

Ruiz v Losito

2023 NY Slip Op 31853(U)

June 1, 2023

Supreme Court, New York County

Docket Number: Index No. 158403/2019

Judge: Adam Silvera

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ADAM SILVERA PART **40**

Justice

-----X

BELKYS RUIZ,

Plaintiff,

- v -

REBECCA LOSITO, FRANK G LOSITO

Defendant.

-----X

INDEX NO. 158403/2019

MOTION DATE 11/02/2022

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77 were read on this motion to/for PRECLUDE.

Upon the foregoing documents, it is ordered that plaintiff's motion to preclude the testimony of Kevin Toosi, M.D. PhD. is granted in accordance with the decision below.

Plaintiff brought this action for personal injuries following a motor vehicle accident with defendants in Sept. 2019. Plaintiff alleged that defendants rear-ended the vehicle in which she was a passenger. Plaintiff was granted summary judgment on liability by Decision & Order of Hon. Lisa S. Headley dated Feb. 14, 2022.

Defendants seek to introduce expert testimony from Dr. Toosi on the basis that he can use biomechanical engineering principles, and a background in medicine, to analyze the conditions of the accident and resulting injury caused to plaintiff. *See* Affirmation in Opposition, p. 9-10.

Expert testimony in New York must meet the *Frye* standard, as articulated by the Court of Appeals in *People v Wesley*. "The long-recognized rule of *Frye v United States*...is 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, 422 (1994) (citing *Frye v United States*, 293 F. 1013 [D.C. Cir. 1923]).

Plaintiff challenges Dr. Toosi's testimony with regards to the methodology used to determine "crush" data and accident impact, foundation for the photographs used in his analysis, and his medical qualifications. The Court does not reach the question of Dr. Toosi's qualifications here as it finds that the first two challenges are sufficient to preclude his testimony.

As to methodology, "[t]he burden of proving general acceptance rests upon the party offering the disputed expert testimony." *Dovberg v Laubach*, 154 A.D. 3d 810, 813 (2nd Dept 2017). Dr. Toosi's report states that his accident analysis (including crush energy analysis and impulse-momentum analysis), occupant kinematics, and injury analysis are "based on methods generally accepted and routinely employed in biomechanical engineering and accident analysis and reconstruction." *See* Order to Show Cause, Exh. A, Dr. Toosi's Biomechanical Analysis Report, November 5, 2021, p. 8. Dr. Toosi cites to several studies to support this proposition, none of which were proffered in opposition of the instant Order to Show Cause.

However, the abstracts of several studies cited for the foundation of Dr. Toosi's methodology emphasize the use of either physical vehicle/tire evidence, data from electronic vehicle sensors, or information from roads. *Id.* at p. 15, n. 5-6. Relatedly, many abstracts highlight determining the "delta-V" or change in velocity for the vehicles as a key factor to determine the severity/impact level of the crash. *Id.* at n. 4-7.

Here, Plaintiff correctly argues that Dr. Toosi did not perform any physical inspections of the vehicles involved in this case. Defendant fails to even allege that Dr. Toosi analyzed any EDR data. *See* Affirmation of Helene E. Blank, dated Oct. 30, 2022, p. 8-9. Therefore, he did not use the methodology described in the studies. While the cited equations he refers to may well be supported by the cited studies, the speculative data entered by Dr. Toosi is not supported by proper foundation. Most notably, Dr. Toosi does not include the speed defendants were driving

prior to the contact in his analysis of crush energy. *See* Order to Show Cause, Exh. A, *supra* at p. 8. Rather, Dr. Toosi estimates the change in velocity without using any available information of the actual velocity leading up to the crash.

Furthermore, Dr. Toosi cites to only one study supporting the method he did use—analysis of photographs or “photogrammetry.” *See id.* at p. 15, n. 8. This study seems to indicate that a photogrammetry analysis, using the software PhotoModeler, provided an equally accurate set of measurements on a post-damage vehicle as physically measuring it. Importantly, the abstract notes that photogrammetry was “suitably accurate” for the purpose of “vehicle damage measurement.” *Id.* Such study does not reach the conclusion that photogrammetry analysis, on its own, can accurately estimate the delta-V of the crash.

Dr. Toosi failed to indicate which software was used, what measurements were obtained for each vehicle from the software reconstruction, or how those measurements generally would support an estimate of the velocity change and why. Dr. Toosi merely described visual damage from the plain photos and cited to repair estimates for the vehicles. Further, Dr. Toosi failed to elaborate on the photographing technique, use of standard measurement points, or other factors involved in accurate photogrammetry. *See* Affirmation of Helene E. Blank, *supra*, Exh. S, Photogrammetry for Documentation of Vehicle Deformations—A Tool in a System for Advanced Accident Data Collection, *Accid. Anal. And Prev.*, Vol. 26, No. 1, pp. 99-106, 1994. Therefore, Dr. Toosi has failed to support his use of photogrammetry as a “generally accepted” primary method under the *Frye* standard.

Even if Dr. Toosi had sufficiently supported his use of photogrammetry, Plaintiff’s argument regarding the photographs’ lack of proper foundation under *Pascocello v Augustine Jibone, et al.*, 161 AD3d 516 (1st Dept 2018) prevails. Plaintiff argues that defendants are

unaware of when their vehicle was photographed and cannot attest that such photographs were taken contemporaneously or shortly after the accident and accurately reflect the damage.

Defendants have failed to sufficiently raise an argument to the contrary. As such, the unauthenticated photographs cannot provide a basis for expert analysis.

Accordingly, it is

ORDERED that plaintiff's motion to preclude the expert testimony of Dr. Kevin Toosi is granted in its entirety; and it is further

ORDERED that within 30 days of entry plaintiff shall serve defendants with a copy of this Decision/Order with notice of entry.

This constitutes the Decision/Order of the Court.

ADAM SILVERA, J.S.C.

6/1/2023
DATE

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