

ORIGINAL

IN THE COURT OF CLAIMS OF OHIO

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OF OHIO
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DARLENE LANE FERRARO,)	CASE NO. 2011-10371
)	
Plaintiff,)	JUDGE PATRICK McGARTH
)	
vs.)	<u>PLAINTIFF'S RESPONSE TO</u>
)	<u>DEFENDANT'S MOTION FOR</u>
THE OHIO STATE UNIVERSITY)	<u>LEAVE TO DEPOSE PLAINTIFF'S</u>
MEDICAL CENTER)	<u>EXPERT</u>
)	
Defendant.)	

REPLY

Plaintiff, Darlene Lane Ferraro, individually and as the fiduciary of the Estate of Junior Lee Lane, Deceased, submits this response to Defendant's Motion for Leave to Depose Plaintiff's Expert or, in the Alternative, Motion in Limine, Regarding Same dated December 23, 2013 ("Defendant's Motion"). Defendant, the Ohio State University Medical Center ("OSUMC"), is seeking to depose Plaintiff's accident reconstruction expert several months past the court's discovery cut-off date. This relief should only be granted if Plaintiff is also allowed to depose the defense expert notwithstanding the expiration of the deadline.

BACKGROUND

This wrongful death/survivorship action was originally filed in the Cuyahoga County Court of Common Pleas on August 4, 2010. *Case No. CV-10-733430*. The Complaint alleged that Junior Lee Lane, Deceased ("Decedent") had been killed on September 10, 2009 when he was struck on Interstate 71 by a 2004 Mercedes C-240 that was being operated by Defendant, Rolf Barth ("Barth"). The Decedent had been riding as a passenger in a 1997 Dodge Ram that was being driven by Defendant, Gary Fury ("Fury"). Fury had stopped his truck on the highway after difficulties were

ON COMPUTER

experienced with a trailer he had been towing. The Decedent had exited Fury's vehicle and was working on the trailer while another passenger, Jessie Fury, attempted to alert oncoming motorists by waving his shirt. Defendant Barth nevertheless collided into the trailer, fatally injuring the Decedent in the process.

Defendants submitted Answers denying liability and leveling cross-claims against each other. Notably, Defendant Barth never once suggested in the pleading he filed on September 13, 2010 that he had been driving his Mercedes in furtherance of any state business or that proper subject matter jurisdiction was lacking. The parties then proceeded with discovery.

On February 7, 2011, Defendant Barth submitted a Motion to Dismiss for Lack of Subject Matter Jurisdiction. For the first time in the proceedings, he argued that he had been acting in the course and scope of his employment with the State of Ohio at the time of the fatal collision. Plaintiff timely opposed this application and the request was "denied at this time" on March 21, 2011.

Defendant Barth filed a Motion to Reconsider on April 4, 2011. Plaintiff opposed this application on April 11, 2011. In a ruling that was issued seven days later, the Common Pleas Court stayed the lawsuit "pending a determination by the court of claims of Ohio as to whether Defendant Rolf Barth was engaged in the course of his employment at the time of the subject accident. ***" *See Journal Entry dated July 18, 2011.*

Plaintiff proceeded to file a separate action in the Ohio Court of Claims on August 17, 2011 against Defendant Barth's reputed employer, OSUMC. *Case No. 2011-10371.* Defendant Barth was deposed on December 6, 2011, during which he acknowledged that he had been driving his personal Mercedes Benz C240 at the time of the accident. *Deposition of Rolf F. Barth ("Barth Depo."), p. 13.* He claimed he had been heading

toward a meeting of physicians at the Cleveland Clinic. *Id.*, pp.16-17. Defendant Barth was adamant that he had be driving at 65 m.p.h. while heading northbound on the highway. *Id.*, pp. 22-24 & 56. According to the Brook Park Police Department Report, the posted speed limit was just 60 m.p.h.

After jurisdictional briefs were submitted by the parties, Judge Alan C. Travis issued an order on July 31, 2012 that held:

It is undisputed that this case concerns injuries sustained as a result of the operation of a motor vehicle. Consequently, Dr. Barth is not entitled to personal immunity pursuant to R.C. 9.86 and 2743.02(F) and there is no need for this court to conduct an immunity hearing. [emphasis added]

The remainder of the decision expressed that the Court would proceed determine whether Defendant Barth was acting in the course and scope of his employment, thereby rendering OSUMC derivatively liable for his negligence. *Id.*

Defendant OSUMC's counsel arranged for a report to be prepared by Timothy J. Tuttle, which was dated April 11, 2013. *Exhibit C, attached.* Even though Defendant Barth had admitted that he had been driving in excess of the posted speed limit, the defense reconstructionist managed to find that he was "operating his vehicle in a safe and prudent matter prior to the crash occurring." *Id.*, p. 6. The fatal accident was blamed instead on Defendant Fury. *Id.*, pp. 6-7.

This Court set a dispositive motion deadline of September 3, 2013 and scheduled the liability phase of the trial for December 9, 2013. *See Order dated October 30, 2012.* On April 30, 2013, Plaintiff submitted a Motion for Extension of Time in which to submit their expert reports. Defendant opposed this request on May 8, 2013, which was limited to berating Plaintiff for her purported "lack of diligence[.]" *Id.*, p. 1. Four days later, Plaintiff forwarded the report of accident reconstructionist James D. Crawford ("Crawford") to defense counsel. *Exhibit A, attached.* In his detailed analysis, the

eminently qualified accident reconstructionist established that Defendant Barth had caused the fatal accident by failing to maintain a reasonable look-out in front of his speeding vehicle. *Id.*, pp. 9-10. This Court then granted the extension in an order dated June 6, 2013.

The discovery cut-off date of August 19, 2013 came and went without any attempt being made to depose Plaintiff's accident reconstructionist. No dispositive motions were filed, moreover, before that deadline expired on September 3, 2013. Following a pretrial conference, this Court issued an order on November 22, 2013 confirming that the parties were prepared to proceed with the jury trial.

Plaintiff's expert then prepared a Supplemental Reconstruction Report dated December 9, 2013, that was promptly forwarded to defense counsel. Crawford indicated that he had "visited the scene of the crash on the night of December 4, 2013 where [he] took lighting measurements and performed rudimentary testing." *Id.*, p. 1. He then "reviewed the deposition transcript of Detective Walentak and visited [the] Brook Park Police station where [he] inspected the light bulbs from the dolly trailer involved in this crash." *Id.* After explaining his analysis of this additional information, Crawford confirmed that the "opinions expressed in [his] original report remain valid[.]" *Id.*, p. 3. In other words, his professional opinion was still that Defendant Barth negligently caused the crash by failing to maintain a proper look-out while speeding on the highway. *Id.*

Plaintiff and her counsel appeared for the trial in Columbus on December 9, 2013. Defendant's counsel arrived and announced for the first time that a "standing" objection was being asserted since the Decedent's estate had been closed on June 4, 2013. *Cuyahoga Prob. Ct. Case No. 2009 Est. 152813*. No explanation was offered for why Defendant waited until the morning of trial before raising this issue. This Court

proceeded to cancel the proceeding and schedule a status conference for January 16, 2014 to discuss the matter. The Decedent's Estate was reopened by Court Order on December 30, 2013.

Defendant is now seeking to re-open discovery and depose Plaintiff's expert upon all aspects of his professional opinion, including those that were disclosed months before the discovery cut-off date of August 19, 2013 expired. If the deposition is going to be permitted, then Plaintiff should be allowed to question the defense expert as well.

ANALYSIS

There is no dispute that defense counsel received Crawford's report on or about May 12, 2013, which was over three months before discovery closed on August 19, 2013. *Exhibit A, attached*. In no uncertain terms, Crawford had disclosed that he intended to opine that Defendant Barth had been traveling at an excessive speed, should have nevertheless perceived the stationary vehicle and pedestrian from at least two hundred and seventy six feet away, but negligently failed to avoid the collision. *Id.*, pp. 9-10.

Plaintiff arranged for Crawford to submit his Supplemental Report merely as a courtesy. *Exhibit B*. Defendant has not denied that the update was received before the trial was scheduled to commence. The sole purpose of the Supplemental Report was simply to avoid any claims of unfair surprise, which appeared to be particularly likely given that the expert was never deposed before the discovery cut-off date expired.

Defendant maintains that the mere submission of the Supplemental Report creates a new opportunity for Plaintiff's expert to be questioned months after discovery has closed. There is no truth to the vacuous assertion that the update addresses "all-new issues[.]" *Id.*, p. 2. The accident reconstructionist's findings and opinions remained exactly the same. In order to avoid any accusations that he had left some stone unturned, he simply confirmed in the Supplemental Report that he had visited the

accident scene and examined the trailer light bulbs. *Exhibit B, p. 1.* Neither inquiry revealed anything that required him to alter his previously expressed opinions. *Id., p. 3.*

If Defendant is going to be allowed to conduct discovery past the cut-off date then Plaintiff should be afforded the same opportunity as well. In order to avoid an uneven playing field, her counsel should also be permitted to depose Tuttle upon all aspects of his suspect report. Given the circumstances, it is inconceivable that Defendant could possess a valid justification for objecting to such an arrangement.

CONCLUSION

In the event that Defendant's Motion for Leave is granted, the Plaintiff should be afforded a reciprocal opportunity to depose the defense expert.

Respectfully Submitted,



W. Craig Bashein, Esq. (#0034591)
Thomas J. Sheehan, Esq. (#0069601)
BASHEIN & BASHEIN CO., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113
(216) 771-3239
FAX: (216) 781-5876
cbashein@basheinlaw.com
tjs@basheinlaw.com

*Attorneys for Plaintiff,
Darlene Lane Ferraro*



Paul W. Flowers, Esq. (#0046625)
PAUL W. FLOWERS CO., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113
(216) 344-9393
FAX: (216) 344-9395
pwf@pwfco.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Memorandum** has been served by e-mail on this 7th day of January, 2014 upon:

Jeffrey L. Maloon, Esq.
Assistant Attorneys General
Court of Claims Defense
150 East Gay Street, 18th Floor
Columbus, Ohio 43215
Jeffrey.maloon@ohioattorney general.gov
*Attorney for Defendant,
The Ohio State University Medical Center*



Paul W. Flowers, Esq. (#0046625)
PAUL W. FLOWERS CO., L.P.A.
*Attorney for Plaintiff,
Darlene Lane Ferraro*

Reconstructionists

Henry P. Lipian
President
ACTAR #83

Dale K. Dent
ACTAR #853

James B. Crawford
ACTAR #1030

Dale W. Meyer
ACTAR #1179

Choya R. Hawn
ACTAR #1592

Thomas G. Walker
ACTAR #1602



CRASH RECONSTRUCTION SERVICES

1006 Vivian Drive, West
Grafton, Ohio 44044

(440) 926-2627 Phone • (440) 926-2684 FAX

Direct email:
JCrawford@IntrotechCrash.com
www.IntrotechCrash.com

Technical Investigators

R. Scott Danniger
Tom Tomasheski
Steven P. Maurer

James M. Drozdowski
Forensic Mechanic

Office Manager

Timothy P. Kalish

May 9, 2013

Mr. Craig Bashein
Bashein & Bashein Company, L.P.A.
35th Floor, Terminal Tower
50 Public Square
Cleveland, Ohio 44113

RE: Junior Lane (deceased)
Our File Number: 09-198

Preliminary Reconstruction Report

Dear Mr. Bashein:

I have completed my investigation and preliminary reconstruction of the crash that occurred at approximately 9:23 p.m. on Thursday, September 10, 2009 in Brook Park, Cuyahoga County, Ohio. The crash took place ~390 feet north of mile post 238 in the northbound lanes of Interstate 71 (I-71). This crash was investigated by the Brook Park Police and was reported on Ohio Traffic Crash Report number BP0921131.

