

Slip Copy, 29 Misc.3d 1231(A), 2010 WL 4983062 (N.Y.City Civ.Ct.), 2010 N.Y. Slip Op. 52110(U)
 (Table, Text in WESTLAW), Unreported Disposition
 (Cite as: 2010 WL 4983062 (N.Y.City Civ.Ct.))

NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

Civil Court, City of New York,
 Richmond County.
 Stefano BARBERA, Plaintiff(s),
 v.

40 BROAD DELAWARE, INC., Tower Realty Management Corporation, Kennedy-Wilson Properties of New York LT, and Schindler Elevator Corporation,
 Defendant(s).

No. 300073/05.
 Dec. 8, 2010.

Myron G. Lasser, Esq., Angiuli, Katkin & Gentile, LLP., Staten Island, for Plaintiff.

Richard J. Sabatini, Esq., Sabatini & Associates, New York City, for Defendant, Schindler Elevator.

Richard Freire, Esq., Hoey, King, Toker & Epstein, New York City, for Defendant, 40 Broad.

ORLANDO MARRAZZO, JR., J.

*1 After a Frye Hearing held before the court on November 29, 2010, the court grants plaintiff's motion in limine and precludes defendant Schindler Elevator Corporation's (hereinafter Schindler) from offering the purported expert testimony of its biomechanical engineer Dr. Owen Schipplein, and professional engineer Mr. Jon B. Halpern. The court further denies Schindler's motion for a unified trial

This is an action for personal injuries allegedly sustained by the plaintiff as the result of an October 5, 2000 incident that occurred on elevator No. 4 located at 40 Broad Street, New York, New York. The incident was allegedly caused by a sudden stop of the elevator. Plaintiff at his May 13, 2005 deposition testified that he had gotten into the elevator on the 22nd floor with the intention to go down. Plaintiff further testified that the elevator began to descend normally and then very shortly thereafter it stopped short like it hit concrete or jammed. Plaintiff further testified that he heard a loud bang when it came to a

stop and as a result his knees buckled about 30 degrees and he grabbed a handrail with both hands as a reflex. Plaintiff further testified that the elevator shot up like a rocket and jolted/slammed again when it stopped. Plaintiff testified that when the elevator stopped both of his feet came off the floor, he noted that on the second stop his knees were bent and he was slightly slouched forward.

This action was commenced by the service of a summons and complaint dated September 22, 2003. Issue was joined by the service of defendant Schindler's Answer dated October 27, 2003. The co-defendant served its Answer on or about December 9, 2003.

Schindler, at the Frye Hearing argued that at the worst the subject elevator engaged a "controlled electrical emergency stop"-a stop which is purposely designed into the elevator car braking system so as to have no adverse impact on passenger safety. The integral part of Schindler's liability defense was that the elevator stop was relatively gentle and incapable of causing injury, and that the alleged injuries sustained by the plaintiff were in fact insubstantial and thus inconsistent with the severe elevator stop that plaintiff contends occurred. Schindler alleges that its proof will establish that the safety stop was not "slamming" or "jolting" as the plaintiff describes it. Schindler alleges that the elevator stop could not have caused the plaintiff's knees to buckle or his feet to come off the floor and did not exert sufficient forces to cause plaintiff the injuries allegedly that he incurred.

Both Mr. Halpern and Dr. Schipplein testified that the elevator stop was well within the design parameters of safe operation and that the stop did not generate the necessary energy to cause injury to persons including the plaintiff. Specifically, Dr. Schipplein testified that there is no direct evidence of causality and that the plaintiff's symptoms appear to be out of proportion to his objective signs.

*2 Schindler contends that the elevator incident even under the worst case scenario involved a stop that caused a momentary de-acceleration force of approximately .44g of a controlled elevator stop. According to Schindler the elevator never jolted and

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could never have caused the plaintiff to incur the injuries that he has allegedly incurred. According to Schindler the elevator made a controlled a safe stop approximately .44g compared to a .19g and that was well within acceptable elevator maintenance standards and which presented no foreseeable risk of injury to an elevator passenger.

THE FRYE STANDARD

It is well settled that the admissibility and limits of expert testimony is primarily in the discretion of the trial court (People v. Wiggins, 89 N.Y.2d 872 [1996]; Frye v. United States, 293 F. 1013 [D.C.1923]), is the seminal case followed by New York courts in determining the admissibility of scientific evidence at trial (People v. Wernicke, 89 N.Y.2d 111 [1996]; People v. Wesley, 83 N.Y.2d 417 [1994].)

A review of the facts in *Frye* demonstrates that attempts by parties to bolster the credibility of witnesses is a not recent development. In *Frye*, a 1923 case, a defendant in a criminal trial wanted to use an expert witness to testify to the result of a "deception test made upon the defendant. The "deception test measured systolic blood pressure which allegedly is influenced by change in the emotions of the witness. The *Frye* court summarized the theory as follows:

In other words, the theory seems to be that truth is spontaneous, and comes without conscious effort, while the utterance of a falsehood requires a conscious effort, which is reflected in the blood pressure. The rise thus produced is easily detected and distinguished from the rise produced by mere fear of the examination itself. In the former instance, the pressure rises higher than in the latter, and is more pronounced as the examination proceeds, while in the latter case, if the subject is telling the truth, the pressure registers highest at the beginning of the examination, and gradually diminishes as the examination proceeds.

