

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

GREGORY LEPERA,

Appellant,

v.

Case No. 5D19-1965

LT Case No. 59-2012-CF-003731-A

STATE OF FLORIDA,

Appellee.

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Opinion filed October 29, 2021

Appeal from the Circuit Court
for Seminole County,
Jessica J. Recksiedler, Judge.

Dean M. Bartzokis and Kendell K. Ali, of
Ali & Blankner, Orlando, for Appellant.

Ashley Moody, Attorney General,
Tallahassee, and Pamela J. Koller,
Assistant Attorney General, Daytona
Beach, for Appellee.

NARDELLA, J.

On May 8, 2019, a jury convicted Gregory Lepera of boating under the
influence manslaughter. Because we find that the trial court abused its

discretion in excluding all expert opinions offered by Dr. Ling Lu, a biomechanical engineer, we reverse and remand for Lepera to receive a new trial. We need not reach the other arguments raised on appeal.

On the night of May 12, 2012, Lepera dined with his girlfriend; his friend, James Kedzierski; and James Kedzierski's girlfriend, Emily Walker. After dinner, Lepera, Kedzierski, and Walker returned to Lepera's home, where he poured shots of moonshine for himself and his guests. Sometime after midnight the group boarded Lepera's 18-foot boat to look at some land on the other side of Lake Sylvan.

The group's decision ended in tragedy when Lepera's boat struck a dock, ejecting Kedzierski, who died. Lepera and Walker made it to another dock on the wrecked boat and were interviewed that same night about the events that led to Kedzierski's death. After months of investigation, the State charged Lepera with boating under the influence manslaughter.

When trial finally commenced more than six years later, the State set out to prove that Lepera was operating the boat when it struck the dock. To meet its burden of proof, the State used Lepera's arguably incriminating statements from the night of the accident and called the only other survivor to testify against Lepera. Consistent with her statement to authorities after the accident, Walker testified that Lepera operated the boat while she and

Kedzierski sat next to each other on the back bench. According to Walker, when the boat collided with the dock, she was thrown forward into the back of the driver's seat. She looked behind her and saw that Kedzierski was gone. Worried that Kedzierski might be injured by the propeller, she climbed over the driver's seat and hit the throttle to stop the boat.

Lepera's sole trial strategy was to contest the State's theory that he operated the boat at the time of the accident. He attempted to do this by offering the testimony of experts from two different fields who applied two different scientific methods to determine each occupant's location in the boat at the time of impact. After a proffer, however, the trial court excluded one of Lepera's experts, Dr. Lu, finding that Dr. Lu's opinion was an improper medical opinion and that it was cumulative. Based upon the record before us, we conclude that the trial court abused its discretion in excluding Dr. Lu from testifying about Lepera's location at the time of impact based upon injury mechanism analysis.

We review a trial court's exclusion of an expert witness for an abuse of discretion. *Doctors Co. v. State, Dep't of Ins.*, 940 So. 2d 466, 469 (Fla. 1st DCA 2006). The trial court announced two reasons for excluding Dr. Lu. First, it found that Dr. Lu was not qualified to give a medical opinion. Second, it found that Dr. Lu's testimony was cumulative to the testimony previously

offered by Lepera's accident reconstructionist, Christopher Stewart. Neither reason withstands examination.

A qualified biomechanical expert may offer an opinion about injury causation if the mechanism of injury falls within the field of biomechanics. *Council v. State*, 98 So. 3d 115, 116 (Fla. 1st DCA 2012) (concluding that expert was qualified to offer opinions about causation because mechanism of injury, which included falls and shaking, fell within field of biomechanics); see *Houghton v. Bond*, 680 So. 2d 514, 521 (Fla. 1st DCA 1996) (holding that defense's biomechanical expert was qualified to testify that plaintiff's injuries were caused by hitting dashboard because he did not wear a seatbelt).

What a biomechanical expert cannot do, unless he or she also has a medical degree, is render an opinion that requires medical expertise. *Maines v. Fox*, 190 So. 3d 1135, 1141 (Fla. 1st DCA 2016). "Issues such as permanency and severity of an injury require medical evaluation of the patient, the patient's history, and the particulars related to a specific person which go beyond the typical expertise of a biomechanical engineer." *Id.* Thus, Florida courts generally hold that a biomechanical expert is not qualified to give a medical opinion regarding the extent of an injury. *Council*, 98 So. 3d at 116; see, e.g., *Stockwell v. Drake*, 901 So. 2d 974, 976 (Fla.

4th DCA 2005) (stating that biomechanical expert's opinion that plaintiff would not have hit dashboard or suffered injuries had he been wearing seatbelt would *not* be considered testimony of extent of injury). Because Florida law prohibits an expert lacking a medical degree from opining on issues that require medical expertise, we begin our analysis by examining whether Dr. Lu's proffered opinions required medical expertise.

At trial, Dr. Lu offered two separate opinions during the defense's proffer. In one opinion, Dr. Lu identified the location of Lepera at the time of impact, and in the other she identified the location of Kedzierski. Both of Dr. Lu's opinions were based upon injuries suffered by Lepera and Kedzierski.¹

Dr. Lu's opinion concerning Lepera did not require medical expertise. Dr. Lu did not opine about the severity or permanency of Lepera's nasal fractures or black eye. Rather, the fact that Lepera had injuries on the front of his face but not the back of his head told her something about his location when the collision occurred. It told her that Lepera's body moved forward and down after the impact. It told her that the back of his head never hit a hard surface, thus allowing her to rule out certain locations on the boat Lepera might have been when the collision occurred. Dr. Lu's analysis did

¹ Dr. Lu testified that Walker had no notable injuries directly relevant to her body movement during the crash but did not offer any further analysis.

not require her to know Lepera's medical history because his pre-existing medical conditions and differing tolerance levels were irrelevant to her inquiry. Likewise, the conclusion of her inquiry did not result in a medical diagnosis. Accordingly, we conclude that her opinion concerning Lepera's location did not require medical expertise.

Our analysis, however, does not end here. The second question we must answer is whether Dr. Lu's opinion concerning Lepera falls within the field of biomechanics.

Biomechanics is "the study of the application or relation of the laws of mechanics to the body." 2 J.E. Schmidt, *Attorney's Dictionary of Medicine*, B-115 (2004). It has also been defined as the study of what happens to the body when the body strikes certain parts of a vehicle or the interior parts of a vehicle. *Houghton*, 680 So. 2d at 517 ("In other words, it's the study of injury mechanism as it relates to the path that the occupant follows within and without the vehicle and the forces that act on the body at different locations and what injuries you would expect to see, what injuries you would not expect to see. . . ."). Here, Dr. Lu utilized her specialized education and training regarding the general forces at work in a collision, together with an analysis of the location of Lepera's injuries, to determine the direction Lepera would likely have moved after impact.

Dr. Lu testified to the absence of injuries on the back of Lepera's head and explained that when biomechanical engineers perform an injury mechanism analysis, they look at both the injury pattern and the "lack of injury pattern" to determine "whether those are consistent with the type of body contact involved in the accident." Dr. Lu's explanation laid a proper foundation for the trial court to conclude that her opinion fell within her field of expertise.

Dr. Lu's second opinion about Kedzierski's location does not fare as well. To form her second opinion Dr. Lu evaluated the size, shape, and spacing of puncture wounds on Kedzierski's forehead and then compared those puncture wounds to objects with which he might have collided. This process of comparison led Dr. Lu to find that Kedzierski collided with the boat's sonar mount because the edges of the mount were the same size, shape, and distance apart as the puncture wounds on his forehead. Dr. Lu's study of the puncture wounds also led her to find that Kedzierski's forehead did not hit the sonar mount at an angle. Taken together, these findings formed the basis of Dr. Lu's ultimate opinion that Kedzierski must have been standing near the helm, where the sonar mount is located, at the time of impact.

