

<b>Guess v City of New York</b>
2013 NY Slip Op 33519(U)
November 12, 2013
Supreme Court, New York County
Docket Number: 113262/2010
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. KATHERYN FREED  
JUSTICE OF THE SUPREME COURT  
Justice

PART 5

JAMES E. GOESB, JR., ET AL.

INDEX NO. 113262/10

- v -

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 002

CITY OF NY, ET AL.

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

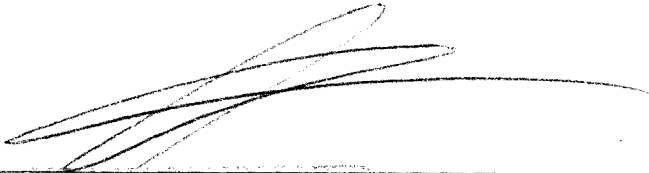
Cross-Motion:  Yes  No **FILED**

Upon the foregoing papers, it is ordered that this motion NOV 14 2013

NEW YORK  
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER

Dated: 11-12-13  
NOV 13 2013

  
HON. KATHERYN FREED  
JUSTICE OF SUPREME COURT J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 5

-----X  
JAMES E. GUESS, JR. and SONJA GUESS,

Plaintiffs,

DECISION/ORDER  
Index No. 113262/2010  
Seq. No. 2

-against-

THE CITY OF NEW YORK and NEW YORK CITY  
FIRE DEPARTMENT AND "JOHN DOE," THE  
PERSON INTENDED TO BE THE OPERATOR OF  
SAID VEHICLE,

Defendants.

-----X  
KATHRYN E. FREED, JSC:

**FILED**  
NOV 14 2013  
NEW YORK  
COUNTY CLERK'S OFFICE

RECITATION, AS REQUIRED BY CPLR§2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF  
THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	.....1-3.....
ANSWERING AFFIDAVITS.....	.....4.....
REPLYING AFFIDAVITS.....	.....
EXHIBITS.....	.....5-11 & A.....
OTHER.....	.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Defendants move for an Order excluding the testimony of defendants' "alleged expert in biomechanics, James C. Otis, because this expert is not competent to testify as to medical causation of an injury as a matter of law and his testimony is not based on generally accepted scientific methodology; or in the alternative, setting the matter down to determine whether the witness is competent to testify and if his testimony is based on generally acceptable scientific methods and, if so, whether the accepted methods were appropriately employed in this case." Defendants' oppose.

After a review of the papers presented, all relevant statutes and case law, the Court **grants the motion for a Frye hearing.**

Factual and procedural background:

The instant case emanates from a motor vehicle accident on June 9, 2010. According to plaintiff James E. Guess, Jr., he was seated in his parked 2004 pickup truck at or near the intersection of Cortlandt and White Streets in New York County, when a fire utility vehicle owned by defendants, parked behind his truck with its curb side wheels upon the curb. After about ten minutes, the fire truck rolled off the curb and struck the back of plaintiff's truck causing him to be propelled forward and simultaneously twist. Plaintiff has been filling out paperwork in his truck at the time of impact and thus, could not prepare or brace himself for the impact. Consequently, his truck began to shake from the impact. Due to the fact that both vehicles have large bumpers, no property damage was apparent except for a "crinkle" on the outer sides of plaintiff's bumper.

Plaintiff was transported via ambulance to the hospital where he complained of tingling and stiffness to his neck and lower back. The following week, he was examined by his personal physician, and complained of "excruciating" pain to his lower back. He was prescribed painkillers and muscle relaxants. He also underwent physical therapy and epidural injections. Plaintiff also had an MRI which indicated the existence of a herniated disc in his lumbar spine at L4-5 with nerve root compression, disc degeneration and instability. On March 14, 2001, he underwent surgery to his L-4 area.

Positions of the parties:

Plaintiff asserts that defendants' expert in biomechanical engineering, Dr. Otis, is expected to testify that with the exception of some sprains and strains, the subject accident could not have

caused plaintiff's lumbar spine injuries. Plaintiff argues that Dr. Otis is not competent to proffer such an opinion, in that his credentials are inadequate as a matter of law to permit him to testify as to causation. Plaintiff points out that Dr. Otis is not licensed to practice medicine, has never attended medical school, and has never done a post graduate medical residency of any kind. Thus, the failure to qualify him as a licensed physician by itself, disqualifies him to offer testimony at trial relative to the causation of plaintiff's injuries. Plaintiff further argues that without this qualifying event, there is no need to even have a *Frye* hearing.

Defendants argue that a *Frye* hearing is unwarranted as the testimony of biomechanical engineers has gained general acceptance in the scientific community as reliable and cite to several cases as support for their position.

Annexed as Exh. A to defendants' Aff. in Opp., is the affidavit of James C. Otis, PhD. In his affidavit, Dr. Otis states that he has a BS in Mechanical Engineering; an MS in Engineering Design and a PhD in Biomedical Engineering. He also states that he has completed the first year of medical school. In addition to being a private consultant in Biomechanical Engineering since 1978, he currently holds a research appointment as a Senior Scientist at the CORE Institute, Sun Health Research Institute in Arizona, and a teaching appointment as Coordinator of Biomechanics at the Department of Orthopedic Surgery at Lenox Hill Hospital. Additionally, he states that he held positions as Professor, Assistant Professor and Associate Professor of Applied Biomechanics in Orthopedic Surgery at various hospitals.

