

1994

Jerry Stevenson v. Karen Stevenson, State Farm Insurance Company : Brief of Appellee

Utah Court of Appeals

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UTAH COURT OF APPEALS

JERRY STEVENSON,)	
)	
Plaintiff/Appellant,)	
)	
vs.)	
)	
KAREN STEVENSON and STATE FARM,)	Case No. 940037-CA
INSURANCE COMPANY,)	
)	Priority No. 15
Defendant/Appellee.)	

BRIEF OF APPELLEE, KAREN STEVENSON

APPEAL FROM THE JUDGMENT OF
THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY,
STATE OF UTAH,
THE HONORABLE MICHAEL J. GLASMANN

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FILED
Utah Court of Appeals

APR 14 1994

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Plaintiff/Appellant,)	
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STATUTES

Utah Code Ann. § 78-2a-3(2)(k)	1
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OTHER AUTHORITIES

None.

JURISDICTION

Jurisdiction is proper in this Court pursuant to Utah Code Ann. § 78-2a-3(2)(k).

STATEMENT OF THE ISSUES ON APPEAL

1. Whether the trial court erred in ruling that even if the indivisible injury rule was adopted in Utah, there was insufficient evidence to meet plaintiff's burden of proof that defendant Karen Stevenson proximately caused any of plaintiff's injuries.

2. Whether the indivisible injury rule should be adopted in Utah.

STANDARDS OF REVIEW

1. In reviewing a grant of summary judgment, the reviewing court will liberally construe all the evidence and the inferences which may be reasonably drawn from the evidence in the light most favorable to the losing party and will affirm when there is no genuine issue of material fact. Malone v. Parker, 826 P.2d 132, 133 (Utah 1992).

2. As the issue of whether the indivisible injury rule should be adopted in Utah is a question of law, the lower court's determination is reviewed for correctness, Johnson v. Morton Thiokol, Inc., 818 P.2d 997, 1000 (Utah 1991), although, because of its ruling on issue number one above, the lower court never reached this issue.

DETERMINATIVE STATUTES, RULES, AND REGULATIONS

Section 78-27-40, Utah Code Annotated (1993). (The statute is set out in full in Exhibit "A".)

STATEMENT OF THE CASE

1. Nature of the Case

Plaintiff Jerry Stevenson ("Plaintiff") initiated this lawsuit in the lower court seeking damages from defendant Karen Stevenson ("Defendant Stevenson") for personal injuries sustained in a multi-car accident ("accident").¹ Plaintiff subsequently filed a Motion for Summary Judgment, which was granted by the lower court. Plaintiff now seeks review of the lower court's award of summary judgment to Defendant Stevenson.

2. Course of Proceedings and Disposition Below

Plaintiff filed suit against Defendants Stevenson and Kristy Armstrong seeking to recover damages for injuries sustained in a four-car collision.² (R. at 1.) Defendant Stevenson denied liability and maintained that Plaintiff's injuries, if any, were proximately caused by the third driver involved [JoAnn Anderson], and not by Defendant Stevenson. (R. at 20.) Defendant Stevenson filed a Motion for Summary Judgment on July 30, 1993. (R. at 59.) Plaintiff filed a Response to Defendant's Motion for Summary

¹Plaintiff has settled with JoAnn Anderson, one of the other drivers involved in the accident.

²The claim against Defendant Kristy Armstrong was subsequently dismissed.

Judgment on August 26, 1993. (R. at 139.) On September 1, 1993, Defendant Stevenson filed her reply brief. (R. at 157.) On October 29, 1993, after oral argument, the District Court granted Defendant Stevenson's Motion for Summary Judgment and dismissed Plaintiff's Complaint with prejudice and on the merits. (R. at 168 and Exhibit "B".) The District Court found that, since Plaintiff's own expert could not testify as to a reasonable probability that the accident between Plaintiff and Defendant caused any injury to Plaintiff, the jury would be left to speculate on whether or not any of Plaintiff's injuries were caused by the impact between Plaintiff's vehicle and Defendant Stevenson's vehicle. Id. The court also found that, even if the indivisible injury rule was adopted in Utah, it would be inapplicable to the case at hand because Plaintiff's expert testified that the first impact between Plaintiff's car and the car driven by JoAnn Anderson was of sufficient speed and force to have caused all of Plaintiff's injuries and thus Plaintiff was unable to establish that Defendant Stevenson proximately caused any of Plaintiff's injuries sustained from the accident. Id.

3. Reconciliation of the Statement of the Facts

A four-vehicle collision occurred on December 8, 1986, on Riverdale Road (SR-26) in Riverdale, Utah. (R. at 63.) The accident occurred at approximately 6:30 p.m. and, at the time of the accident, the road conditions were icy and it was snowing. (R. at 63.) JoAnn Anderson ("Anderson") was traveling east on SR-26.

(R. at 63.) Plaintiff was traveling west on SR-26. (R. at 63.) Defendant Stevenson was traveling west behind the Plaintiff. (R. at 63.) The fourth car was driven by Defendant Kristy Armstrong who was traveling east on SR-26. (R. at 63.)

While traveling over a bridge, Anderson hit a patch of ice and lost control of her vehicle. (R. at 63.) Anderson's vehicle flew over the divider between the eastbound and westbound lanes, travelled into the westbound lane and collided head-on with Plaintiff's vehicle. (R. at 63.) The collision impact speed between the Anderson vehicle and Plaintiff's vehicle was estimated by Plaintiff's expert, Dr. Paul France, at approximately 50 m.p.h.; the collision was characterized as a severe impact. (R. at 64.)

This first head-on impact caused the Plaintiff, who was not wearing a seatbelt, to be thrown violently forward, hitting the structures at the front of his car, including the windshield, dash, and the post between the windshield and the driver's door window. (R. at 64.) The initial head-on impact between Plaintiff and Anderson was sufficient to cause all of Plaintiff's injuries, which included facial damage, damage to the parietal skull region, blunt trauma to the chest, ribs and knees, and contusions to the knees. (R. at 64.)

Defendant Stevenson had been traveling westbound, approximately 5-6 car lengths behind Plaintiff, at the time of the collision between Anderson and the Plaintiff. (R. at 64.) After observing the impact between Anderson and Plaintiff, Defendant

Stevenson attempted to avoid Plaintiff's car but was unable to stop because of the icy road conditions and lack of traction. (R. at 65.) Therefore, subsequent to the severe head-on impact between Plaintiff and Anderson, Defendant Stevenson had a minor, rear-end impact with Plaintiff. (R. at 65.) Dr. France estimated the collision impact speed between Plaintiff and Defendant Stevenson at approximately 5-10 m.p.h., and characterized the collision as a minor impact. (R. at 65.)

After the impact between Plaintiff and Defendant Stevenson, the fourth car driven by Defendant Armstrong lost control, came across the divider, and struck the Plaintiff. (R. at 65.) No collision impact speed was estimated for this third impact. (R. at 66.)

On December 6, 1990, Plaintiff filed this suit against Defendant Stevenson and Defendant Armstrong. (R. at 1.) Plaintiff had previously settled with Anderson. (R. at 1.) Plaintiff retained Dr. France, a bio-mechanical/medical expert, to analyze the effects of the collision between Plaintiff and Defendant Stevenson. Dr. France was unable to attach any probability to the allegation that the Plaintiff was physically injured as a result of the second minor rear-end impact with Defendant Stevenson's vehicle, only a possibility. (R. at 66.) Dr. France also testified that the third impact between Plaintiff's car and the car driven by Defendant Armstrong did not cause Plaintiff additional

damage and Plaintiff dismissed his case against Defendant Armstrong. (R. at 53 and Exhibit "C" at p. 69.)

SUMMARY OF ARGUMENTS

I. Even if the indivisible injury rule was adopted in Utah, Plaintiff still cannot sustain his burden of proving that Defendant Stevenson proximately caused any injury to Plaintiff. In a negligence action, a plaintiff has the burden of proving that the defendant's actions proximately caused the plaintiff's injuries. Reeves v. Gentile, 813 P.2d 111, 116 (Utah 1991). A showing of proximate cause is required even when the indivisible injury rule is applied. Petersen v. Parry, 448 P.2d 653, 659 (Idaho 1968).

