

White v Grocery Haulers, Inc.

2014 NY Slip Op 30412(U)

February 19, 2014

Supreme Court, New York County

Docket Number: 101821/11

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH
Justice

PART 22

Dorian White and Al Bovan

-v-

Grocery Haulers, Inc. and Rafael Mordam

INDEX NO. 101821/11

MOTION DATE _____

MOTION SEQ. NO. 003

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

Notice of Motion/Order to Show Cause -- Affidavits -- Exhibits _____ No(s). _____

Answering Affidavits -- Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Decided after hearing -

See accompanying

Decision/Order after hearing.


Next pt 40 Tap Date: 3/10/14

FILED

FEB 21 2014

**COUNTY CLERK'S OFFICE
NEW YORK**

Dated: 2/19/14


HON. ARLENE P. BLUTH, J.S.C.

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

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NY
COUNTY OF NEW YORK: PART 22

Index No.: 101821/11

Dorian White and Al Bovian,
Plaintiffs,
-against-

Grocery Haulers, Inc. and Rafael Mordan,
Defendants.

**DECISION/ORDER
AFTER HEARING**

HON. ARLENE P. BLUTH, JSC

In this action, plaintiffs, occupants of a van which made contact with a tractor-trailer on the driver's side of the van, claim various neck and back injuries, including surgery; both plaintiffs, among other things, underwent a cervical diskectomy. Triggered by the plaintiff Al Bovian's motion to preclude (and joined by White), this Court held a Frye hearing to determine whether defendant's expert, Dr. Matthew Kaplan, a biomechanical engineer, should be allowed to testify as to his opinion (1) of the forces involved in the accident and (2) that those forces could not have caused the injuries plaintiffs allegedly suffered. For the following reasons, plaintiff Bovian's motion to preclude Dr. Kaplan's testimony at trial is denied in part and granted in part. He can testify as to the forces involved in the accident but can not testify as to whether those forces could have caused plaintiffs' injuries.

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Frye standard

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"[W]hile courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made

must be sufficiently established to have gained general acceptance in the particular field in which it belongs.” *Frye v U.S.*, 293 F 1013, 1014 [DC Cir 1923]. Therefore, a Frye hearing is held to determine “whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally” (*People v. Wesley*, 83 N.Y.2d at 422). Frye “emphasizes ‘counting scientists’ votes, rather than on verifying the soundness of a scientific conclusion.” (*Wesley*, 83 NY2d at 439).

Whether the expert’s testimony makes logical sense to the Court is irrelevant - the key to the Frye hearing is that both the theory and method used by the expert witness have already gained general acceptance in the relevant scientific field so that they are "generally accepted as reliable in the scientific community." *See Styles v General Motors Corp.*, 20 AD3d 338, 341 (1st Dept 2005)(even when each test on a vehicle was generally accepted, the combination of the two tests to one vehicle must also be generally accepted); *Frye v U.S.*, 293 F 1013 [DC Cir 1923]; *People v Wesley*, 83 NY2d 417, 422 [1994]).

The expert can establish that his methodology is generally accepted by the relevant scientific community by showing that peer-reviewed literature in the field supports his methodology. This would demonstrate that other scientists in his field have performed their own studies, using the same methods and theories, and reached the same conclusions enough times to be reliable and generally accepted. *Styles*, 20 AD3d 338 [2005]; *Fraser v 301-52 Townhouse Corp.*, 57 AD3d 416, 418-419 (1st Dept 2008) (it was not proven at the Frye hearing that it was generally accepted that indoor dampness and mold *cause* health problems).

Defendant's expert, Dr. Kaplan

Dr. Kaplan is clearly well educated; he earned his B.S. in mechanical engineering at Yale and his Master's and PhD in mechanical engineering at Stanford. After doing postdoctoral work for two years, he started work as a consultant. This was his first time testifying in court. Dr. Kaplan is *not* a medical doctor of any type; he never went to medical school, he does not have any patients and he does not diagnose or treat anybody. Other than co-workers, Dr. Kaplan does not work with people; he works with numbers, pictures, graphs, formulas and computers. And while he did not disagree with any medical diagnosis of either plaintiff, he certainly did disagree with any claim that the subject accident caused the claimed injuries. From his calculations, Dr. Kaplan opined that the forces involved in the subject accident could not have caused the injuries that plaintiffs claimed.

