

167 A.D.3d 671  
Supreme Court, Appellate Division, Second Department, New York.

Syed A. **SHAH**, Appellant,  
v.  
Mo M. **RAHMAN**, et al., Respondents.

2016–04719  
|  
(Index No. 15370/12)  
|  
Argued—November 9, 2018  
|  
December 5, 2018

**Synopsis**

**Background:** Driver of first vehicle, who was involved in a motor vehicle accident with second vehicle, brought personal-injury action against driver and owner of second vehicle. Driver of first vehicle was awarded summary judgment on the issue of liability. Following a jury trial on the issue of damages and after denial of motion to exclude expert testimony or, in the alternate, for hearing on admissibility of expert testimony, the Supreme Court, Kings County, [Mark I. Partnow, J.](#), [2016 WL 5815223](#), entered judgment in favor of driver and owner of second vehicle and dismissed driver of first vehicle's complaint. Driver of first vehicle appealed.

**[Holding:]** The Supreme Court, Appellate Division, held that trial court acted within its discretion in permitting biomechanical engineer expert's testimony without holding a hearing to determine its admissibility.

Affirmed.

West Headnotes (5)

|                     |                                                                                                                                                                                                                                                             |
|---------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <a href="#">[1]</a> | <b>Evidence</b><br><a href="#">Necessity and sufficiency</a>                                                                                                                                                                                                |
|                     | The <i>Frye</i> rule is that expert testimony based on scientific principles or procedures is admissible but only after a principle or procedure has gained general acceptance in its specified field.<br><br><a href="#">Cases that cite this headnote</a> |

|                     |                                                              |
|---------------------|--------------------------------------------------------------|
| <a href="#">[2]</a> | <b>Evidence</b><br><a href="#">Necessity and sufficiency</a> |
|---------------------|--------------------------------------------------------------|

|  |                                                                                                                                                                                                                                                                                                                    |
|--|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|  | <p>General acceptance of scientific principals or procedures, as required for admissibility of expert testimony, can be demonstrated through scientific or legal writings, judicial opinions, or expert opinions other than that of the proffered expert.</p> <p><a href="#">Cases that cite this headnote</a></p> |
|--|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

|                     |                                                                                                                                                                                                                                                                                                                                              |
|---------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <a href="#">[3]</a> | <p><b>Evidence</b><br/>Necessity and sufficiency</p>                                                                                                                                                                                                                                                                                         |
|                     | <p>Even if a proffered expert opinion is based upon accepted methods, it must satisfy the admissibility question applied to all evidence, that is, whether there is a proper foundation to determine whether the accepted methods were appropriately employed in a particular case.</p> <p><a href="#">Cases that cite this headnote</a></p> |

|                     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
|---------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <a href="#">[4]</a> | <p><b>Evidence</b><br/>Automobile Cases</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
|                     | <p>Trial court acted within its discretion in permitting biomechanical engineer expert's testimony without holding a hearing to determine its admissibility in personal-injury action arising from motor vehicle accident between first and second vehicle, even though driver of first vehicle claimed that expert testimony was not based on generally accepted principles and methodologies; during oral argument, counsel of driver and owner of second vehicle represented that trial court recently presided over a trial where the same expert was permitted to testify regarding biomechanics and causation, and there was proper foundation for the admission of expert's opinion.</p> <p><a href="#">Cases that cite this headnote</a></p> |

|                     |                                                      |
|---------------------|------------------------------------------------------|
| <a href="#">[5]</a> | <p><b>Evidence</b><br/>Necessity and sufficiency</p> |
|---------------------|------------------------------------------------------|

|                                                                                                                                                                                                                                           |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| A court need not hold a <i>Frye</i> hearing to determine the reliability of scientific evidence where it can rely upon previous rulings in other court proceedings as an aid in determining the admissibility of the proffered testimony. |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

[Cases that cite this headnote](#)

## Attorneys and Law Firms

\*229 Grover & Fensterstock, P.C., New York, N.Y. ([Simon B. Landsberg](#) of counsel), for appellant.

Russo & Toner, LLP, New York, N.Y. ([Cecil E. Floyd](#) and [Josh H. Kardisch](#) of counsel), for respondents.

[WILLIAM F. MASTRO](#), J.P., [JOHN M. LEVENTHAL](#), [SANDRA L. SGROI](#), [ANGELA G. IANNACCI](#), JJ.

## DECISION & ORDER

In an action to recover damages for personal injuries, the plaintiff appeals from a judgment of the Supreme Court, Kings County (Mark I. Partnow, J.), dated March 18, 2016. The judgment, upon a jury verdict finding that the plaintiff did not sustain a serious injury within the meaning of [Insurance Law § 5102\(d\)](#) as a result of the subject accident, is in favor of the defendants and against the plaintiff dismissing the complaint.

ORDERED that the judgment is affirmed, with costs.

