis's carpal tunnel syndrome – including any reference to her upcoming surgery and its results – must also be excluded because there would be no valid expert opinion that Kapetanakis's carpal tunnel syndrome resulted from the car accident.

11. Kapetanakis responds with evidence establishing that, immediately following the accident, she made complaints – documented by her physicians – of pain, numbness, and tenderness in her wrist. Kapetanakis stresses that her physicians can opine that her carpal tunnel syndrome is causally related to her car accident based on her complaints immediately following her accident, the EMG, and their subjective understanding that Kapetanakis claims that the carpal tunnel syndrome began as a result of the accident. Kapetanakis also points to Plaintiffs' Rule 26 Expert Interrogatory Answers, filed in September 2007, in which the plaintiffs listed James G. Moran, M.D., Dr. Sowa's partner, as an expert to testify on causation.[7]

12. Delaware Rule of Evidence ("DRE") 702 controls the admissibility of expert opinions. DRE 702 states:

[7] Docket 41, Ex. E.

> 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.[8]

Thus, to be admissible, expert testimony must be both relevant and reliable.[9] The expert's methodology, as well as his ultimate conclusion, must have "a reliable basis in the knowledge and experience of the relevant discipline."[10] Evidence is reliable where it is "based on the methods and procedures of science, rather than subjective belief or speculation."[11]

13. The trial judge acts as the gatekeeper to determine whether the evidence is reliable.[12] The "proponent of the proffered expert testimony bears the burden of establishing the relevance [and] reliability . . . by a preponderance of the evidence."[13] The trial judge "does not choose between competing scientific theories, nor is it empowered to determine which theory

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[8] D.R.E. 702.

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

[10] *Id.* (citing *M.G. Bancorporation v. LeBeau*, 737 A.2d 513, 522-23 (Del. 1999)).

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

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

[13] *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)).

is stronger."[14] 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."[15]

14. A similar proffer of expert testimony was evaluated by this Court in *Quinn v. Woerner*.[16] There, Quinn was involved in car accident when she was twelve weeks pregnant. Approximately three months later, Quinn delivered her baby prematurely, and the baby died two days later. Quinn then sued the other driver and sought to introduce the expert opinion of Dr. McCracken, a board certified obstetrician and gynecologist. Quinn proffered that Dr. McCracken would opine that the baby's death was caused by a placental abruption resulting from the accident. Dr. McCracken's sole basis for this conclusion, however, was that this was the "most likely" cause of death.

15. Finding Dr. McCracken's opinion unreliable, the *Quinn* Court refused to admit her opinion as to the cause of death, reasoning as follows:

> While it is not the function of the Court to make a determination as to whether Dr. McCracken's conclusions are correct by weighing the objective evidence, the Court is charged with the duty to ensure that her opinions are based on some articulable and objective standard. In reaching her

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

[15] *Id.* (citing *McMullen*, 900 A.2d at 114).

[16] 2006 WL 3026199 (Del. Super. Ct. Oct. 23, 2006).

> opinion, however, Dr. McCracken failed to articulate her use of "methods and procedures of science" to reach her conclusion. The methodology actually employed by Dr. McCracken consisted of "looking back" in an effort to determine what could be included and excluded as a cause for Quinn's pre-term delivery. This "looking back" method caused her to conclude that, because she subjectively excluded all other causes for Quinn's pre-term delivery, a placental abruption must be the "No. 1" cause. As applied here, however, this "looking back" method does not impart an objective methodology used to reach a medical conclusion and, as such, does not meet the reliability threshold required by *Daubert.*[17]

16. Just as in *Quinn*, Plaintiffs have failed to offer by a preponderance of the evidence that Dr. Sokoloff's opinion is reliable. Dr. Sokoloff based his opinion on two factors: (1) Kapetanakis did not have carpal tunnel symptoms before her July 17, 2004 accident; and (2) Kapetanakis was not employed long enough at her job after the car accident to cause the disease.[18] Like Dr. McCracken, however, Dr. Sokoloff did not employ "objective diagnostic techniques and sound methodology" in reaching his conclusion that carpal tunnel syndrome could arise nearly one and a half years after her car accident.[19] Nor did he conduct a thorough differential diagnosis to rule out other causes of the malady. Dr. Sokoloff did not offer "sufficient facts or data" to support his opinion, nor did he

[17] *Quinn*, 2006 WL 3026199 at *3.

[18] *See* Docket 39, Ex. 1.

[19] *McMullen*, 900 A.2d at 114.

explain his "principles and methods."[20] Without any objective methodology, his approach is merely speculation and is unreliable under *Daubert*.[21] To the extent that Dr. Sokoloff's opinion is inadmissible, Defendant's Motion *in limine* is **GRANTED**.

17. That is not to say that *no* expert may testify as to causation of Plaintiff's carpal tunnel syndrome. Notwithstanding this Court's finding that Dr. Sokoloff may not offer his medical opinion that Kapetanakis's car accident caused her carpal tunnel syndrome, there is sufficient evidence suggesting that her carpal tunnel syndrome may have resulted from her accident. Highlighted by Kapetanakis – and conspicuously and misleadingly absent from Baker's motion – is evidence of wrist and hand complaints to both Dr. Sowa and Woodlyn Physical Therapy immediately following the accident. Dr. Sowa's records also indicate that her carpal tunnel syndrome may be causally related to her accident. Without surgery, however, Dr. Sowa cannot determine whether the accident caused her carpal tunnel syndrome. Because there is evidence of wrist complaints immediately following the accident, this Court is satisfied that the trial should be

[20] D.R.E. 702.

[21] *Price*, 790 A.2d at 1210 (citing *M.G. Bancorporation*, 737 A.2d at 523).

continued so that Kapetanakis may undergo surgery and supplement the record to determine whether the accident caused her carpal tunnel syndrome.

18. For the foregoing reasons, Dr. Sokoloff's testimony regarding the Kapetanakis's carpal tunnel syndrome is excluded. To that extent, Baker's Motion *in limine* is **GRANTED**. The Court, however, also finds that trial should be continued so that Kapetanakis may undergo surgery and supplement the record with her physicians' findings after surgery. The Court will schedule a teleconference to establish a new trial date and new discovery deadlines on the issue of the cause of Plaintiff's carpal tunnel syndrome. The question of whether carpal tunnel may be "mentioned at trial" will have to be determined following further expert discovery, presumably based on Dr. Sowa's opinion. Accordingly, Plaintiffs' Motion to Amend the Trial Scheduling Order/Continue the Trial Date is hereby **GRANTED**; Baker's Motion *in Limine* is **GRANTED in part** and **DENIED in part.**

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary