

**IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA**

WINSTON CHEN,

Plaintiff,

v.

**AMERICAN HONDA MOTOR CO.,
INC., Individually and d/b/a ACURA,
STEVEN ALEXANDER RENNIE,
BP CORPORATION NORTH
AMERICA,**

Defendants.

**Civil Action
File No. 04-VS-067587-J**

**BP CORPORATION NORTH AMERICA'S BRIEF IN SUPPORT OF
MOTION TO EXCLUDE THE TESTIMONY OF
PLAINTIFF'S ACCIDENT RECONSTRUCTION EXPERTS**

Pursuant to Georgia Code Ann. § 24-9-67.1(f), Defendants BP Corporation North America and Steven Rennie request that the Court exclude the testimony of plaintiff's accident reconstruction experts, Dwayne Canupp and Thomas Langley, because their opinions and conclusions do not satisfy the standards announced by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and its progeny.

I. BACKGROUND FACTS.

At approximately 6:50 a.m. on October 26, 2002, 20 year old Emory student Winson Chen was driving his Acura sedan on Interstate 285 near the Memorial Drive exit. Chen was last seen by his friends at a college house party in the Emory

area at approximately at 11:00 p.m. (Radcliffe at 34-35, Moreno at 8-9) the night before. Due to the location of the accident on I-285, he apparently was not coming from the Decatur area, on his way to his family home in Macon. At the same time and on the same stretch of highway, 31 year old Steven Rennie, a professional truck driver, was driving his BP Corporation tanker truck with a load of gasoline. Rennie was scheduled to deliver fuel to a BP gas station located at Memorial Drive and Hambrick and therefore intended to exit the highway at Memorial Drive. (Rennie at 47-49).

There are four lanes of traffic on eastbound I-285 in the vicinity of the Memorial Drive exit. Rennie testified he was in the far right lane as he prepared to exit at Memorial Drive. (Id. at 59). As he approached the exit, Rennie suddenly felt a hard impact on the left side of his tractor. (Id. at 53). Rennie then looked over and saw Chen's Acura collide with the median wall separating the northbound lanes of I-285 from the southbound lanes. (Id. at 47-48).

The Acura scraped against the wall and tilted up on its left side twice. (Id. at 47-48). Chen's vehicle then veered to the right in front of Rennie's truck and crossed all four lanes of traffic until it struck a guardrail on the right side of the highway. (Id. at 48). Fearing a collision with Chen's Acura as it crossed the roadway in front of him, Rennie hit his brakes. (Id. at 48). Rennie testified that his wheels did not lock up and he did not hear any squealing from his tires; instead, he

felt the action of the truck's antilock brakes. (Id. at 76). Rennie agrees with the official police report that his truck did not lay down any skid marks on the highway. (Id. at 76; see also attached accident report, Ex. L).

After striking the guardrail on the right side of the highway, Chen's Acura ended up on the right side of the road facing in the direction of travel. (Rennie at 48). Rennie pulled over to the shoulder in front of Chen's car, looked for his rig's accident kit, and called his headquarters and 9-1-1. (Rennie at 130, 132, 170-71). In the meantime, Chen's vehicle began to burn from the engine compartment. Police and fire rescue teams fought the fire, removed Chen from the Acura, and transported him to the hospital. Urine samples taken from Chen tested positive for cocaine and benzodiazepine metabolites. (Ex. C). The police department determined that Chen caused the accident, but did not cite him out of sympathy for his injuries. (Kelley at 75-76, 125).

II. THE PARTIES' THEORIES REGARDING THE ACCIDENT.

The following additional and undisputed facts played an important role in the efforts of the parties' experts to reconstruct the accident. First, information about the movements, speed, and braking of Rennie's truck were recorded by an onboard computer. Second, a set of dual-wheel skid marks are shown in the police scene pictures in the lane to the immediate left of the far right hand lane Rennie testified he was driving in. The two rear axles of Rennie's tractor were equipped

with typical tandem wheels, but the trailer was equipped with four “super single” tires – *i.e.*, extra-wide tires that substitute for the dual wheel/tire assembly typically found on a heavy-duty trailer. (See Exhibit M). Both the tractor and the trailer were equipped with a functioning antilock brake system. Third, found on the right side of the Acura was a short expanse of so-called “scallop” marks caused by contact between the Acura and the lug nuts on left front wheel of Rennie’s tractor. Photos of the skid marks and the scallop marks on the Acura are attached as Exhibits E and F.

A. Plaintiff’s Theory.

Mr. Chen has no memory at all of the accident. (Chen at 15-16). Accordingly, his entire theory of the accident is based on the testimony of his experts. Plaintiff’s experts reject Rennie’s uncontradicted testimony that at the moment of impact he was fully within in the right hand lane so that he could exit at the approaching Memorial Drive exit and make his scheduled delivery to the gas station at Memorial and Hambrick. Instead, they contend Rennie (i) was traveling in the right hand lane, (ii) began “drifting” left into the next lane with his front wheels turned slightly to the left, (iii) made contact with Chen’s Acura which they contend was in the adjacent lane, (iv) steered quickly back to the right but then somehow traveled fully back left into “Chen’s lane,” and (v) applied and locked his brakes, leaving the dark, heavy tandem skid marks found entirely within

“Chen’s lane.” Plaintiff’s experts assert that the scallop marks on the Acura confirm this theory. They say the initial marks toward the front of the car could only have been made if the front wheel of Rennie’s tractor was turned to the left and the final set of marks could only have been made if the front wheel of the tractor was turned to the right, suggesting a corrective steering action by Rennie during the fraction of a second of contact between the two vehicles.

B. Defendant’s Theory.

BP’s theory comports with the eyewitness testimony (*i.e.*, Mr. Rennie’s testimony), the physical evidence, and common sense. Rennie, a professional truck driver, was traveling in the right hand lane so that he could exit at Memorial Drive only a few hundred yards ahead and make his scheduled gasoline delivery to the gas station at Memorial Drive and Hambrick. Chen – a college student who had been partying the night before and whose urine tested positive for cocaine – drove his Acura into the left front portion of Rennie’s tractor with sufficient force to bend the tractor’s heavy duty front bumper forward. The Acura then careened into the median wall, travelled back across the highway in front of Rennie, who applied his brakes while still in the exit lane. Plaintiff’s experts both concede that Chen was traveling faster than the BP rig when the impact occurred. (Canupp at 37; Langley at 117-18).

The antilock brake system on Rennie's rig functioned properly, bringing him to a stop without a skid. The skid marks near the scene pre-dated the accident and cannot be attributed to Rennie's vehicle because (i) the deceleration forces recorded by the truck's onboard computer were not, according to published studies, substantial enough to cause skidding, (ii) these heavy, dark, uninterrupted skid marks could not be caused by a rig equipped with an antilock brake system and do not match the track width or tread patterns of the rig Rennie was driving, (iii) tractor-trailer rigs are designed so that the trailer wheels lock up first to prevent a jackknife, and (iv) the dual-wheel skid marks found at the scene of this accident could not be caused by a trailer outfitted with super single tires. And, of course, the location of the skid marks, completely within the lane they say Chen was in, is totally at odds with the plaintiff's experts' claim that Rennie steered away from Chen after impact.

The pattern of scallop marks on Chen's Acura do not reflect an initial left steer and then corrective right steer on Rennie's part. Among other things, the short length of the marks confirms the vehicles were in contact for such a brief period of time that Rennie – given ordinary human perception/reaction times – would not have had time to input a corrective steer to the right. The plaintiff's experts never bothered to calculate the duration of contact between the vehicles but guessed that it would have been one second or less. Nearly all published resources use a

perception/reaction time of 1.5 seconds or higher for drivers reacting to a sudden, unexpected event on the roadway. *See, e.g.*, J.L. Pline, *Traffic Engineering Handbook*, Institute of Traffic Engineers (5th ed. 1999). The only scientific explanation for the reversal of the scallop marks is that they reflect when the Chen vehicle itself changed directions after the impact.

III. STANDARDS FOR ADMISSIBILITY OF EXPERT TESTIMONY.

Georgia Code Ann. § 24-9-67.1, which governs the admissibility of expert opinions in civil actions, requires the exclusion of expert testimony that does not satisfy the standards enunciated by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and its progeny:

It is the intent of the legislature that, in all civil cases, the courts of the State of Georgia not be viewed as open to expert evidence that would not be admissible in other states. Therefore, in interpreting and applying this Code section, the courts of this state may draw from the opinions of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999); and other cases in federal courts applying the standards announced by the United States Supreme Court in these cases.

Ga. Code Ann. § 24-9-67.1(f) (2005).

Under this provision, Georgia trial judges must give careful scrutiny to the testimony of paid experts to avoid verdicts based on “junk science.” Expert testimony must be not only relevant, but reliable. *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999). Thus, trial judges must act as

“gatekeepers” to undertake a “preliminary assessment of whether the reasoning or methodology underlying [expert] testimony is scientifically valid.” *Daubert*, 509 U.S. at 592-93. This obligation applies to all expert testimony, not just scientific testimony. *Kumho*, 526 U.S. at 147. Accordingly, the factors listed in *Daubert* for determining the reliability of scientific testimony – whether a theory or technique has been tested; whether it has been subject to peer review and publication; whether it has a known or potential margin of error; and whether it enjoys general acceptance within a relevant community – may also bear on the reliability of technical or other specialized knowledge. *Id.*

This Court’s gate keeping role requires it to keep unreliable and irrelevant information from the jury because of its inability to assist in the factual determinations, its potential to create confusion, and its lack of probative value. *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1311-12 (11th Cir. 1999). Thus, the Court must exclude “opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.” *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). Expert testimony is inadmissible when “there is simply too great an analytical gap between the data and the opinion proffered.” *Id.*

In sum, expert testimony is admissible only if: (i) the expert is qualified to testify competently on the topic at issue; (ii) the methodology used by the expert is sufficiently reliable; and (iii) the testimony will assist the trier of fact. *Daubert*,

509 U.S. at 589; *Club Car, Inc. v. Club Car (Quebec) Import, Inc.*, 362 F.3d 775, 780 (11th Cir. 2004). The burden of proving each of these three *Daubert* elements rests on the party offering the expert. *Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1292 (11th Cir. 2005).

