

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT  
IN AND FOR MANATEE COUNTY, FLORIDA  
CIRCUIT CIVIL DIVISION

ANTHONY ALLEN JORDAN,

Plaintiff,

Case Number: 2017-CA-001913

v.

GAUDENCIA HERNANDEZ, TRINITY  
SERVICES GROUP, INC. a Florida Profit  
Corporation, and RYDER TRUCK RENTAL  
LT, a Florida Trust d/b/a RYDER TRUCK  
RENTAL, INC., a Florida Profit Corporation,

Defendants.

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**PLAINTIFF'S MOTION TO STRIKE**  
**TESTIMONY OF DEFENDANTS' ENGINEERING EXPERTS**  
**RONALD FIJALKOWSKI, PH.D AND SHAWN HARRINGTON**

Plaintiff, ANTHONY ALLEN JORDAN, moves this Honorable Court for an order in limine to exclude or limit the testimony of Defendants, TRINITY SERVICES GROUP, INC. and GAUDENCIA HERNANDEZ's ("Defendants") engineering experts, Ronald Fijalkowski, Ph.D. and Shawn Harrington, BSESM, ACTAR. In support thereof, Plaintiff states as follows:

**FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

1. This action pertains to severe and significant injuries suffered by Plaintiff ANTHONY ALLEN JORDAN ("Mr. Jordan") as the result of a motor vehicle crash which occurred on October 7, 2015 ("Crash") when the Isuzu box truck driven by Defendant, TRINITY SERVICES GROUP, INC.'s ("Trinity"), employee, Defendant GAUDENCIA HERNANDEZ ("Hernandez"), rear-ended Mr. Jordan's Ford utility truck.

2. Defendants filed an initial witness list on August 30, 2018. It was not until January

16, 2019 in Defendants' Third Amended Witness List that Defendants named Ronald Fijalkowski, Ph.D. as an expert biomechanical engineer and Shawn Harrington as an accident reconstructionist who are **“expected to perform an accident reconstruction, testify on the subject matter of causation and damages within his specialty, including but not limited to the claimed neurological/spine injuries, TMJ, TBI, relevant forces imparted on Mr. Jordan, and/or damages; and rebuttal of Plaintiff’s experts addressing these issues.”**

3. Dr. Fijalkowski and Mr. Harrington prepared a report, dated January 31, 2019, that purports to reach eight conclusions in this case based on the analysis included in the report:

1. On October 7, 2015, Mr. Jordan was the belted driver of a 2006 Ford F550 Super Duty utility truck that was involved in a rear-end collision with a 2014 Isuzu NQR box truck.
2. Scientific analyses demonstrate that the subject Ford experienced a rear-end Delta-V that was less than 8.0 mph with an average acceleration level that was less than 3.6g.
3. Had the subject incident been sufficient to initiate occupant motion, Mr. Jordan would have moved rearward relative to the vehicle’s interior. This response would have been supported and controlled by the occupant protection system during the subject incident.
4. Mr. Jordan was exposed to forces during the subject incident. The magnitude of these forces were evaluated in the context of human tolerance and his biomechanical attributes. This analysis demonstrated that the relevant forces he experienced were maintained within human tolerance and his personal tolerance.
5. The subject incident did not create the injury mechanism responsible for a concussion/TBI. Therefore, causation between the subject incident and a concussion/TBI to Mr. Jordan cannot be established.
6. The subject incident did not create the injury mechanism responsible for Mr. Jordan’s TMJ injuries. Therefore, causation between the subject incident and Mr. Jordan’s TMJ injuries cannot be established.
7. The subject incident did not create the injury mechanism responsible for acute onset, aggravation, and/or exacerbation of Mr. Jordan’s cervical and/or thoracic injuries. Therefore, causation between the subject incident

and acute onset, aggravation, and/or exacerbation of Mr. Jordan's cervical and/or thoracic injuries cannot be established.

8. The subject incident did not create the injury mechanisms responsible for acute onset, aggravation, and/or exacerbation of Mr. Jordan's lumbar injuries. Therefore, causation between the subject incident and acute onset, aggravation, and/or exacerbation of Mr. Jordan's lumbar injuries cannot be established.

See Dr. Fijalkowski's and Harrington's Report, attached hereto as **Exhibit A**.

4. Dr. Fijalkowski's and Mr. Harrington's depositions were taken on February 26, 2019. Dr. Fijalkowski's deposition and CV reveal that he holds himself out as a "senior biomechanist here at ARCCA, Incorporated, spelled A-R-C-C-A." See Plaintiff's Notice of Filing Deposition Transcript of Ronald Fijalkowski, dated February 26, 2019, filed on March 15, 2019 at p. 4:15-16, attached in pertinent part as **Exhibit B**; and CV of Ronald Fijalkowski, attached hereto as **Exhibit C**.

5. Mr. Harrington's deposition and CV reveal that he is the director of accident reconstruction at ARCCA. See Plaintiff's Notice of Filing Deposition transcript of Shawn Harrington, dated February 26, 2019, filed on March 15, 2019 at p. 6:4-15, attached pertinent part as **Exhibit D**, and CV of Shawn Harrington, attached hereto as **Exhibit E**.

6. Dr. Fijalkowski and Mr. Harrington's analysis starts with Mr. Harrington performing an accident reconstruction. At this point, Mr. Harrington utilized photogrammetry to analyze the physical forces involved in the collision to discover the Delta V (or change in velocity) of the vehicle occupied by Mr. Jordan. Dr. Fijalkowski described the reconstruction as Mr. Harrington reporting to him so that he could put together his opinions. See Plaintiff's Notice of Filing Deposition Transcript of Ronald Fijalkowski, dated February 26, 2019, filed on March 15, 2019 at p. 44:15-20 attached in pertinent part as **Exhibit B**. In other words, Mr. Harrington determined the crash severity.

7. After the accident reconstruction, Dr. Fijalkowski took Mr. Harrington's Delta V, and other forces, to evaluate the occupant kinematics, or movement of Mr. Jordan's body within the vehicle to reach "causation" opinions relating to the injuries which Mr. Jordan sustained as a result of the crash (although Fijalkowski and Harrington are not medical doctors).

8. The photogrammetry and crush analysis utilized by Mr. Harrington was inappropriate for this crash.

9. As such, the Delta V utilized by Dr. Fijalkowski is inaccurate, undercutting his injury causation analysis.

10. Further, Dr. Fijalkowski's injury causation analysis improperly utilized a comparison to "daily activities" that did not actually apply to Mr. Jordan's personal tolerance levels or the forces or circumstances involved in this crash to reach the conclusion that Mr. Jordan could not have been hurt in this crash (despite the fact that Mr. Jordan went to the hospital by ambulance from the scene of the crash, despite the fact that Mr. Jordan has over \$500,000.00 in medical bills for crash-related treatment and surgeries, and *amazingly* despite the fact that nearly every one of Mr. Jordan's treating doctors and Defendants' own experts have testified that Mr. Jordan was injured in the crash and required treatment because of the crash).

## **ARGUMENT**

### **A. Introduction**

The opinions by Dr. Fijalkowski are not admissible because they are not based on any adequate data, cannot be applied to the evidence, and would not assist the trier of fact. The admission of this fundamentally deficient and fabricated testimony would only serve to confuse and mislead the jury to render a verdict not supported by the facts. In other words, there is nothing

about Dr. Fijalkowski's methods that reliably produce his conclusions, which in turn makes his conclusions unreliable and irreproducible.

Assumptions based on speculation and methodology whose application of biomechanical engineering has never been subjected to testing for reliability cannot and should not be allowed in this Court. Dr. Fijalkowski's testimony is directed at disavowing medical opinions regarding causation under the guise of a scientific analysis. Despite the fact that Dr. Fijalkowski readily admits to having no medical or other clinical qualifications, training, experience, or licensure, throughout his report he claims that the injuries Mr. Jordan has been diagnosed with by qualified and licensed physicians – and agreed to by Defendants' own medical experts – didn't really happen. It should be noted that Fijalkowski relies completely on Shawn Harrington to provide his "biomechanical analysis." If allowed, Fijalkowski will testify that pursuant to *his* expert analysis, he has determined that the forces upon Mr. Jordan's body were insufficient to cause the injuries sustained in the crash, or even equivalent or similar injuries.

The science of "biomechanics" does not consist of a substitute or proxy for diagnosis of injury (this is clinical medicine) nor can it be used to quantify probability of injury given specified facts (this is the field of epidemiology).

"Biomechanics" is defined by the American Society of Biomechanics as "the study of the structure and function of biological systems using the methods of mechanics." We recognize that biomechanics is a legitimate area of science and applied physics, and the field of biomechanics provides the tools to assess *how* an injury, which has been diagnosed clinically, resulted from a given crash. However, biomechanics has no legitimate application to determine *whether* an injury resulted from a crash (this is medicine), or how often it may be expected that an injury would result from a specific crash (this is epidemiology). This type of "accident reconstruction and

biomechanics" is ***not generally accepted within the scientific community*** to reach a conclusion that a person seeking medical treatment for injury was not actually injured in a traumatic event. That is novel and unique to defense forensic work in the litigation arena.

The only generally accepted and scientifically valid approach to injury causation requires not just an understanding of the injury mechanism, but also an examination of the probability of the injury occurring in the individual in the absence of the injury mechanism. Dr. Fijalkowski did not even begin to address these issues with his methods. His opinions consisted of circular reasoning; he asserted that Mr. Jordan's injuries couldn't or should not have occurred based on technical sounding language that ignored the actual evidence that an injury did, in fact, occur. The jury is left with the option that if they believe Dr. Fijalkowski then they either have to accept that no injury occurred and all of the medical and other evidence of injury is false, or that the injury occurred for no known reason ***at the exact same time as the crash***, but as a pure coincidence to the crash. This conundrum demonstrates the lack of validity of Dr. Fijalkowski's approach. Compounding the issues is Dr. Fijalkowski's failure and inability to point to anything else other than the crash that may have caused Mr. Jordan's injuries.

This history of the misuse of the science of biomechanics solely for the purposes of injury litigation defense is beyond the scope of this memorandum. However, it is critical to note that one of the major components to this distortion of biomechanics is the misuse of crash, cadaver, and animal tests/studies.

The nature of the science used in Defendants' proposed biomechanical expert testimony, as described above, is relevant to a Frye analysis. As shown in the exhibits to this motion, the distortion of biomechanics into some sort of injury threshold diagnosis or determination, as used by Fijalkowski and Harrington in this case, has no place or application in the real world. It is

science developed exclusively for low impact vehicle crash litigation purposes. The tests involve either human subjects in low-speed impacts who have essentially been guaranteed that they will not be injured, or they involve cadavers or crash-test dummies with no real-world application to Mr. Jordan or the crash at issue.

Over recent years, biomechanists like Dr. Fijalkowski, who look at photographs of a vehicle, or ask someone else to look at a photograph of a vehicle, in this case Shawn Harrington, and then conclude forces were too minimal to injure, have been struck in both state and federal courts. See orders striking biomechanical engineer's opinions attached hereto as composite **Exhibit F**. Like those opinions, Dr. Fijalkowski's opinions are fundamentally flawed.

#### **B. Admissibility of Expert Opinions in Florida**

Admissibility of expert opinions in Florida is governed by Florida Statutes §§ 90.702 through 90.705, and 90.403. Section 90.702 states:

If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion. However, the opinion is admissible only if it can be applied to evidence at trial.

A four-prong test for the admissibility of expert testimony, construing the language of 90.702, as well as 90.403, was outlined in the case of CSX Transp.Inc. v Whittler, 584 So. 2d 579 (4th DCA 1991). (1) The opinion evidence must be helpful to the trier of fact; (2) The opinion evidence must be applicable to evidence offered at trial; (3) The witness must be qualified as an expert; (4) The evidence, although technically relevant, must not present a substantial danger of unfair prejudice that outweighs its probative value.

Each of these four prongs must be met in order for the admission of expert testimony by this court. A significant body of case law has developed regarding each of these elements, all of

which are relevant to our case in chief, but for purposes of this memorandum, only the first and second requirements shall be discussed since it is these elements of the test dealing specifically with opinions based on the use of novel scientific theories.

**i. Dr. Fijalkowski's opinion is not helpful to the trier of fact.**

In assessing whether expert opinion evidence will be helpful to the trier of fact the court must make certain preliminary findings to determine whether the subject matter is proper for expert testimony, i.e. that it will assist the trier of fact in understanding the evidence or in determining a fact in issue.

The initial finding to be made by the court is whether the fact on which the expert opinion is based is so basic, so well known, or of such common understanding that the expert opinion would not aid the jury in its deliberations. If such a finding is made, the expert testimony will not be admitted, Jordon v State, 694 So. 2d 708 (Fla. 1997); Smith v Hooligan's Pub and Oyster Bar, Ltd., 753 So. 2d 596 (3rd DCA 2000); State Farm Ins. Co. v Penland, 668 So. 2d 200 (41h DCA 1995). Once a finding is made that the subject matter is one outside the ordinary experiences of lay people, and a party wishes to introduce scientific, technical or other specialized testimony, such testimony may be appropriate. If, however, the expert testimony relies on a scientific principle, test, or methodology, which by its nature implies an infallibility not found in pure opinion testimony, *the courts have placed a burden on the party proposing such evidence to prove the general acceptance of both the underlying scientific principle and the testing procedures used to apply that principle to the facts in the case at hand before such testimony will be admitted.*

Without this general acceptance standard, these expert opinions from professional witnesses would not be helpful to the jury. In fact, in most instances to allow such testimony would, more likely than not, mislead the jury since juries tend to give more weight to the testimony of a

well credentialed expert witness, even though a well credentialed expert cannot make invalid science valid merely by espousing an opinion.

This general acceptance standard has been followed by the Courts of Florida and has been referred to as the “Frye test” named for the case of Frye v United States, 293 F. 1013 (D.C. 1923) which the Florida Supreme Court adopted in Stokes v State, 548 So. 2d 188 (Fla 1989), and has continued to follow ever since. The Frye test requires that 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. Frye, 293 F. 103.

The underlying theory for this Frye rule is that a courtroom is not a laboratory, and as such it is not the place to conduct scientific experiments. If the scientific community considers a procedure or process unreliable for its own purposes, then the procedure must be considered less reliable for courtroom use. Stokes v State, 548 So. 2d 188 (Fla. 1989). The Supreme Court of Florida further amplified the reasons supporting its allegiance to the Frye test in Hadden v State, 690 So. 2d 573 (Fla 1997), stating:

We firmly hold to the principle that it is the function of the court to not permit cases to be resolved on the basis of evidence for which a predicate of reliability has not been established. Reliability is fundamental to issues involved in the admissibility of evidence. It is this fundamental concept which similarly forms the rules dealing with the admissibility of hearsay evidence. Novel scientific evidence must also be shown to be reliable on some basis other than simply that it is the opinion of the witness who seeks to offer the opinion.

Not only must the evidence be based on a scientific principle, theory or methodology which is scientifically valid, the procedures followed to apply the technique or process must also be generally accepted in the relevant scientific community. Haynes v. State, 660 So. 2d 257 (Fla. 1995); Florida Evidence, Ehrhardt, § 702.3.

Whether it is only the underlying methodology and procedure that needs to be Frye tested, or whether it is also the ultimate opinion of the expert that needs to be Frye tested remains somewhat unclear. Erhardt, § 702.3. In Hadden, the Supreme Court stated that it would not permit factual issues to be resolved on the basis of opinions which have yet to achieve general acceptance in the relevant scientific community, implying that the opinion itself must be Frye tested. Meaning, the opinion itself must be accepted by the relevant scientific community. In Berry v CSX Transp., Inc., 709 So. 2d 552 (1st DCA 1998) the first DCA felt that Hadden should be limited to the facts of that case since the opinions in Hadden concerning whether a child could exhibit symptoms consistent with child sexual abuse accommodation syndrome was inextricably intertwined with an unacceptable diagnostic methodology. It was simply a case in which the conclusions and methodology were not distinguishable from one another. Therefore, the First District Court of Appeals held it is only the underlying methodology and procedures that need to be Frye tested and not the ultimate opinion. Berry, 709 So. 2d 552.

In the case in chief, Dr. Fijalkowski's opinions as to injury causation are based on methodology and procedures that cannot withstand a Frye analysis. Therefore, the question of whether his opinions must also be Frye tested, is moot for purposes of this motion to strike. When there is an issue as to whether a scientific test, methodology or procedure meets the Frye standard the Florida Supreme Court in Ramirez v State, 651 So.2d 1164 (Fla 1995) has held that the burden is on the proponent of the evidence to prove the general acceptance of both the underlying scientific principle and the testing procedure used to apply that principle to the facts of the case at hand. Before the evidence may be admitted, the trial judge has the "sole responsibility" to determine whether the proponent has established the Frye foundation by a preponderance of the evidence.

Florida Evidence, Ehrhardt § 702.3. In determining the admissibility of such evidence the court can consider expert testimony, scientific and legal literature and other judicial decisions.

Therefore, it is essential that both the methodology and procedures used Dr. Fijalkowski in arriving at his opinions in this cause must be Frye tested by this Court to determine whether his methodology or procedure has the predicate of reliability necessary to allow the trier of fact to hear any such opinions. Plaintiff would submit that the methodology and procedures used by Dr. Fijalkowski do not meet this predicate of reliability and thus any opinions.

**ii. Dr. Fijalkowski's methodology and procedures are unreliable and not applicable to pertinent evidence.**

**1. Dr. Fijalkowski is another example of the defense biomechanical opinions.**

Dr. Fijalkowski and other biomechanical experts are known to offer unreliable opinions. They have written a slew of journals cross-referencing each other's work to gain "acceptability" in the scientific community. The opinions of defense biomechanics now stop just short of the magic words, "the plaintiff could not have been injured, or is not injured." Now, defense biomechanics simply conduct an "analysis" and then conclude that the forces were very minimal. It is no coincidence that defense biomechanical experts, like Dr. Fijalkowski here, utilize a Delta V of 8 or less in their analysis – it is the maximum justifiable Delta V that they can justify when trying to twist and contort the studies relied upon in reaching their "Not Injured" opinions. This obvious tactic to pass Frye scrutiny should not be condoned by the courts.

Whether the magic words are uttered, or not, the message to the jury is that they have used "expert" means to determine that the plaintiff really is not injured, regardless of what medical doctors say. They invite juries to ignore the testimony of treating physicians. And since they offer no alternative explanation for the surgeries and treatment given to plaintiffs in vehicle crashes, we are left to speculate, without any evidence, that all plaintiffs (in their cases) are simply liars.

Even short of the magic words, Fijalkowski and Harrington's methodology does not pass Frye muster. Fijalkowski and Harrington's methodology lacks evidentiary foundation and is not qualified in the *correct* scientific communities – medicine and epidemiology, and his testimony would not be helpful to the jury. Dr. Fijalkowski's opinions are unreliable for this reason.

2. Dr. Fijalkowski's methodology is unreliable and not accepted in the scientific community.

Mr. Jordan's rebuttal expert, Dr. Michael Freeman, one of the leading forensic epidemiologists in the area of low and moderate impact motor vehicle injury, testified in this matter. Part 1 of Dr. Michael Freeman's Deposition is attached hereto as **Exhibit G.**<sup>1</sup> Dr. Freeman has testified and will testify at trial that Dr. Fijalkowski's methodologies: cannot be tested and have not been tested, have not been subject to peer review and publication, have a substantial potential for rate of error, and are not generally accepted in the appropriate scientific community.

Dr. Freeman is a doctor of medicine and an epidemiologist, and a nationally and internationally known and well-established expert in the disciplines of forensic medicine, injury causation, crash reconstruction and injury biomechanics. Dr. Freeman is a Fulbright Fellow in Forensic Medicine with the United States Department of State (2017-2020).

He serves as an Associate Professor of Forensic Medicine at Maastricht University, and a full Affiliate Professor of Psychiatry at Oregon Health and Science University School of Medicine, where he has taught courses for 15 years in forensic medicine, forensic epidemiology, and injury epidemiology. Dr. Freeman has been a credentialed crash reconstructionist since 1996, and has had ACTAR accreditation (the Accreditation Commission on Traffic Accident Reconstruction) since 2005. Over the past 20 years he has served as a vehicular homicide investigator for law

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<sup>1</sup> Defendants did not finish with Dr. Freeman's deposition until March 14, 2019. The continued deposition transcript will be filed upon receipt. Plaintiff intends to supplement this Motion once the continued transcript is received.

enforcement (consultant to the state medical examiner and special deputy sheriff), and is currently an affiliate medical examiner with the Allegheny County Medical Examiner's office.

Dr. Freeman has more than 60 scientific publications pertaining to injury biomechanics, including a book for the Society of Automotive Engineering, and taught injury biomechanics at OHSU for the 15 years (1999-2013). He has served as a consultant on injury biomechanics to state and federal government agencies, including NASA and the US Congress.

He has published more than 200 scientific papers, abstracts, book chapters and books on topics that include traffic crash injuries, crash reconstruction, injury causation and injury biomechanics, including the recent text for Elsevier, Forensic Epidemiology: Principles and Practice (2016).

During his continued deposition, Dr. Freeman provides an explanation of why the relevant scientific community and field of study determining whether a person has been injured is medicine, and that probability or likelihood of injury for a given set of facts is evaluated using the discipline of epidemiology. Dr. Fijalkowski is neither a medical doctor nor an epidemiologist, and his attempt to call opinions in both areas "biomechanics" falls short of Frye standards since it's not generally accepted within the relevant scientific community.

Dr. Freeman further explains the faulty methodology employed by Dr. Fijalkowski, and the experts upon whom he relied clearly shows the technique is not scientifically, medically, or logically valid. Dr. Fijalkowski attempts to opine that the subject crash is similar to activities in daily living. Dr. Freeman makes clear that this crash cannot be compared to any daily activity and that a daily activity analysis cannot be compared to this crash and cannot be used to analyze Mr. Jordan's personal tolerance levels. Dr. Fijalkowski misuses the science of daily activity studies to analyze Mr. Jordan's personal tolerance levels, particularly in this crash that forced him to go to

the hospital. Dr. Freeman makes clear that the generally accepted relevant community does not subject real people to crashes this severe.

Dr. Freeman is not aware of any human crash testing ever performed with intent to assess injury risks. The prevailing medical (and appropriate) literature that addresses injury caused by forces on the cervical spine, makes it clear that crash test based methodologies, especially cadaver testing, such as those relied upon by Fijalkowski, inherently have huge rates of error because of the many assumptions built in to the modeling.

Moreover, Dr. Freeman strongly disagrees with Dr. Fijalkowski's methodologies for the random articles cited as "support" for his opinions. Not a single paper referenced by Dr. Fijalkowski: addresses injury mechanisms like Mr. Jordan was exposed to here nor addresses injury risk in a real-world crash.

Simply put, Defendant has not provided the proper evidentiary foundation for the admission of Dr. Fijalkowski's testimony, as required to pass the muster of Frye.

**iii. Dr. Fijalkowski is not qualified to render medical causation opinions.**

As stated above, the essence of Dr. Fijalkowski's opinion is that the forces in the subject collision were too minimal to have injured Mr. Jordan. Under Florida law, medical doctors give opinions on injuries, not engineers. Stockwell v. Drake, 901 So.2d 974 (Fla. 4<sup>th</sup> DCA 2005); Mattek v. White, 695 So.2d 942 (Fla. 4<sup>th</sup> DCA 1997). Dr. Fijalkowski is an engineer who obtained a doctorate of philosophy. He is not a medical doctor as he gladly verifies. Yet - Dr. Fijalkowski has been retained to show how an injury did not occur, not to dispute that an injury exists. In Smelser v. Norfolk Southern Railway Co., the Sixth Circuit struck a so-called biomechanical expert in a very similar situation to the present and offered a clear, compelling analysis:

During preliminary questioning, Huston explained that biomechanics apply the principles in mechanics to the facts of a specific accident and provide information

about the forces generated in that accident, explain how the body moves in response to those forces, and thus determine what types of injuries would result from the forces generated. Huston admitted that biomechanics are qualified to determine what injury causation forces are in general and can tell how a hypothetical person's body will respond to those forces, but are not qualified to render medical opinions regarding the precise cause of a specific injury. He acknowledged that each individual person has his own tolerance level, and therefore, admitted he could testify only in general terms, i.e., that "X" forces would generally lead to "Y" injuries and "Y" injuries are consistent with those the plaintiff claims to have suffered.

Huston also admitted that (1) he was not a medical doctor, had no medical training, and must rely on a medical doctor's opinion to determine a particular individual's injuries; (2) each individual has his or her own tolerance level and pre-existing medical conditions could have an effect on what injuries result from an accident; and (3) he had not examined Smelser's complete medical history. Nonetheless, the trial court permitted Huston to testify that:

the failure of the seat belt, the shoulder belt webbing to lock directly, led to the injuries. The neck injury, in my opinion, was caused by the rear-end collision, with the neck being thrust backward. And then the failure of the shoulder belt allowed the shoulder to go forward, aggravating that injury, causing it to go back further. And at the same time then the lumbar region came from what might be called a jackknifing or a bending around the belt, causing the injury to the lower spine.

This opinion testimony goes beyond Huston's expertise in biomechanics. As he previously admitted, he was qualified to render an opinion that made use of his discipline's general principles, described the forces generated in the August 1989 rear-end collision, and spoke in general about the types of injuries those forces would generate. Huston is not a medical doctor who had reviewed Smelser's complete medical history, and his expertise in biomechanics did not qualify him to testify about the cause of Smelser's specific injuries. As this court observed in *Berry*, "[t]he issue with regard to expert testimony is not the qualifications of a witness in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question." (citation omitted).

Smelser v. Norfolk S. Ry. Co., 105 F.3d 299 (6th Cir. 1997).

Dr. Fijalkowski is not competent to speak about "probabilities" of injury based on the statistics cited. That field of science is epidemiology, not engineering. An opinion as to the mechanism of injury in a motor vehicle accident cannot be rendered without falling under the general umbrella encompassing a medical opinion because one may not analyze the mechanism of

injury without the education, training, or experience necessary to understand the anatomy and pathology of the portion of the body injured in the incident. Dr. Fijalkowski is not competent to speak these things.

Expressing an opinion that the mechanism of injury is *not present* is no different than testifying it is *impossible* for an occupant of a vehicle to have been injured in the collision. See e.g. Goodwin v. MTC Products, 232 F. 3d 600 (7<sup>th</sup> Cir. 2000); see also Mattek v. White, 695 So. 2d 942, 943 (Fla. 4<sup>th</sup> DCA 1997). Notwithstanding the fact that Dr. Fijalkowski is not a medical doctor and therefore not qualified to testify as to injuries, assuming he were qualified, he did not take into consideration Mr. Jordan's personal injury tolerance. The only way to know an individual's tolerance is to exceed it. And clearly Mr. Jordan's injury tolerance was exceeded in this real-world crash at issue, as even agreed to by Defendants' own experts.

Regarding injury tolerance, the studies relied upon by Dr. Fijalkowski related to the forces on Mr. Jordan's body parts that were injured in this crash are also inapplicable here. These daily activity studies in crash studies involving subjects and crashes not similar to the circumstances here do no support Dr. Fijalkowski's testimony relating to the forces applied to Mr. Jordan – an actual person in this crash – an actual crash where Mr. Jordan had no guarantee of not being injured. These studies used by Dr. Fijalkowski are not real people and they are not real crashes.

In Carrier v. Ramsey, the purported expert, like Dr. Fijalkowski, offered an opinion that the crash could not have caused injury to the plaintiff, even though he did not have a medical degree. The Fifth District Court of Appeals held that the trial Court did not abuse its discretion in determining that the witness was not qualified to render an opinion about whether the crash caused the plaintiff's injuries. Carrier v. Ramsey, 714 So. 2d 657, 659 (Fla. 5<sup>th</sup> DCA 1998).

An opinion as to the mechanism for injury in a motor vehicle crash cannot be rendered without falling under the general umbrella encompassing a medical opinion because one may not analyze the mechanism for injury without the education, training, or experience necessary to understand the anatomy and pathology of the portion of the body injures in the incident. As a non-medical expert who candidly conceded that he is not qualified in the field of medicine<sup>2</sup>, Dr. Fijalkowski would not be qualified to testify that Mr. Jordan did suffer an injury as a result of this accident. Therefore, it logically follows that Dr. Fijalkowski is not qualified to testify that Mr. Jordan did not sustain injuries in this crash.

**iv. Dr. Fijalkowski's opinions will mislead the jury and unfairly prejudice Plaintiff.**

Dr. Fijalkowski's testimony should also be excluded on grounds of prejudice or confusion.

Section 90.403, Florida Statutes provides as follows:

Exclusion on grounds of prejudice or confusion.—Relevant evidence is inadmissible if its probative value is substantially ***outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury***, or needless presentation of cumulative evidence. This section shall not be construed to mean that evidence of the existence of available third-party benefits is inadmissible.

(emphasis added). The opinions expressed in Fijalkowski and Harrington's report would not be helpful to the jury. The sole purpose of their testimony is to lead the jury to believe that the forces produced by a crash – not even necessarily this crash – were not sufficient to produce injury to most people. However, Mr. Jordan is not “most people” or a sampling of a demographic as depicted in a computer model. Dr. Fijalkowski nor Mr. Harrington were able to show the forces produced by this crash, to this Plaintiff, nor were they able to specifically identify what Mr.

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<sup>2</sup> As an example, Dr. Fijalkowski started to opine that Mr. Jordan's prior broken jaw may have related to the cause of Mr. Jordan's TMJ injuries. When plaintiff's counsel pointed out that Defendants' own dental expert, Dr. Melzer, testified that the prior broken jaw was not related in any way to Mr. Jordan's TMJ injuries, Dr. Fijalkowski deferred.

Jordan's personal tolerance levels were at the time of the crash specific to the areas of his body that were injured.

Allowing both Fijalkowski and Harrington to testify would gravely mislead the jury. "Simply put, expert testimony may be assigned talismanic significance in the eyes of lay jurors, and, therefore, the district courts must take care to weigh the value of such evidence against its potential to mislead or confuse." United States v. Frazier, 387 F.3d. 1244 (11<sup>th</sup> Cir. 2004) (en banc) (finding no abuse of discretion when the trial court concluded that an "imprecise and unspecific" expert opinion would not assist the jury, and observing that the expert's "imprecise opinion easily could have served to confuse the jury, and might well have misled it" and "because of the powerful and potentially misleading effect of expert evidence, sometimes expert opinion that otherwise meet the admissibility requirements may still be excluded by applying Rule 403.")

In a personal injury trial, the complex addition of biomechanical engineering testimony on causation of medical injuries will confuse the issues, mislead the jury, and certainly unfairly prejudice Mr. Jordan. In particular, such testimony will unfairly prejudice Plaintiff because it will mislead and confuse the jury into believing a non-doctor is qualified to make a medical determination of Plaintiff's injuries. Such testimony will transform this case into a complex science exam for the jury and should not be admissible since its probative value is far outweighed by the propensity for the testimony to confuse the issues and mislead the jury.

### **CONCLUSION**

Defendants' engineering experts attempted to piece together the lowest Delta-V crash possible so that it could fit within their unrelated studies and predetermined testimony intended to conclude that Mr. Jordan could not have been hurt in this crash. This despite the fact that Mr. Jordan's medical doctors and Defendants' own experts agree that Mr. Jordan was hurt in this crash

and required treatment because of this crash. Defendants' attempt to use a biomechanical engineer to usurp a medical doctor's place in opining on an injured person's injury causation should not be allowed. For the reasons stated herein, Dr. Fijalkowski and Shawn Harrington should be stricken.

WHEREFORE, Plaintiff, ANTHONY ALLEN JORDAN, respectfully requests that this Court enter an Order striking Defendants, GAUDENCIA HERNANDEZ and TRINITY SERVICES GROUP, INC.'s biomechanical engineer experts, Ronald Fijalkowski, Ph.D. and Shawn Harrington, BSESM, ACTAR, from presenting any testimony, including any testimony on their expert report, together with such other and further relief as the Court deems appropriate under the circumstances.

#### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic mail via the Florida E-filing Portal to: **Michael E. Reed, Esq., Christopher A. Cazin, Esq.**, [tpacrtpleadings@wickersmith.com](mailto:tpacrtpleadings@wickersmith.com); Wicker Smith O'Hara McCoy & Ford, P.A. (Counsel for the Defendants); **Jeffrey S. Glassman, Esq. and William G.K. Smoak, Esq.**, [courtdocuments@flatrtrialcounsel.com](mailto:courtdocuments@flatrtrialcounsel.com); Smoak, Chistolini & Barnett, PLLC (Co-Counsels for Trinity Service Group, Inc.); **Lisa Ann Kalo, Esq.**, [lkalo@kvpalaw.com](mailto:lkalo@kvpalaw.com), (Co-Counsel for Plaintiff), on this **15<sup>th</sup>** day of **March, 2019**.

**/s/Marc Matthews**  
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