The *Frye* court refused to allow the testimony of the expert as to the results of the deception test. The Court found:

This court holds that the bio mechanical engineers principles relied by Schindler's experts herein has not yet gained such standing and scientific recognition among engineering authorities as would justify

the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made.

New York courts have restated and followed the principles of *Frye* and set forth a test as to the admissibility of the expert testimony relating to scientific theory. New York courts permit expert testimony if it is based on scientific principles, procedures or theory only after the principles, procedures or theories have gained general acceptance in the relevant scientific field, proffered by a qualified expert and on a topic beyond the ken of the average juror (People v. LeGrand, 8 N.Y.3d 449 [2007].)

*3 The Court of Appeals noted in (People v. Williams, 6 N.Y.2d 18 [1959]) where rejecting the use of an expert who was to testify as to the alleged lack of credibility of heroin addicts:

But the expert testimony proffered here is not usual. How complex and confusing would a trial become for the jury if it were faced with expert opinions that lack concrete scientific authority to support it, upon the collateral matter of credibility. The first question would be the credibility of the experts, and then the credibility of the witness. The battle of the experts challenging the non expert witnesses might well be such that the jury would lose sight of the issues or, at the very least, would tend to regard the opinion of the expert as determinative of the credibility of the witness rather than to consider it only as one factor of many to be considered in concluding whether a witness is telling the truth. court observed, our common law tradition provides that credibility is a matter solely for the jury. Anything that impinges on the province of the jury on issues of credibility should be treated with a great deal of skepticism.

It is for this reason that courts have advised that the threshold question under *Frye* in passing on the admissibility of expert's testimony is whether the testimony is "within the ken of the typical juror (People v. Cronin, 60 N.Y.2d 430 [1983].) Expert testimony offered to bolster the credibility of a fact witness has been appropriately excluded (Water Wheel Inn, Inc. v. Exchange Ins. Co., 261 A.D.2d 535, 690 N.Y.S.2d 622 [App.Div., 2d Dept.1999].) Furthermore, it is well established that unless the jurors are unable or incompetent to evaluate the evidence and draw inferences and conclusions, the opin-

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ion of an expert, which intrudes on the province of the jury, is both unnecessary and improper (*Kulak v. Nationwide Mut. Ins. Co.*, 40 N.Y.2d 140 [1976].) Expert testimony is proper only when it would help to clarify an issue calling for professional or technical knowledge possessed by the expert and is beyond the ken of the typical juror (*De Long v. County of Erie*, 60 N.Y.2d 296 [1983].) The proffered engineering principles are akin to a polygraph test which has been widely rejected by New York State courts (*People v. Shedrick*, 66 N.Y.2d 1015 [1985]; *Water Wheel Inc v. Exchange Inc.*, Co, 261 A.D.2d 535 [App.Div., 2nd Dept,1999].)

Also see the decision authored by Justice Robert J. Miller from New York State Supreme Court-Kings County in (*Wilson v. Corestaff Services, L.P.* 28 Misc.3d 425, 900 N.Y.S.2d 639 [Supreme Court, Kings County, 2010]; see also the decision authored by Justice Joseph J. Maltese from New York State Supreme Court-Richmond County in (*Graceann Larose v. Shailesh Pathare, M.D. and Shailesh Pathare, M.D.*, 29 Misc.3d 1023(A) [Supreme Court, Richmond County, 2010]; and also see the decision authored by Justice Charles S. Lopresto from New York State Supreme Court-Queens County in (*Garner v. Baird*, 27 Misc.3d 1231(A) [Supreme Court, Queens County, 2010]; these cases offer insight into the legal standards of Frye Hearing and where used by this court in its analyses).

*4 Here the opinion to be offered by Schindlers pertains to issues of credibility of a fact and credibility of facts is a matter solely for the jury and is clearly within the ken of the jury, defendant has failed to meet this key prong of the *Frye* test and no other inquiry is required. However, a review of what scientific literature (this is why we need a hearing?) demonstrates that the defendant is unable to establish that the use of the expert engineer to determine the cause of the accident (Must show that it is an accepted as reliable in the relevant scientific engineering community.) The scientific proof raises serious issues about the lack of acceptance of the experts testimony in the scientific community.

Accordingly, plaintiff's motion *in limine* to exclude the testimony of the engineering expert is granted.

ISSUE OF BIFURCATED TRIAL

Defendant's motion for a unified trial is denied. There has been no showing that issues of liability and damages are intertwined that would compel a bifurcated trial herein (*see, Smith v. McClier Corp.*, 38 A.D.3d 322, 831 N.Y.S.2d 413 [App.Div., 1st Dept, 2007].)

This matter is adjourned to February 28, 2011, 9:30 AM for a conference.

This constitutes the court's decision and order.

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