The Court held a Frye Hearing to determine whether the methods Dr. Kaplan used to reach his conclusion are generally accepted in the scientific community. In order to determine the forces involved in the accident, Dr. Kaplan examined photos and repair records of the van; he stated that any damage to the tractor was irrelevant because it was the impact to the van that mattered. He did not see the actual van until well after it was repaired. In this accident, the truck moved along the driver's side of the van and then caught the van's front left bumper with enough force to rip it off. Besides the dislodged bumper, there are black marks along the driver's side of the van; not all the marks are of the same height and from the picture it is unclear whether there were just black marks or there were also dents ("crush"). If there were dents, it is unclear whether the dents were there before the accident or caused by the accident. In any event, it is clear that the impact was at least sufficient to cause the black rubber of the truck's tires to rub off

along most of the side of the van before some part of the truck snagged the van's bumper and pulled it off. Dr. Kaplan was not sure whether the bumper was snagged by the lug nuts on the truck's right front tire, the wheel and rim of the tire, the step used to get into the truck or something else.

In any event, using his assumptions, including the van's characteristics such as the stiffness parameters, weight¹, thickness of the material, height of the various parts of the vehicles and speed of the vehicles, and assuming that the van was going straight at the time of impact, Dr. Kaplan determined the change in velocity (the Delta V) that the van experienced upon impact, which he used to calculate the force that was applied to the van upon impact. Based upon deposition testimony and medical records, which he also assumed was accurate, Dr. Kaplan took into account in his calculations factors such as each plaintiff's height, weight, and body position at time of impact. He then analyzed the way plaintiffs, who were inside the van, must have moved due to the impact. In other words, based on various documents assumed to be true, and other various assumptions, Dr. Kaplan claimed he could tell how plaintiffs' bodies were (or were not) thrown around the van.

Having determined the force of the impact and how their bodies moved inside the van due to the impact, Dr. Kaplan then concluded that those forces could not have caused the neck and back injuries that plaintiffs claimed. Dr. Kaplan said that in order to cause plaintiffs to suffer an injury, the forces and motions have to be sufficiently significant, and this was such a minor

¹Although Dr. Kaplan admitted during questioning that he used the incorrect vehicle weight, he used a different weight and re-calculated the numbers by the second day of testimony and concluded that his opinion was the same. This goes to how Dr. Kaplan uses the science, not whether the science itself is generally accepted.

touching - which caused no crushing to either vehicle (another assumption, as Dr. Kaplan had no picture of defendant's vehicle post-accident and never saw the actual truck and only saw plaintiffs' van after it was repaired)) – that the forces were not sufficient to cause any harm to plaintiffs. Dr. Kaplan concluded that the forces involved in ripping a front bumper off and causing rubber to rub off were too minor to cause harm to plaintiffs' bodies.

Analysis

There were two issues for this Court to resolve. The first issue is whether Dr. Kaplan may testify as to the accident reconstruction; the Court finds the field of accident reconstruction, and the methods of calculating the forces involved in the accident, and even how much force was applied to bodies inside the van, is generally accepted in the scientific community. Whether Dr. Kaplan's various assumptions render his findings unreliable is for cross-examination; the jury will decide how much of his testimony to believe, if any. And so while the numbers Dr. Kaplan plugged into the formulas may be challenged, there can be no serious question that the formulas themselves are generally accepted in the field of accident reconstruction.

However, Dr. Kaplan could not show significant peer-reviewed literature validating the methods he used to conclude that the forces of that accident could not have caused the injuries plaintiffs allege that they suffered. Articles Dr. Kaplan cited used test dummies, and neither plaintiff was the height or weight of a test dummy. Besides, test dummies do not have prior injuries or the multitude of variations in muscle strength and tone, degeneration, medical conditions, etc., that humans have.

