

1 SECOND JUDICIAL DISTRICT COURT
2 COUNTY OF BERNALILLO
3 STATE OF NEW MEXICO

4 D-202-CV-2011-09334

5 SIMON LEES, et al.,

6 Plaintiffs,

7 vs.

8 STOREFRONT SPECIALTIES AND GLAZING, LLC, et al.,

9 Defendants.

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11
12 TRANSCRIPT OF PROCEEDINGS

13 On the 18th day of December, 2012, at approximately
14 8:40 a.m., this matter came on for JURY TRIAL before the
15 HONORABLE C. SHANNON BACON, Division XXIII, Judge of the
16 Second Judicial District, State of New Mexico.

17 The Plaintiffs, SIMON LEES, et al., appeared by
18 Counsel of Record, GREGG V. FALLICK, Attorney at Law,
19 100 Gold Avenue, SW, Suite 205, Albuquerque,
20 New Mexico 87102.

21 The Defendants, STOREFRONT SPECIALTIES AND GLAZING,
22 LLC, et al., appeared by Counsel of Record, SETH L. SPARKS
23 and GINA T. CONSTANT, Rodey, Dickason, Sloan, Akin & Robb,
24 PA, PO Box 1888, Albuquerque, New Mexico 87103.

25 At which time the following proceedings were had:

20 Q. (BY MR. FALLICK) You know that Officer Enyart
21 concluded that the defendant's conduct was the sole
22 contributing factor in causing this crash, right?

23 A. Yes, something to that effect. He has testified that
24 way in deposition and here in trial, I believe.

25 Q. Officer Enyart was dispatched to the crash scene in

1 his capacity as an Albuquerque police officer?

2 A. Yes.

3 Q. He was not selected by one of the parties to conduct
4 his investigation?

5 A. No, sir.

6 Q. He wasn't paid by one of the parties either, was he?

7 A. No.

8 Q. As a neutral law enforcement officer,
9 Officer Enyart's role was to conduct a completely
10 independent investigation, right?

11 A. Yes. I mean, he's there to investigate the crash.

12 Q. He didn't answer to one of the parties, did he?

13 A. No. He's a -- he's a public servant in his capacity
14 as a law enforcement officer.

15 Q. None of the parties to the crash had greater access
16 to Officer Enyart than any of the other parties, right?

17 A. I'm sorry; I lost you on that. You're saying -- go
18 ahead.

19 Q. He talked to everybody the same, didn't he?

20 A. Treated everybody the same? Well, yes. I mean,
21 Officer Enyart testified to what he did, and I don't have
22 any reason to dispute it one way or the other.

23 Q. Officer Enyart's duty was to communicate with all
24 parties equally and in an even-handed manner, right?

25 A. Again, I'm not in that teaching aspect now, but, yes,

1 you would expect him to do that.

2 Q. Officer Enyart's role was to call the balls and
3 strikes on behalf of the State of New Mexico, right?

4 A. Call the balls and strikes? You know, he's there to
5 fill out the report and investigate.

6 Q. So you don't know what it means to "call the balls
7 and strikes"?

8 A. Well, it's -- no, not really. I mean, I know
9 baseball, but I'm not sure what the correlation is between
10 a law enforcement officer investigating an accident and
11 balls and strikes. Sorry.

12 Q. Officer Enyart was not an advocate for either party.
13 True?

14 A. Well, he testified that he wasn't.

15 Q. Your role is different than Officer Enyart's, isn't
16 it?

17 A. My role? I mean, I'm engaged by, usually, one party
18 or the other to do an investigation.

19 Q. You were selected by the defendants' lawyers?

20 A. Yes, yes.

21 Q. You were paid by the defense lawyers?

22 A. Yes.

23 Q. All the information you relied upon was provided to
24 you by the defendants' lawyers, right?

25 A. Well, no. I mean, there's other information I did --

1 they give me discovery and photographs and things that -- I
2 do my own -- do my own work and get my own data.

3 Q. You consider defendants' lawyers, the opposing
4 lawyers to Simon and Claire and Adelle and Emma Lees, to be
5 your clients, right?

6 A. Well, Mr. Sparks and Gina Constant are the people
7 that I talked to in this case and was hired by. I'm not
8 sure those other people -- I'm not sure who you're talking
9 about there.

10 Q. Page 14, line 17 -- actually line 22:

11 "QUESTION: You consider the
12 Defendants' lawyers -- the opposing
13 lawyers to Plaintiff, Simon Lees, to be
14 your clients in this case, right?

15 "ANSWER: Yes. They're paying my bill,
16 yes."

17 Was that your testimony?

18 A. Yes.

19 Q. And, in fact, your intake sheet in this case, which
20 you testified at your deposition and is marked as
21 Exhibit 0000 for the plaintiffs in our case, specifically
22 lists Gina Constant and the Rodey Law Firm as your client,
23 correct?

24 A. Yes.

25 MR. FALLICK: And I offer 0000 into evidence,

1 Your Honor.

2 MR. SPARKS: I haven't looked at it either. Can
3 I look at it?

4 THE COURT: Counsel, we need to take a brief
5 recess. We'll be in recess for ten minutes.

6 (NOTE: Jury excused.)

7 THE COURT: We had an emergency request from a
8 juror. So it will be just a few minutes.

9 MR. FALLICK: Everybody is okay, you think?

10 THE COURT: Don't know.

11 I am not going to mark this as an exhibit.

12 (NOTE: Court in recess at 11:26 a.m.

13 and reconvened at 11:35 a.m.)

14 (NOTE: Jury present.)

15 MR. FALLICK: May I proceed, Your Honor?

16 THE COURT: You may.

17 Q. (BY MR. FALLICK) Your job is to be an advocate for
18 defendants, right?

19 A. No.

20 Q. You've known Seth Sparks for a while?

21 A. Yes, many years. I don't recall when I met him.

22 Q. And I'm going to ask you, because I know we want to
23 get the jury to lunch sooner rather than later, so I'm
24 going to ask you a series of yes-or-no questions, and if
25 they're capable of being responded to that way, please do.

1 You' ve done work for Mr. Sparks' law firm before,
2 right?

3 A. Yes.

4 Q. You' ve known him for quite a while?

5 A. Yes.

6 Q. At your deposition, you denied earning much from
7 Mr. Sparks' law firm, right?

8 A. Yes.

9 Q. You' ve had three or four cases with Mr. Sparks alone,
10 haven' t you?

11 A. Yes.

12 Q. There are more than 70 lawyers in Mr. Sparks' law
13 firm?

14 MR. SPARKS: Your Honor, may we approach?

15 THE COURT: You may.

16 (NOTE: Beginning of bench conference.)

17 THE COURT: Discussing this is not appropriate in
18 any case. You can ask him how many cases he has done.

19 MR. FALLICK: It goes directly to bias,
20 Your Honor.

21 THE COURT: You can ask him how many cases -- but
22 the size of Rodey itself is not bias. It' s big firm
23 against you. That' s not appropriate.

24 MR. FALLICK: Isn' t it important that he knows
25 he' s got 70 lawyers as a source of his business? I think

1 that goes directly to --

2 THE COURT: You can ask him how many cases he's
3 performed under the umbrella of Rodey.

4 MR. FALLICK: He didn't know -- he said it at his
5 deposition, he didn't know how long Seth had been with
6 Rodey, that he hasn't -- so I'm not going to get what I
7 need from that. I mean, if that's the ruling --

8 THE COURT: How many times he's been hired by
9 Rodey, yeah, you could ask him that.

10 MR. FALLICK: He didn't know that Seth was with
11 him. So if I asked him, he wouldn't have included --

12 THE COURT: It's not about Seth. Rodey is --
13 proposition that there's 70 lawyers, he's been hired four
14 or five times by 70 lawyers. That's craziness.

15 MR. FALLICK: The incentive isn't there?

16 THE COURT. You can ask him how many times.

17 (NOTE: End of bench conference.)

18 Q. (BY MR. FALLICK) Do you know how many times you've
19 been retained in all your years by the Rodey firm?

20 A. No, but it's not that much, not that many.

21 Q. But three or four are from Mr. Sparks, alone?

22 A. Yes, yes, three or four, yes.

23 Q. All of your earned income comes from providing these
24 sorts of services, doesn't it?

25 A. Are you asking me for the IRS or -- because I know

1 this is --

2 Q. It's on the record.

3 A. No, I couldn't live on what I do with this.

4 Q. So you're saying that you have earned income from
5 sources other than --

6 A. Oh, yes.

7 Q. -- your firm?

8 A. Oh, yes. I have a lot of other earned income.

9 Q. Do you know what earned income is?

10 A. I have to report it on the my taxes. That's what I
11 call "earned income."

12 Q. Do you know the difference between earned income
13 meaning income you earn from your labor and income you earn
14 from your investments?

15 A. No, I mean, I don't distinguish it.

16 Q. Well, let me do it for you. Is all of the income you
17 make from your labor as a result of this sort of the
18 services you're providing today?

19 A. No.

20 Q. Page 179, line 15 -- there is an objection to these
21 questions at the deposition. Do I need to approach?

22 THE COURT: Let me -- let me see what
23 Mr. Sparks --

24 MS. CONSTANT: I'm not there yet. What did you
25 say?

1 MR. FALLICK: Page 179, line 15 through page 180,
2 line 2.

3 THE COURT: He's catching up with you.

4 MR. SPARKS: Sorry. We're having technical
5 issues.

6 MR. FALLICK: I can go ahead?

7 MS. CONSTANT: Yes.

8 MR. FALLICK: And just skipping the objections.

9 MR. SPARKS: For that one, anyway, go ahead.

10 MR. FALLICK: I meant --

11 Q. (BY MR. FALLICK) Page 179, line 15:

12 "QUESTION: What percentage of your
13 earned income results from providing
14 accident reconstruction services and
15 testimony?

16 "ANSWER: Well, my business. That's my
17 business is doing consulting work.

18 "QUESTION: So that's your sole
19 business and your sole source of
20 income; is that right?

21 "ANSWER: Well, it's -- it's my sole --
22 it's my business. I don't have any
23 other -- I have rent houses and things
24 like that, but as far as business
25 goes. "

1 Was that your testimony?

2 A. That was my testimony, yes.

3 Q. For providing these services, you earn more than the
4 Chief of the New Mexico State Police, true?

5 MR. SPARKS: Objection, Your Honor. I think
6 there's a lack of foundation for all of that questioning.

7 THE COURT: Sustained.

8 Q. (BY MR. FALLICK) Your opinion is that defendants
9 completely fulfilled their duty to yield to oncoming
10 bicycle traffic. True?

