

MEMORANDUM

SUPREME COURT - STATE OF NEW YORK
COUNTY OF QUEENS - **IAS PART 12**

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JOSEPH BORZACCHIELLO,

Plaintiff, Index No. 4875/04

- against -

BY: DORSA, J.

AHMED BOUSBACI, JER SERVICE CORP.
AND NORTHERNWAY MANAGEMENT, CORP.

Defendants.

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By Order of this Court, a "Frye" hearing was held concerning the admissibility at trial of defendants' proposed expert testimony of Robert S. Fijan, a biomechanical engineer. The hearing was conducted over four days. Two witnesses were called; Dr. Robert Fijan, a biomechanical engineer and defendants' proffered expert and Robert Daba, an insurance assessor, who took photographs of the plaintiff's vehicle after the accident and before any repairs were done. Dr. Fijan utilized said photos in forming his expert opinion. Dr. Fijan's qualifications included, a bachelor's degree in engineering science, a master's degree in mechanical engineering, and a doctorate in mechanical engineering. Dr. Fijan has taught both mechanical engineering and biomechanics courses at the college level. He has been qualified to testify as an expert in accident reconstruction and biomechanical engineering. Currently, he works independently. Previously he worked in private industry for Exponent, a scientific and engineering consulting firm.

In support of defendants' application to be allowed to proffer expert testimony at trial on the application of biomechanics, defendants' expert testified that he relied on authoritative articles and texts, including accident reconstruction articles (Exhs. A and B); occupant kinematics and dynamics (Exh. E); articles regarding the effect of certain specific forces and motions on the foot and ankle (Exh. F); the Basic Orthopaedic Biomechanics Book, which addresses the types of forces different body parts experience on a daily basis, in everyday activities (Exh. G); and the Handbook of Human Tolerance, which contains information concerning what types of forces are required to produce certain injuries in certain body parts (Exh. H).

Dr. Fijan explained basically that "biomechanics," is the application of mechanical engineering principles to living things.

In "low speed impact," litigation such as before this Court where the defense is questioning the validity of plaintiff's personal injury claim, Dr. Fijan explained, that a biomechanical analysis is a three stage approach (Transcript at 60). First, the expert engages in an accident reconstruction analysis focusing on how the vehicle moved or accelerated as a result of the collision. Second, using occupant kinematics, the expert focuses on how the occupants would have moved within the vehicle and what motions and forces would have applied to the occupants (T-60). Finally, the expert would then draw conclusions on what types of mechanics or forces would be necessary to produce the type of injury claimed (T-60).

In arriving at his conclusions in this instance, Dr. Fijan also reviewed the police reports, the repair/estimates, the EBT's, the medical records which described plaintiff's injuries and the photos already noted. He did not use the process known as photogrammetry or the process of using photos to determine the three dimensional geometry of the crash, because there was no visible crush to plaintiff's vehicle.

Plaintiff offered no expert testimony in rebuttal.

"It is well settled in New York that scientific opinion evidence will only be admitted at trial if the procedure and results are generally accepted as reliable in the scientific community" (Styles v. General Motors Corp., 20 AD3d 338, 341 [1st Dep't. 2005] citing People v. Wernick, 89 NY2d 111, 115-116 [1996]; People v. Wesley, 83 NY2d 417, 423 *[1994]; People v. Hughes, 59 NY2d 523, 527 [1983]; see also, Frye v. US, 293 F1013 [DC Cir. 1923]; Selig v. Pfizer, 290 AD2d 319 [2002], lv denied, 98 NY2d 603 [2002]).

"While this does not mean that the methodology used must be unanimously endorsed by the scientific community [it must be shown to] be generally accepted as reliable." Id. at 342, "...and that generally accepted scientific methodology has been employed to arrive at a conclusion" (Beck v. Warner Lambert Co., NYLJ, 9/13/02, p. 18, col. 2, Hon. Helen E. Freedman.

In a matter entitled People v. Legrand, (196 Misc2d 179, 186-187, [NY County 2002]) the Hon. Bernard J. Fried set out the four fold test that is to be applied for the admissibility of scientific expert evidence once a "Frye" hearing has been ordered and held. In Legrand, the Court noted that "[t]he first requirement concerning the admissibility of scientific expert evidence under the 'Frye' test provides that the witness be competent in the field of expertise that he purports to address at trial." Id. at 186.

Second, the "...expert testimony [should] be based on scientific principle or procedure which has been sufficiently established to have gained general acceptance in the particular field in which it belongs;" and "[i]t is incumbent upon the proponent of expert

testimony to lay a proper foundation establishing that the processes and methods employed by the expert in formulating his or her opinion adhere to accepted standards of reliability within the field." Id. at 186, 187.

A third factor to be considered is whether the proffered testimony is beyond the ken of the jury. Id. And finally, the expert's opinion must be "...relevant to the issues and facts of the individual case." Id. at 188.

The science of accident reconstruction and the expert testimony in support thereof has long been recognized in the New York courts (Spier v. Barker, 35 NY2d 444 [1974]; People v. Moore, 155 AD2d 725 [3rd Dep't 1989]).

As noted previously, accident reconstruction is only the first stage in the three stage process engaged in by defendants' expert. Defendants produced for the Court's and their adversary's review, the authoritative texts and articles upon which he relied to draw conclusions for the second and final stage of the process, and established general acceptance of such procedures in the biomechanical engineering community.

Defendants also established, through testimony and exhibits his credentials in this field. Finally, it is apparent to this Court, that such testimony is beyond the ken of the ordinary juror and is entirely relevant to the remaining damages portion of the trial.

Accordingly, upon all of the foregoing, it is this Court's decision that the defendants shall be allowed to present at trial the expert testimony of Dr. Robert S. Fijan, a biomechanical engineer, on the issue of whether or not in his opinion, plaintiff sustained the injuries claimed as a result of the subject accident.

Dated: Jamaica, New York
February 8, 2006

JOSEPH P. DORSA
J.S.C.