

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CASE NO. 11-08137-A

PATTI K. KNIGHT,

Plaintiff,

vs.

CARMEN FITCHETT,

Defendant.

**ORDER ON PLAINTIFF'S MOTION TO EXCLUDE THE TESTIMONY OF
DEFENDANT'S EXPERT DAWN FREYDER**

THIS MATTER, having come before the Court on Plaintiff's Motion to Exclude the Testimony of Defendant's Expert Dawn Freyder on December 10, 2014, and the Court having considered the motion, attached exhibits, the file, argument of counsel, and being otherwise fully informed in the premises, hereby finds as follows:

BACKGROUND

Litigation in this case arises from an October 29, 2010, underride/override rear-end collision involving Plaintiff, PATTI K. KNIGHT, and Defendant, CARMEN FITCHETT. Plaintiff seeks recovery from Defendant for injuries and related damages resulting from the collision, including medical expenses for treatment received for complaints to her neck and back. Accordingly, of paramount issue in this case is whether, and to what extent, Plaintiff was injured as a result of the accident giving rise to these proceedings. To that end, Defendant retained Scientific Expert Analysis Limited, ("SEA"), to perform an accident reconstruction. Dawn Freyder, an employee of SEA with a B.S. degree in Mechanical Engineering and an M.S. degree in Biomedical Engineering, performed the accident reconstruction. Defendant seeks to introduce

testimony of Dawn Freyder to give her opinions regarding the accident reconstruction. Plaintiff moved this Court to exclude such testimony pursuant to §90.702 of the Florida Evidence Code.

LEGAL STANDARD

Florida Statute §90.702, titled “Testimony by Experts” provides:

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 or otherwise, if:

- (1) The testimony is based upon sufficient facts or data;
- (2) The testimony is the product of reliable principles and methods; and
- (3) The witness has applied the principles and methods reliably to the facts of the case.

In the case of an expert relying on scientific principles, the trial judge must assess “whether the reasoning or methodology underlying the testimony is scientifically valid and . . . whether that reasoning or methodology properly can be applied to the facts in issue.” *Daubert v. Merrill Dow Pharm, Inc.*, 509 US 579, at 592-93 (1993). To assist in making the determination of the reliability of an expert’s testimony, the following factors may be considered:

- (1) Whether the expert’s methodology has been tested or is capable of being tested;
- (2) Whether the theory or technique used by the expert has been subjected to peer review and publication;
- (3) Whether there is a known or potential error rate of the methodology; and
- (4) Whether the technique has been generally accepted in the relative scientific community.

United Fire and Cas. Co. v. Whirlpool Corp., 704 F. 3^d 1338, 1341 (11th Cir. 2013). However, “these factors are not exhaustive and are intended to be applied in a flexible manner.” *Id.* (Internal quotations omitted.) “The burden is on the party offering the expert testimony to prove that it is reliable.” *Wagner v. Heston Corp.*, 450 F.3d, 756, 758 (8th Cir. 2006).

DISCUSSION

The SEA Accident Reconstruction and Biomechanical Analysis was authored by Dawn Freyder and contains opinions and findings regarding the accident reconstruction. Plaintiff argues that Freyder’s opinions and testimony are based on insufficient facts and data, and are not reliable, thereby failing to meet the first two prongs of Florida Statute §90.702. The Court agrees in part.

The Court finds that Freyder’s reconstruction of the subject crash is based on an unreliable methodology, and based on insufficient facts and data. Freyder relied upon the Society of Automotive Engineers (“SAE”) publication 2003-01-0158 for a relationship between bumper-to-bumper impacts and underride/override impacts. Freyder Dep. 38: L4-L25. SAE 2003-01-0158 examined five different vehicles in a total of five underride/override impacts and five bumper-to-bumper impacts. Freyder Dep. 39:24-40: 4 Freyder candidly admits that the five underride/override crash tests with five different vehicles are not statistically significant. Freyder Dep. 60:17-22. None of the five cars subjected to an underride/override crash test in SAE 2003-01-0158 was of the same make, model or year as the vehicles involved in the subject auto crash. Moreover, none of the five vehicles subjected to an underride/override crash test was an SUV similar to the vehicle driven by the Plaintiff.

To approximate the extent of the damage to the subject vehicles, Freyder relied on repair estimates of the vehicles in the accident. Freyder Dep. 73:18-23. In *Clemente v. Bloomenberg*,

the court held that the proffered biomechanical engineer could not render an opinion based on his report, which consisted of:

[U]sing repair costs and photographs as a method for calculating the change in velocity of two vehicles at impact [because it] is not a generally accepted method in any relevant field of engineering or under the laws of physics, hence, under the *Frye* test of general acceptance, the opinion upon which it relies is inadmissible. By applying the *Daubert/Kumho* factors [the court also found] this methodology to be invalid.

705 N.Y.S. 2d 792, 800 (Sup. Ct. 1999). Pursuant to *Daubert/Kumho* the court found that the data and methodology employed by the biomechanical engineer was not scientifically or technically valid; therefore, the testimony based upon the data and methodology was not reliable and could not be presented to a jury. Similarly, in the instant case, Freyder's use of the estimated costs of repairs to determine the speed and acceleration of the vehicles is not a scientifically reliable methodology.

Further, the Court finds additional data used by Freyder to be inapplicable to the facts in this case. Freyder's reliance on the Insurance Institute for Highway Safety news release from July 2, 2002 for data from a 5 miles per hour barrier to rear bumper crash test involving a Honda CRV is misplaced. The news release specifically states that instead of a barrier to rear bumper crash, the spare tire on the tailgate was impacted by the barrier and resulted in significantly more damage.

Therefore, this Court in its gate-keeper role finds that this evidence is not sufficiently reliable and will not be admissible.

BASED ON THE FOREGOING, it is

ORDERED and ADJUDGED as follows:

1. Plaintiff's Motion to Exclude the Testimony of Defendant's Expert Dawn Freyder is hereby **GRANTED IN PART**. Dawn Freyder's opinions and testimony regarding A.) the maximum change in speed of the Plaintiff's vehicle due to contact by the Defendant's vehicle, B.) whether the Plaintiff's kinematics resulting from this accident are or are not consistent with causing injury, and C.) whether the forces the Plaintiff was exposed to in this accident are or are not consistent with causing injury to the Plaintiff's cervical or lumbar spine are hereby excluded and inadmissible, and Freyder shall not testify, in any fashion, as to what injuries might or might not have resulted from this accident.

2. Dawn Freyder may testify as to the average acceleration of the Plaintiff's vehicle after impact by the Defendant's vehicle only after first laying a proper predicate with the Court and only upon showing that the opinion is based on reliable scientific methodology and data, and not based upon, or calculated from, repair estimates.

DONE and ORDERED in Chambers, Hillsborough County, Florida on this _____ day of December, 2014.

Honorable Sam D. Pendino

ORIGINAL SIGNED
CONFORMED COPY

DEC 18 2014

SAM D. PENDINO
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to the following individuals by hand delivery and/or U.S. Mail/Courthouse Box Delivery, this ____ day of December, 2014.

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