Affirmed and Opinion filed October 19, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00395-CV

ANTHONY LE, Appellant

V.

JUAN MANUEL CANO ZUNIGA, Appellee

On Appeal from the 113th District Court
Harris County, Texas
Trial Court Cause No. 96-11839

O P I N I O N

In this personal injury case, Anthony Le appeals a take-nothing judgment in favor of Juan Manuel Cano Zuniga on the ground that the trial court erred by admitting opinion testimony of Zuniga's accident reconstruction expert. We affirm.

Background

In February of 1996, a sequence of collisions occurred in the southbound lanes of Highway I-45 involving a small truck driven by Billy Henderson, a car driven by Yousuffudin Khaja, and a dump truck driven by Juan Manuel Cano Zuniga.[1] As a result of those collisions, Zuniga struck a concrete barrier

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[1] For purposes of this opinion, the vehicles will simply be referred to by the names of the drivers.

separating the northbound and southbound lanes of the highway. This collision dislodged a piece of concrete that crashed through the windshield of Le's car, which was traveling in a northbound lane, and struck Le in the face.

In March of 1996, Le filed a personal injury lawsuit against Henderson, Khaja, and Zuniga, among others. At trial, the parties disputed the manner in which the Henderson-Zuniga collision had occurred. Before the accident, Henderson was traveling in the inside lane closest to the barrier, Khaja was in the middle lane, and Zuniga was in the outside lane. The parties agreed that Henderson and Khaja first had some type of side impact collision. Beyond that, Henderson testified that Zuniga had swerved into him while veering across the middle and inside lanes toward the concrete barrier, whereas Zuniga's expert, Ed Martinez, opined that it was Henderson first hitting Zuniga that caused Zuniga to lose control, veer across the highway, and crash into the concrete barricade.

Le twice moved to exclude Martinez's testimony, both requests were denied, and Martinez was allowed to testify at trial. After the conclusion of the evidence, but before the case was submitted to the jury, Le settled with Henderson and Khaja. The jury thereafter found that Henderson, alone, was 100% liable for causing the accident. Accordingly, the trial court entered a take-nothing judgment in Zuniga's favor.

Admission of Expert Testimony

On appeal, Le's three issues challenge the admission of Martinez's opinion testimony on the ground that it was unreliable because there was no physical evidence to support it.[2]

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[2] Le's brief cites the following "reasons" that Martinez's opinion was unreliable: "(A) The expert did not exclude all other potential points of impact; (B) The expert's opinion was not based on an adequate foundation; (C) The opinion of the expert was based on his subjective interpretation of the facts and not based on physical evidence; (D) The expert's opinion was conclusory; (E) The expert's opinion has an analytical gap; (F) The expert's opinion was not relevant or reliable; (G) There was no evidence to support the expert's opinion; (H) The undisputed physical evidence contradicts or otherwise renders the expert's opinion unreasonable; (I) The sources relied upon by the expert do not support his opinion; (J) The expert's assumptions are not supported by the physical evidence; (K) The point of impact about which the expert testified is not a proper subject of expert testimony in the absence of physical evidence; (L) The expert does not meet the requirements of Rule 702; (M) The expert's opinion is not admissible under Rule 403; (N) The expert's theory, technique and methodology is flawed; (O) The theory, technique and methodology of the expert requires his subjective interpretation and is not based upon physical evidence; (P) The expert's opinion was a mere possibility used to bolster the testimony of Appellee Zuniga; (Q) The expert's

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. *See* TEX. R. EVID. 702. As a precondition to the admissibility of expert testimony, a trial judge must determine whether: (1) the proposed expert is qualified; (2) the expert's testimony has a reliable basis in the knowledge and experience of the relevant discipline; and (3) the testimony is relevant. *See E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1998).

Because there is no dispute in this case that Martinez was qualified or that his testimony was relevant, we turn our attention to Le's assertion that his testimony was not reliable. To be reliable, expert testimony must be grounded in the methods and procedures of science and not be mere "subjective belief or unsupported speculation." *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 720 (Tex. 1998). In this regard, a trial court is not required to admit opinion evidence "which is connected to existing data only by the *ipse dixit* of the expert." *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997); *Gammill*, 972 S.W.2d at 726. In other words, an opinion is not so merely because an expert says it is so. *See Gammill*, 972 S.W.2d at 726. Rather, "[a] court may conclude that there is simply too great an analytical gap between the data and opinion proffered." *General Elec.*, 522 U.S. at 146; *Gammill*, 972 S.W.2d at 727. An impermissible analytical gap thus exists where an expert fails to demonstrate how his observations support his conclusions, *i.e.*, to provide some explanation to show that "what he believes *could have* happened actually *did* happen." *Gammill*, 972 S.W.2d at 727, 728.[3] However, in making its initial determination as to the admissibility of expert testimony, the trial court is not

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opinion is no more than speculation in the absence of physical evidence; and (R) The expert's opinion is not a matter for expert testimony in the absence of physical evidence." Le's brief does not contain argument for each of these contentions, much less citations to the record or supporting authorities, as required by Rule 38.1(h) of the Texas Rules of Appellate Practice. Nor were these contentions, other than the lack of physical evidence, asserted by Le at the pre-trial hearing on the admissibility of Martinez's testimony.

[3] The trial court's "gatekeeping" function does not supplant cross-examination as the traditional and appropriate means of attacking shaky but admissible evidence; neither does the availability of cross-examination relieve the trial court of its threshold responsibility to ensure that an expert's opinion is relevant and reliable. *See Gammill*, 972 S.W.2d at 728.

to determine whether an expert's conclusions are correct, but only whether the analysis used to reach them is reliable. *See id.* at 728.

In this case, Le's objection to Martinez's opinion was not with regard to the methodology he used but the fact that no tire marks, broken glass, or other physical evidence was present at the point of impact that Martinez calculated. Le argues that the lack of such physical evidence creates an impermissible analytical gap between the underlying facts and Martinez's opinion on the point of impact.

The physical evidence in this case consisted of: damage to the median barrier; the area in which each of the vehicles involved in the accident came to rest; photographs of the damage to those vehicles; and photos of tire marks from the vehicles on the roadway. Based on this evidence and other undisputed facts, Martinez made hand and computer calculations of the point of impact for the Henderson-Zuniga collision based on how the course and speed of each vehicle would have been affected by the collisions so as to eventually reach their respective resting positions. Although Martinez acknowledged that the photographs did not depict any physical evidence of an impact at the point he calculated it to have occurred, he explained that any such physical evidence might not have been left at the point of impact or was simply not visible in the photos taken.

Although Martinez did not detail how he performed his calculations or how the results of those calculations supported his conclusion, that omission was not the basis for Le's objection at the "gatekeeping" hearing which was instead confined to "the physical facts or evidence upon which the initial impact is based or the lack thereof." We do not believe that the lack of such physical evidence would itself render Martinez's opinion on the point of impact inadmissible if Martinez's methodology and its application to the available facts were sound and reliable, which has not otherwise been challenged by Le. Obviously, had the physical evidence conclusively shown the point of impact, there would have been little need for experts to calculate it in the first place.

In any event, the error Le complains of is not reversible unless it probably caused the rendition of an improper judgment. *See* TEX. R. APP. P. 44.1(a). In this regard, Le need not prove that but for the alleged error a different judgment necessarily would have been rendered, but only that it probably would have been. *See City of Brownsville v. Alvarado*, 897 S.W.2d 750, 753 (Tex. 1995). As a practical matter, however, a successful challenge to an evidentiary ruling usually requires the complaining party to

show that the judgment turns on the particular evidence excluded or admitted. *See id.* at 753-54. In determining whether the case turns on the evidence in question, we review the entire record. *See id.*

In this case, Le asserts that the admission of Martinez's testimony was harmful because the point of impact was the "critical pivotal issue" in establishing the liability of Zuniga, and that allowing Martinez's testimony obviously persuaded the jury that the scenario of the accident and point of impact testified to by Zuniga was correct even though it was unsubstantiated by the physical evidence. However, these contentions do not establish, in light of the entire record, that Martinez's testimony was crucial to the outcome of the case.

Rather, because the final arguments in this case were not transcribed, we have no record of the portions of the evidence which the attorneys emphasized most heavily to the jury at the conclusion of trial. Obviously, to establish liability against Zuniga, it was Le's burden to provide evidence of Zuniga's negligence. However, besides the alleged collision with Henderson, Le has cited no evidence of any other explanation for Zuniga crossing the highway, such as that he had fallen asleep or suffered a mechanical problem, let alone evidence showing that it resulted from negligence on his part. On the other hand, Henderson did not appear at trial and conceded in his deposition testimony that he had been "partying" all night and was only just returning home at six o'clock in the morning when the accident occurred. Moreover, neither of the respective experts' testimony was very strong in establishing a point of impact or even the more likely sequence of collisions. Under these circumstances, if anything, it appears more probable that a jury would have been influenced by the lack of evidence of negligence by Zuniga and the incriminating evidence against Henderson than by the weak opinion testimony of Martinez. It could also have seemed to a jury too great a coincidence that Zuniga's truck could have happened to veer into the median right after the Henderson-Khaja collision without having been affected by that collision. Because Le's points of error thus fail to demonstrate reversible error by the trial court, they are overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed October 19, 2000.

Panel consists of Justices Anderson, Fowler, and Edelman.

Do Not Publish — TEX. R. APP. P. 47.3(b).