11 A. Yes, that's right.

12 Q. Because, in your opinion, defendants cannot yield to
13 something they cannot see. True?

14 A. In part, yes, that's true.

15 Q. You reached those conclusions after carefully
16 reviewing Defendant Lynch's deposition testimony, right?

17 A. In part, yes.

18 Q. At your deposition, we went through Defendant Lynch's
19 deposition testimony again, word for word, didn't we?

20 A. Word for word, word for word. I think it was 188
21 pages.

22 Q. And you've also read Mr. Lynch's testimony from the
23 trial since the deposition?

24 A. Yes.

25 Q. And that testimony at trial was pretty consistent

1 with his testimony at his deposition, wasn't it?

2 A. Yeah, I think so.

3 Q. Nothing in Defendant Lynch's testimony has changed
4 your opinion that none of his conduct was a contributing
5 factor in this crash. True?

6 A. Yes, that's right, no, none.

7 Q. You are the second expert hired by defendants'
8 lawyers, right?

9 A. Yes. There was a man named Ron Feder that did some
10 work before I.

11 Q. And you've worked with Mr. Feder before?

12 A. Mostly against, but, yes, I've worked semi aligned, I
13 guess, if you will, in civil cases.

14 Q. Mr. Feder received his information from the
15 defendants, too, right?

16 MR. SPARKS: Objection, Your Honor, foundation.

17 THE WITNESS: I don't know.

18 THE COURT: Sustained.

19 Q. (BY MR. FALLICK) Well, you reviewed Mr. Feder report,
20 didn't you?

21 THE COURT: Sir -- hang on -- when somebody
22 objects, you need to stop answering.

23 THE WITNESS: Yes, ma'am.

24 THE COURT: Because you have to give me an
25 opportunity to rule.

1 THE WITNESS: Yes, ma'am.

2 THE COURT: Okay?

3 Q. (BY MR. FALLICK) From your 150 trials, you know that
4 "sustained" means that we're moving on?

5 A. Well, I was just trying to --

6 Q. I just wanted to make sure you understood the ruling
7 and we're moving on.

8 You read Mr. Feder report, right?

9 A. Yes. It was sent to me, yes.

10 Q. You know Mr. Feder spoke to Jeffrey Lynch about the
11 crash, right?

12 A. I don't recall. He could have, but I don't recall.

13 Q. And I'm approaching you with a document that has been
14 marked as Exhibit I and ask you if you recognize that as
15 part of Mr. Feder's report.

16 A. Yes. It has his logo on every page.

17 Q. Would you turn to the page marked 1004. Read the
18 first two sentences, and let me know when you've done that.

19 A. Let me -- I found it.

20 Q. Yeah, have you read the first couple of sentences?

21 A. Well, I don't need to read. I'm assuming you're
22 going to let me read it out loud.

23 THE COURT: No. Read it to yourself.

24 THE WITNESS: Okay.

25 Q. (BY MR. FALLICK) Does that refresh your recollection

1 that Mr. Feder spoke with Jeffrey Lynch about the crash?

2 A. Yes.

3 Q. As a result of Mr. Feder's investigation, including
4 his discussion with Mr. Lynch, he concluded defendants'
5 truck was traveling between 5 miles per hour and 15 miles
6 per hour at the time of the crash, right?

7 MR. SPARKS: Your Honor, we object about
8 foundation. And this has been a subject to -- this
9 report -- we had had a standing objection to it, anyway,
10 and this is the first time it's come up. So I guess we'd
11 like to approach and discuss it with you.

12 THE COURT: We've already discussed it.
13 Overruled.

14 Q. (BY MR. FALLICK) Do you have the question in mind,
15 sir? No? I'll ask you it again.

16 A. No, I'm sorry.

17 Q. It's all right. As a result of Mr. Feder's
18 investigation, including his discussion with Mr. Lynch, he
19 concluded defendants' truck was traveling between 5 miles
20 per hour and 10 miles per hour at the time of the crash,
21 right?

22 A. I don't recall that.

23 Q. Do you see that in the report? Would that refresh
24 your recollection?

25 A. Yes, on page --

1 Q. Same page?

2 A. Exhibit I? Yes. One of the pages.

3 Q. And that's consistent with your testimony today,
4 isn't it?

5 A. Yes.

6 Q. And Mr. Feder also concluded that defendants' truck
7 came to a stop approximately 21 feet from the point of the
8 impact. True?

9 A. Again, I don't recall the details, the specific
10 details, but if it's in here --

11 Q. Well, why don't you look again at that same
12 paragraph?

13 A. Yes, that's what he says. He says it was 21 feet.

14 Q. And you concluded today that it could be more like 24
15 feet, right?

16 A. No. It's -- as far as I'm concerned, it's 24 feet.
17 That's -- I did my own investigation, and it's 24 feet.

18 Q. You know that Mr. Lynch testified both at his
19 deposition and at trial that he was going idle speed at the
20 time of the crash, right?

21 A. Well, he testified to various things, but he said one
22 time that he didn't even -- I think he just let off the gas
23 or something and idled.

24 Q. Do you remember him saying that he just took his foot
25 off the brake and idled?

1 A. Yeah, that's what I meant. If I said the gas, I
2 meant the brake.

3 Q. You don't agree that that's possible, do you?

4 A. No, no, no. It's a -- there's a grade there.
5 There's a grade there.

6 Q. If Mr. Lynch had been traveling at idle speed in the
7 truck and slammed on his brakes immediately upon impact, it
8 would not have taken him 21 feet to stop, would it?

9 A. No. No, he would have stopped real quick.

10 Q. You agree that Mr. Lynch should have been traveling
11 slowly enough when he was making that turn to be prepared
12 to stop immediately if he needed to, right?

13 A. Yes, that's true.

14 Q. And you know he was going faster than that, right?

15 A. Faster than what?

16 Q. Faster than a speed that would allow him to stop
17 immediately.

18 A. Well, in terms of idle speed, yes, that's correct.

19 Q. To be clear, you understand that Jeffrey Lynch was
20 making that left at a speed that did not permit him to stop
21 immediately. True?

22 A. Yes, that's true. That would be true, yes.

23 Q. Because it took him 21 feet to stop, right?

24 A. Or some distance, yeah. He didn't stop in 1 or 2
25 feet. He took some distance to stop.

1 Q. And if it took him 24 feet to stop and a woman with a
2 baby carriage were walking across that lane 10 feet in
3 front of him, he would have run her over and kept going for
4 14 feet longer, isn't that true?

5 A. I remember that discussion in the deposition. She's
6 in the crosswalk, crossing Oxnard?

7 Q. Yes.

8 A. If there -- if the time and distance works out, he's
9 going to go further than that. Yes.

10 Q. So you agree that, under the conditions, it was
11 unsafe for Mr. Lynch to be traveling at a speed that
12 required him between 21 feet and 24 feet to come to a
13 complete stop. True?

14 A. Yeah, if he was going, if you look at the upper limit
15 of 10 miles an hour, some might consider that to be too
16 much under the circumstances. And I think I said, under
17 the circumstances, that probably was a little high.

18 Q. Your statement at deposition was a little stronger
19 than that, wasn't it?

20 A. Well, I was waiting for you to give me the page so we
21 can see what I said.

22 Q. Page 162, line 19 through page 163, line 2. Were you
23 asked the following question and did you give the following
24 answer:

25 "QUESTION: So under the circumstances

1 that Mr. Lynch describes in the
2 testimony about looking for anything --
3 pedestrians, bicyclists, anything --
4 was it safe for him at that location to
5 be traveling at a speed that required
6 him somewhere between 21 and 24 feet to
7 stop after slamming on the brakes?

8 "ANSWER: Under the -- under the
9 conditions that existed there, I would
10 think that that was probably -- would
11 be too fast."

12 A. Yes.

13 Q. That's what you said, right?

14 A. Yes, uh-huh.

15 Q. It was daylight at the time of the crash, right?

16 A. Yes. It was -- the sun came up a little before
17 seven.

18 Q. Defendant's headlights shining across the bicycle
19 lane would not have been visible at the time of the crash,
20 would they?

21 A. No, not at all.

22 Q. You claim that you can calculate how fast Mr. Lees
23 was traveling by the damage to his bicycle without knowing
24 it's metal composition, true?

25 A. Well, yes, to the extent of the crash test, the basis

1 of the crash test. That frame was not tested, that I
2 recall.

3 Q. 173, line 19, were you asked the following question,
4 and did you give the following answer:

5 "QUESTION: What data did you rely on
6 to inform your opinions about the
7 characteristics of the bicycle's metal
8 frame?

9 "ANSWER: Well, I looked at -- looked
10 at the different compositions for that
11 bike. There's some different
12 compositions. And then it doesn't seem
13 to make a whole lot of difference when
14 you're doing the calculations as to
15 what the frame is because it's designed
16 to be a certain structure. So it's
17 either thicker or thinner depending on
18 the titanium or whatever it is. It's
19 always going to respond the same way in
20 the crash based on my experience and
21 the research that I did."

22 Was that your testimony?

23 A. Yes. That is my testimony back in, I guess, August
24 or whenever. Yes.

25 Q. You think all bikes bend the same way?

1 A. Well, from -- from a reconstruction standpoint, I
2 would think so, because people buy them and they ride them
3 and they weigh certain weights and they do certain things.
4 So I would think that manufacturers would try and be
5 consistent in how they build them.

6 Q. Do you have the expertise to express that as an
7 opinion, or are you just guessing?

8 A. I'm sorry; I'd say what I just said, based on my
9 experience as a reconstructionist, they build cars, they
10 build bicycles. I would expect them to build bicycles the
11 same way, that people are going to ride them in -- under
12 the conditions, and whatever the frame is, it would just be
13 lighter, you know, it would be -- it might be a lighter
14 frame, but as far as its response, in a crash, as a
15 reconstructionist, I would expect them to respond pretty
16 much the same, regardless of -- like titanium can be
17 thinner and others are thicker. It also has to do with
18 weight, but I wouldn't expect them to respond differently,
19 and that's the -- the compression testing that has been
20 done with generic frames of different kinds. They all seem
21 to compress at the same time. But I'm not saying that this
22 would be different. The best test would be to have a
23 frame, that actual frame, and do a test, would be the best.