Overview

Traffic Units. This incident was a three-unit crash with one non-contact unit:

- Unit #1: A 1997 Dodge Ram 1500 four wheel drive pickup truck, white in color, Ohio registration PGN9369, driven by Gary Fury, a 51 year old male who was the sole occupant. The pickup had been pulling a tow dolly trailer and was stopped in the #2 lane (second lane from the center median) northbound on I-71 at the time of the crash.
- Unit #2: 2004 Mercedes C240 four door sedan, silver in color, Ohio registration ER78AA, driven by Rolf Barth, a 72 year old male who was the sole occupant. The Mercedes was northbound in the #2 lane on I-71 at the time of the crash.
- Unit #3: A pedestrian, Junior Lane wearing blue jeans and a white T-shirt. At the time of the crash Mr. Lane was at the rear of the stopped pickup truck

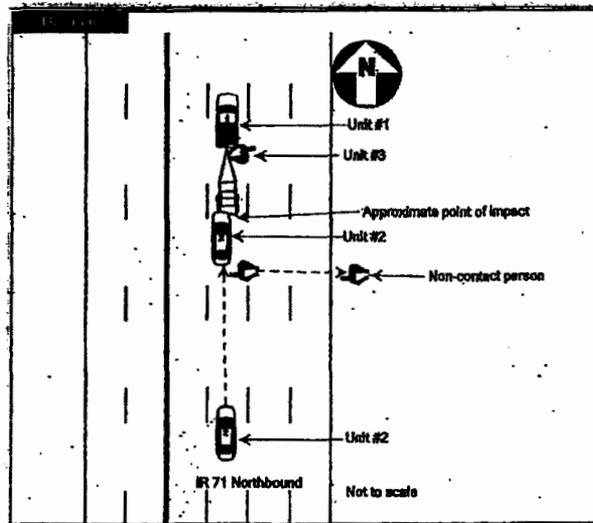


attempting to reattach the tow dolly trailer that had become unhitched from the pickup.

Non-contact unit: A pedestrian, Jesse Fury wearing blue jeans and no shirt. At the time of the crash Mr. Lane was about 10 – 20 feet behind the dolly and the stopped pickup truck waving his white T-shirt in an attempt to flag approaching northbound traffic.

Crash Summary. The Ohio Traffic Crash Report described the crash as follows:

UNIT #1 (A PICKUP TRUCK PULLING A TOW DOLLY TRAILER) WAS TRAVELING NORTHBOUND ON IR-71 WHEN THE DRIVER STOPPED TO ADJUST THE TRAILER. AFTER STOPPING, TWO OF THE ORIGINAL OCCUPANTS OF UNIT ONE, JUNIOR LANE AND JESSE FURY (LANE MARKED ON DIAGRAM AS UNIT #3 AND FURY MARKED ON DIAGRAM AS NON-CONTACT PERSON) EXITED THE VEHICLE TO REPAIR/ADJUST THE TRAILER. UNIT #3 BEGAN TO WORK ON THE TRAILER HITCH AND WAS POSITIONED BETWEEN THE TRAILER AND THE REAR OF THE PICKUP. THE NON-CONTACT PERSON WAS POSITIONED IN THE ROADWAY APPROXIMATELY 10 FEET BEHIND THE TRAILER, WAVING A WHITE T-SHIRT IN AN ATTEMPT TO WARN ONCOMING MOTORISTS OF THE STOPPED VEHICLE. UNIT #2, TRAVELING NORTHBOUND ON IR 71, DID NOT SEE UNIT #1, UNIT #3, OR UNIT #4, AND SUBSEQUENTLY STRUCK UNIT #1 AND THEN #3. THE NON-CONTACT PERSON AVOIDED BEING STRUCK BY TAKING EVASIVE ACTION AND RUNNING OFF TO THE RIGHT SIDE OF THE ROADWAY.



Police diagram of crash

Purpose. The purpose of this reconstruction was to examine avoidability issues.

Available Data. In any investigation or reconstruction, data (evidence) is generally obtained from three sources:

- The vehicles involved in the crash
- The roadway or the environment
- The drivers, other occupants and witnesses, or the human element

Physical evidence encompasses those things that we can see, touch, measure, photograph and record. Information from drivers, other occupants and/or witnesses can be important

to an investigation but should be compared with the physical evidence obtained from vehicles and the environment to verify the validity of the statements. During my preliminary reconstruction of this crash I had the following data and information available to me:

1. Ohio Traffic Crash Report BP0921131 (with associated forms)
2. Summaries of police interviews with Chad Meeks, Peter Jung, Anthony Angey, Rolf Barth and Autumn Clink with associated hand drawings
3. Police photos of the crash scene and the vehicles in their final rest locations
4. Total Station forensic measurements taken by Brook Park Police at the scene
5. Additional photos of the vehicles in their damaged conditions
6. Decoded VIN data and original vehicle specifications for the pickup and Mercedes
7. Driver license data on the drivers of the Mercedes and pickup
8. Streets & Trips maps of the area near the crash scene
9. Google Earth aerial and street level photographs of the area of the crash
10. Working scale drawing of the scene including vehicles and evidence points
11. Weather and astronomical data for the date of the crash
12. Deposition transcripts of Rolf Barth, Gary Fury, Chad Meeks, Anthony Angey, Myron Sulminski, Joseph Klemenc and Thomas Chmura
13. Reports prepared by Timothy Tuttle and Alfred Staubus
14. Coroner's Verdict and Autopsy Report for Junior Lane

Environment

The Weather. At the time of the crash there were scattered clouds, the air temperature was about 71 degrees, the reported visibility was 10+ miles, there was no precipitation and the roadways were dry.

Astronomical Conditions. This crash occurred at about 9:23 pm. The sun had set at about 7:45 pm, and so this crash occurred during nighttime conditions after the end of astronomical twilight.¹