Dr. Kaplan admitted the obvious – that every person has a different threshold – that is, a 75 year old woman with osteoporosis may suffer a broken bone with less force than it would take a 20 year old man’s bone to break, and a swimmer’s shoulder muscles may withstand more strain than those of a sewing machine operator. While Dr. Kaplan opined that the subject accident was so minor that it could cause no injury, he did not cite a single study to say that some impacts could not hurt anyone, no matter their individual status of health/muscle/bone density/age/weight/etc. Understandably, experiments cannot be performed on live people – it would not be appropriate to ask volunteers to participate in crashes so their injuries can be measured. The fact is that Dr. Kaplan did not cite peer-reviewed studies showing that his methodology is generally accepted in the scientific community for the purpose of determining injuries in car accidents irrespective of variations in individuals’ medical condition(s) or status. In short, even if Dr. Kaplan cited to studies saying a “normal” cervical spines may take “x” pounds of pressure, who says these plaintiffs had normal cervical spines? Certainly, Dr. Kaplan, who is not a medical doctor, could not speak to the condition of either plaintiff’s body at the moment of impact.

And so while there are many aspects to biomechanics, and studies may have been done in order to build an artificial knee, to help athletes train without injury, to get answers by viewing a crime scene, and to make cars safer by relying on crash dummies, Dr. Kaplan failed to convince this Court that his conclusion – that this accident could not have caused plaintiffs’ injuries – is based upon methodology generally accepted by scientists in the field of biomechanics. Dr. Kaplan cited to no peer-reviewed studies tying all these branches together – and then adding medical expertise to account for variances in the human body – in his testimony. He might do it,

and other litigation consultants might do it, but in order to be admissible to a New York jury, it must be generally accepted in the scientific community at large.

Conclusion

Dr. Kaplan may testify as to his accident reconstruction and the forces of the truck and van hitting and even the forces of the bodies inside the van. The problems plaintiffs raised with Dr. Kaplan's testimony on these points go to the weight of his testimony, not its admissibility.

However, Dr. Kaplan may not testify regarding whether, in his opinion, plaintiffs could have sustained their injuries in this accident. He has not shown that his methods of determining whether the injuries were caused by the accident are "generally accepted" and did not rely on any peer-reviewed studies or other scientific literature which utilized his methodology. While Dr. Kaplan, who is not a medical doctor, mentioned various articles and their authors, there was not a single article relating any of either plaintiff's claimed specific injuries to the force of the instant side-impact-and-front-bumper-rip-off-collision.

Dr. Kaplan's testimony that there is plenty of research to support his methodology was conclusory. There may be many litigation consultants employing the same or similar procedures, but that is a far cry from the scientific community at large. Litigation consultants may be ahead of their time, but there is no indication that Dr. Kaplan's methods have spread to and been accepted by the general scientific community. Therefore, Dr. Kaplan's opinion that the accident did not cause or contribute to plaintiffs' injuries is based upon unreliable methodology and lacks sufficient foundation.

Finally, in *Santos v Nicolas*, 24 Misc.3d 999, 879 NYS2d 701 (Sup Ct Bx Cty 2009)

appeal dismissed 65 AD3d 941, 885 NYS2d 202 (1ST Dept 2009), the Court precluded the testimony of a biomechanical expert who sought to testify that the plaintiff's injuries could not have been caused by that subject low-impact rear-end collision using the same rational used here - that the methods used by the proposed expert were not "generally accepted" in the scientific community. The First Department dismissed the appeal because a Frye ruling is an evidentiary one, which is "generally reviewable only in connection with the appeal from the judgment rendered after trial." However, the Court went on: "were we to reach the merits of the appeal, we would affirm" *Santos*, 885 NYS2d 202 (1ST Dept 2009).

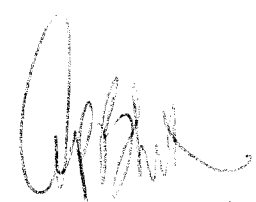
Accordingly, based on the testimony adduced at the hearing, plaintiff Bovian's motion to preclude the testimony of Matthew S. Kaplan, Ph.D. is granted in part and denied in part. Dr. Kaplan may testify as to the forces involved in the accident and the forces the passengers in the van to which the plaintiffs were subjected, but he cannot testify as to whether those forces caused or contributed to plaintiffs' injuries.

This is the Decision and Order of the Court.

The parties must pick up their exhibits in the courtroom by February 28, 2014.

The matter will appear on the part 40 TAP calendar on March 10, 2014.

Dated: February ¹⁹ ~~10~~, 2014
New York, New York



HON. ARLENE P. BLUTH, JSC

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