Plaintiff's own expert witness concedes that there is not enough evidence to prove that Defendant Stevenson proximately caused or even aggravated any of Plaintiff's injuries. (R. at 66.) Therefore, Plaintiff has failed "to make a showing sufficient to establish the existence of an element essential to [Plaintiff's] case, and on which [Plaintiff] will bear the burden of proof at trial". Celotex Corp. v. Catrett, 106 S.Ct. 2548, 2552 (1986). On that basis, summary judgment was appropriate and should be affirmed.

II. The indivisible injury rule provides that two or more independent tortfeasors who have caused injury to a plaintiff are liable for all of the plaintiff's damages where it is not reasonably possible to make a division of the damage caused by the separate acts of negligence. Potts v. Litt, 828 P.2d 1239, 1241

joint and several liability on individual defendants. Holtz v. Holder, 418 P.2d 584, 588 (Ariz. 1966). This rule is in glaring contravention of § 78-27-40, Utah Code Ann., which abolishes joint and several liability in Utah. Therefore, the indivisible injury rule should not be adopted in Utah.

ARGUMENT

A. EVEN IF THE INDIVISIBLE INJURY RULE IS ADOPTED IN UTAH, PLAINTIFF CANNOT PROVE THAT DEFENDANT STEVENSON PROXIMATELY CAUSED ANY INJURY TO PLAINTIFF

1. Plaintiff Cannot Prevail Under The Indivisible Injury Rule

Even if the indivisible injury rule ("Rule") is adopted, Plaintiff still cannot prevail. The Rule provides that:

two or more independent tortfeasors who have caused injuries to a plaintiff are liable for all the plaintiff's damages where it is not reasonably possible to make a division of the damage caused by the separate acts of negligence.

Potts v. Litt, 828 P.2d 1239, 1241 (Ariz. App. 1991).

The Rule was devised because "it is unfair to deny a [plaintiff] redress simply because he cannot prove how much damage each tort-feasor caused, when it is certain that between them they caused it all." Fugere v. Pierce, 490 P.2d 132, 135 (Wash. App. 1971). (Emphasis added.) Joint and several liability is imposed by the Rule upon defendants when fault cannot be apportioned between "two or more independent tortfeasors who have caused injuries to a plaintiff." Potts v. Litt, 828 P.2d 1239, 1241 (Ariz. App. 1991). (Emphasis added.) However, the Rule is

(Ariz. App. 1991). (Emphasis added.) However, the Rule is inapplicable when the evidence is insufficient to support a finding of proximate cause. Petersen v. Parry, 448 P.2d 653, 659 (Idaho 1968). Therefore, defendants are jointly and severally liable for a plaintiff's injuries under the Rule only when the plaintiff is able to prove that each defendant proximately caused some injury to Plaintiff. As set forth below, the Plaintiff in this case has failed to establish that Defendant Stevenson proximately caused any injuries to this Plaintiff and, therefore, his claim fails under the Rule.

2. Plaintiff Has Failed To Come Forth With Any Evidence To Prove Defendant Stevenson Proximately Caused Any Injury to Plaintiff

Plaintiff has not and cannot come forth with any evidence to prove that Defendant Stevenson proximately caused any injury to Plaintiff. Dr. France, Plaintiff's own bio-mechanical/medical expert, explicitly testified that no evidence exists which would prove that Defendant Stevenson's conduct caused injury to Plaintiff:

Q. So there's no medical evidence of a secondary impact [to Plaintiff] and you don't have enough evidence from the photographs or the evidence from the collision to tell me that in fact there was any kind of damage at all done [to Plaintiff] by the second impact...?

A. The only damage I know that I believe was created by this impact is what I see on the outside structure of the car...

Q. And there's no physical evidence in the records or from the photographs that in fact the second

impact did any [physical] damage [to Plaintiff] at all, is there?

A. Correct.

(R. at 67-68.) Dr. France also testified to the fact that the initial, severe, head-on collision with Anderson was sufficient to cause all of Plaintiff's injuries. (R. at 64.)

Furthermore, Dr. France testified only as to "possibilities" and refused to attach any probability on the issue of causation:

Q. And we also know you don't know where Jerry's body is, Jerry's placement is after the first impact?

A. Not specifically, no.

Q. We know it's somewhere --

A. He's in the vehicle and I think he's in the front section somewhere.

Q. In the front section of the vehicle somewhere?

A. Yes.

Q. How can you then form any kind of opinion on what happens to Mr. Stevenson's body by virtue of this second impact?

A. I think I can indicate that there is a possibility for some aggravation or some further injury to the head, but I can't place a probability on it.