IV. DEFECTS IN CANUPP'S METHODOLOGY AND CONCLUSIONS.

Dwayne Canupp is a former police officer who now offers his services as an accident reconstructionist. As demonstrated next, Canupp's methodology and conclusions do not satisfy the requirements of *Daubert* and its progeny.

A. Canupp's Theory Of The Accident Should Be Excluded Because It Is Internally Inconsistent And Does Not Pass The Common Sense Test.

A court's "experience and common sense" is a legitimate *Daubert* factor. *Hein v. Merck Co., Inc.*, 868 F. Supp. 230, 231 (M.D. Tenn. 1994). There is no eyewitness testimony contradicting Rennie's testimony that he was in the far right lane intending to exit at Memorial Drive to make a scheduled fuel delivery. Nonetheless, Canupp opines that the collision occurred when Rennie's truck drifted left about two feet into Chen's lane and collided with Chen's Acura. (Canupp at 79, 180-81). Counter-intuitively, he says Rennie then somehow traveled fully into Chen's lane, locked his brakes, and left the skid marks found in Chen's lane. (Canupp at 79, 81). Yet Canupp also thinks the alleged pattern change

in the scallop marks on Chen's vehicle was caused by the left front wheel of Rennie's tractor being turned or "yanked" to the right at or shortly after the impact, which necessarily would have sent the truck back into the right hand lane. (Canupp at 161-62, 165, 168, 170, 176, 178, 181-82). By itself, this serious internal inconsistency in Canupp's opinion warrants its exclusion. *See Group Health Plan, Inc. v. Philip Morris, USA, Inc.*, 344 F.3d 753, 759-60 (8th Cir. 2003) (affirming district court's exclusion of expert testimony that was internally inconsistent). This fundamental inconsistency, however, is just the tip of the iceberg.

B. Canupp's Conclusion That The Scallop Marks Prove Rennie Drifted Into Chen's Acura Is Unreliable.

Canupp formulated his lane-drift theory by "eyeballing" the scallop marks on the Acura. (Canupp at 161-62). Canupp theorized that the scallop mark pattern could not have occurred if the wheels on Rennie's tractor were in a straight alignment. (Canupp at 163). But "personal observation is not a substitute for scientific methodology and is insufficient to satisfy *Daubert's* most significant guidepost." *Chapman v. Maytag Corp.*, 297 F.3d 682, 687 (7th Cir. 2002). Remarkably, Canupp never placed the Acura against an exemplar tractor to test his hypothesis. (Canupp at 163). Nor did Canupp inspect an exemplar tractor. (Canupp at 36). *See Fairley v. Clarke*, 2004 WL 877102, at *5 (E.D. La. 2004) (excluding expert testimony because expert "never inspected the vehicles or the actual damage caused").

Canupp admitted that it would be useful to match up the two vehicles to confirm his scallop-mark hypothesis but then, in a textbook case of *ipse dixit* reasoning, simply asserted: “But I think my theory is correct.” (Canupp at 163-64). The fundamental flaw in that approach is that “supposed ‘expert’ testimony cannot be a hunch or a gut feeling – it must be based on some specific data.” *Klaczak v. Consol. Med. Transp.*, __ F. Supp. 2d __, 2006 WL 2849734, at *37 (N.D. Ill. 2006). Nothing in *Daubert* requires a court “to admit opinion evidence which is connected to the existing data only by the *ipse dixit* of the expert.” *Joiner*, 522 U.S. at 146.

In addition, Canupp ruled out the possibility that the same scallop marks could have been made if the front wheels of Rennie’s tractor were pointed straight ahead even though he enthusiastically agreed that it would have been helpful to match up the vehicles in order to exclude that possibility:

Q: Do you think it would be useful to you to be able to do some match-up to see if that, in fact – that that – whether or not you would get engagement with the tractor trailer just traveling straight?

A: Oh yeah.

(Canupp at 163-64). Nor did Canupp have any idea how much steering input it would take from Rennie to change the pattern of the scallop marks in the manner Canupp theorizes:

Q: Do you know how much steer input it would take from the driver on the steering wheel to change directions of the striations in the manner you claim here?

A: No, I do not know.

(Canupp at 169). In short, Canupp's testimony does not satisfy *Daubert* because he "is working on insufficient data to make his conclusions." *Dukes v. Georgia*, 428 F. Supp. 2d 1298, 1317 (N.D. Ga. 2006) ("It appears to the court that Dr. McGinnis did not have sufficient data and information in order to form reliable opinions regarding Defendants' actions").

Finally, common sense dictates that it is critical to the plaintiff's scallop-mark theory to determine whether it was humanly possible for Rennie to have turned his wheel from the left to the right during the split-second of contact between the two vehicles. Human beings do not react instantaneously to a stimulus, such as the impact of another vehicle. Yet instead of measuring the length of the scallop marks and comparing that measurement to the speed of the vehicles to determine the length of time they were engaged, Canupp merely guessed at the duration of contact:

Q: How long do you believe that the – do you believe the [Acura] and the truck tire were engaged to make these marks here that you see?

* * *

A. Okay. Short duration. Probably a second, somewhere in there.

Q: One second?

A: I'm just giving you a ballpark guess at it.

(Canupp at 170-71).

Plaintiff's other accident reconstructionist, Thomas Langley, hadn't given it any thought either, but he guessed the duration of contact was shorter than a second. (Langley at 124). Canupp's outlandish conclusion that Rennie could have turned his wheels from left to right during the split second of contact between the two vehicles is a textbook example of a speculative assumption and must therefore be excluded. *See J.B. Hunt Transport, Inc. v. General Motors Corp.*, 243 F.3d 441, 444 (8th Cir. 2001) (excluding testimony of accident reconstructionist that was based on speculation and conjecture).

C. Canupp's Conclusion That Rennie's Truck Made The Skid Marks Is Unreliable.

The assumption that Rennie drifted left and struck Chen's Acura is critical to Canupp's theory of the accident. Canupp says the skid marks found in Chen's lane were made by Rennie's truck and thus prove his "drift" theory. But Canupp was apparently unaware that Rennie testified he never locked up his wheels because Canupp didn't "go through [Rennie's deposition] real tight." (Canupp at 138). More importantly, Canupp's conclusion that Rennie's truck made the skid marks is utterly unreliable for the following three reasons:

First, it is undisputed that both Rennie's tractor and his trailer were equipped with properly-functioning antilock brakes designed to prevent or minimize skidding. Yet Canupp performed his analysis with only a vague understanding about the rig's antilock braking system:

Q: Did you – do you have any knowledge or information about whether this rig, the BP rig, utilized ALBs?

A: I did see somewhere, and I honestly cannot recall where, that one of them was equipped with it, but I don't know which one.

Q: One of, meaning the tractor or the trailer –

A: Yeah.

Q: – but not both?

A: It may have been both. But I just remember somewhere about one of them having – yeah.

(Canupp at 121). Once again, Canupp was working with insufficient data to make his conclusions. When an expert's testimony rests on insufficient data, it does not satisfy the *Daubert* standard. *Owens v. Ford Motor Co.*, 297 F. Supp. 1099, 1110 (S.D. Ind. 2003).

Moreover, Canupp admitted he “hasn't done a lot of study on ABS brakes for commercial vehicles,” and he tried in vain to talk around the fact that he doesn't know the typical skid pattern for a tractor trailer equipped with antilock brakes. (Canupp at 133-34). Canupp's limited, if not nonexistent, experience with reconstructing accidents involving ABS-equipped commercial vehicles does not

provide an adequate basis for him to judge that Rennie's rig caused the skid marks in question. *See Owens*, 297 F. Supp. at 1108 ("Cassada's limited experience with air bag systems did not provide an adequate basis for him to judge whether the supposedly excess material was aberrant.").¹

When defense counsel confronted Canupp with the fact that Rennie's rig had antilock brakes, Canupp theorized that a shift in the tanker's fuel load might have overridden the tractor's antilock braking system and caused the tandem skid marks found at the scene. (Canupp at 134-35). But he then turned right around and conceded there are baffles in a tanker to prevent load shift. (*Id.*). And even though he admitted that it would have been helpful to do so, he did not perform a skid test with a loaded tanker truck to ascertain whether his load-shift theory was valid. (Canupp at 135-36). Canupp's dubious excuse for not performing such a test was that it would be necessary to use: "the same truck, same setup, same weight, *and the same day it happened.*" (Canupp at 136). Canupp's failure to test his novel hypothesis that a "load shift" might have overridden the antilock brake system for the entire time the truck supposedly was skidding renders it inadmissible. *See*

¹ Honda's expert, Dr. Geoffrey Germane, Ph.D., who does have experience investigating accidents involving tractor-trailer rigs equipped with antilock brakes, testified that a rig with properly function antilock brakes would not have left the type of skid marks found near the scene of this accident. (Germane at 104). *See* also the deposition of BP's expert Bob Rucoba at 118, 120. Plaintiff's expert Wallingford testified based on his experience with ABS that a tractor trailer so equipped would not leave heavy dark skid marks. (Wallingford at 103-04).

Brown v. Raymond Corp., 432 F.3d 640, 648 (4th Cir. 2005) (trial court properly excluded expert testimony because expert did not test theory); *Brooks v. Outboard Marine Corp.*, 234 F.3d 89, 92 (2d Cir. 2000) (“failure to test a theory of causation can justify a trial court’s exclusion of the expert’s testimony”); *Morehouse v. Louisville Ladder Group, LLC*, 2004 WL 2431796, at *6 (D.S.C. 2004) (failure to properly test ladder-bending hypothesis rendered expert’s opinion inadmissible).

Second, the skid marks near the accident scene were dual-wheel skid marks, and it is undisputed that Rennie’s trailer was equipped with super single tires. Rennie’s tractor was equipped with tandem tires, but Canupp admitted that tractor-trailer rigs are designed so that that rear wheels on the trailer lock up first to avoid a jackknife. (Canupp at 122-23). Thus, by Canupp’s own admission, it would have been important to determine whether the super single tires on Rennie’s trailer, which would have locked up first in a skidding scenario, could have left the type of skid marks found at the scene. Yet Canupp – who has never before reconstructed an accident involving super single tires (Canupp at 119) – concluded that the skid marks were made by Rennie’s rig even though he (i) did no research on super single tires (Canupp at 119-20), (ii) merely guessed at the width of a super single tire (Canupp at 120), and (iii) had never before seen a skid pattern for a tractor trailer equipped with super single tires (much less one with both antilock brakes and super single trailer tires). (Canupp at 123). Again, an expert’s speculative

hunches and *ipse dixit* assertions cannot satisfy the requirements set forth in *Daubert* and its progeny. See, e.g., *Klaczak*, 2006 WL 2849734, at *37.

Third, it is undisputed that a braking vehicle will not leave skid marks unless it reaches a high enough deceleration rate. Based on his analysis of the onboard computer records from the BP tractor, Canupp calculated that the deceleration rate for Rennie's truck during the "hard" braking phase was .36, which he characterized as a *medium* rate. (Canupp at 57, 143, 146). He baldly asserted that a .36 deceleration rate on a tractor trailer such as the one involved in this accident would result in a skid *but admitted he had done nothing to verify that conclusion*. (Canupp at 148). In fact, he conceded that published materials could be consulted to test his hypothesis, but he did not consult them and refused to do so: "I will not do your research, but I can tell you for a fact it's there." (Canupp at 149-54).

As a substitute for actually consulting published studies, Canupp offered only his *ipse dixit* assurance that: "I have slid trucks for years doing tests with them. I'm telling you that's how it produces it." (Canupp at 148). But he then admitted: "I don't have the test results I can give you a copy of. I do not have that, if that's what you're asking." (Canupp at 151). Canupp's cavalier answer and inability to back up his assertions confirms that his testimony is unreliable. Federal courts have repeatedly admonished that "whether an expert's opinion is based on

scientific studies or personal experience, he still must employ ‘the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.’” *Owens*, 297 F. Supp. at 1109. Importantly, plaintiff’s other accident reconstructionist, Thomas Langley, testified that a deceleration rate of .36 will not produce skid marks. (Langley at 80). Expert testimony must be excluded when “there is simply too great an analytical gap between the data and the opinion proffered.” *Joiner*, 522 U.S. at 146.

Finally, Canupp conceded that his braking-percentage assumptions were potentially flawed because they might not correlate with the actual braking percentage on Rennie’s truck:

Q: And how did you get – how do you measure braking percentage?

A: **There’s the flaw.** I can’t measure because I hadn’t looked at the truck. Typically an ABS-type truck or commercial motor vehicle will produce between 60 and 65 percent of braking power of a car.

(Canupp at 157) (emphasis added). Canupp went on to explain that he relied on a standard braking percentage assumption of 60-65%, but he did not consider whether Rennie’s ABS-equipped rig might have had a higher braking percentage because: “I don’t think you’re going to produce any more than 65, 67, maybe. But I don’t think any higher than that.” (Canupp at 158). Canupp’s guesswork on that

important aspect of the case is inexcusable given his admission that he “hasn’t done a lot of study on ABS brakes for commercial vehicles.” (Canupp at 133).

To sum up, it is readily apparent that Canupp started with the assumption that Rennie drifted into Chen’s vehicle and then, without any rigorous analysis or testing, concocted a fanciful theory that the skid marks in Chen’s lane and the scallop marks on the Acura prove that assumption. An expert does not assist the trier of fact if he starts his analysis by assuming the very thing he must prove and then relies on unsupported bluster and *ipse dixit* assertions to falsely conform the physical evidence to his theory. The Court should exclude Canupp’s testimony on the grounds that it is unreliable and untrustworthy.

V. DEFECTS IN LANGLEY’S METHODOLOGY AND CONCLUSIONS.

Thomas Langley is a former police officer who now offers his services as an accident reconstructionist. At the outset, the Court should be aware of Langley’s confessions that he has “not done any accident reconstruction calculations in this case,” (Langley at 88-89), and that he did not do “any testing at all of anything in this case.” (Langley at 153). That alone should cast grave doubt on the reliability of his opinions and conclusions. Countless cases hold that an expert’s testimony cannot be reliable if he fails to test the validity or even the possibility of his underlying assumptions. *See, e.g., Brown v. Raymond Corp.*, 432 F.3d 640, 648 (4th Cir. 2005); *Weisgram v. Marley Co.*, 169 F.3d 514, 520-21 (8th Cir. 1999). But

there are numerous other reasons why his testimony should be excluded as untrustworthy.

A. Langley's Conclusions Regarding the Skid Marks Are Unreliable.

The Court is now familiar with plaintiff's skid mark theory and the serious flaws in Canupp's methodology for arriving at the conclusion that Rennie's rig made those skid marks. Langley's conclusions and methodology are also riddled with similar flaws.

Langley did not take any measurements to correlate the skid marks with Rennie's rig: "Eyeballing make have the advantage of ease, but it surely lacks scientific reliability in the sense of producing consistent results." *Ayers v. Robinson*, 887 F. Supp. 1049, 1060 (N.D. Ill. 1995). Langley arrived at his conclusion that Rennie's rig made the skid marks near the accident scene after "eyeballing" photographs of the skid marks and the tires on the exemplar BP tractor trailer. He did not make any measurements to correlate the skid marks with those tires. (Langley at 26-27, 33-34). He did not even know the distance between the skid marks, *i.e.*, the "track width," and thus could not compare the skid mark track width with the track width of Rennie's rig. (Langley at 34, 251).² Nor did Langley measure the width of the treads on the exemplar tractor's tandem wheels

² In fact, there is about a seven inch difference in width between the skid mark width in the photographs and the track width on the tractor that supposedly left the marks. (Rucoba at 81-82).

to see whether they matched the skid marks. (Langley at 35). For these reasons alone, the Court should exclude Langley's testimony. *See Reali v. Mazda Motor of America, Inc.*, 106 F. Supp. 2d 75, 77-78 (D. Me. 2000) (excluding expert testimony under *Daubert* because expert calculated vehicle speed in large part by "eyeballing" accident photographs).

Moreover, Langley, like Canupp, lacks any experience reconstructing an accident involving super single tires – this was his first. (Langley at 67, 257). Nonetheless, he did not hesitate to opine that there was evidence of skidding super single tires because, he contends, the photos show evidence of "a super single muddying up the [skid] mark[s]." (Langley at 39). Yet when asked whether he had "tried to correlate the patterns of the tires that are making those marks with the tires that were on the BP tractor that was involved in this accident," Langley had to confess: "No, I haven't." (Langley at 38). Nonetheless, in a stunning example of pure *ipse dixit*, Langley declared: "They're made by the same vehicle, yes." (Langley at 39). When pressed on the issue, Langley revealed that his conclusions are rank speculation because he had to guess at the mounting configuration and width of the super single tires, and he made no study regarding the attributes of super single tires:

Q: And we've tried to talk about it earlier, track width and how everything matches up, but we don't quite know that.

A: I don't know that I've ever really seen that much in the way of super singles to know exactly at what point on the axle end they put them or how they're mounted.

Q: What about the width of the super single, is it wider than, say, the tires we find on axle 2 or 3 [of the tractor]?

A: Yes.

Q: How much wider?

A: There wasn't one at the shop to measure. I asked Houston when I was over there. They didn't have any super singles left. But you can tell from the marks left on the ground. I mean, they're probably going to be 12 inches wide, maybe 15. It's big.

* * *

Q: But would you acknowledge there's a rather dramatic differential between the amount of rubber being laid down by axles 2 and 3 [on the tractor, which were outfitted with tandem tires] versus the rubber being laid down by the super singles.

A: Sure.

Q: And you account for that how?

A: Well, it could be a lot of things. I've never really studied super singles that much, so I mean it could be the stiffness of the rubber. You could check it with the Myers durometer, see the stiffness of the rubber; you could see what the air pressure of the tire is; you can see what weight is carried on those axles ends.

There are a lot of things that could attest to it. The fact that you still got friction to the front and the liquid load staying at the front of the baffles. It could be a lot of things.

(Langley at 256-57; 262-63). Guesswork and speculation of this sort do not satisfy the *Daubert* standard. *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 319 (7th Cir. 1996) (courtroom is not place for scientific guesswork, even of the inspired sort).

Langley has no experience reconstructing an accident involving a tractor trailer with antilock brakes: Langley could not explain how Rennie’s ABS-equipped rig would have made the skid marks, so he glibly tried to talk his way past the issue. (Langley at 28). The truth of the matter, however, is that Langley doesn’t know anything about the antilock brake system on Rennie’s rig:

Q: Tell me about the ABS system present on the subject tractor trailer system.

A: Don’t know.

Q: Do you know which wheels the ABS system would operate if it were operating normally?

A: No, I didn’t study that.

(Langley at 190).

Adding to his ignorance about the antilock brake system on Rennie’s rig, Langley, like Canupp, had no experience or knowledge about antilock brake systems on tractor trailer rigs in general: “No, I haven’t really studied the tractor trailer ABS systems.” (Langley at 191). But this lack of information and experience didn’t stop Langley from echoing Canupp’s unsupported and untested theory that fluid movement in a tanker equipped with baffles to prevent fluid

movement, combined with steering input, could cause an ABS-equipped rig to leave skid marks. (Langley at 191-92). Langley's failure to test his ad hoc theory that load shift and steering input negated the tractor trailer's antilock brake system requires that it be excluded. *See Bogosian v. Mercedes-Benz of No. America, Inc.*, 104 F.3d 472, 479 (1st Cir. 1997) (excluding as irrelevant expert testimony because in performing test the expert "did not, in any way, attempt to replicate the known facts surrounding the injury-producing event").

Langley's conclusion that Rennie's rig left the skid marks does not fit with the objective deceleration rate evidence: The deceleration (braking) forces Langley calculated from the tractor's onboard computer recording simply do not fit with his conclusion that the rig made the skid marks at the scene. Langley testified that the "saturation point" (meaning wheel lock-up and skid point) necessary for tractor-trailer tires to leave a skid mark requires a deceleration rate of .55 to 6 Gs. (Langley at 73). But according to Langley's calculations, the highest G force experienced by Rennie's rig at any point during the hard braking phase was .408 and over the length of the skid marks was .363. (Langley at 74). He admitted those were not the saturation points for the brake system on Rennie's vehicle. (Langley at 74).

