

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK PART 59

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NELSON VIRUET,

Plaintiff,

Index # TS-300025-18/NY

-against-

Decision & Order

AMERICAN UNITED TRANSPORTATION, INC.
AND HAMADY KOME,

Defendants.

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KENNEY, J.

Plaintiff seeks an *in limine* Order, precluding defendant's expert witness, a biomechanical engineer, Kevin K. Toosi, M.D., PhD, from testifying at trial and in the alternative a Frye Hearing is to be conducted before the commencement of voir dire. Defendants' oppose the motion. This litigation emanates from a motor vehicle accident.

Discussion

New York courts routinely permit expert testimony based on scientific principles, procedures or theories only after they have gained general acceptance in the relevant scientific field (see *People v. Wesley*, 83 NY2d 417, 422 [1994]). The burden of proving general acceptance rests upon the party offering the disputed expert testimony (see *Lara v New York City Health & Hosps. Corp.*, 305 AD2d 106, [1st Dept 2003]); *Pullman v Silverman*, 125 AD3d 562, 562 (1st Dept 2015), rev'd, on other grounds, 28 N.Y.3d 1060 (2016).

A Frye (*Frye v United States*, 293 F 1013 [DC Cir 1923]) motion may be reviewed by the trial judge to determine whether "accepted

techniques when properly performed generate results accepted as reliable within the scientific community generally." The burden of proof is imposed upon the party offering the disputed expert testimony. *Id.* An expert witness is qualified by education, training, skill, experience and knowledge to give opinions that lie beyond the ordinary scope of knowledge and that are helpful to a fact finder in making a determination. Thus, even though the expert is using reliable principles and methods and is extrapolating from reliable data, a court may exclude the expert's opinion if "there is simply too great an analytical gap between the data and the opinion proffered" (*id.*), see also *Marso v Novak*, 42 AD3d 377, 378 [1st Dept 2007] [remarking that a " 'methodology-only, ignore-the-conclusion' approach would circumvent the rationale for the Frye doctrine"]; *Cornell v 360 W. 51st St. Realty, LLC*, 22 NY3d 762, 781 (2014).

Dr. Kevin K. Toosi (Dr. Toosi) is a biomechanical engineer, with a bachelor's degree in engineering and master's and doctoral degrees in bioengineering from the University of Pittsburgh (Expert Biomechanical Report of Dr. Kevin Toosi, dated July 28, 2016, annexed to the moving papers as Exhibit F ("Toosi Report")). Currently, Dr. Toosi is a principal scientist at Pittsburgh Biomechanics LLC where he specializes in biomedical sciences and the exploration of the cause, and severity of injuries in a variety of accident settings, specifically, occupational environments,

slip-and-fall accidents and motor vehicle collisions (Toosi's Report at 1). Prior to this position, Dr. Toosi was an engineer for three years at Exponent Failure Analysis Associates where he worked in the areas of accident reconstruction, crush analysis and occupant kinematics with respect to motor vehicle accidents (Toosi's Report at 1). Dr. Toosi also teaches in the Department of Bioengineering at the University of Pittsburgh (Dr. Toosi's CV, p 2, as attached to the Report as part of Exhibit F).

In addition to Dr. Toosi's engineering training and experience, he also received a medical degree in 1994 from Mashhad University of Medical Sciences in Iran and worked as a primary care physician for over five years in Iran before immigrating to the United States (Toosi Report at 1; Toosi CV at 1). Dr. Toosi's research and work experience for the past 20 years indicates that there are significant crossovers between the fields of medicine and biomechanical engineering, particularly in the area of motor vehicle accidents and injury causation.

In his 20-page expert report, Dr. Toosi concluded (1) impact vehicle acceleration against plaintiff's vehicle resulting from the collision with plaintiff's vehicle was low; (2) plaintiff's body experienced very limited movement within his vehicle and (3) plaintiff's alleged knee, shoulder and spine injuries could not be attributed to the January 6, 2015, accident due to the minimal impact and body movement (Toosi Report at 12-16). In reaching

these conclusions, Dr. Toosi reviewed numerous reports and documents related to this litigation.

In particular, Dr. Toosi relied upon a January 6, 2015 police accident report, 14 photographs of plaintiff's vehicle, insurance documents and the deposition of plaintiff (Toosi Report at 2). Dr. Toosi also made use of information about the vehicles involved in the accident, including geometry, inertia and stiffness information (Toosi Report at 2).