. . . .

Q. -- almost anything is possible. It's possible I can hit an elephant when I leave the parking lot, but not likely.

A. I hope not.

Q. I hope not either. But, you know, you're used to testifying as an expert in terms of reasonable medical probabilities, aren't you?

A. Yes, I am.

. . .

Q. That's how you prefer to testify is to give an opinion in terms of reasonable medical probability?

A. Yes.

. . .

Q. Now, from the evidence that's before you in this case, are you able to give me any kind of opinion based upon a reasonable medical probability as to what, if any, damage was done to Mr. Stevenson by this second impact?

A. I cannot establish the level of probability that this accident would have. I can say that it is greater than just the possibility we've just talked about, and that was hitting the elephant in the parking lot.

Q. . . . But are you able to tell me in your opinion that there's a greater than 50-percent probability, for example?

A. No.

Q. Greater than 25-percent probability?

A. I think the best I can do is to tell -- is to indicate that in relationship to the second accident there was some forces delivered to Mr. Stevenson's body. . .

. . .

A. . . . Because I don't know his position at the end of the initial collision I cannot attribute a probability to what I say is possibly occurring.

(Exhibit "C" at pp. 43-46.) (Emphasis added.)

From the above testimony, it is clear that Plaintiff failed to come forth with sufficient evidence to prove that Defendant Stevenson proximately caused any of Plaintiff's injuries.

3. Summary Judgment Is Appropriate When The Plaintiff Is Unable To Establish Proximate Cause

Plaintiff argues that summary judgment in Defendant Stevenson's favor was improper because a genuine issue of material fact existed regarding whether Defendant Stevenson caused any of Plaintiff's injuries. However, it is well established that summary judgment is proper if a party is unable "to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden at trial." Celotex Corp. v. Catrett, 106 S.Ct. 2548, 2552 (1986). At trial in a negligence action, a plaintiff has the burden of establishing that the defendant proximately caused the plaintiff's injuries. Reeves v. Gentile, 813 P.2d 111, 116 (Utah 1991). Although the issue of proximate cause is normally left for a jury, if the plaintiff is unable to prove that the defendant's negligence was the proximate cause of the plaintiff's injury, summary judgment is appropriate because a jury would be left to speculate on the issue of proximate cause. Mitchell v. Pearson, 697 P.2d 240, 245-246 (Utah 1985).³ As set forth above, Plaintiff was unable to

³Plaintiff states that other jurisdictions have allowed indivisible injury rule cases to go to a jury even though the element of proximate cause is missing. Brief for Appellant at p. 7. Conspicuously absent from Plaintiff's argument is case law supporting this bald assertion. Contrary to Plaintiff's assertion,

establish that Defendant Stevenson proximately caused any of Plaintiff's injuries and, therefore, summary judgment in this case was appropriate and should be affirmed.

B. BECAUSE JOINT AND SEVERAL LIABILITY HAS BEEN ABOLISHED IN UTAH, THE RULE SHOULD NOT BE ADOPTED

As set forth above, the underlying principle of the Rule is joint and several liability. However, in Utah, joint and several liability has been abolished. Section 78-27-40 of the Utah Code Annotated provides the following:

[s]ubject to Section 78-27-38, the maximum amount for which a defendant may be liable to any person seeking recovery is that percentage or proportion of fault attributed to that defendant.

(Exhibit "A".) (Emphasis added.) Accordingly, a defendant cannot be held jointly and severally liable for an injury caused to a plaintiff by another independently negligent party.

As is evident by the passage of § 78-27-40, the Utah legislature has deliberated the issue and has clearly rejected the concept of joint and several liability. The rule is unambiguous and provides for no exceptions: A defendant will be held liable solely for that percentage for which he or she is responsible. The plaintiff has the burden of proving that the defendant contributed to the injuries suffered by the plaintiff and to what degree. If a plaintiff is unable to meet this burden, then, according to Utah

an indivisible injury rule case will not be submitted to the jury when the Plaintiff's evidence is insufficient to support a finding of proximate cause. Petersen v. Parry, 448 P.2d 653, 659 (Idaho 1968).