The plaintiff commenced this action against the defendants to recover damages for personal injuries he allegedly sustained when the vehicle he was driving was struck by a vehicle owned by the defendant Viacheslav Abrashkin and driven by the defendant Mo M. **Rahman**. Subsequently, the plaintiff was awarded summary judgment on the issue of liability. At a trial on the issue of damages, the plaintiff moved to preclude the defendants' expert, a biomechanical engineer, from testifying or, in the alternative, for a hearing on the admissibility of that expert's testimony pursuant to *Frye v. United States*, 293 F. 1013 (D.C. Cir.). The plaintiff argued, in effect, that the expert's testimony was not based on generally accepted principles and methodologies, and that there was not a proper foundation for the admission of the expert's opinion. During oral argument, the defense attorney represented that the Supreme Court Justice recently presided over a trial where the same \*230 expert was permitted to testify regarding biomechanics and causation. The Supreme Court permitted the expert's testimony without first holding a hearing to determine its admissibility.

The expert gave trial testimony to the effect that the collision could not have caused the plaintiff's alleged injuries. The jury returned a verdict in favor of the defendants, and the Supreme Court issued a judgment in favor of the defendants and against the plaintiff dismissing the complaint. The plaintiff appeals from the judgment, arguing that the court erred in not precluding the expert's testimony or, in the alternative, in not holding a pretrial *Frye* hearing.

[1] [2] [3]“The long-recognized rule of *Frye v. United States* ... is that expert testimony based on scientific principles or procedures is admissible but only after a principle or procedure has gained general acceptance in its specified field” (*Lipschitz v. Stein*, 65 A.D.3d 573, 575, 884 N.Y.S.2d 442 [internal quotation marks omitted]; see *Cornell v. 360 W. 51st St. Realty, LLC*, 22 N.Y.3d 762, 780, 986 N.Y.S.2d 389, 9 N.E.3d 884; *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434, 447, 824 N.Y.S.2d 584, 857 N.E.2d 1114; *People v. Wesley*, 83 N.Y.2d 417, 422, 611 N.Y.S.2d 97, 633 N.E.2d 451; *Ratner v. McNeil-PPC, Inc.*, 91 A.D.3d 63, 71–72, 933 N.Y.S.2d 323). “General acceptance can be demonstrated through scientific or legal writings, judicial opinions, or expert opinions other than that of the proffered expert” (*Dovberg v. Laubach*, 154 A.D.3d 810, 813, 63 N.Y.S.3d 417; see *Parker v. Mobil Oil Corp.*, 16 A.D.3d 648, 650, 793 N.Y.S.2d 434, *aff'd* 7 N.Y.3d 434, 824 N.Y.S.2d 584, 857 N.E.2d 1114). Further, even if the proffered expert opinion is based upon accepted methods, it must satisfy “the admissibility question applied to all evidence—whether there is a proper foundation—to determine whether the accepted

methods were appropriately employed in a particular case” (*Parker v. Mobil Oil Corp.*, 7 N.Y.3d at 447, 824 N.Y.S.2d 584, 857 N.E.2d 1114; see *Ratner v. McNeil-PPC, Inc.*, 91 A.D.3d at 72–73, 933 N.Y.S.2d 323).

[4] [5] In this case, we agree with the Supreme Court’s determination to permit the expert’s testimony without first holding a hearing to determine its admissibility (see *Vargas v. Sabri*, 115 A.D.3d 505, 981 N.Y.S.2d 914; see also *Plate v. Palisade Film Delivery Corp.*, 39 A.D.3d 835, 837, 835 N.Y.S.2d 324; *Cardin v. Christie*, 283 A.D.2d 978, 979, 723 N.Y.S.2d 912). “A court need not hold a *Frye* hearing where[, as in the case at bar,] it can rely upon previous rulings in other court proceedings as an aid in determining the admissibility of the proffered testimony” (*People v. LeGrand*, 8 N.Y.3d 449, 458, 835 N.Y.S.2d 523, 867 N.E.2d 374; compare e.g. *Vargas v. Sabri*, 115 A.D.3d at 505–506, 981 N.Y.S.2d 914, and *Gonzalez v. Palen*, 48 Misc.3d 135[A], 2015 WL 4460712, with *Singh v. Siddique*, 52 Misc.3d 1204[A], 2016 WL 3583905 ). Moreover, in this particular case, there was a proper foundation for the admission of the expert’s opinion.

We note that the plaintiff does not contend that the verdict was contrary to the weight of the evidence.

MASTRO, J.P., LEVENTHAL, SGROI and IANNACCI, JJ., concur.

#### All Citations

167 A.D.3d 671, 88 N.Y.S.3d 228, 2018 N.Y. Slip Op. 08342

End of Document

© 2019 Thomson Reuters. No claim to original U.S. Government Works.