Langley tried to maneuver around the problem by attributing the skid marks to Rennie's alleged steering action, but he then admitted that he did not know by

what factor the alleged steering input affected the deceleration rate. (Langley at 75). Nor could he even begin to quantify the purported steering input during the skid. (Langley at 76). And finally, the fact that the skid marks are, for all intents and purposes, straight as a proverbial arrow show there was little, if any, “steer input.” (See Exh. E). “There is no ‘fit’ when there where ‘there is simply too great an analytical gap between the data and the opinion proffered.’” *Optimum Tech., Inc. v. Henkel Consumer Adhesives, Inc.*, __ F. Supp. 2d __, 2006 WL 1663357, at *4 (N.D. Ga. 2006).

It is undisputed that the average deceleration rate for Rennie’s vehicle during the hard braking phase was .363. Langley did not consult any published source to determine whether a braking tanker truck with that average deceleration rate would leave skid marks, but he admitted there were resources he could have checked to determine whether it would. (Langley at 112-13; 157). Rather than citing those published materials to support his conclusion, Langley offered only this *ipse dixit*: “I think it would leave marks, yeah.” (Langley at 113). However, “[f]or expert analysis to be acceptable in court, it must be subjected to the ‘same level of intellectual rigor that characterizes the practice of an expert in the relevant field.’” *Jack v. Glaxo Wellcome, Inc.*, 239 F. Supp. 2d 1308, 1316 (N.D. Ga. 2002).

When pressed to answer whether the literature would support his conclusion, Langley waffled: “Well, I’d have to look under tanker trucks. We don’t do that

much, as far as dynamic testing, with tanker trucks because of the instability. I mean, we test box trucks a lot more than we do with tankers.” (Langley at 157). And when asked to look for the published information he should have consulted before arriving at his conclusion, Langley said he would do so only if the defendants paid him to do it. (Langley at 158). As one court explained: “An opinion has significance proportioned to the sources that sustain it. An expert who supplies nothing but the bottom line supplies nothing of value to the judicial process.” *Minasian v. Standard Chartered Bank, PLC*, 109 F.3d 1212, 1216 (7th Cir. 1997).

B. Langley’s Conclusions Regarding the Scallop Marks are Unreliable.

The Court is also now familiar with the plaintiff’s scallop-mark theory and the flaws in Canupp’s methodology for arriving at the conclusion that the scallop marks prove Rennie’s rig drifted into Chen’s Acura. Once again, Langley’s conclusions and methodology are riddled with similar flaws.

Langley made no calculations to confirm his “right steer” theory: Langley, like Canupp, subscribes to the theory that Rennie drifted into Chen’s vehicle and, during the split second that the two vehicles were in contact, steered back to the right. Langley says the alleged change in the scallop-mark pattern reflects a turn to the right by Rennie (as opposed to a turn to the left by Chen, which undisputedly happened, sending him to the median wall), a notion that necessarily assumes it

was humanly possible for Rennie to turn his wheels during the brief instant of contact. Incredibly, however, Langley never bothered to calculate how long the two vehicles were in contact. (Langley at 123-24). He couldn't do so because, among other things, he didn't compute the relative speed of the two vehicles. (Langley at 115). Langley chose not to make the calculation because he believed it would only confirm the hunch he made after eyeballing the scallop marks:

Q: Do you believe you could do a calculation as to the relative speed of the two vehicles from taking measurements from those marks?

* * *

A: I'm sure you could.

Q: You've not done that?

A: No.

Q: Do you think it would make sense to do that?

A: It would simply confirm what you can see visually, but. . . .

(Langley at 115).

Moreover, Langley had no idea how many times a tractor tire revolving at the speed Rennie's rig was traveling would turn in a second. (Langley at 148-49).

And he did not even measure the scallop marks. Instead, he just eyeballed them:

Q: Did you measure the marks on the Acura at the junkyard?

A: Exactly, no. It's in – when I saw it in San Antonio, it was on a lift.

Q: Did you measure them inexactly?

A: No, I didn't measure them at all.

Q: Okay.

A: The radius is consistent with what I expected. But, no, I didn't measure them.

Q: And the only way you can say that the radius is consistent of the marks on the Acura and the lug nuts of the tractor is just eyeballing them, visual inspection?

A: Well, that's the only thing I've done so far.

(Langley at 130).

Ultimately, Langley was forced to disavow the absurd notion that Rennie could have begun the process of turning his wheels during the split second of contact between the two vehicles. (Langley at 150, 152). Attempting to explain away the disconnect, Langley speculated that Rennie must have perceived he was in the wrong lane and began to steer to the right *before* the two vehicles made contact. (Langley at 150-51). But that was pure guesswork on his part and did not fit with Langley's other conclusion that Rennie was not keeping a proper lookout before the collision. (Langley at 151). "Unscientific speculation [even when] offered by a genuine scientist" is not reliable expert testimony. *Moore v. Ashland Chem. Inc.*, 151 F.3d 269, 278 (5th Cir. 1998). Moreover, steering away before contact cannot explain why or how contact would occur in the first place.