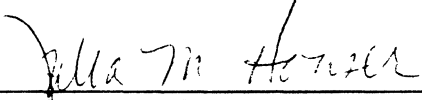
law, that defendant cannot be held liable. Therefore, because the underlying principle behind the Rule is joint and several liability and because the Utah legislature has abolished joint and several liability without providing for any exceptions, the Rule cannot be applied in Utah. As a result, this court should refuse to adopt the Rule.

CONCLUSION

Based on the foregoing, Defendant Karen Stevenson respectfully requests that this Court (1) affirm the lower court's ruling that even if the indivisible injury rule was applied, the Plaintiff is unable to sustain his burden of proving that Defendant Stevenson's conduct proximately caused any injury to Plaintiff, and (2) decline to adopt the indivisible injury rule as contrary to established Utah law.

DATED this 14 day of April, 1994.

RAY, QUINNEY & NEBEKER



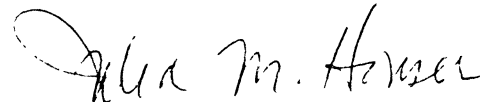
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Karen Stevenson

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing BRIEF OF APPELLEE was mailed, postage pre-paid, on this 14 day of April, 1993, to the following:

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78-27-40. Amount of liability limited to proportion of fault - No contribution.

Subject to Section 78-27-38, the maximum amount for which a defendant may be liable to any person seeking recovery is that percentage or proportion of the damages equivalent to the percentage or proportion of fault attributed to that defendant. no defendant is entitled to contribution from any other person.

1986

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IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY

STATE OF UTAH

-----oo0oo-----

JERRY STEVENSON,	:	
Plaintiff,	:	ORDER GRANTING SUMMARY
	:	JUDGMENT
v.	:	
KAREN STEVENSON and STATE FARM	:	Civil No. 900903179PI
INSURANCE COMPANY,	:	Judge Michael J. Glasmann
Defendant.	:	
	:	

-----oo0oo-----

Oct 29 1993

Defendant Karen Stevenson's Motion for Summary Judgment came on regularly for hearing on the 6th day of October, 1993 at the hour of 10:30 a.m. before the Honorable Michael J. Glasmann, District Judge, with James R. Hasenyager appearing for the plaintiff and Paul S. Felt appearing for defendant Karen Stevenson. The Court having read the memoranda on file, having reviewed the pleadings, having heard arguments and being fully apprised in the matter,


IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendant's Motion for Summary Judgment be and is hereby granted and plaintiff's Complaint is dismissed with prejudice and on the

merits, the Court finding that since both parties stipulated the first accident between plaintiff and JoAnn Anderson was of sufficient impact that it could have caused all of plaintiff's injuries and since plaintiff's expert cannot testify that it is reasonably probable that the second accident caused any injury to the plaintiff, therefore, the jury would be left to speculate on whether or not any of plaintiff's injuries were caused by the impact between plaintiff's vehicle and defendant's vehicle. The Court rules that if the "indivisible injury" rule were to be adopted in the State of Utah, such rule would not apply to this case since plaintiff cannot establish that the impact between plaintiff's vehicle and defendant's vehicle was a proximate cause of any injury to the plaintiff.

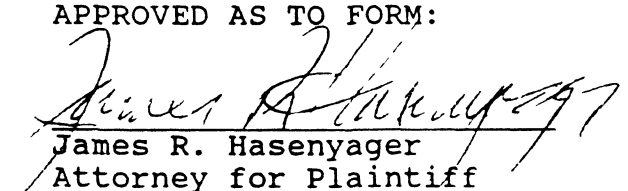
Defendant is awarded her costs of court in this action.

DATED this 9th day of October, 1993.

BY THE COURT:


Honorable Michael J. Glasmann
District Court Judge

APPROVED AS TO FORM:


James R. Hasenyager
Attorney for Plaintiff

1 A. I based that on the ending positions of
2 the vehicles. In order for the cars to have ended
3 up as diagramed in the accident report, that's where
4 that vehicle would have been coming from.

5 Q. To reiterate a question Mr. Felt was
6 asking you, is there any evidence in the
7 documentation that you've reviewed and that we've
8 discussed in the deposition today to indicate that
9 the collision between the Loucel vehicle and Mr.
10 Stevenson's vehicle affected Mr. Stevenson in any
11 way?