We do not decide whether Dr. Lu's opinion based upon the size, shape, and spacing of the puncture wounds on Kedzierski's forehead falls within her field of expertise. Suffice it to say that the foundation laid during the proffer below was insufficient for this Court to reach such a conclusion. The trial court therefore did not abuse its discretion in excluding Dr. Lu's expert opinion concerning the object with which Kedzierski collided.²

The trial court excluded Dr. Lu's testimony for a second reason; it found her proffered testimony was cumulative of the testimony previously offered by Christopher Stewart, an accident reconstructionist. As a general rule, the limit of expert witnesses is a matter of discretion for the trial court. *Woodson v. Go*, 166 So. 3d 231, 233 (Fla. 5th DCA 2015); see *Nicholson v. Hosp. Corp. of Am.*, 725 So. 2d 1264, 1265 (Fla. 4th DCA 1999); *Lion Plumbing Supply, Inc. v. Suarez*, 844 So. 2d 768, 770 (Fla. 3d DCA 2003). Section 90.612(1)(b), Florida Statutes (2019), requires a trial judge to exercise reasonable control over the presentation of the evidence to avoid wasting time. *Woodson*, 166 So. 3d at 233. Additionally, section 90.403, Florida

² Our review is confined to the issues and arguments raised below and on appeal and the consideration of any tipsy coachman grounds for affirmance supported in the record. We do not consider any other grounds upon which the State might have challenged Dr. Lu's opinions, nor does our opinion preclude Dr. Lu from laying a proper foundation in the future if she is able to do so.

Statutes (2019), allows for the exclusion of relevant evidence if the evidence's probative value is substantially outweighed by the needless presentation of cumulative evidence. § 90.403, Fla. Stat. (2019).

In deciding whether the trial court abused its discretion, we must recognize that there is a “difference between cumulative testimony, which courts have discretion to exclude, and relevant confirmatory testimony, which they do not.” *Gutierrez v. Vargas*, 239 So. 3d 615, 626 (Fla. 2018). Testimony that relies in part on different facts and evidence is not cumulative as a matter of law, even if the same conclusion is reached by both witnesses. *Delgado v. Allstate Ins.*, 731 So. 2d 11, 16 (Fla. 4th DCA 1999) (holding that second surgeon's testimony based *in part* on same facts and evidence as first surgeon's but also *in part on new facts and evidence was not* cumulative as a matter of law).

In the instant case, Lepera's two experts offered complementary conclusions but based their conclusions on different scientific methods recognized within their separate fields of expertise. Christopher Stewart, a mechanical engineer and accident reconstructionist, testified to his use of occupant kinematics, a method that applies physics to the physical evidence on the boat and dock, to determine how each occupant's body moved at the time of impact and immediately after. Mr. Stewart concluded that Kedzierski

must have been standing by the helm at the time of impact because, if he had been sitting at the place Walker indicated, either all the occupants would also have been ejected or there would have been evidence of additional damage, indicative of a specific force, to the area of the boat where Walker testified Kedzierski was sitting.

Dr. Lu offered a complementary conclusion but used a different scientific method—injury mechanism analysis—in her study of the accident. She also considered separate facts and evidence. Specifically, she looked at the injury pattern on Lepera to determine his location on the boat at the time of impact. Because Dr. Lu's testimony was not cumulative, but confirmatory, the trial court abused its discretion in prohibiting the jury from considering another expert's analysis of the accident using a different scientific method to study separate facts and evidence.

Moreover, we cannot say that the trial court's error was harmless. Walker was the State's key witness, and her testimony placed Lepera at the helm while she and Kedzierski sat together on the back bench. Lepera had the right to challenge the veracity of that claim with these two experts from two different fields using separate scientific methods to reach complementary conclusions. The fact that he was prohibited from doing so requires this Court to reverse.

AFFIRMED in part; REVERSED in part; and REMANDED for new trial.

EISNAUGLE, J. and ALVARO, C.K., Associate Judge, concur.