Sam v Mirtil
2018 NY Slip Op 33281(U)
October 15, 2018
Supreme Court, Bronx County
Docket Number: 305739/2011
Judge: George J. Silver

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART STP

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WILLIAM SAM Index №.:305739/2011

-against- **Hon. GEORGE J. SILVER**

MICHAEL MIRTIL AND NEW YORK CITY TRANSIT AUTHORITY Justice Supreme Court

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The following papers numbered 1 to 3 were read on this motion for (Seq. №: 007) to **PRECLUDE FROM TESTIFYING**

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s). 1
Answering Affidavit and Exhibits	No(s). 2
Replying Affidavit and Exhibits	No(s). 3

Plaintiff WILLIAM SAM's order to show cause to preclude defendants' MICHAEL MIRTIL and NEW YORK CITY TRANSIT AUTHORITY (collectively "defendants") biomechanical engineer, Dr. Kevin Toosi ("Dr. Toosi"), from offering testimony as an expert or in the alternative setting the matter down for a *Frye* hearing in accordance with *Frye v. U.S.*, 293 F 1013, 1014 (DC Cir 1923) is decided as follows:

It is well settled that biomechanical engineers may offer testimony as to the mechanics of injuries in motor vehicle accidents (*Shillingford v NYC Tr. Auth.*, 147 AD3d 465 [1st Dept. 2017]; *Vargas v Sabri*, 115 AD3d 505 [1st Dept 2014]). In the instant application, plaintiff submits that Dr. Toosi is not qualified to render an ultimate opinion as to whether a specific injury occurred because the use of biomechanical engineering principles has been rejected as not meeting the admissibility standards set forth in *Frye*. Defendants, highlighting the Appellate Division, First Department, authority cited above oppose plaintiff's application. For the reasons set forth below, the court denies plaintiff's application.

DISCUSSION

New York follows the rule of *Frye* "that expert testimony based on scientific principles or procedures is admissible but only after a principle or procedure has 'gained general acceptance' in its specified field" (*People v Wesley*, 83 NY2d 417 [1994], *quoting Frye v United States*, 293 F at 1014, *supra*). "Frye is not concerned with the reliability of a certain expert's conclusions, but instead with whether the [expert's] deductions are based on principles that are sufficiently established to have gained general acceptance as reliable" *(Nonnon v City of New York*, 32 AD3d 91,103 [1st Dept. 2006], *affd* 9 NY3d 825, 842 [2007]) "[G]eneral acceptance does not necessarily mean that a majority of the scientists involved subscribe to the conclusion. Rather it means that those espousing the theory or opinion have followed generally accepted

scientific principles and methodology in evaluating clinical data to reach their conclusions" (*Zito v Zabarsky*, 28 AD3d 42, 44 [2d Dept 2006]). A *Frye* hearing is not required where novel scientific issues are not implicated (*see Johnson v Guthrie Med. Group, P.C.*, 125 AD3d 1445, 1447 [4th Dept. 2015] [allowing plaintiff's theory, and holding Frye hearing was not required, where plaintiffs' experts laid a foundation for the theory that the child's cognitive deficits were caused by treatment with IFN-a with generally accepted medical principles of the cognitive effects on adults treated with IFN-a, a chemotherapeutic agent, and the cognitive effects of chemotherapy on the developing brain of a child]).

To satisfy *Frye*, a peer-reviewed case study is not invariably required. In *LaRose v Corrao*, 105 AD3d 1009 (2d Dept 2013), defendants' expert physician failed to produce a case or study unequivocally establishing that an MRI scan performed within hours of a transforaminal epidural injection would have conclusively revealed any injury caused by that procedure. Nevertheless, he demonstrated that his theory was reasonably permitted by a synthesis of medical literature which established that the expert's theory had an objective basis and was founded upon more than theoretical speculation or a scientific hunch. The absence of textual authority to support the theory pertained to the weight to be given to his testimony, but did not preclude its admissibility.

Nor does *Frye* invariably require that the literature relied on to establish general acceptance must involve circumstances virtually identical to those of the plaintiff (*Victor Q. v Bronx Lebanon Hosp. Ctr.*, 149 AD3d 456, 456 [1st Dept. 2017] [holding that, after *Frye* hearing, articles proffered by plaintiffs were sufficient to establish that it was generally accepted that perinatal hypoxia can be the cause of brain injury, in the absence of evidence of neurological injury in the neonatal period; that the infants in the articles exhibited manifestations of hypoxia not exhibited by the infant plaintiff was irrelevant]; *see Parker v. Mobil Oil Corp.*, 7 NY3d 434, 447 [2006] [inquiry whether plaintiff's exposure to benzene in gasoline caused plaintiff to develop acute myelogenous leukemia was "more akin to whether there is an appropriate foundation for the experts' opinions, rather than whether the opinions are admissible under Frye."]; *see also Lugo v. New York City Health & Hosps. Corp.*, 89 AD3d 42, 57-58 [2d Dept 2011]["this Court has affirmed the preclusion of expert testimony as to causation in circumstances where there was a complete absence of any literature or studies supporting the particular causation theory espoused by the expert"]).

Here, Dr. Toosi's education, background, experience and areas of specialty sufficiently qualify him to render an opinion as to whether the accident could have caused movants' injuries (*Vargas*, 115 AD3d at 505; *Gonzalez v Palen*, 48 Misc 3d 135 [A] [App T 1st Dept 2015] [holding Dr. Toosi's education and professional qualifications are sufficient to qualify him to render an opinion as an expert on the issue of whether the force of the accident could have caused the injuries alleged by plaintiff]).

However, it is manifestly true that Dr. Toosi's "opinion evidence must be based on facts in the record or personally known to [him]" (*Hambsch v NYC Tr. Auth.*, 63 NY2d 723 [1984]; *see also Roques v Noble*, 73 AD3d 204 [1st Dept 2010]). "[A]n expert cannot reach a

conclusion by assuming material facts not supported by record evidence" (*Roques*, 73 AD3d at 206]). Here, Dr. Toosi based his opinion that the accident could not have caused the injuries claimed in part on photographs that were taken at the scene of the accidence on the date of the accident by a New York City Transit Authority employee.

It is unclear whether the photographs relied on by Dr. Toosi fairly and accurately represent the damaged condition of the vehicles at issue, as there is no foundational evidence that the photographs relied on by Dr. Toosi fairly and accurately represent the damage to plaintiff's vehicle (*See* Prince, Richardson on Evidence 4.09). Therefore, since Dr. Toosi relied on photographs that he merely assumed fairly and accurately depicted the damage to plaintiff's vehicle, his opinion based on those photographs may be of little probative value (*see Diaz v. New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]). Nevertheless, as highlighted by defendants in their opposition, the photographs at issue are not the only evidence relied on by Dr. Toosi to draw the conclusions reached. Indeed, Dr. Toosi's report reveals that he took into consideration all of the testimony, accident reports, bills of particulars and other documents when making his determinations. Moreover, the fact that Dr. Toosi's methods have achieved general acceptance contravenes plaintiff's arguments to the contrary. Indeed, it is notable that the gravamen of cases cited by plaintiff predate *Vargas,* 115 AD3d 505, *supra,* and *Shillingford,* 147 AD3d 465, *supra.*

Plaintiff's remaining contentions concerning the viability of Dr. Toosi's methods are rejected by that same Appellate Division authority, which held that data akin to that utilized by Dr. Toosi in connection with this case is sufficient when determining whether the force of a collision could have produced certain types of traumatic injury (*see Vargas,* 115 AD3d at 505, *supra*; *see also Shillingford*, 147 AD3d at 465, *supra*). Any issues plaintiff may have regarding Dr. Toosi's credentials or issues raised regarding his methodology necessarily go to weight, and not to admissibility (*see Valentine v. Grossman*, 283 AD2d 571 [2d Dept. 2001]).

Accordingly, Dr. Toosi may testify as to his accident reconstruction, the forces of the cars hitting, the forces of the bodies inside the car, and as to his opinion regarding whether plaintiff could have sustained his injuries in this accident. The problems plaintiff raises with Dr. Toosi's testimony on these points go to the weight of his testimony, not its admissibility.

The court has considered plaintiff's remaining contentions, and finds them unavailing. As such, based on the foregoing, it is hereby

ORDERED that plaintiff's application to preclude Dr. Toosi from offering expert testimony at trial is denied in its entirety; and it is further

ORDERED that plaintiff's request, in the alternative, for a *Frye* hearing is similarly denied; and it is further

ORDERED that a copy of this order will be served on all interested parties. All parties will appear in Part STP for a conference on October 29, 2018 at 9:30 AM at the Bronx County Civil Courthouse located at 851 Grand Concourse, Room 607, to set a trial date.

This constitutes the decision and order of the court.

Dated: 10-15-18 **Hon.** George J. Silver

GEORGE J. SILVER, J.S.C.

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1. CHECK ONE..... ☐ CASE DISPOSED IN ITS ENTIRETY ☐ CASE STILL ACTIVE
2. MOTION IS..... ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER