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## News Story

# Expert Testimony On Speed Subject To Challenge

The speed of motorists — often a key piece of evidence in auto accident suits — can be successfully excluded in some cases, says one Raleigh lawyer.

Jay Trehy represented a motorist, Brent Taylor, who suffered severe personal injuries in a 1997 Johnston County car crash.

### ADVERTISEMENT

While preparing for an August trial, Trehy learned a defense expert planned to testify that Taylor was traveling around 70 mph when the crash occurred. That testimony would have allowed the jury to find that Taylor was contributorily negligent, blocking recovery.

Trehy used a two-prong strategy to keep that testimony out of the trial.

He relied on case law that said only eyewitnesses should testify about

speed. He also questioned the calculations the expert used to come up with the estimated speed.

"In my opinion, in a proper case with proper accident reconstruction methodology, a qualified expert should be able to opine about the speed," Trehy said. "But through no fault of the expert, he didn't have the ability to do proper accident reconstruction. So I argued his evidence shouldn't come in because it was flawed."

Superior Court Judge Knox V. Jenkins Jr., who presided at the trial, eventually ruled the jury could not hear the defense expert's preferred opinions on the plaintiff's speed.

"That gutted our contrib defense," said Raleigh lawyer Palmer Sugg, who represented the defendant.

The jury ultimately ruled in the plaintiff's favor. Judgment was entered for \$1,186,774, which included \$968,140 for personal injuries and \$14,450 for property damage. The defendant had a liability limit of \$100,000 on her auto policy.

## No-Contact Accident

The suit in *Brent Taylor v. Christy Flowers Gachuz* (99 CVS 464; Johnston County Superior Court) involved a "no-contact" motor vehicle accident on June 20, 1997 at an intersection outside Kenly (see case report, Oct. 8, 2001 Lawyers Weekly).

The defendant's vehicle emerged from a side road, Piney Grove Church Road, and into the intersection. The plaintiff, driving a Pontiac Trans Am on Hickory Crossroads Road, swerved to miss her and lost control of his vehicle. He rolled over and crashed into a nearby field, suffering severe personal injuries. He sued in 1999.

The defendant denied negligence and also argued the plaintiff had been contributorily negligent.

One of the defendant's experts, accident reconstructionist Wayne McCracken, planned to testify that the plaintiff was traveling at 69-71 mph just before the wreck. That speed set up a potential finding of contributory negligence by the jury.

In a motion in limine, Trehy challenged the admissibility of the defense expert's opinions on speed:

\* **Case law.** Trehy cited a 1985 Appeals Court case, *Hicks v. Reavis*, 337 S.E.2d 121. It states: "[W]ith respect to the speed of the vehicle, the opinion of a lay or expert witness will not be admitted where he did not observe the accident, but bases his opinion on the physical evidence at the scene."

Said Trehy, "That case has not been overruled by an appellate court. What it specifically holds is that rule 702 does not change North Carolina law, and North Carolina law has traditionally prohibited a witness, lay or expert, from testifying about speed if that witness didn't observe it."

\* **Calculations questioned.** Trehy also argued the mathematical formulas McCracken used couldn't accurately describe the real speed of the plaintiff's vehicle.

"Reconstruction of a rollover accident can be a very sophisticated endeavor," Trehy said. "The real flaw in Mr. McCracken's methodology is not of his own doing. He was never given the opportunity to fully investigate the accident. He went to the scene four years afterwards and couldn't take any measurements himself, and he never got a chance to examine the vehicle."

McCracken was able to mathematically describe two of three phases of the accident — the yaw portion and the rollover portion. But he was unable to reconstruct the furrowing aspect of the accident, Trehy argued, and that made his estimate unreliable.

Judge Jenkins conducted a preliminary assessment of McCracken's testimony pursuant to *State v. Goode*, 461 S.E.2d 631, 639 (N.C. 1995), and Trehy conducted a voir dire of the defense expert. At the conclusion of the hearing, Judge Jenkins excluded McCracken's opinions.

"The sense I got from Judge Jenkins is that the law in this state is that engineers cannot testify as to speed," said Sugg. "There is not one case where a contested engineer was allowed to testify, although there are some where each side had an engineer and it was allowed in, or where a party didn't object and it came in."

Sugg said the exclusion of that speed testimony puts North Carolina in the minority of jurisdictions on that issue.

"I think over the next several years, someone may take this up," said Sugg. "From the defense side of the table, I don't know whether it helps or hurts the plaintiff."

## Family Purpose Doctrine

The defense prevailed at trial on a family purpose doctrine issue. The jury rejected the claim against Charles Ray Flowers, the father of the defendant.

"Her father had bought her the vehicle, but the evidence was fairly clear that the father didn't exercise control over the car," Trehy said.

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