12 A. Of the information that I have, that
13 I've reviewed and observed, I don't see that that
14 collision would have created a significant force.

15 Q. When you say significant force, what do
16 you mean by that?

17 A. From an injury viewpoint.

18 Q. Does that mean that based on the
19 documents you've reviewed, the collision which we've
20 called collision no. 3 had no adverse impact on Mr.
21 Stevenson whatsoever?

22 A. As I now understand that collision, that
23 is correct.

24 Q. Just a couple of tail ends. Other than
25 the computer-generated documents that we've reviewed

1 Q. So that looks to you from the damage in
2 the photograph the appropriate angle of impact
3 between Karen Stevenson's car and Jerry Stevenson's
4 car?

5 A. Yes.

6 Q. Now, I'm a little curious as to the fact
7 that we've now had this first major impact with the
8 Olds Toronado, we've had all the impact and the
9 damage that you've described in that crash with the
10 head accelerating forward and hitting the post and
11 now that collision -- the cars have come to rest for
12 whether it's a second or less than a second or more
13 than a second, I guess you don't know.

14 A. Correct.

15 Q. And we also know you don't know where
16 Jerry's body is, Jerry's placement is after the
17 first impact?

18 A. Not specifically, no.

19 Q. We know it's somewhere --

20 A. He's in the vehicle and I think he's in
21 the front section somewhere.

22 Q. In the front section of the vehicle
23 somewhere?

24 A. Yes.

25 Q. How can you then form any kind of

1 opinion on what happens to Mr. Stevenson's body by
2 virtue of this second impact?

3 A. I think I can indicate that there is a
4 possibility for some aggravation or some further
5 injury to the head, but I can't place a probability
6 on it.

7 Q. Well --

8 A. The possibility --

9 Q. -- almost anything is possible. It's
10 possible I can hit an elephant when I leave the
11 parking lot, but not likely.

12 A. I hope not.

13 Q. I hope not either. But, you know,
14 you're used to testifying as an expert in terms of
15 reasonable medical probabilities, aren't you?

16 A. Yes, I am.

17 Q. Isn't that the way the question is most
18 often framed to you?

19 A. Usually that is the evidence that's
20 brought before the jury is what's reasonable from a
21 probability viewpoint.

22 Q. That's how you prefer to testify is to
23 give an opinion in terms of reasonable medical
24 probability?

25 A. Yes.

1 Q. And in fact in the cases you testify
2 about you are qualified by the attorney and a
3 foundation is laid and then the evidence is put
4 before you sufficient enough for you to give an
5 opinion in terms of reasonable medical probability
6 that a particular accident caused particular kinds
7 of damage to the plaintiff?

8 A. Correct.

9 Q. That's essentially what you do, correct?

10 A. Yes.

11 Q. Now, from the evidence that's before you
12 in this case, are you able to give me any kind of
13 opinion based upon a reasonable medical probability
14 as to what, if any, damage was done to Mr. Stevenson
15 by this second impact?

16 A. I cannot establish the level of
17 probability that this accident would have. I can
18 say that it is greater than just the possibility
19 we've just talked about, and that was hitting the
20 elephant in the parking lot.

21 Q. Which is maybe less than one-tenth of
22 one percent, since there are no circuses in town.
23 But are you able to tell me in your opinion that
24 there's a greater than 50-percent probability, for
25 example?

1 A. No.

2 Q. Greater than 25-percent probability?

3 A. I think the best I can do is to tell --
4 is to indicate that in relationship to the second
5 accident there was some forces delivered to Mr.
6 Stevenson's body. Mr. Stevenson, I shouldn't refer
7 to him as a body, that's a little morbid.

8 Q. We keep talking about his body, but we
9 all know that he did survive, luckily, the
10 accident.

11 A. Yes. And those forces have the ability
12 to cause enough acceleration to move him towards
13 another structure for impact. Because I don't know
14 his position at the end of the initial collision I
15 cannot attribute a probability to what I say is
16 possibly occurring. I think I stated that the way I
17 wanted to.

18 Q. Well, are you able to give an opinion in
19 any kind of reasonable medical probability that the
20 second impact had any particular effect on Mr.
21 Stevenson's body?

22 A. I think that if the acceleration is
23 delivered to the car, and because of this five- to
24 ten-mile-an-hour collision we're going to see
25 probably around one and a half to two Gs of