



**Texas Trial Lawyers Association
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March 3, 2016
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October 6, 2016
Dallas, TX

**Attacking the Bio-Mechanic
APPENDIX 1**

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Appendix 1

NO. 2013-CCL-00029

ENRIQUE DAVILA
Plaintiff,

V.

ENRIQUE GARCIA
Defendant.

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§

IN THE COUNTY COURT AT LAW

NO. 1

CAMERON COUNTY, TEXAS

PLAINTIFF’S MOTION TO EXCLUDE TESTIMONY OF
DEFENSE OPINION WITNESS JOSEPH CORMIER

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Plaintiff, Enrique Davila, Movant herein, and brings this *Plaintiff’s Motion to Exclude Testimony of Defense Opinion Witness Joseph Cormier*, and would show the Court the following:

I.

On or about the 28th day of October, 2011 Plaintiff Enrique Davila was traveling east on the left lane of E. Saint Charles Street in Brownsville, Texas. Defendant Enrique Garcia was traveling directly behind Plaintiff. Plaintiff then proceeded to slow down in an attempt to make a left turn. Defendant Enrique Garcia, failing to keep a proper lookout and failing to control his speed, collided with the rear of Plaintiff’s vehicle. As a result of the impact Plaintiff sustained severe bodily injury and substantial property damage and, subsequently, filed this suit to recover monetary damages and general relief.

Defendant has designated Joseph Cormier to “provide testimony regarding the biomechanical forces and effects of the accident made the basis of this lawsuit as they relate to the medical treatment and the contentions made by plaintiffs in this litigation.” *See Defendant’s Designation of Experts.*

Plaintiff now files this Motion to Exclude Testimony of Opinion Witness Joseph Cormier.

II.

For an expert's testimony to be admissible, (1) the expert must be qualified (2) his opinions must be relevant; and (3) the methodology used by the expert must be reliable. *E.I. Dupont de Nemours vs. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995). The party offering the testimony bears the burden of establishing the witness' expert qualifications and the relevance and reliability of his opinions. *Id.*; *Borders vs. Heise*, 924 S.W.2d 148, 152 (Tex. 1996). An expert's opinion evidence must be supported by appropriate methodology based upon an adequate foundation of relevant facts, data or opinions. *Robinson*, 923 S.W.2d at 556. If an expert relies upon unreliable foundational data, any opinion drawn from the data is inadmissible. *Helena Chem. Co. vs. Wilkins*, 47 S.W.3d 486,499 (Tex. 2001). If the Court determines that the underlying facts or data do not provide a sufficient basis for the expert's opinions, the opinion is inadmissible. *Daubert vs. Merrell Dow Pharm., Inc.*, 509 US. 579, 597, (1993). The data on which an expert relies must support his opinions, i.e., there cannot be an "analytical gap" between the data and the opinions. *Gammill vs. Jack Williams Chevrolet, Inc.*, 927 S.W.2d 713 (Tex. 1998). An expert's opinion cannot be conclusory, it must disclose the basis of the opinion. *Burrow vs. Arce*, 997 S.W.2d 229, 235 (Tex. 1999). Additionally, "Rule 702's fundamental requirements of reliability and relevance are applicable to all expert testimony offered under that rule." *Id.* at 726. The burden is on the proponent of scientific expert testimony to demonstrate that the evidence is relevant and reliable before it can be admitted. *Id.* at 720.

Under Rules 104(a) and 702 of the Texas rules of Evidence, this Court is assigned the roles of "gatekeeper." The Court must "make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kuhmo*

Tire Co. Ltd v. Carmichael. 526 U.S. 137, 149 (1999). See also *Watkins v. Telsmith, Inc.*, 121 F.3d 984,991 (5th Cir. 1997) (the Court must determine "whether the expert is a hired gun or a person whose opinion in the courtroom will withstand the same scrutiny that it would among his professional peers.").

A. MR. CORMIER IS NOT QUALIFIED TO TESTIFY AS TO INJURY OR MEDICAL TREATMENT.

Based upon his curriculum vitae, Mr. Cormier is an engineer. Defendant designated Mr. Cormier to testify as follows:

“Mr. Cormier...will provide testimony regarding the biomechanical forces and effects of the accident made the basis of this lawsuit as they relate to the medical treatment and the contentions made by plaintiffs in this litigation.”

An engineer is not qualified to testify on spinal injuries or the causation of those injuries. See *Broders vs. Heise*, 924 S.W.2d 148,153 (Tex. 1996) (emergency room doctor was not qualified to testify in death case about cause of brain injury); *Houghton vs. Port Terminal RR*, 999 S.W2d 39,47-49 (Tex. App. - Houston [14th Dist.] 1999, not pet), (railroad engineer excluded because party could not show connection between engineer's experience and training and the pertinent inquiry at issue). Furthermore, Mr. Cormier is not qualified to render the above-described opinions because he is not a licensed practitioner of the healing arts.

Q: You are not a medical doctor.

A: That's correct.

Q: You're not qualified to testify as a medical doctor.

A: That's correct.

Deposition of Dr. Joseph Cormier: Page24, Lines 21-25

Q: Medically speaking, could you testify as to whether or not Mr. Davila suffered a medical injury?

....

A: From a medical standpoint, I – I would not have opinions regarding the diagnosis of his injuries.

Deposition of Dr. Joseph Cormier: Page 25, Lines 14-19

Notwithstanding his lack of a medical background or expertise, according to the Defendant's expert designation, Cormier intends to give his opinion concerning injury causation in this case. To constitute evidence of causation (in a personal injury case) an expert opinion must rest on reasonable "medical" probability. *Burroughs Wellcome Co. v. Crye*, 907 S.w^{2d} 497, 500 (Tex. 1995). Any opinions which Cormier may have as to the causation or nature of the physical injuries suffered by Plaintiff is incompetent, is not based on medical science and should not be allowed. Mr. Cormier has attempted to give this same testimony in other cases in Texas and regularly works for insurance companies in their efforts to create doubt about causation of injury in rear end collisions - indeed, giving such unfounded testimony is Mr. Cormier's only real experience or expertise - as a professional witness for insurers.

In addition, Mr. Cormier is not qualified to render opinions about injury causation because Mr. Cormier's opinions are based upon studies conducted by other paid professional witnesses on, at best, limited and anecdotal human volunteer crash tests.

Q: Did you determine the injury potential of this event?

A: Yes.

Q: And what were your conclusions, Doctor?

A: Based on the – the change of velocity, the severity of the impact to the Dodge Stratus and the biomechanical data that's available using human volunteers at impacts that are similar and greater in severity to this impact, this event would have

produced very minor motion and forces experienced by Mr. Davila and would have been comparable and similar to everyday activities.

A: The tests that you were talking about with the human volunteers, Doctor, did any of those volunteers suffer neck injury?

A: No, sir.

Q: Did any of those volunteers suffer a back injury?

A: No.

Deposition of Dr. Joseph Cormier, Page 21 Line 14 – Page 22 Line 7

These studies do not meet the scientific standard required under the law. Fifteen years ago, in *E.I. Dupont de Nemours vs. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995), the Texas Supreme Court, following the lead of the United States Supreme Court in *Daubert v. Merrill Dow Pharmaceuticals. Inc.*, 509 U.S. 579 (1993), articulated various factors which should be considered by the trial court, in its role as a "gatekeeper" with respect to irrelevant or unreliable evidence presented as "expert testimony."

Those factors are:

- i. The extent to which the theory has been or can be tested;
- ii. The extent to which the techniques relies upon the subjective interpretation of the expert;
- iii. Whether the theory has been subjected to peer review and /or publication;
- iv. The technique's potential rate of error;
- v. Whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and
- vi. The non-judicial uses which have been made of the theory or technique.

Robinson, 923 S.W.2d at 557. This, in a nutshell, is the "reliability" test promulgated by the Texas Supreme Court Applying each of these factors in turn, it is clear that there is no basis in law or fact for the "opinions" of Mr. Cormier to be allowed before the jury in this case.

Moreover, it is *precisely* this kind of methodology for which Mr. Cormier's testimony has already been stricken in other matters, which Mr. Cormier confirmed during his deposition.

Q: Okay. And, in fact have you ever been struck or limited in your testimony by any courtrooms?

A: Yes.

Q: And how many times?

A: I believe in the case you're referring to I was limited.

Q: Any other times where you were limited or struck?

A: I believe there was one case where my testimony was – was not allowed....

Deposition of Dr. Joseph Cormier Page 25, Line 20 to Page 26, Line 5

Q: I'm going to go ahead and mark as Deposition Exhibit No. 3 Order on the Motion to Exclude the Testimony of Defense Opinion Witness Joseph Cormier. And the court in that case found that the use of the methodology to study and determine the causes of physical injuries in a given case, based upon a comparison to injury sustained to a limited group of dissimilar human occupants subjected to collisions involving unidentical forces in a controlled environment is a mythology that is not supported by the engineering community and, thus, an unreliable scientific method of testimony.

Do you recall that order?

A: Not specifically.

....

Q: Okay. And here you already testified that you're trying to reference other studies, dissimilar populations, and somehow

compare them back to the accident that we're here about today with Mr. Davila, correct?

A: Well, I think this is different, because that's referring to one test that had been done by a different consultant. And here in this case I'm relying on a large range of – of studies that have been done using human volunteers. So it's not just – it's not one individual.

Deposition of Dr. Joseph Cormier Page 27, Line 6-17 through Page 28, Line 12-22.

B. MR. CORMIER HAS PERFORMED NO TESTS AND HE HAS NOT EXAMINED ANY EVIDENCE IN THIS CASE.

It is against the following factors that the Court must weigh the testimony of Joseph Cormier; and it is against these factors that his testimony will be found wanting.

a. The first Robinson factor is "the extent to which the theory has been or can be tested." Mr. Cormier offers no evidence that his theories have or can be tested, and nowhere in his opinion letter does he refer to any testing. Joseph Cormier is merely giving unsupported opinion testimony that has no scientific value. Nowhere in his report is there any indication of proper scientific (repeatable) testing as required by the first Robinson factor.

b. The second factor to be considered is "the extent to which the technique relies upon the subjective interpretation of the expert." The opinions of Mr. Cormier are based almost entirely on his subjective interpretation. Cormier does not offer any calculations or formulae to substantiate or buttress his conclusory opinions. Thus, his methodology fails to meet the requirements of Robinson and his testimony should be excluded.

c. The third factor is "whether the theory has been subjected to peer review and publication." There is no indication that any of the methodology used by Joseph Cormier has ever been subjected to peer review or publication because he does not utilize any methodology, just baseless opinions despite the fact that he has never examined the Plaintiff nor examined the vehicles.

d. The fourth factor is "the technique's potential rate of error." There is nothing in evidence to show the potential rate of error of Mr. Cormier's techniques.

e. The fifth factor is "whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community." Since there is no methodology, there is nothing to be accepted, other than unfounded opinions.

f. The sixth factor the Court should consider is "the non-judicial uses that have been made of the theory or technique." The expert cannot point to any non-judicial use for the techniques he relies upon. In fact he testifies that over 90% of his practice is giving medical opinions for defense lawyers and insurance companies.

There is no evidence of any relevant testing of Mr. Cormier's theory in this case. The vehicles involved in the wreck were not examined by Mr. Cormier, which he testified to during his deposition.

Q: Did you have a chance to look at and physically examine

Mr. Davila's vehicle?

A: No.

Q: Did you have an opportunity to physically inspect Mr.

Garcia's vehicle?

A: No.

Deposition of Dr. Joseph Cormier Page 16, Line 7-15

Q: Okay. So I was reading through your report and one of the things that struck me is that you actually reviewed black-and-white pictures, huh? Is that right?

A: Yes.

Q: Okay. Is that – is that a good way to ascertain damage in a – in a case, by reviewing black and whites? Does that – do black and whites give you the sufficient amount of detail that is needed to come up with a good conclusion?

A: It depends on what other information you have available.

Deposition of Dr. Joseph Cormier Page 33, Line 24 to Page 34, Line 9

Q: Okay and I assume you called the mechanic, right, to find out what he saw underneath that bumper?

A: No, I did not.

Deposition of Dr. Joseph Cormier Page 35, Line 9-15

Q: All right. Well, then, I assume you must have called Mr. Davila to ask him what kind of damage there was underneath the bumper.

A: No, I did not.

Q: Okay. Then I – I assume you asked to inspect Mr. Davila's car, to remove the bumper and find out what kind of damage was under there, correct, before you came up with your analysis and conclusions.

*A: I ask if it's available, but I don't recall asking if I could
remove the – the bumper.*

Deposition of Dr. Joseph Cormier Page 36, Lines 5-14

The ONLY "evidence" Mr. Cormier has reviewed and relied upon are photographs taken by insurance adjusters, in the manner, lighting and angles chosen by those insurance adjusters. The technique relied upon by Mr. Cormier is subject to his personal interpretation of the data that he chooses to review, and the personal interests and biases of the person(s) who took the photographs. There is no evidence that the theory, basis or method that forms the basis of his opinion has been subjected to any relevant peer review and/or publication, for public comment and criticism. There is no basis for determining the technique's potential rate of error, and the technique for speculation utilized by Mr. Cormier is used primarily, if not exclusively, in the litigation setting where he is hired to give this testimony for insurers attempting to escape responsibility for rear end collisions caused by their insured's.

III.

CONCLUSION

Based on the foregoing, the opinion testimony of Mr. Cormier should be stricken or, alternatively, limited. His opinion is medical/injury causation testimony that is not based on "reasonable medical probability," that is not offered by a qualified and licensed practitioner of the medical or healing arts, that is not based on a differential diagnosis and that is based on a technique that has not been proved, subjected to peer review or comment, and was developed and used solely as a litigation tool for insurers to attempt to confuse jurors. As such, the Court should exercise its gatekeeper authority and refuse to allow expert opinion testimony from Mr. Cormier.

The underlying facts supporting the expert's opinion do not provide a sufficient basis for the opinion offered herein by Mr. Cormier. Under Tex. R. Evid. 702 and Tex. R. Evid 703, the expert's opinion must be based on sufficient "underlying facts or data."

Texas law is certainly not so loose that any paid witness can testify as to an expert opinion just because, like Cormier, he says so. *Robinson*, 923 S.W.2d at 553; *Merrell Dow Pharm., Inc. vs. Havner*; 953 S.W.2d 706, 711 (Tex. 1997). Significantly more is required. Indeed, for a medical expert to testify to injury causation and treatment a differential diagnosis must be performed. *Transcon. Ins. Co. v. Crump*, 274 S.W.3d 86 (Tex. App. Houston 14th Dist. 2008), *Coastal Tankships U.S.A., Inc. v. Anderson* (In re Estate of Anderson), 87 S.W.2d 591 (Tex. App. Houston 1st Dist. 2002), *Overton v. State*, 2009 Tex. App. LEXIS 8312 (Tex. App. Corpus Christi Oct 29, 2009). And as stated earlier, Mr. Cormier is not a medical expert, he is not a health care provider and he performed no differential diagnosis. Indeed, he never spoke with any witness, he never inspected the vehicles, and he never went to the scene and never consulted with any treating doctor.

"Where an expert becomes an advocate for a cause, he therefore departs from the ranks of an objective expert witness, and any resulting testimony would be unfairly prejudicial and misleading." *Viterbo v. Dow Chem. Co.*, 646 F.Supp. 1420 (E.D. Tex. 1986), *affirmed*, 825 F.2d 420 (5th Cir. 1987).

Just because Cormier says "it is so," does not suffice to meet the requirements for admissibility. See *Havner*, 953 S.W.2d at 712 ("[I]t is not so simply because an expert says it is so"): *Gen. Elec. Co. v. Joiner*, 522 U.S. 136,143 (1996) (the court should not "admit opinion evidence that is connected to existing data only by the ipse dixit of the expert"); *Viterbo v. Dow Chemical Co.*, 825 E.2d 420, 424 (5th Cir. 1987) ("Without more than credentials and a subjective opinion, an expert's testimony that 'it is so' is not admissible.").

The Court's role is to determine whether the expert's opinion is relevant and whether the methods and research underlying the opinion are reliable. If the foundational data underlying opinion testimony are unreliable, an opinion drawn from that data is likewise unreliable. *Austin v. Kerr-McGee Refining Corp.* 25 S.W. 3d 280,288 (Tex. App. - Texarkana 2000, no pet). An expert's opinion is not admissible if it is based on unreliable foundation evidence. *Havner*, at 714; *Robinson*, at 558. Cormier's methods and research are not reliable and, accordingly, his testimony should be excluded.

A court must exclude the opinion testimony of an expert if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, or needless presentation of cumulative evidence. Tex. R. Evid 403. The Court should exclude the testimony of Joseph Cormier because Cormier is not a doctor or physician, he relies on information and photographs created and provided by GEICO Insurance, the same insurer that has hired and pays him to reach such conclusions in this and other cases and because Mr. Cormier is not qualified to offer any opinion on the issue of injury and its causation related to this case. Such opinion testimony by Mr. Cormier would be unfairly prejudicial, would confuse the issues, and would mislead the jury.

Defendant's expert, Mr. Cormier is employed by Biodynamic Research Corporation, whose experts have previously been subject to numerous court orders in Texas excluding their expert testimony under Robinson. Mr. Cormier and his mentor's at Biodynamic Research Corporation have an extensive history as paid witnesses for insurers, where they work to convince jurors to deny injured plaintiffs fair reimbursement.

IV.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff hereby challenges this

“expert” and requests that the testimony of Mr. Joseph Cormier be stricken and excluded for all purposes in this case, and for such and further relief that may be awarded at law or in equity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 7, 2014 a true and correct copy of the foregoing was served on the following by the method listed below.

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