Langley made no reliable measurements to confirm his “left steer” theory:

Langley insists that the initial scallop marks on the Acura could only have been made if the front wheels on Rennie’s tractor were turned slightly to the left, causing the leading lug nuts on the left wheel to extend beyond the body of the tractor. He arrived at that conclusion through the highly unscientific method of placing a *ladder* (as opposed to Chen’s Acura) against the tractor’s left front side with the tractor’s wheels turned to the left. (Langley at 119-20). Langley was forced to concede, however, that when the tractor’s wheels are pointed straight ahead, the lug nuts protrude beyond, or “stand proud versus the edge of,” the step rail on the tractor. (Langley at 212). Given that admission, it would have been important for Langley to determine whether the scallop marks on the Acura could have occurred even if the tractor’s wheels were facing straight ahead. Yet, Langley never bothered to measure how far the lug nuts protrude when the wheels are in a straight alignment:

Q: “[D]id the lug nuts stand proud versus the edge of the step rail?”

A: Yes.

* * *

Q: Do you know by how much?

A: No. Once, again, I mean, it’s a difficult thing to measure, because then you’re looking at references. And that’s why the laser scanner is so much more –

Q: Well, it's not that hard to measure. I mean, if you got the right equipment, you can do that pretty easily. Figure out – put the wheel in a straight position –

A: I know.

(Langley at 212-13).

Like Canupp, Langley also made no effort to correlate the lug-nut measurements he did take with the damage on the Acura. Once again, he relied solely on eyeballing:

Q: And to date, you not tried to correlate any of those measurements with the deformation you see on the Acura.

A: Right. When I saw it in San Antonio, it was on a lift. It had multiple people examining it.

* * *

Q: Is there a particular calculation that you base it on, or are you eyeballing the deformation on the side of the Acura and saying, Looks like two-mile-an-hour differential to me?

A: **I'm strictly eyeballing it.** Because if you were to have a greater speed differential, then you're going to have a lot of tearing as it goes through there, and then you're going to have a totally different dynamic post-impact. We covered that two hours ago.

(Langley at 286) (emphasis added). Eyeballing is not sufficient to satisfy *Daubert*.

As the Eleventh Circuit has explained: “[i]n *Kumho Tire*, the Supreme Court made it clear that testimony based solely on the experience of an expert would not be admissible.” *Rider v. Sandoz Pharmaceuticals Corp.*, 295 F.3d 1194, 1197 (11th Cir. 2002).

To sum up, by his own admission, Langley’s convoluted theory of the accident requires him to completely ignore the uncontradicted testimony of the witnesses. (Langley at 89). Among other things, his conclusions assume as false Rennie’s palpably reasonable testimony that he was planning to exit the highway at Memorial Drive in order to make a scheduled gasoline delivery. (Langley at 90). To be relevant, expert testimony must be “sufficiently tied to the facts of the case.” *United States v. Downing*, 753 F.2d 1224, 1242 (3rd Cir. 1985) (quoted in *Daubert*, 509 U.S. at 591). Langley’s testimony clearly is not tied to the basic facts of the case, and the methodology he used to arrive at his hypothesis consists almost entirely of speculation, guesswork, and eyeballing. The Court should therefore exclude his testimony. *See Nebraska Plastics, Inc. v. Holland Colors Ams., Inc.*, 408 F.3d 410, 416 (8th Cir. 2005) (“[I]f the experts opinion is so fundamentally unsupported that it can offer no assistance to the jury, it must be excluded.”).

CONCLUSION

Georgia Courts must now apply a *Daubert* analysis. No more may “qualification” alone be sufficient. Here, the testimony of these experts is woefully inadequate and unscientific and should not be permitted. For the foregoing reasons, Defendants BP Corporation North America and Steven Rennie request that, in accordance with Georgia Code Ann. § 24-9-67.1, the Court exclude the testimony of plaintiff’s accident reconstructionists Dwayne Canupp and Thomas Langley as

unreliable and untrustworthy. Defendants also request any other relief to which they may be justly entitled.

Respectfully submitted,

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INDEX OF EXHIBITS

- Exhibit A: Depositions of Radcliffe and Moreno**
- Exhibit B: Deposition of Steven Rennie**
- Exhibit C: Grady Toxicology Record**
- Exhibit D: Deposition of Officer David Kelley, Jr.**
- Exhibit E: Photograph of Skid Marks**
- Exhibit F: Photograph of “Scallop Marks” on Mr. Chen’s Acura**
- Exhibit G: Deposition of Winson Chen**
- Exhibit H: Deposition of C. Dwayne Canupp**
- Exhibit I: Deposition of Thomas Langley**
- Exhibit J: Deposition of Dr. Geoffrey Germane**
- Exhibit K: Deposition of Robert Rucoba**
- Exhibit L: Accident Report**
- Exhibit M: Photograph of Super Singles on Subject Vehicle**
- Exhibit N: Deposition of Jerry Wallingford**
- Exhibit O: DeKalb Emergency Call Log and BP Cell phone invoice**

**IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA**

WINSTON CHEN,

Plaintiff,

v.

**AMERICAN HONDA MOTOR CO.,
INC., Individually and d/b/a ACURA,
STEVEN ALEXANDER RENNIE,
BP CORPORATION NORTH
AMERICA,**

Defendant.

Civil Action

File No. 04-VS-067587-J

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for all parties in this action with a copy of the Certificate of Service of the foregoing **BP Brief in Support of Motion to Exclude the Plaintiff's Accident Reconstruction Expert Witnesses** by electronic filing and that I have served counsel for all parties with a copy of the document by depositing in the United States Mail a copy of same in envelopes with adequate postage thereon, addressed as follows:

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