24 Q. Thirty-eight miles an hour is a pretty specific
25 number, isn't it?

1 A. Well, that's what the chart -- I mean, that's what
2 the chart lines out at.

3 Q. It's not 40 or 35 or 39, it's 38, right?

4 A. Well, the chart that I used, it's -- if you go
5 through the deformation, that's what it is. But you could
6 have error. You know, you could have an error in the data.
7 That's just what the calculation comes out, 38.

8 Q. You don't know whether some metals crack under force,
9 do you?

10 A. Do what?

11 Q. You don't know whether some metals crack under force,
12 do you?

13 A. Some metals crack under force? I would expect that
14 some metals would crack under force. It would depend on
15 the composition. This one cracked. This one cracked open,
16 split open.

17 Q. Page 177, line 17:

18 "QUESTION: Some metals crack under
19 force, right?

20 "ANSWER: Some metals crack under
21 force? I suppose. They usually bend
22 until they get to their brittle point
23 and then they break. I'm not -- I'm
24 not a metallurgist, so I'm -- you're
25 asking me questions that I don't --

1 i t ' s n o t m y f i e l d . "

2 Was that your testimony?

3 A. Uh-huh, yes.

4 Q. Your opinion is that Simon Lees was traveling at

5 approximately 38 miles per hour at the time of the crash?

6 And you understand what the parties have stipulated, which

7 is, that's 55.7 feet a second, right?

8 A. Yeah, it's 50-something, yes, 50 -- yeah, 55, 55.86.

9 Q. Will you hold that out, sir.

10 A. I can back up too.

11 Q. You're fine.

12 THE COURT: Mr. Sparks will probably want to go

13 and verify his measurements.

14 THE WITNESS: Be sure to read the red side.

15 Q. (BY MR. FALLICK) To the window in the hallway -- to

16 the window --

17 THE COURT: Hang on. Let Mr. Sparks verify,

18 there.

19 MR. FALLICK: You got to pull it tighter, Seth.

20 MR. SPARKS: It's close enough.

21 MR. FALLICK: What do you got at the window?

22 MR. SPARKS: Please proceed.

23 Q. (BY MR. FALLICK) 52 feet to the window, right?

24 A. Well, I wasn't over there. I'm taking your word for

25 it.

1 Q. Okay. Seth's word for it.

2 MR. FALLICK: What was it?

3 MR. SPARKS: Please proceed.

4 Q. (BY MR. FALLICK) 52 feet. So less than one second to
5 the window, right? And two seconds is more than double
6 that, and four seconds is more than quadruple that, right?

7 A. Right, yeah. I gave some distances at 35. I could
8 do it at 38.

9 Q. So if he was going that fast, and he's that far away,
10 four seconds from the time that Mr. Lynch crosses his path
11 in the bike lane, should he know four seconds before the
12 crash that Mr. Lynch is going to cross the bike lane?

13 A. Not Mr. Lynch specifically, just a vehicle could be
14 crossing.

15 Q. Could be?

16 A. Uh-huh, yes.

17 Q. At four seconds, should he know that any particular
18 vehicle is not going to stop when it gets to the edge of
19 the bike lane?

20 A. If I was on a bike, I would assume that nobody's
21 stopping, yeah.

22 Q. Well, that's not my question. My question is this:
23 From more than four times to the window, should Simon Lees
24 know that Jeffrey Lynch is not going to stop before he
25 comes into the bike lane?

1 A. I don't know what anybody would know. I'm just
2 saying that when you're approaching an intersection, you
3 need to be looking for potential conflicts.

4 Q. Still not my question. Because I want you to be as
5 helpful to me on cross as you were on direct. So let's try
6 that again. Visualize a bike that's four times that
7 distance of the bike lane, looking down the bike lane. Is
8 there any way for that bicyclist to know that a vehicle is
9 going to cross that bike lane in their path?

10 A. To know? No. No, there's no way to know.

11 Q. And then three seconds? Three times that distance,
12 is there any way for a bicycle to know that a vehicle is
13 going to cross its path in that bike lane?

14 A. No, not to know for sure, no.

15 Q. Two seconds? Twice that distance, is there any way
16 for Simon Lees to know that Jeffrey Lynch is going to cross
17 that bike lane without stopping?

18 A. Not unless he looks, no.

19 Q. What if he does look?

20 A. If he doesn't look --

21 Q. What if he does look?

22 A. Pardon?

23 Q. What if he does look? If Simon Lees looks from 110
24 feet up the bike lane, can he know that Jeffrey Lynch is
25 not going to stop before he enters that bike lane?

1 A. You know, I just don't really understand what you're
2 saying. It -- there's a problem with visibility. You need
3 to slow down and adjust your speed, give you more time. So
4 when you say he should know or not know, I -- I just did an
5 accident reconstruction. I'm not a fortune teller.

6 Q. I'm asking you to do an accident reconstruction now
7 and think of a prudent bicyclist who is 110 feet up that
8 bike lane, going 38 miles an hour. Two seconds before
9 Jeffrey Lynch crosses that bike lane and blocks his path,
10 should he know from 110 feet away that that's going to
11 happen?