First, Dr. Toosi assessed the severity of the collision between plaintiff and defendant by analyzing the vehicle acceleration at the time of the crash because acceleration "is the most effective indicator of the severity of collision for the vehicle occupants" (Toosi Report at 7-8). Dr. Toosi performed this analysis by examining photographs of plaintiff's car and descriptions in the accident report and comparing them with "estimated vehicle stiffness parameters" (Toosi Report at 8). In his report, Dr. Toosi cited six references that confirmed this crush comparison method is a "generally accepted" method in biomechanical engineering to determine the acceleration of a vehicle at the point of impact (Toosi Report at 8-10). Relying on published crash reports. Dr. Toosi also acknowledged that because plaintiff's rear quarter panel was damaged, that the bulk of the impact occurred at the rear section of the driver's side of the vehicle (Toosi Report at 16).

Next, Dr. Toosi analyzed plaintiff's body movements inside the car at the time of this impact (Toosi Report at 17). Dr. Toosi concluded that based upon the impact acceleration figures, the point of impact and his experience in occupant kinematics, plaintiff's body could have experienced only minor accelerations and that there was no mechanism present to exceed the physiological range of motion of plaintiff's shoulder, knee, cervical or lumbar spine (Toosi Report at 11-12).

While a court's decision as to whether a witness should be qualified as an expert is largely discretionary, the range of allowable discretion is not so broad as to render sustainable a patently unreasonable refusal to accord a witness expert status *Khatri v Lazarus*, 225 AD2d 302, 303 (1st Dept 1996). An expert should not be required to satisfy an overly narrow test of his own qualifications. (*Steinbuch v Stern*, 2 AD3d 709 [2nd Dept 2003]). Dr. Toosi is without doubt an expert in his field. His qualification threshold has been met. However, this Court must look to the expert's particular opinion itself and permit the expert to testify only if the opinion is both relevant and reliable. *Frye*, *infra*.

In discharging its gatekeeping obligation, a trial judge must first find that the proposed witness's "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue," 9 NYCRR 517.7. Dr. Toosi opined, that plaintiff's alleged injuries could

not be a result of the January 6, 2015 accident because there was not a sufficiently severe impact during the collision to create the loads and mechanisms required to cause such traumatic injuries (Toosi Report at 18-22).

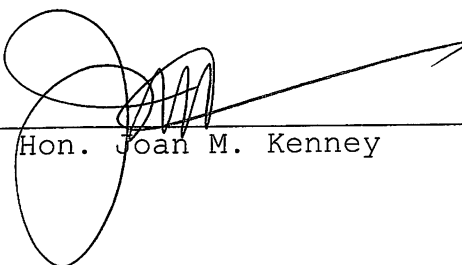
Dr Toosi's opinion is not based upon his personal knowledge. *Hamsch v NYC Tr. Auth.*, 63 NY2d 723 (1984). The police officer who wrote the report did not witness the accident, and relied solely upon the parties' narratives for the information contained in the report. In fact it appears that Dr. Toosi reviewed an uncertified copy of the police report. Dr. Toosi's reliance is misplaced because the police report is inadmissible as a matter of law without the police officer's testimony/affirmation. Dr. Toosi's Crush Energy Analysis relies too heavily upon the contents of the police report (see Toosi Report at 8-10) which is "double hearsay." *Hamsch v New York City Transit Authority*, 63 NY2d 723, 726 (1984) (an expert may rely on out-of-court material if it is of a kind accepted in the profession, but only if there is evidence of the material's reliability). Notwithstanding Dr. Tossi's dependence on disputed photographs for his accident analysis (Tossi Report at 8), these photographs may or may not accurately depict the state of plaintiff's car after the accident. Disputed photographs have been determined by the Appellate Division First Department to be unacceptable support for an expert's opinion. *Pascocello v Jibone*, 161 AD3d 516 (1st Dept 2018).

The Court has considered defendants arguments and find them to be without merit. Consequently, plaintiff's motion in limine seeking to preclude the expert's testimony is granted. Accordingly, it is

ORDERED that Dr. Kevin K. Toosi shall not be permitted to testify at trial.

Dated: November 21, 2018

E N T E R:

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Hon. Joan M. Kenney