

Marte v Germain

2021 NY Slip Op 31779(U)

May 25, 2021

Supreme Court, New York County

Docket Number: 154537/2016

Judge: Louis L. Nock

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LOUIS L. NOCK PART IAS MOTION 38EFM

Justice

-----X

CESAR MARTE,

Plaintiff,

- v -

DANIEL GERMAIN and SNT BUS INC.,

Defendants.

-----X

LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 70, 71, 72, 73, 74, 75, 76, 77, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, and 100

were read on this motion IN LIMINE/ FRYE HEARING

Upon the foregoing documents, and after oral argument, it is determined that plaintiff's motion in limine to preclude trial testimony from defendants' proffered biomechanical expert witness, Bradley W. Probst, MSBME, and related motion for a Frye hearing, are denied for the reasons that follow.

The complaint seeks damages on the allegation that on January 25, 2016, plaintiff's parked 2008 Cadillac Escalade, while plaintiff was therein situated, was negligently struck by a bus owned by defendant SNT Bus Inc. and driven by the individual defendant, causing serious injuries to plaintiff as defined in Section 5102 of the Insurance Law. The matter has been referred to the undersigned for a jury trial, scheduled to commence early next month.

Defendants have proffered as a trial witness a Biomechanical Engineer – Bradley W. Probst, MSBME¹ – as noticed in their Expert Exchange Pursuant to CPLR 3101 (d) (NYSCEF

¹ The acronym stands for Master of Science in Bio-Medical Engineering.

Doc. No. 89). Mr. Probst has prepared a comprehensive report (the “Probst Report”) of his findings, addressed to defendants’ counsel and served and filed in this action (*id.*). Based on his consideration of the incident underlying this action, and his understanding of the incident, Mr. Probst concludes, “[b]ased upon a reasonable degree of scientific and biomechanical certainty,” that, *inter alia*, there is no biomechanical failure mechanism present in the underlying incident to account for Mr. Marte’s claimed cervical, thoracic, lumbosacral or shoulder biomechanical failures (*id.* at 12).

Plaintiff has moved, *in limine*, to preclude any trial testimony from Mr. Probst, submitting the conflicting opinion of his own selected biomechanical engineer – James Pugh, Ph.D., P.E. (NYSCEF Doc. No. 91). Dr. Pugh states in his report (the “Pugh Report”): “I expect to rebut the findings, testimony, and opinions of defense expert Probst” (*Id.* at 4.)

Relatedly, plaintiff has moved for a *Frye* hearing (*Frye v United States*, 293 F 1013 [DC Cir 1923]) to determine the admissibility of Mr. Probst’s anticipated testimony. Significantly, though, Dr. Pugh does not question Mr. Probst’s qualifications as a biomechanical engineer, which are set forth in detail as an exhibit to the Probst Report. Rather, Dr. Pugh sets forth his own opinions and conclusions in contradiction with those in the Probst Report, concluding that the medical procedures undergone by plaintiff in the aftermath of the underlying accident “were necessitated by the accident” (*Id.* at 6.)

As plaintiff’s counsel confirmed during oral argument, the premise of his motion is not to question the validity of the discipline of Biomechanics as a whole (*see*, Transcript of Oral Argument dated May 21, 2021 [“Tr.”] at 4-5). Indeed, he would be very hard pressed to do so given two significant factors: (i) the Appellate Division, First Department, has already recognized Biomechanics as an admissible form of expert evidence (*see, Vargas v Sabri*, 115

AD3d 505 [1st Dept 2014]; *see also*, *Shah v Rahman*, 167 AD3d 671 [2d Dept 2018]); and (ii) plaintiff's counsel has, himself, submitted the Pugh Report, which is, itself, authored by a biomechanical engineer (Dr. Pugh) and predicated upon biomechanical principles (*see*, Pugh Report at 1 & Exhibit [NYSCEF Doc. No. 91]). When asked to explain his position more clearly, plaintiff's counsel stated the following:

Okay, there are no studies, to my knowledge, in which volunteers with preexisting spine pathology are subjected to a potential injury in a crash test, all right. Such a test would probably be, *per se*, unethical, because if you know that a person is predisposed to injury, has a preexisting physical condition, to put them in a car run and another car into it, even under controlled circumstances, I don't think that's – I'm pretty sure that would be unethical.

(Tr. at 7.) But that opinion of counsel – regarding the overall application of biomechanical science to persons with preexisting conditions (as in the case at bar) – unavoidably comes into conflict with appellate authority that has found such science to be relevant in cases involving plaintiffs with preexisting conditions (*see, e.g., Holmes v Brini Transit Inc.*, 123 AD3d 628 [1st Dept 2014]; *Plate v Palisade Film Delivery Corp.*, 39 AD3d 835 [2d Dept 2007]).

Moreover, and as for the thoroughness of the Probst Report, Mr. Probst recites his review of “Medical Records pertaining to Cesar Marte” as well as other materials, including Mr. Marte's own deposition testimony (*see*, Probst Report at 2). After a painstaking analysis spanning pages 3 through 11 of his report, Mr. Probst notes in a section titled “Personal Tolerance Values” (*id.* at 11) that his evaluation incorporated “an understanding of the unique personal tolerance level of Mr. Marte using peer-reviewed and generally-acceptable methodologies” (*id.* at 12).

As this court intimated during oral argument, the objections proffered by plaintiff's counsel, relying in part on statements found in the Pugh Report, can validly and appropriately constitute areas of exploration at trial on cross-examination of Mr. Probst, which this trial court will allow in liberal measure. However, they do not rise to the level of valid objections to the

threshold admissibility of Mr. Probst's anticipated trial testimony altogether. As this court posited to plaintiff's counsel during oral argument:

But sir, what I'm hearing from you has the ring – more than a ring – of the weight of his evidence, the value of his evidence in terms of its probativeness. I'm not hearing an admissibility argument here.

(Tr. at 13.)

This is especially so in light of appellate recognition of the subject science (even involving plaintiffs with preexisting conditions); plaintiff's own resort to a biomechanical engineer (who does not challenge Mr. Probst's qualifications as an expert in the field of biomechanics), and the thorough nature of the Probst Report (taking into account, *inter alia*, plaintiff's medical records and deposition testimony). As the Appellate Division noted in *Valentine v Grossman* (283 AD2d 571, 573 [2d Dept 2001]) – which reversed a trial court's preclusion of a biomechanical witness and ordered a new trial: “The weight to be accorded this expert witness is a matter to be determined by the jury.”

In view of the foregoing, this court finds no grounds to deem Mr. Probst's anticipated testimony precludable; nor is there any sufficient basis to necessitate a *Frye* hearing on the matter (*see, Vargas v Sabri*, 115 AD3d 505 [1st Dept 2014]).

Accordingly, it is

ORDERED that plaintiff's motion *in limine* to preclude trial testimony from defendants' proffered biomechanical expert witness, Bradley W. Probst, MSBME, and related motion for a *Frye* hearing, are denied.

This will constitute the decision and order of the court.

ENTER:

Louis L. Nock

5/25/2021

DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE