

## STATEMENT OF FACTS

This is a wrongful death case wherein the decedent, Ester Zydiak, suffered about 30 days pre-death pain, suffering and agony. At the time of the accident Ms. Zydiak was being transported to an adult day care activity in a mobility assistance van owned and operated by the Somerset County Division of Transportation. Ms. Zydiak was confined to a wheelchair due to an earlier stroke she had suffered. When the employees of the defendant loaded Ms. Zydiak into the van, they forgot to strap her into the wheelchair. As the van pulled into the driveway of the day care facility, Ms. Zydiak was thrown out of her van, banged her head on a metal bar and sustained serious injuries which culminated in her death about one month later.

At the time of the accident Esther Zydiak was a frail, 88 year old woman- the classic eggshell plaintiff. Christian Kohler, M.D. has issued an expert report linking the death of Esther Zydiak from a neuropsychiatric-medical perspective to defendants' failure to strap her in her wheelchair. The Kohler report documents in more detail the specific injuries sustained by Esther and the treatment she underwent until her death 25 days later. It also discusses the impact the injuries had on Esther's overall mental health and well being, including inability to eat as a result of her facial injuries. (*Exhibit C*, Kohler report and CV).

Defendant has offered the proposed expert testimony of Daniel Greenfield, M.D., on the issue of linkage of the accident suffered by Ms. Zydiak to her death only twenty five days later. Dr. Greenfield has issued a report dated May 1, 2001. (*Exhibit A*, 5/01/01 report of Dr. Greenfield). Dr. Greenfield was also deposed on October 25, 2001. (*Exhibit B*, 10/25/01 deposition transcript of Dr. Greenfield). However, Dr. Greenfield repeatedly testified in his deposition that he has, "no

opinion” to offer with respect to causation in this case. Therefore, his testimony should be excluded under *N.J.R.E.* 702 because it would not be helpful to the trier of fact.

### **LEGAL DISCUSSION**

Expert testimony is limited to that which “will assist the trier of fact to understand the evidence or determine a fact in issue.” *State v. Berry*, 140 N.J. 280, 291 (1995) (quoting Fed.R.Evid. 702 and N.J. Evidence Rule 56(2) (now N.J.R.E. 702)). Rule 702, “Testimony by Experts” provides the following:

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.

*N.J.R.E.* 702 (emphasis added). Indeed, *N.J.R.E.* 702 clearly requires that expert testimony has to be helpful to the trier of fact before a trial court should allow proffered “expert testimony” to be placed before the jury. Indeed, helpfulness to the trier of fact is the “linchpin” for the admission of expert testimony. Biunno, *New Jersey Rules of Evidence*, 2000 Edition at 677. Although not previously expressed in the New Jersey rules, this notion was widely accepted by our courts even before the rule amendment. *State v. Berry*, 140 N.J. 280, 291 (1995). The *Berry* Court’s quotation from *Rempfer v. Deerfield Packing Corp.*, 4 N.J. 135, 141-142 (1950) is instructive:

The true test of admissibility of [expert] testimony is. . . whether the witnesses offered as experts have peculiar knowledge or experience not common to the world which renders their opinions founded on such knowledge or experience any aid to the . . . jury in determining the questions at issue.

*Id.* As the Supreme Court in *Berry* further noted:

Testing the admissibility of expert testimony by focusing not only on the jury’s comprehension of the subject matter but also on whether the specific proffered testimony will aid the jury in resolving factual issues has been a recurring theme in our cases.

Therefore, if the trial court determines that the proffered expert testimony addresses issues irrelevant to the jury's proper function in the particular case, the testimony may be excluded. Further, where, because of its scientific unreliability, expert evidence poses the danger that "prejudice, confusion and diversion of attention exceeds its helpfulness to the fact finder," that evidence must be excluded. *State v. Cavallo*, 88 N.J. 508, 520 (1982); *Procida v. McLaughlin*, 195 N.J. Super. 396, 402 (Law Div. 1984).

In this case Dr. Greenfield offers nothing more for the jury than a conclusory Monday morning quarterback statement that "no opinion" can be given in this case with respect to causation. Dr. Greenfield continually testified that he has no opinion to offer in this case. For example, he testified as follows:

Q. What, if any, effect did that statement, that Esther Zydiak stopped eating by her own direction, have on the opinions and conclusions you gave in this case? How does that work into your report and opinion?

A. Well, ultimately as I say, my opinion is that an opinion can't be offered by anybody, including Dr. Kohler or me.

(*Exhibit B*, Greenfield dep. at pg 49, ln 14 to 20)

Indeed, Dr. Greenfield was unable to offer meaningful comment with respect to key evidence relied on by Dr. Kohler in establishing causation. For example, Dr. Kohler discussed at some length the fact that after this injury Esther Zydiak reverted back to speaking in her Ukrainian tongue to her son who did not speak this language. When asked the significance of this important information to his opinion he stated he considered it merely "background" information because, "[S]ince [his] opinion is that an opinion is not possible..." (*Exhibit B*, Greenfield dep. at 69). Dr. Greenfield further testified:

Q. You say that you can't--your opinion is that no opinion can be given in this case; is that correct?

A. Yes.

(*Exhibit B*, Greenfield dep. at pg 70). Indeed, on page 71 he clearly stated that he cannot give an opinion within a reasonable degree of medical probability or certainty about whether or not the June 3, accident and head injury ultimately caused Esther Zydiak's death and again on page 83, he stated, "I can't come to an opinion..." (*Exhibit B*, Greenfield dep. at pg 83).

Indeed, in this case, Dr. Greenfield should not be permitted to testify because he has nothing to say to the jury that would help them in their fact finding mission. While Dr. Kohler offers a meaningful opinion and analysis, Dr. Greenfield offers nothing meaningful and essentially admits he has no opinion to offer the jury. In fact, he himself admitted many times that he has "no opinion" to offer whatsoever. Accordingly, his testimony should be excluded under *N.J.R.E. 702* because it will do nothing to assist the trier of fact.

### **CONCLUSION**

Accordingly, it is respectfully requested the Court exclude the testimony of Daniel Greenfield, M.D., at the time of trial.

**LYNCH ♦ MARTIN**

The Galleria  
2 Bridge Avenue, Bldg. 6, 3<sup>rd</sup> Floor  
Red bank, New Jersey 07701  
(732) 224-9400  
(732) 224-9494 (fax)

By: \_\_\_\_\_  
GERALD H. CLARK