In the instant matter, Dr. Otis reviewed certain material regarding the subject accident. He states that plaintiff's allegation that as a result of the impact, his body moved forward and twisted at the same time is not possible in that "Newton's First Law dictates that the occupant of a vehicle

that is struck from behind will remain in place until the forward movement of his vehicle results in the seat back applying force to his back and his head moving toward and, if the force is significant, contacting the headrest.” ( *Id.*). Dr. Otis finds plaintiff’s rendition of the accident to be incredible in that plaintiff never described any head contact with the headrest of his vehicle.

Moreover, Dr. Otis states that in his April 10, 2013 report, he noted plaintiff’s claim of a herniated disc at L4-5 and his post-operative diagnosis of degenerative disc disease and instability. He opines that in order for a herniated disc to occur, the disc would have to either be subjected to a high compressive force, such as that associated with heavy lifting or excessive motion, thus undermining plaintiff’s rendition of his accident and the injuries he allegedly sustained as a result thereof.

#### Conclusions of law:

In determining the admissibility of expert testimony, New York follows the rule promulgated by *Frye v. United States*, 293 F. 1023 (D.C. Cir. 1923), “that expert testimony based on scientific principles or procedures is permissible but only after a principle or procedure has ‘gained general acceptance’ in its specified field ( *People v. Wesley*, 83 N.Y.2d 417, 422 [1994]; *People v. Wernick*, 89 N.Y.2d 111, 115 [1996]; *Nonnon v. City of New York*, 32 A.D.3d 91, 101, *affd. on other grounds*, 9 N.Y.3d 825 2007]; *Giordano v. Market Am., Inc.*, 15 N.Y.3d 560, 601[1st Dept. 2006] ). The admissibility and limits of expert testimony is primarily in the discretion of the trial court ( *People v. Wiggins*, 89 N.Y.2d 872 [1996] ).

“Frye is not concerned with the reliability of a certain expert’s conclusions, but instead with ‘whether the experts’ deductions are based on principles that are sufficiently established to have gained general acceptance as reliable’ ” ( *Nonnon v. City of New York*, 32 A.D.3d at 103, quoting

*Marsh v. Smyth*, 12 A.D.3d 307, 308 [1<sup>st</sup> Dept. 2004] ). Thus, in adhering to the principles set forth by *Frye*, New York courts permit expert testimony if it is based on scientific principles, procedures or theory only after these scientific principles, procedures or theory have gained general acceptance in the relevant scientific field, proffered by a qualified expert and on a topic beyond the ken of the average juror ( *Barbera v. 40 Broad Delaware, Inc.*, 29 Misc.3d 1231(A), 2010 N.Y. Slip Op. 52110(U) ( Civ. Ct. Richmond County, 2010); see also *People v. LeGrand*, 8 N.Y.3d 449 [2007] ).

The most common way an expert can establish that his/her theory has been generally accepted in the scientific community is by citing to peer-reviewed literature in his/her particular field. This is accomplished by demonstrating that independent studies have been performed utilizing this particular theory and that the results have been duplicated, and that the studies were done on a statistically significant number of subjects ( see *Styles v. General Motors Corp.*, 20 A.D.3d 338 [1<sup>st</sup> Dept. 2005]; *Fraser v. 301-52 Townhouse Corp.*, 57 A.D.3d 416, 418-19 [1<sup>st</sup> Dept. 2008]; *Lara v. New York City Health & Hosps. Corp.*, 305 A.D.2d 106 [1<sup>st</sup> Dept. 2003], *appeal dismissed* 12 N.Y.3d 847 [2009] ). Thus, the key inquiry for a court at a *Frye* hearing is “whether the proffered expert opinion properly relates existing data, studies or literature to the plaintiff’s situation, or whether it is connected to existing data only by the ipse dixit of the expert” ( *Santos v. Nicolos*, 24 Misc. 3d 999, 2009 N.Y. Slip Op. 29224(U) ( Sup Ct, Bronx County 2004) citing *Marsh v. Smyth*, 12 A.D.3d 307, 312 [1<sup>st</sup> Dept. 2004]).

“Once *Frye* has been satisfied the question is ‘whether the accepted techniques were employed by the experts in this case’ ...The focus moves from the general reliability concerns of *Frye* to the specific reliability of the procedures followed to generate the evidence proffered and whether they establish a foundation for the reception of the evidence at trial. The trial court determines, as

a preliminary matter of law, whether an adequate foundation for the admissibility of this particular evidence has been established....Once the *Frye* reliability and the trial foundation have been established, the evidence is admissible”, leaving the trier of fact to hear the evidence ( *People v. Wesley*, 83 N.Y.2d at 429 [1994] ).

In the instant case, the Court finds that a *Frye* hearing is necessary not only to establish the general reliability of biomechanics, but more importantly, to further explore and determine with certainty, Dr. Otis’s credentials, and the techniques he employed, as well as the legitimacy of his opinion(s). These are necessary to ascertain prior to qualifying him as an expert in his field.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that plaintiffs’ Order To Show Cause is granted to the extent that a *Frye* hearing is to be conducted before this Court on January 15, 2014 at 2:30 pm in Room 280 at 80 Centre Street; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: November 12, 2013  
NOV 12 2013

**FILED**  
ENTER:  
NOV 14 2013  
NEW YORK  
COUNTY CLERK'S OFFICE  
Hon. Kathryn E. Freed  
J.S.C.  
HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT