Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **3rd day of April, 2020** are as follows:

BY Crichton, J.:

2019-CC-00795 GEORGE BLAIR VS. MARY CONEY, AMERISOURCEBERGEN DRUG CORPORATION, ACE AMERICAN INSURANCE COMPANY AND UNITED SERVICES AUTOMOBILE ASSOCIATION (UNINSURED/UNDERINSURED MOTORIST) (Parish of Livingston)

We granted the writ in this matter to address whether the court of appeal erred in summarily reversing the district court's order excluding the testimony of Dr. Charles E. "Ted" Bain. Finding no abuse of discretion in the district court's determination that Dr. Bain's testimony was not based on sufficient facts or data, as required by C.E. art. 702(A)(2), we reverse the court of appeal and reinstate the ruling of the district court.

REVERSED AND REMANDED.

Retired Judge James H. Boddie, Jr., appointed Justice ad hoc, sitting for Justice Marcus R. Clark.

Weimer, J., additionally concurs and assigns reasons.
Crain, J., dissents.

04/03/20

SUPREME COURT OF LOUISIANA

No. 2019-CC-00795

GEORGE BLAIR

VS.

MARY CONEY, AMERISOURCEBERGEN DRUG CORPORATION, ACE AMERICAN INSURANCE COMPANY AND UNITED SERVICES AUTOMOBILE ASSOCIATION (UNINSURED/UNDERINSURED MOTORIST)

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST CIRCUIT, PARISH OF LIVINGSTON

CRICHTON, J.

We granted the writ in this matter to address whether the court of appeal erred in summarily reversing the district court's order excluding the testimony of Dr. Charles E. "Ted" Bain. Finding no abuse of discretion in the district court's determination that Dr. Bain's testimony was not based on sufficient facts or data, as required by C.E. art. 702(A)(2), we reverse the court of appeal and reinstate the ruling of the district court.

FACTS AND PROCEDURAL HISTORY

On May 1, 2014, George Blair ("Plaintiff") filed a petition for damages (as amended, the "Petition"), in which he alleged that a 2011 Ford Escape driven by Lori Brewer[1] struck his 2008 Honda Civic on May 13, 2013. According to Plaintiff, at the time of the collision he was at a complete stop at a traffic signal when his vehicle was suddenly struck from the rear by Ms. Brewer's vehicle, propelling him

* Retired Judge James Boddie Jr., appointed Justice *ad hoc*, sitting for Justice Marcus R. Clark.

[1] While the original Petition for Damages listed Mary Coney as the person driving the vehicle that struck Plaintiff's vehicle, Plaintiff filed an Amended Petition for Damages in which he listed Lori Brewer as the driver.

into the intersection. At the time of the accident, Ms. Brewer was in the course and scope of her work and was driving a company vehicle owned by AmerisourceBergen Drug Corporation ("Amerisource"), which, according to the Petition, had a policy of motor vehicle liability insurance with ACE American Insurance Company Inc. ("ACE") insuring against the negligent acts of Ms. Brewer (together with Amerisource and ACE, "Defendants").[2] Plaintiff alleged that the collision caused injuries to his neck and back for which he seeks damages from Defendants related to, *inter alia*, his physical pain and suffering, mental pain, anguish, and distress, medical expenses, and loss of enjoyment of life.

In an apparent effort to disprove a causal connection between Plaintiff's injuries and the collision, Defendants sought to introduce at trial the expert opinion of Dr. Charles E. "Ted" Bain. According to his affidavit and deposition testimony, Dr. Bain is a consultant and partial owner of Biodynamics Research Corporation ("BRC"), a for-profit corporation whose employees have conducted over 100 quasi-static collision tests, the data from which Dr. Bain utilizes in his injury causation analysis for this and other collisions. Dr. Bain has testified at trial as an expert in the areas of biomechanics, injury causation analysis, and accident reconstruction in over 200 cases.

Related to his qualifications to testify in the foregoing areas of expertise, in 1974 Dr. Bain obtained a degree in nuclear engineering, which he describes as a combination of chemical and mechanical engineering and nuclear science. He has never been licensed as a professional engineer. He thereafter received his medical degree from Queens University College in Canada, where he was first licensed to practice medicine, and was later licensed to practice medicine in Texas. Dr. Bain was board certified in the fields of emergency medicine and family medicine and

[2] Defendant United Services Automobile Association was dismissed with prejudice upon Plaintiff's motion.

practiced in those fields until 2003. Although not an orthopedic surgeon or an expert in pain management, Dr. Bain testified he has expertise in orthopedics as it relates to emergency and family medicine and regularly treated pain in both his role as emergency physician and family physician. Similarly, he testified that, although he would not be comfortable performing some of the medical procedures Plaintiff had undergone following the underlying collision, he "certainly [knew] a lot about them."

Dr. Bain completed Traffic Accident Reconstruction courses at the Northwestern University Traffic Institute in Illinois, which courses totaled three weeks in duration, and has been certified by the Accreditation Committee for Traffic Accident Reconstruction. He has published in the areas of biomechanics, including on the topic of low impact collisions. Since 2008, he has served as a clinical adjunct professor for the United States Air Force School of Aerospace Medicine, teaching injury causation analysis to physicians as part of their flight surgeon certification.

Pertinent to this matter, Dr. Bain rendered a report on April 28, 2017, in which he set forth his methodology for calculating the force of impact of the underlying collision. Using this calculation, he performed an injury causation analysis, determined that the probable cause of Plaintiff's injuries was Degenerative Disc Disorder, and concluded that this cause would have preceded the collision. After setting forth his calculation of the low impact of the collision and the likely preexisting nature of Plaintiff's injuries, Dr. Bain concluded:

> In summary, [Plaintiff] was involved in a low speed rear-end motor vehicle collision that subjected him to minimal forces and accelerations. He was not subjected to forces and acceleration that would cause serious or long-lasting injuries. Diagnoses and subsequent investigations and treatments related to [Plaintiff's] degenerative cervical spine pathologies are not causally related to the subject event.

On June 20, 2018, Plaintiff filed "Plaintiff's Motion Pursuant to La. Code Civ. Proc. Art. 1425 and/or Motion in Limine and/or *Daubert* Motion to Exclude Charles

E. 'Ted' Bain" (the "Motion"), in which he argued Dr. Bain should be excluded from testifying or offering any opinion or report at trial of this matter "on the grounds that such testimony, opinion or report is wholly irrelevant, unreliable, and unduly prejudicial pursuant to *Daubert* and its progeny"[3] and that Dr. Bain's expert opinion failed to meet the requirements of C.E. art. 702.[4] Defendants opposed Plaintiff's Motion, arguing that Dr. Bain was qualified, that the methodology he employed was sound, and that—contrary to Plaintiff's depiction of jurisprudence on this matter—there has been widespread admission of Dr. Bain's expert testimony across the country.

The district court held a hearing on the Motion on August 6, 2018. At the hearing Plaintiff introduced into evidence certain of the exhibits to his Motion, which included (i) excerpts of Dr. Bain's deposition in the instant case and in other cases; (ii) a portion of the deposition of Defendants' IME physician, Dr. Kevin McCarthy, whose opinions that Plaintiff's injuries were a result of the accident and that even low-impact collisions can result in injury were directly contradicted by Dr. Bain; and (iii) judgments of various state and federal district courts, in Louisiana and elsewhere, wherein Dr. Bain's testimony has been excluded.[5] Defendants also

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[3] Plaintiff argues, *inter alia*, that Dr. Bain's testimony is "extremely suspect," highlighting Dr. Bain's incorrect statement that he has never been excluded as a witness due to his qualifications and expressed belief that he was excluded due to "[t]he bias of the judge." Plaintiff similarly argues that Dr. Bain's testimony is unreliable because he assumes Plaintiff is lying about his injuries, pointing to Dr. Bain's testimony that subjective injuries such as Plaintiff's create a "huge problem for reliability" because "[w]e know [litigation is] a tremendous driver for subjective complaints."

[4] Louisiana Code of Evidence article 702 provides in pertinent part:

> A. A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
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> (1) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
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> (2) The testimony is based on sufficient facts or data;
>
> (3) The testimony is the product of reliable principles and methods; and
>
> (4) The expert has reliably applied the principles and methods to the facts of the case.

[5] Plaintiff also attached an article titled "Injury Causation Analysis and Biodynamics Research Corporation – an In-depth Review" by John J. Smith, PE BSGP MSEE MSBMT MSS. Defense counsel objected to the introduction of this document, which was undated and unsigned, at the

introduced the exhibits attached to their opposition to Plaintiff's Motion: (i) the Affidavit of Dr. Bain, to which Dr. Bain's *curriculum vitae* and expert report were among the attachments; (ii) the First Circuit Court of Appeal's writ grant in *Adams v. Baptiste*, 2013-0299 (La. App. 1 Cir. 3/7/13), 2013 WL 10343229, in which the court reversed the district court's exclusion of Dr. Bain's testimony in a case involving similar facts; (iii) certified copies of the motion to exclude Dr. Bain and corresponding trial court judgment in *Adams*; and (iv) excerpts of Dr. Bain's deposition in the instant case.

The district court summarily granted the Motion on August 22, 2018. On November 9, 2018, the First Circuit Court of Appeal granted Defendants' writ application appealing the district court's judgment. The court noted that the district court failed to comply with the requirements of C.C.P. art. 1425(F)(3)[6] and (F)(4)[7] in granting the Motion, which failure constituted legal error, and remanded the matter for compliance with C.C.P. art. 1425.

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hearing on Plaintiff's Motion. The district court excluded the exhibit subject to it being supplemented with its publication information and other relevant information. There is no evidence in the record that any supplemental information was provided.

[6] C.C.P. art. 1425(F)(3) provides: "If the ruling of the court is made at the conclusion of the hearing, the court shall recite orally its findings of fact, conclusions of law, and reasons for judgment. If the matter is taken under advisement, the court shall render its ruling and provide written findings of fact, conclusions of law, and reasons for judgment not later than five days after the hearing."

[7] C.C.P. art. 1425(F)(4) provides:

> The findings of facts, conclusions of law, and reasons for judgment shall be made part of the record of the proceedings. The findings of facts, conclusions of law, and reasons for judgment shall specifically include and address:
>
> (a) The elements required to be satisfied for a person to testify under Articles 702 through 705 of the Louisiana Code of Evidence.
>
> (b) The evidence presented at the hearing to satisfy the requirements of Articles 702 through 705 of the Louisiana Code of Evidence at trial.
>
> (c) A decision by the judge as to whether or not a person shall be allowed to testify under Articles 702 through 705 of the Louisiana Code of Evidence at trial.
>
> (d) The reasons of the judge detailing in law and fact why a person shall be allowed or disallowed to testify under Articles 702 through 705 of the Louisiana Code of Evidence.

As a result of the court of appeal's ruling, the district court issued detailed reasons for its judgment granting Plaintiff's Motion on November 15, 2018. The pertinent portion of the district court's reasons are as follows:

> This Court cannot find that the testimony of Dr. Bain is based on sufficient facts or data. To allow Dr. Bain to testify to the degree in which Plaintiff suffered injury from the accident without examining his prior medical history or Plaintiff himself, would, in the opinion of this Court, not be based on sufficient facts. Further, Dr. Bain's undergraduate degree in nuclear engineering and his experience as a general practitioner in family and emergency medicine would not assist the trier of fact to understand the evidence or to determine a fact in issue. Thus, this Court held that Dr. Bain should be excluded as an expert witness in this matter.

While the district court's ruling implicitly calls into question Dr. Bain's qualifications, the judge expressly ruled only that Dr. Bain's testimony was inadmissible because his testimony would not assist the trier of fact to understand the evidence or to determine a fact in issue and because it was not based on sufficient facts or data – violations of C.E. art. 702(A)(1) and (A)(2), respectively.

Defendants again sought supervisory review of the district court's ruling, and the court of appeal granted their writ application on April 17, 2019, reversing the district court's exclusion of Dr. Bain as a witness. *Blair v. Coney*, 2018-1193 (La. App. 1 Cir. 11/9/18), 2018 WL 5883895. The court did not provide any legal analysis for its ruling except to cite *Adams*, *supra*.

Plaintiff subsequently filed a writ application with this Court, which we granted on October 1, 2019. *Blair v. Coney*, 2019-795 (La. 10/1/19), -- So. 3d --.

LAW AND ANALYSIS

The narrow issue before the Court is whether the court of appeal erred in reversing the district court's order excluding the testimony of Dr. Bain under C.E. art. 702, which provides in pertinent part:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

> (1) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (2) The testimony is based on sufficient facts or data;
>
> (3) The testimony is the product of reliable principles and methods; and
>
> (4) The expert has reliably applied the principles and methods to the facts of the case.

C.E. art. 702(A).

Article 702 was revised in 2014 to track FED. R. EVID. 702, which was amended as part of a restyling of the Federal Rules of Evidence. *See* C.E. art. 702, cmt. (b); *see also* FED. R. EVID. 702, cmt. The revision creates a five-element test as to the admissibility of expert testimony, requiring that the witness be "qualified as an expert by knowledge, skill, experience, training, or education" and setting forth four enumerated requirements of the qualified expert's testimony that relate to its reliability and relevance. Failure of the witness to qualify as an expert pursuant to the introductory paragraph of C.E. art. 702(A) *or* failure of the testimony to meet any of the indicia of reliability or relevancy set forth in C.E. art. 702(A)(1) through (A)(4) will render the testimony inadmissible.

Prior to the foregoing revision to C.E. art. 702, this Court recognized that the admission of expert testimony is proper only if all three of the following are established: "(1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in [*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)]*;* and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue." *Cheairs v. State ex rel. Dep't of Transp. & Dev.*, 2003-680, pp. 9–10 (La. 12/3/03), 861 So. 2d 536, 542–43 (quoting *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548 (11th Cir. 1998). These

requirements are reproduced in the introductory paragraph of C.E. art. 702(A), in C.E. art. 702(A)(3), and in C.E. art. 702(A)(1), respectively.[8]

The foregoing amendment to C.E. art. 702 ostensibly adds two requirements to the three-prong inquiry adopted in *Cheairs*: first, that the testimony must be based on sufficient facts or data, C.E. art. 702(A)(2), and; second, that the expert must reliably apply the principles and methods to the facts of the case, C.E. art. 702(A)(4). Although not previously enumerated in C.E. art. 702 or *Cheairs*, these additions do not change the law. Instead, C.E. art. 702(A)(2) and C.E. art. 702(A)(4) are grounded in the longstanding principle recognized in *Daubert* that the determination of whether an expert's testimony is admissible requires an assessment of "whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*, 50 U.S. at. 592–593;[9] *see also* La. Acts 2014, No. 630, § 2 ("No change in law or result in a ruling on evidence admissibility shall be presumed or is intended by the Legislature of Louisiana by the passage of this Act.").

The district court performs the important gatekeeping role of ensuring "that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Cheairs*, 861 So. 2d at 541 (citing *Daubert*, 509 U.S. at 589). Accordingly, a district court is afforded broad discretion in determining whether expert testimony is admissible, and its decision with respect thereto shall not be overturned absent an abuse of that discretion. *Cheairs*, 861 So. 2d at 541 (citing *State v. Castleberry*, 98-

[8] The four non-exclusive factors set forth in *Daubert* for determining reliability of an expert's methodology – namely, (1) whether it can be (and has been) tested, (2) if the theory or technique has been subjected to peer review and publication, (3) the known or potential rate of error, and (4) whether it is generally accepted within the scientific community – are appropriately reviewed under C.E. art. 702(A)(3). *See Indep. Fire Ins. Co. v. Sunbeam Corp.*, 99-2181, p. 13 (La. 2/29/00), 755 So. 2d 226, 234 (citing *Daubert*, 509 U.S. at 594–95).

[9] This Court has long recognized that the applicable federal law interpreting FED. R. EVID. 702, including *Daubert* and its progeny, is relevant and persuasive when analyzing C.E. art. 702. *See e.g.*, *State v. Foret*, 628 So. 2d 1116 (La. 1993) ("As [C.E. art. 702] is virtually identical to its source provision in the Federal Rules of Evidence, F.R.E. 702 and in several states' evidentiary rules, we will examine and consider federal jurisprudence and other states' jurisprudence interpreting the proper application of this rule.").

1388 (La. 4/13/99), 758 So. 2d 749, 776); *see also* C.E. art. 702, cmt (d) ("[b]road discretion should be accorded the trial judge in his determination as to whether expert testimony should be held admissible and who should or should not be permitted to testify as an expert."); *State v. Foret*, 628 So. 2d 1116, 1123 (La. 1993) ("The admission of the evidence [is] subject to the discretion of the trial judge.") (internal quotations omitted); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 142, 119 S. Ct. 1167, 1171, 143 L. Ed. 2d 238 (1999) (finding the gatekeeping role of the district court recognized in *Daubert* applies to all forms of expert testimony).

In exercising its gatekeeping duty, the district court must be mindful of the balancing of interests set forth in C.E. art. 403 – *i.e.*, whether the probative value of the expert testimony outweighs its prejudicial effect – as an expert's testimony can be misleading and prejudicial if this role is not properly satisfied. C.E. art. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time."); *see State v. Foret*, 628 So. 2d at 1122 (finding the use of Child Sexual Abuse Accommodation Syndrome-based testimony for the purpose of bolstering a witness's credibility creates a risk of prejudice that outweighs its questionable probative value).

The relaxation of the usual requirement that a witness have firsthand knowledge and the permission granted to an expert to express opinions not based on firsthand knowledge or observation "is premised on an assumption that the expert's opinion will have a reliable basis in the knowledge and experience of the discipline." *Indep. Fire Ins. Co. v. Sunbeam Corp.*, 99-2181 (La. 2/29/00), 755 So. 2d 226 (citing *Daubert*, 509 U.S. at 591–92). On the other hand, we recognize that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596. Moreover, specifically in the

context of claims related to vehicular collisions, "[a]s the force of impact in a collision lowers, and the seriousness of the injury rises, expert testimony becomes more relevant." *Fussel v. Roadrunner Towing and Recovery, Inc.*, 99-0194 (La. App. 1 Cir. 3/31/00), 765 So. 2d 373.

The Third Circuit Court of Appeal addressed the admissibility of Dr. Bain's testimony in *Godchaux v. Peerless Ins. Co.*, 2013-1083 (La. App. 3 Cir. 6/4/14), 140 So. 3d 817, a case wherein plaintiffs argued that the jury failed to provide sufficient damage awards and that such failure was related to the district court's error in admitting Dr. Bain's testimony. *Id*. at 1. In *Godchaux*, Dr. Bain was introduced as an expert in biomechanics and injury causation analysis. *Id*. at 3. The court noted that Dr. Bain never spoke to plaintiff, never contacted plaintiff's physicians, never visited the accident scene, never inspected plaintiff's vehicle, never spoke with a damage appraiser, did not know the body position of the plaintiff at the time of the accident, did not consider the angle of impact or the dimensions of the vehicular head rack that struck plaintiff's vehicle, and failed to conduct an analysis of force using the same type of vehicle involved in the collision. *Id*. at 8.

The court of appeal in *Godchaux* reversed the district court's ruling admitting Dr. Bain's testimony, finding that although Dr. Bain likely *qualified* as an expert in biomechanics and injury causation analysis, his opinions and methods were nonetheless *unreliable*. *Id*. at 4. Considering that Dr. Bain did not recreate the actual accident and only relied on a crash analysis of a different make and model to assess the force asserted on the plaintiff's vehicle, the *Godchaux* court concluded Dr. Bain's findings were "inherently suspect" without evidence of support from the scientific community. *Id*. at 8. Since Dr. Bain did not testify as to the reliability or potential errors in the crash analysis, the court found the comparative data on which he relied was also "inherently suspect." *Id*. Moreover, the court held that Dr. Bain's testimony did not assist the jury in determining a fact in issue, reasoning that force-

of-impact testimony cannot be used to disprove causation. *See id*. at 9.[10] Accordingly, the court of appeal in *Godchaux* found that the trial court abused its discretion in permitting Dr. Bain to testify. *Id*. at 10. A writ application was filed with this Court, which we denied. *Godchaux v. Peerless Ins. Co.*, 2014-1411 (La. 10/3/14), 149 So. 3d 801.

The federal district courts in Louisiana have both excluded and admitted Dr. Bain's testimony on force of impact and injury causation. *See e.g.*, *Parker v. NGM Ins. Co.*, 2016 WL 3546325 (E.D. La. 2016) (finding Dr. Bain was qualified to testify as to accident reconstruction but that his methods were unreliable and further finding Dr. Bain was not qualified to testify as to medical causation because he was not board certified in a relevant specialty of medicine); *Breaud v. Werner*, 2016 WL 8432363 (M.D. La. 2006) (finding Dr. Bain's testimony was based on insufficient facts where Dr. Bain himself admitted there were dents in the vehicle he could not see in the black and white photographs he reviewed); *cf. Burgo v. Davis*, 2016 WL 3257589 (E.D. La. 2016) (expressing doubt as to whether Dr. Bain is qualified to opine on the relationship of the seriousness of the impact and plaintiff's spinal injuries in light of his lack of specialized expertise but nevertheless finding "[t]he fact Dr. Bain is not a neurologist, neurosurgeon, or orthopedic surgeon ultimately relates to his credibility, not the admissibility of his testimony."); *White v. Great West Cas. Co.*, 2009 WL 2747795 (W.D. La. 2009) (also finding Dr. Bain's medical experience relates to admissibility rather than credibility and concluding Dr. Bain's opinions were "sufficiently sound and based on facts sufficient to satisfy [FED. R. EVID. 702]'s reliability requirement."). Ultimately, the decision in each case is fact specific, turning on the areas of expertise in which Dr. Bain is attempting to testify,

[10] Although the court of appeal stated "our circuit does not accept force-of-impact testimony to *prove* causation," the cases on which it relied for this holding related to the use of injury causation analysis to *disprove* causation. *Id*. (emphasis added).

the evidence on which he relied, and the specific methodology employed by Dr. Bain in reaching his conclusions.

Here, Dr. Bain reviewed the police report for the accident, property damage estimates for both vehicles, statements made by the parties relative to the accident, including Plaintiff's depositions, seven black and white photographs of Plaintiff's Honda, 11 color photocopies of photographs of Ms. Brewer's Ford, and two color photocopies of photographs of the accident scene, to determine the extent of damages to either vehicle. He also conducted an "exemplar-surrogate inspection," renting the exact make and model vehicles involved in the collision, deconstructing them, and taking measurements of the parts of each.

After viewing the photographic evidence of vehicular damage, noting which parts of the vehicles were estimated to require replacement per the property damage estimates, and taking measurements of those parts on the exemplar vehicles, Dr. Bain calculated that there was a "maximum mutual crush of 5.75 inches" to the vehicles, cumulatively. Relying in part on results of tests performed by Dr. Bain and his colleagues at BRC's Research Test Center, Dr. Bain used this "maximum mutual crush" value to determine that the impact-related change in velocity ("delta-V") experienced by Plaintiff's Honda was approximately 6 mph, with a peak acceleration of 5.5 g.[11] Based on this delta-V, Dr. Bain asserted:

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[11] Dr. Bain explained in his deposition that BRC had simulated "a hundred or more tests" where they pushed different vehicles together and measured the amount of force it would take to cause certain levels of deformation. These tests were done at various levels of "offset," meaning the vehicles were not always "straight bumper to bumper." Dr. Bain relied on this data and crash testing data from the National Highway Traffic Safety Administration to calculate the delta-V experienced by Plaintiff's Honda. Based on the drivers' description of the collision and the photographs of the vehicles in this case, Dr. Bain determined that the collision fell within "the lateral offset category" of vehicular collisions because only the right side of Ms. Brewer's Ford struck the left rear of Plaintiff's Honda. Since the BRC test results indicated a lower impact in the lateral offset category, he reduced the normal stiffness values from the National Highway Traffic Safety Administration data by 50 percent to account for the lateral offset.

In *Parker*, *supra*, United States District Judge Susie Morgan found it "troubling" that Dr. Bain's methodology in that case was supported only by articles published by other BRC authors or owners, that Dr. Bain conceded he had published no peer-reviewed articles describing his methodology and conclusions, and that Dr. Bain admitted "the only members of his profession who have 'reviewed' his testing methodology are his coworkers at [BRC], a for-profit entity

> [Plaintiff] experienced minimal impact-related motion during the collision. **His torso was contacted and accelerated by the forward-moving seat back structure. His head would have contacted the headrest**. . . . There would have been some extension of his neck, followed by mild forward flexion during a subsequent rebound phase. [Plaintiff's] seatbelt would have locked, preventing rebound of his trunk.
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> ***
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> In the subject impact, there was very little differential movement between [Plaintiff's] thorax and lumbar spine **as a result of the support provided by his seatback**. . . . The horizontal accelerations that [Plaintiff] was subjected to (peak vehicle acceleration approximately 2.6 g) have been shown not to injure any spinal structure **as long as the spine is supported by a device such as the seatback and headrest that [Plaintiff] had**. Failure of the lumbar spine is typically the result of compressive loading. In rear-end impacts straightening of the lumbar spine **from a slightly flexed seat position** to a more neutral position occurs as well as upward ramping of the torso along the seatback. Compressive loading occurs during the return to a normal pre-event position.

(emphasis added).

Notably, Dr. Bain describes Plaintiff's "slightly flexed seat position" with relative certainty, a fact on which he relied in reaching his conclusion that Plaintiff was not injured by the collision. However, Dr. Bain was unable in his deposition to point to any documentation or other information that he reviewed in order to arrive at the foregoing description of Plaintiff's posture:

> [Dr. Bain]: Well, he's the driver. He's - - He's an average to a large size guy. His buttocks are in the seat; he's got his right foot on the brake. **He said he's initially looking at his phone, so his head is turned downwards and rightwards slightly, assuming the phone is in his right hand.**

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actively engaged in consulting for litigation purposes." *Parker*, 2016 WL 3546325 at p. 8. However, in the instant case Plaintiff cites no evidence *in the record* to support similar conclusions. The only support submitted by Plaintiff to the district court that attacked Dr. Bain's methodologies was found in *other district court rulings* attached to the Motion. In sum, instead of presenting his own evidence in this matter by drawing out problems with Dr. Bain's methodology in his deposition and submitting that deposition to the district court for review, Plaintiff asks this Court to take judicial notice of the findings in *Parker* and other court rulings, which findings may have been based on different evidence, including variations of Dr. Bain's methodology, to conclude that Dr. Bain's methodology is based on "junk science." We decline to do so. Similarly, he cites to publications on injury causation analysis in his brief and asks this Court to review excerpts of those publications in order to conclude that Dr. Bain's methodology is unreliable. We decline to rely on the foregoing submissions, particularly where it has not been properly introduced to the district court.

	His back would be against the seat back. He's a big - - For a Honda Civic, he's a big guy in a small car, so I know roughly or relatively what his position in the vehicle is. Now if you're going to ask me the exact angle of his [SIC] or neck or his arm or whatever, I don't know it.
[Mr. Koloski]:	Okay. And you don't know if he has his torso turned at all?
[Dr. Bain]:	I would be - - **I highly doubt that**. He said he's looking at his phone. **You don't have to turn to your right to look at your phone.**
[Mr. Kolosi]:	Okay. But this is an assumption you're making, it's not - - **you weren't there so you don't know?**
[Dr. Bain]:	**Correct.**

Dr. Bain ultimately concluded that Plaintiff was involved in a low speed rear-end motor vehicle collision that subjected him to minimal forces and accelerations and that "[h]e was not subjected to forces and acceleration that would cause serious or long-lasting injuries." Dr. Bain opined, without reservation, that Plaintiff's injuries and treatments were not causally related to the subject event.

In summary, Dr. Bain did not interview Plaintiff, did not know Plaintiff's body position at the time of the accident, did not inspect the actual vehicles involved in the collision, did not speak to a damage appraiser, and instead calculated the impact of the collision on Plaintiff's body based in part on black and white photographs, vehicle repair estimates, and descriptions of the accidents by the parties. Importantly, as noted above, Dr. Bain made assumptions about the posture of Plaintiff in his vehicle and premised some of his conclusions on the assumption that Plaintiff was in a "slightly flexed seat position," despite Plaintiff's deposition testimony that he was looking at his phone when the collision occurred. He assumed that Plaintiff's back would have been against the seat, yet he acknowledged that he did not know how Plaintiff was positioned. Nevertheless, Dr. Bain made certain assumptions about Plaintiff's posture, reasoning Plaintiff would not "have to turn to the right" to look at his phone. Dr. Bain's supposition as to how Plaintiff was

positioned in his vehicle, particularly in light of contradictory evidence, is nothing short of conjecture.

It is also significant that Dr. Bain did not inspect the vehicles involved in the collision and did not speak with the damage appraisers. Instead, he relied on two-dimensional photographs, *estimates* of the damage to the vehicles involved, and measurements of exemplar vehicles– *i.e.* vehicles of the same make and model as those involved in the collision – in lieu of actual measurements of damage to the vehicles, which exemplar measurements formed the basis of his delta-V calculation. The delta-V thus calculated was critical to Dr. Bain's conclusion that the impact from the collision on Plaintiff was so insignificant that it could not have possibly caused the damage at issue in this case. Moreover, because he did not inspect Plaintiff's vehicle for variance from the "exemplar" vehicle, Dr. Bain could not have confirmed if Plaintiff's headrest was intact, seatbelt functioning or any other indicia to support his conclusion that the headrest and seatback prevented injury to Plaintiff.

Based on the foregoing assumptions made by Dr. Bain, as necessitated by his remote review, we cannot say that the district court abused its discretion in concluding that Dr. Bain's testimony is based on insufficient facts or data, thus failing to meet the requirement of C.E. art. 702(A)(2).[12] It is critical to our holding that Dr. Bain expressed his opinion that Plaintiff was not injured by the collision at issue (i) without condition or stipulation in his report that his conclusions were premised on assumptions he made about the position of the Plaintiff, (ii) without acknowledging that Plaintiff was not looking ahead and therefore possibly not in a "flexed upright position" when he was struck by Ms. Brewer's vehicle, and (iii) without recognition of the limitations on his ability to ascertain the extent of damage

[12] Defendants correctly note that the district court overtly relied on statements of Plaintiff's counsel, as opposed to evidence in the record, in its reasons for judgment. However, we find this reliance is harmless in this matter because the evidence supports the court's ultimate finding.

to the vehicles because he did not inspect the actual vehicles involved or speak with damage appraisers.[13]

We therefore find, based on the specific facts and circumstances of this case, that the court of appeal erred in reversing the district court's ruling to exclude Dr. Bain's testimony in the underlying matter on the basis of C.E. art. 702(A)(2). We decline to address whether the remaining four requirements of C.E. art. 702 were met in this instance, as the failure to satisfy any of the five elements disqualifies a witness seeking to testify on matters of expert opinion.[14] To be clear, we express no opinion as to whether Dr. Bain is qualified to testify in biomechanics, injury causation analysis, or accident reconstruction, nor do we opine, except as otherwise provided herein, as to the reliability of the underlying methodology in general. Our opinion is grounded in the discretion we afford the district court as gatekeeper on issues of admissibility of C.E. art. 702 evidence, finding no abuse of that discretion in this case.

DECREE

Accordingly, we reverse the court of appeal and reinstate the ruling of the district court.

REVERSED AND REMANDED.

[13] We expressly decline to decide the question of whether or not Dr. Bain's testimony would have met the requirements of C.E. art. 702(A)(2) if he had noted these assumptions and conditions as limitations on the certainty of his opinion.

[14] Moreover, we note that the dearth of evidence provided in the record limits our ability to satisfactorily review many aspects of Dr. Bain's testimony. Notably, for instance, the entirety of Dr. Bain's deposition was not introduced at trial and is therefore beyond the scope of our review.

04/03/20

SUPREME COURT OF LOUISIANA

No. 2019-CC-00795

GEORGE BLAIR

VERSUS

MARY CONEY, AMERISOURCEBERGIN DRUG CORPORATION, ACE AMERICAN INSURANCE COMPANY AND UNITED SERVICES AUTOMOBILE ASSOCIATION (UNINSURED/UNDERINSURED MOTORIST)

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST CIRCUIT
PARISH OF LIVINGSTON

WEIMER, J., additionally concurring.

I agree with the majority that because the expert's methodology is insufficiently tailored to the circumstances here, the expert's opinion evidence is inadmissible "to disprove a causal connection between Plaintiff's injuries and the collision." **Blair v. Coney**, 2019-0795, slip op. at 2 (La. 3/__/20). A trial is a search for truth, and its outcome is cast in terms of focused probabilities relating to the immediate parties. See, e.g., **Shelton v. Aetna Cas. & Sur. Co.**, 334 So.2d 406, 409 (La. 1976) ("[I]f the plaintiff can show that he probably would not have suffered the injury complained of but for the defendant's conduct, he has carried his burden of proof relative to cause in fact."). Although, here, the expert opinion evidence is inadmissible as to this particular plaintiff's injuries, I write separately to emphasize that with proper proof, an opinion may be admissible regarding speed of collision and the level of force likely felt by the occupant of a vehicle. See **Blair**, slip op. at 9-10 (quoting **Fussell v. Roadrunner Towing and Recovery, Inc.**, 99-0194, p. 4 (La.App.

1 Cir. 3/31/00), 765 So.2d 373, 376 (“As the force of impact in a collision lowers, and the seriousness of the injury rises, expert testimony becomes more relevant.”)).

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CRAIN, J., dissents.