

Parker v Niagara Frontier Transp. Auth.

2021 NY Slip Op 33291(U)

September 3, 2021

Supreme Court, Erie County

Docket Number: Index No. 818566/2018

Judge: Timothy J. Walker

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SUPREME COURT
STATE OF NEW YORK : COUNTY OF ERIE

TOMMY PARKER,

Plaintiff,

vs.

DECISION & ORDER

Index No. 818566/2018

NIAGARA FRONTIER TRANSPORTATION
AUTHORITY and LYDIA ABID,

Defendants.

BEFORE: **HON. TIMOTHY J. WALKER, Presiding Justice**

APPEARANCES: **CELLINO LAW, LLP**
Stephen C. Ciocca, Esq., Of Counsel
Attorneys for Plaintiff

NIAGARA FRONTIER TRANSPORTATION AUTHORITY
John P. DePaolo, Esq., Of Counsel
Attorneys for Defendants

WALKER, J.

This action for personal injuries arises out of a motor vehicle accident that occurred on September 7, 2018, on Pearl Street in the City of Buffalo, New York (the “Incident”), and the jury trial is scheduled to commence on September 13, 2021.

At the time of the Incident, Defendant, Lydia Abid, while employed by Defendant, Niagara Frontier Transportation Authority (“NFTA”), and working within the scope of her employment, operated an NFTA bus that rear-ended the vehicle being operated by Plaintiff.

Plaintiff has applied for an order precluding the testimony of Defendants' expert witness, Ronald Fijalkowski, PhD., in its entirety, or in the alternative, directing that a Frye Hearing be held to determine, *inter alia*, whether Mr. Fijalkowski's proposed testimony satisfies the threshold test of reliability, general acceptance, and adequate foundation (Motion 6; Doc. 74). Plaintiff has also separately applied for an order precluding the testimony of Defendants' expert witness, Alberto Benedicto, M.D. (Motion 7; Doc. 95).

Ronald J. Fijalkowski, Ph.D

Dr. Fijalkowski earned a Bachelor of Science in Biomedical Engineering from the Milwaukee School of Engineering and a Ph.D. in Biomedical Engineering from Marquette University (Doc. 78).

Defendants retained Dr. Fijalkowski as an expert witness in order to provide "scientific opinions regarding the severity of the collision, [Plaintiff's] movements, and the forces he experienced as compared to those of his daily life" (Doc. 111; ¶1). Dr. Fijalkowski also intends to provide expert opinion testimony "regarding the biomechanical injury mechanisms responsible for [Plaintiff's] diagnosed injuries in the context of human tolerance [of] his unique biomechanical attributes (i.e. age, sex, pre-existing conditions, and degeneration, amongst others)" ("Proposed Fijalkowski Testimony") (*Id.*).

Plaintiff contends that the Proposed Fijalkowski testimony includes novel, unsupported theories on causation and does not meet the standard pronounced in *Frye v. U.S.* (293 F. 1013 [DC Cir 1923]), which is that, to be admissible, "expert testimony [must be deduced] from a well-recognized scientific principle or discovery, [and] 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” (*Id.*, at 1014).

Plaintiff further contends that Dr. Fijalkowski is not a medical doctor and therefore does not possess the requisite skill, knowledge, education, training, or experience necessary to opine on issues of injury causation, including whether forces generated during the Incident were sufficient to cause Plaintiff’s alleged injuries.

The burden of proving that the proposed expert’s testimony satisfies the Frye standard lies with the party offering it, and “[b]road statements of general scientific acceptance, without accompanying support, are insufficient to meet the burden of establishing such acceptance” (*Dovberg v. Laubach*, 154 AD3d 810, 813 [2d Dept 2017] [internal citations omitted]).

Plaintiff’s position is in stark contrast to the holding in *Vargas v. Sabri* (115 AD3d 505, 506 [1st Dept 2014]), where the First Department held, in relevant part, as follows:

The court did not improvidently exercise its discretion in denying plaintiffs’ request for a Frye hearing . . . to determine the admissibility of the anticipated testimony of Dr. McRae, a biomechanical engineer. The fact that Dr. McRae lacked medical training did not render him unqualified to render an opinion as an expert that the force of the subject motor vehicle accident could not have caused the injuries allegedly sustained Dr. McRae’s stated education, background, experience, and areas of specialty, rendered him able him to testify as to the mechanics of injury . . . (internal citations omitted).

However, there appears to be a split among the Departments, because the Fourth Department more recently held that “[i]t is well settled . . . that biomechanical experts are not qualified to render opinions regarding injury causation” (*Jeffery v. Queen City Foods, LLC*, 2021 WL 3782922, *1 [4th Dept 2021]). The Fourth Department distinguished the biomechanical

expert before it from the biomechanical expert in *Cardin v. Christie* (283 AD2d 978 [4th Dept 2001]) - whose expert opinion on injury causation was permitted, because the expert in *Cardin* was also a **medical** doctor.

Calum G. A. McRae, Ph.D, is the biomechanical expert in *Jeffery*. While Dr. McRae's educational background is not stated in *Jeffery*, the court reviewed his CV in the underlying action (Index No. 814792/2018; Doc. 52), which reflects that Dr. McRae earned a Masters of Engineering degree in Mechanical Engineering from the University of Glasgow, Scotland, and a Ph.D. in Biomedical Engineering from the University of Glasgow.

Clearly, Dr. McRae is not a medical doctor. Nor is Dr. Fijalkowski, meaning he may not offer the Proposed Fijalkowski Testimony at trial (*Jeffery*, 2021 WL 3782922, *1). Where, as here, there is a split among the First and Fourth Appellate Departments, the court is bound to follow the Fourth Department (*Van Nostrand v. Froehlich*, 44 AD3d 54 [2d Dept 2007]).

Alberto Benedicto, M.D.

Dr. Benedicto is a radiologist, and Defendants seek his expert testimony at trial regarding injury causation.

At trial, Dr. Benedicto may render expert testimony as to proximate causation for Plaintiff's alleged injuries, including whether Plaintiff's alleged injuries as a result of the Incident were due to one or more preexisting degenerative conditions (*Bongiovanni v. Cavagnuolo*, 138 AD3d 12, 19 [2d Dept 2016] ["defendant's radiologist . . . was foundationally qualified to render his opinion that the defendant's chiropractic treatment was not a proximate cause of the alleged injuries, as his opinion was based upon a review of radiologic films reflecting preexisting degenerative changes within the expertise of a radiologist to diagnose"]).

In light of the foregoing, it is hereby

ORDERED that Plaintiff's motion to preclude the trial testimony of Dr. Fijalkowski is granted, in part, to the extent that Dr. Fijalkowski shall not be permitted to testify about proximate causation for Plaintiff's alleged injuries arising out of the Incident; and it is further

ORDERED, that Plaintiff's motion to preclude the trial testimony of Dr. Benedicto is denied.

This constitutes the Decision and Order of this Court. Submission of an order by the Parties is not necessary. The delivery of a copy of this Decision and Order by this Court shall not constitute notice of entry.

Dated: September 3, 2021
Buffalo, New York



HON. TIMOTHY J. WALKER, J.C.C.
Acting Supreme Court Justice