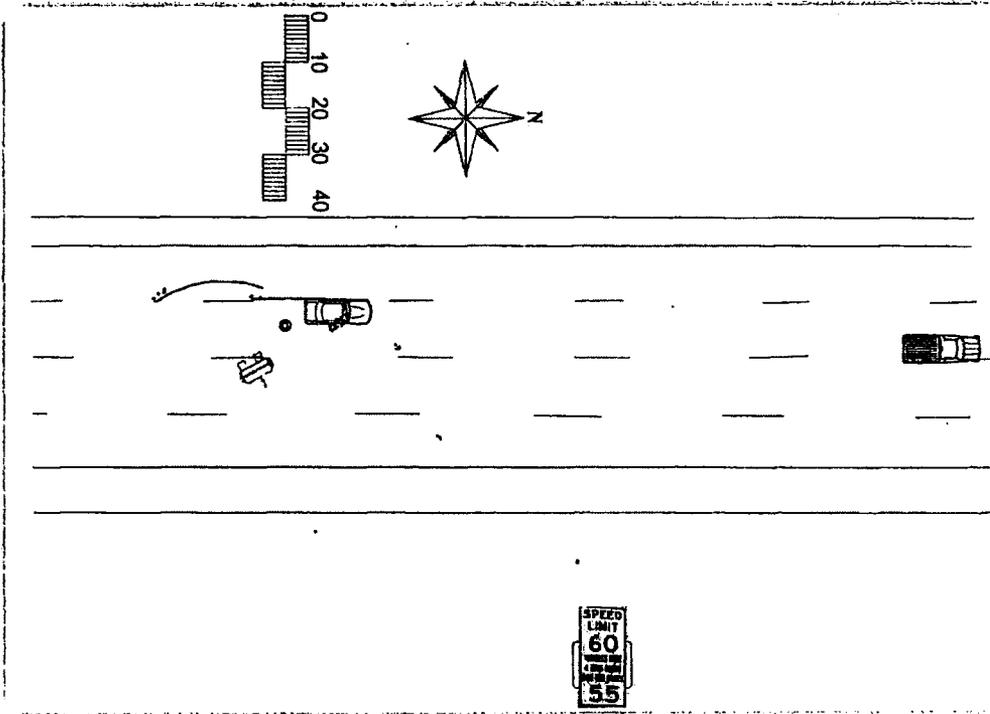
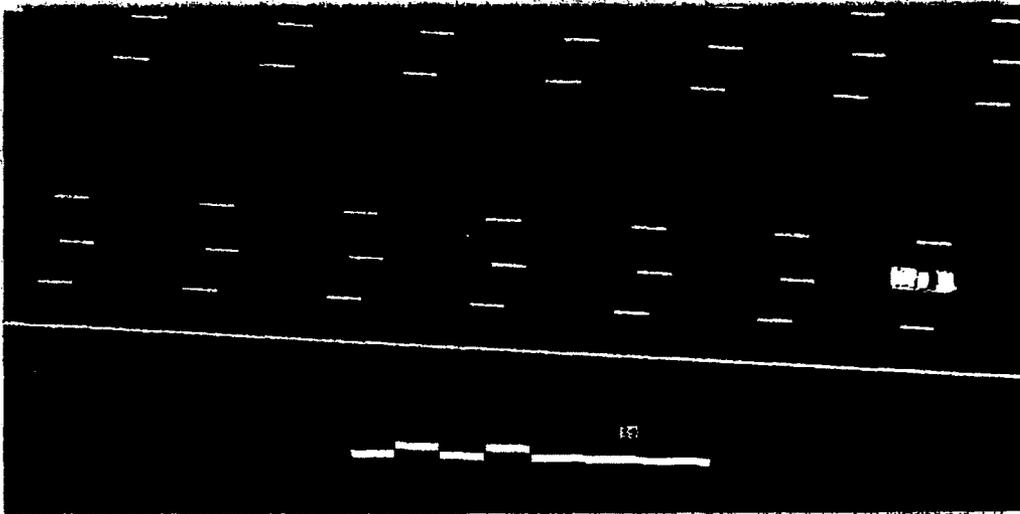
Roadways.

- In the area of the crash I-71 runs predominately north/south. It is a four lane, limited access divided highway with a center Jersey barricade and paved shoulders. In the area of the crash the northbound travel lanes are virtually straight with a slight downslope (~1 degree). The posted speed limit is 60 mph for passenger vehicles. On the center median there were overhead street lights that were spaced about 233 feet apart and provided artificial illumination in the area of the crash.

¹ **Astronomical twilight** is defined to end in the evening when the center of the Sun is geometrically 18 degrees below the horizon (approximately 90 minutes after sunset). After the end of astronomical twilight in the evening the Sun does not contribute to sky illumination at all.

Roadway Evidence. The investigating officer documented physical evidence including the final rest locations of the vehicles and the roadway geometry by forensic total station measurements and photographs.

Diagram. The working scale diagrams below shows the area of the crash, including the documented roadway evidence.