12 MR. SPARKS: Objection, Your Honor. Asked and
13 answered and argumentative.

14 THE COURT: Overruled.

15 A. He should expect that there may be a conflict, and he
16 should slow down. If he can't see, then he needs to slow
17 down. That's --

18 Q. (BY MR. FALLICK) And you're trying to instruct the
19 jury on the law, so --

20 A. No, you're asking me a question about do I know, does
21 he know. I'm not Mr. Lees. I'm not Mr. Lynch.

22 Q. I know, but you've expressed lots of other opinions.

23 A. And I have a good basis for those opinions.

24 Q. So --

25 A. You're asking me an abstract question about what

1 somebody should know. I don't know what somebody knows. I
2 know how you're supposed to drive on the streets of
3 Albuquerque. And going into an intersection at 38 miles an
4 hour when everybody's stopped is just not good sense.

5 Q. I know that's your legal opinion, but that's not what
6 I'm asking you.

7 A. Well, I'm trying to answer your question.

8 Q. I'm asking you if -- so if you don't know, you can
9 say you don't know. You don't know whether somebody two
10 seconds up that bike lane going 38 miles an hour should be
11 able to tell whether Jeffrey Lynch is going to block the
12 bike lane?

13 A. Has he seen Jeffrey Lynch? He never saw
14 Jeffrey Lynch, so how can he make a decision about what
15 Jeffrey Lynch is going to do if he hasn't seen him?

16 Q. But you said he should have seen him.

17 A. No, I did not say he should have seen him. You are
18 totally incorrect about that. I said that he needs to slow
19 down approaching that intersection because of the traffic
20 and needs to be looking. And had he been going slower,
21 there would not have been a crash. That's -- that's what
22 I'm saying.

23 Q. Now, I'm approaching you with Exhibit PPP, which is
24 your opinions and conclusions, Exhibit 2 to your
25 deposition, drawing your attention to paragraph 5. And I'm

1 going to ask you to read the first two sentences of
2 paragraph 5. Oh, you have that right there?

3 A. Yes, I have it right here.

4 Q. Please read the first two.

5 A. It is my opinion Mr. Lees was in a better position to
6 see the Lynch truck than Mr. Lynch seeing Mr. Lees.

7 Mr. Lynch in the left turn should be looking in the area of
8 his turn, and the right and left lane traffic was at a
9 standstill. There would not be an expectation --

10 Q. You can stop. Those were the first two sentences.
11 So you're saying that Mr. Lees was in a better position to
12 see Mr. Lynch than the other way around. Why are you
13 telling us that?

14 A. Well, I already said that earlier to the jury,
15 because of the simple fact of the size, the size of a
16 bicycle compared to the size of a truck. But I can't say
17 what the visibility was, because we don't know the size of
18 all the cars that were there, the traffic that was there.

19 Q. So you're saying that, but you don't mean to imply
20 that he could see Mr. Lynch. Is that your testimony?

21 A. Yeah, I'm not -- I'm not implying that Mr. Lees could
22 see or Mr. Lynch could see. I'm just saying that there are
23 vehicles there that cause an obstruction at different
24 points in time, varying degrees; and because of that,
25 there's a difficulty seeing. I'm not saying they couldn't

1 see or they could see. I'm just saying that Mr. Lynch --
2 Mr. Lees is in a better position to see simply because
3 Mr. Lees is on the bicycle. He's a smaller object. The
4 truck is a larger object. That's simply what I said
5 earlier.

6 Q. You see Mr. Lees sitting there, right?

7 A. Yes.

8 Q. You know he's alive?

9 A. Yes, amazingly. It's a -- it's a big crash.

10 Q. You acknowledge that your conclusion about speed only
11 can be correct if Simon could survive this crash of 38
12 miles per hour, correct?

13 A. Well, I guess, yes.

14 Q. Well --

15 A. That he -- in other words, we -- we talked about this
16 extensively at the deposition. So you want to talk about
17 that case? I have the case.

18 Q. I do.

19 A. I brought the case with me.

20 Q. And we will --

21 THE COURT: Please wait for a question.

22 THE WITNESS: I'm sorry, Judge.

23 Q. (BY MR. FALLICK) But my question for now is, since
24 you believe Mr. Lees was traveling at 38 miles an hour, and
25 since Mr. Lees is alive, you must believe that Mr. Lees

1 could survive a 38-mile-per-hour crash, right?

2 A. Yes. The way this -- this occurred, that's correct.

3 Q. And when I asked you at your deposition that very
4 question, you said that you don't have the expertise to
5 give opinions on survivability. True?

6 A. I just lost you, because you asked me about Mr. Lees
7 being alive and me saying 38 and he's obviously alive. So
8 I said that he survived. That's not an opinion. I'm just
9 giving you an answer to your question based on the facts.

10 Q. Let's talk about that. Page 43, line 19, through
11 page 44, line 3. And, actually, let's go up a little to
12 line 16.

13 A. Where are you starting?

14 Q. Page 43, line 16:

15 "QUESTION: My point is, you believe
16 Mr. Lynch could survive this crash at
17 38 miles per hour because Mr. Lynch did
18 survive this crash at 38 miles per
19 hour, right?"

20 A. And we were talking about Mr. Lees, but --

21 Q. And we were talking --

22 A. I heard you say Lynch, but I thought Lees.

23 Q. Thank you. And you said, "Yeah. Mr. Lees." And I
24 acknowledged.

25 "ANSWER: I don't -- I don't -- I'm not

1 a biomechanic expert, so you're -- I
2 think you're asking me about
3 survivability of a crash, which I'm
4 not -- I don't have -- that's not my
5 area of expertise.

6 "QUESTION: Really? You've never
7 testified about that?

8 "ANSWER: About biomechanics?

9 "QUESTION: You've never testified that
10 it's within your area of expertise that
11 a witness would or would not survive a
12 crash at certain speeds?

13 "ANSWER: Right. Yes. I'm -- I'm sure
14 of that."

15 Do you remember that testimony?

16 A. Yes, yes. Well, I'm reading it right now.

17 Q. But it wasn't true, was it?

18 A. Pardon?

19 Q. It wasn't true?

20 A. What wasn't true?

21 Q. It wasn't true that you never testified about
22 survivability?

23 A. Not that I recall at that time, yes.

24 Q. Does your area of expertise change based on the needs
25 of your clients?

1 A. No. I'm not a biomechanic expert, and I don't give
2 opinions about survivability in a crash, unless I have an
3 opinion that the bike was going 38 and the driver is still
4 alive. That's a conclusion that's not a biomechanical one,
5 it's just an observation. It's not an opinion. It's just
6 an observation.

7 Q. You testified in a case in San Miguel County,
8 captioned Gerald Baca, as personal representative of the
9 Estate of George Gilbert Portillo, deceased, and Margaret
10 Portillo v. defendants, correct?

11 A. Yes. I can tell you who the defendants are.

12 Q. I'm not asking you that.

13 A. Oh.

14 Q. I'm specifically not asking you about that.

15 MR. SPARKS: What's the exhibit number on --

16 MR. FALLICK: And there's a reason I'm not
17 specifically not asking you that.

18 OOOOOO.

19 Q. (BY MR. FALLICK) And in that testimony, did you --
20 were you asked the following questions and did you give the
21 following answers:

22 "QUESTION: You said you were able to
23 determine the fatal implications?

24 That's the phrase you used; correct?

25 "ANSWER: Yes.

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"QUESTION: Tell me what qualifies you to be able to make that determination, the determination -- I can understand that you have determinations as to what the kinetic implications would be between the impact of the two vehicles, but in terms of the actual fatal implications, I would assume that involves a biomechanical analysis; is that correct?

"ANSWER: No.

"QUESTION: Tell me what you mean by that, then.

"ANSWER: The fatal implications involve two aspects. One is Delta V, which is change of velocity in a collision. There's plenty of research -- I don't have it with me, but there's plenty of documentation that has been done primarily by auto manufacturers and, I guess, biomechanical people that are looking at injury causation that Delta Vs or change in velocities in excess of 32 miles an hour, and some say 30, but 30 to 33

1 miles an hour, Delta Vs in excess of
2 that produce fatal injuries most of the
3 time, and in this case we clearly have
4 a Delta V that is well in excess of 30.

5 "Secondly, this collision occurs
6 as a result of a cabover tractor
7 smacking right in the driver door of
8 the pickup truck. Therefore, the
9 expectation would be that not only
10 would the Delta V be in the
11 fatality-producing realm, but that
12 there would actually be propensity to
13 have direct contact in the surfaces of
14 the driver door and the front rigid
15 structure of the tractor and the
16 driver, who is sitting directly inside
17 the driver door. So you have crushing
18 and contacting type injuries as well as
19 the actual change in velocity that
20 produces -- independently produces or
21 can produce fatal injuries.

22 "QUESTION: I understand your comments
23 regarding a Delta V in excess of
24 between 30 and 32 producing a fatal
25 injury. Is that also dependent upon

1 where the impact takes place?

2 "ANSWER: Well, Delta V calculations
3 generally involve the analysis of the
4 center of gravity -- or not the center
5 of gravity, some portion of the vehicle
6 that is in the contact area, like the
7 damage centroid is sometimes used to
8 calculate changes in velocity."

9 Did you give that testimony?

10 A. You know, I didn't -- I didn't have the deposition,
11 but that's fine. I'll take your word for it. I would
12 expect -- I've looked that case up. So I'm -- I agree with
13 everything you've said.

14 Q. So in the Estate of Mr. Portillo case, you testified
15 that you did have the expertise to determine fatal
16 implications; and in our case, you testified that you don't
17 have the expertise to determine fatal implications. Right?

18 A. Well, we just went through an exercise where I'm
19 saying that the bike is going 38 and Mr. Lees is here. But
20 that's not based on any biomechanical analysis.

21 Q. No. But you're forgetting about this testimony.

22 A. Which testimony?

23 Q. I'm going to read it to you.

24 MR. SPARKS: Page and line, please?

25 MR. FALLICK: I'm sorry. Page 43, line 25.

1 Q. (BY MR. FALLICK)

2 "QUESTION: You've never testified that
3 it's within your area of expertise that
4 a witness would or would not survive a
5 crash at certain speeds?

6 "ANSWER: Right. Yes. I'm -- I'm sure
7 of that."

8 That was your testimony, right?

9 A. Yes. That's -- you're reading back from my
10 deposition and then you have the deposition in the other
11 case.

12 Q. So you've talked about having 40 years of experience.
13 Do you have less expertise now than you did 12 years ago?

14 A. No. I have more expertise, more experience, I guess.

15 Q. You didn't disclose your testimony to Simon Lees and
16 his family in Mr. Portillo's case, did you?

17 A. No. It was 12 years -- 10, 12 years ago. That case
18 was in 2000 -- the year 2000, and I only gave four years.
19 I was required to give four years' testimony.

20 Q. And you're also required to tell the truth, right?

21 A. Sure.

22 Q. If we had not found that testimony on our own, we
23 never would have known about it, right?

24 A. Unless you ask me for my testimony 10 years back, 10 years,
25 10 or 15 years, then it would have been there. It's

1 listed; but, no, otherwise, you wouldn't have known.

2 Q. So if I had known about this, I could have asked you
3 for it, but then I'd already know about it, right?

4 A. Well, I've had lawyers ask me for all of my testimony
5 logs for 30 or 40 years. And I have it back to 30 years.
6 But I don't have 34.

7 Q. And if we hadn't found out about it, the jury
8 wouldn't have found out about it either, right?

9 A. And I brought the case. We can talk about the case,
10 if you want. I have pictures. I have my calculations.
11 It's vastly different facts and a vastly different case.
12 And a bicycle --

13 Q. And vastly different expertise too?

14 A. No, it's accident reconstruction. I don't think it's
15 vastly different. It's just when you get hit in the door
16 with a semi, there's fatal implications of that.

17 Q. Vastly different clients with vastly different
18 interests too?

19 A. Pardon?

20 Q. Vastly different clients with vastly different
21 interests?

22 A. No. They wanted a reconstruction in that case and --
23 calculate the speed, and I did everything that I normally
24 do. It was a different -- it wasn't the Rodey firm. It
25 was Bob Sabin in Roswell.

1 Q. And in that case, your clients wanted to say that a
2 party wouldn't have survived a 32-mile-per-hour crash; but
3 in this case, your clients want to that say Simon Lees
4 would survive a 38-mile-per-hour crash?

5 A. I don't know what my clients would want in that case
6 or this. I did a reconstruction, and that's what the facts
7 are -- what my opinions are, not facts, but opinions.

8 Q. George Gilbert Portillo was killed in a traffic
9 accident, right?

10 A. Well, he was killed because he was in the truck
11 that -- he was in the pickup truck that the semi hit in the
12 door.

13 Q. And --

14 A. Down by Fort Sumner -- I mean, by Vaughn, New Mexico.

15 Q. And you testified against his widow?

16 A. Pardon?

17 Q. You testified --

18 A. I gave a deposition in the case, never went to trial.

19 Q. And the deposition you gave in the case was testimony
20 against his widow, right?

21 A. Well, I guess, from the standpoint of -- again, when
22 you say "against," I was hired by James Hamilton
23 Construction. So I was doing the reconstruction, and I was
24 presented in a deposition to David Armijo, who was
25 representing the widow, Ms. Portillo.

1 Q. You acknowledge that the contact injuries to a
2 bicyclist are even greater than the contact injuries to a
3 motor vehicle driver who is hit on his door, correct?

4 MR. SPARKS: I'm -- objection, Your Honor.
5 Foundation. Outside of his expertise.

6 THE COURT: Response?

7 MR. FALLICK: He testified about it at his
8 deposition.

9 THE COURT: Overruled.

10 Q. (BY MR. FALLICK) Do you have the question in mind,
11 sir?

12 A. No. I'm sorry. Go ahead, say it again.

13 Q. You acknowledge that the contact injuries to a
14 bicyclist are even greater in a crash than to an occupant
15 in a truck. True?

16 A. Yes, relatively speaking, because the bicyclist is --
17 doesn't have the protection of an occupant compartment.

18 Q. And you know when Simon Lees hit that truck he didn't
19 have the protection of an occupant compartment, right?

20 A. No. He -- he's -- like I explained to the jury, he
21 hit right in the wheel of that truck, which is just
22 completely rigid.

23 MR. FALLICK: That's all I have, Your Honor.

24

25

1 STATE OF NEW MEXICO)
2 COUNTY OF BERNALILLO) SS

3
4 I, ROBERT W. PASCHAL, Official Court Reporter for the
5 Second Judicial District Court of the State of New Mexico,
6 hereby certify that I reported, to the best of my ability,
7 the proceedings, D-202-CV-2011-09334; that the pages
8 numbered TR-1 through TR-292, inclusive, are a true and
9 correct transcript of my stenographic notes, and were
10 reduced to typewritten transcript through Computer-Aided
11 Transcription; that on the date I reported these
12 proceedings, I was a New Mexico Certified Court Reporter.

13 Dated at Albuquerque, New Mexico, this 8th day of
14 January, 2013.

15
16
17
18 _____
19 ROBERT W. PASCHAL, RPR, CRR
20 New Mexico CCR No. 27
21 Expires: December 31, 2013
22
23
24
25