After crash situation drawings

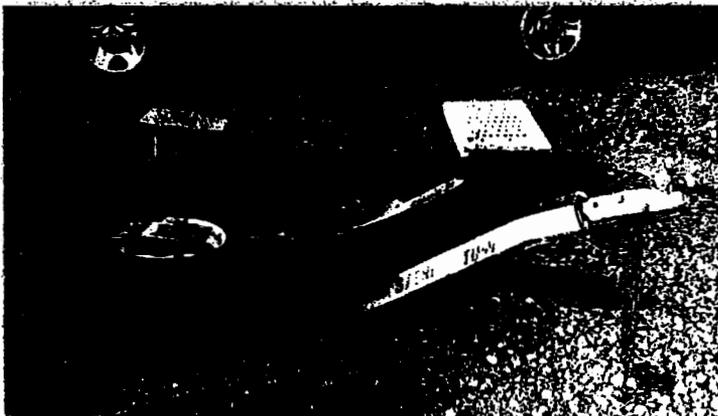
Photographs. The daytime photographs below show the area of this crash from the direction of travel of the respective drivers.



Daytime Google Street View photograph – looking northbound
Imagery Date: 9/2009

Vehicles

Dolly. The tow dolly's left wheel assembly/fender was broken off during the crash. The tongue was bent and the towing coupler showed evidence of contact with the towing vehicle. The dolly itself showed evidence of contact on the left (driver's) side.



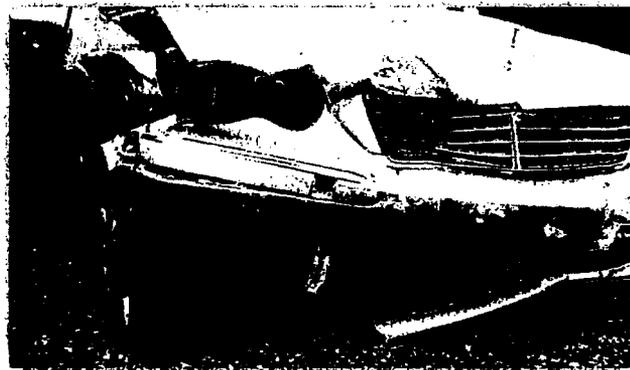
Police photos of damaged tow dolly

Pickup. The photos of the pickup showed evidence of contact to the rear on the left (driver's) side. The bed was crushed and collapsed forward against the cab of the truck where there was induced damage and intrusion into the occupant compartment.



Police photos of damaged pickup

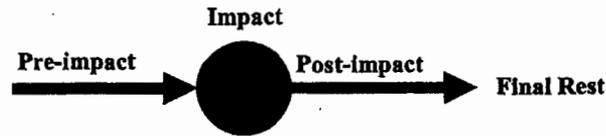
Mercedes. The Mercedes showed evidence of contact with the dolly about $\frac{3}{4}$ of the way across the right (passenger's) side of the front bumper. There was evidence of contact with the rear of the pickup almost half way across the right side of the front of the vehicle with a portion of the pickup's tail light assembly lodged in the Mercedes' grille.



Police photos of damaged Mercedes

Analysis

Crash Phases. In every crash there are three crash phases, each of which may play an important part in the analysis of the crash in order to resolve certain issues. The diagram on the next page illustrates the three crash phases – Pre-impact, Impact and Post-impact – as the traffic units move through the crash sequence to their respective final rest locations.



Calculating Speed. All moving vehicles possess momentum by virtue of their speed and weight. The initial speed possessed by the Mercedes must be dissipated in order to bring it to a stop at final rest. The laws of conservation of energy and momentum may be applied during the various crash phases to resolve the issue of speed dissipation in each phase.

- During the Pre-impact Phase some of the vehicle's speed may be dissipated during evasive actions, if any were taken (i.e.: skidding).
- During the Impact Phase the vehicles exchange momentum with the net change in momentum being zero. Momentum calculations may allow the vehicle's impact speed to be determined directly through physics equations without the need for detailed vehicle crush analysis.
- In the Post-impact Phase each vehicle's speed remaining after impact is dissipated as the vehicles move off to their respective final rest locations.

Protocol. Since reconstructionists begin their speed analysis only after the crash is over, the only known speed at that point is the speed of the vehicles when they are stopped at final rest, which is obviously zero. The reconstructionist must work backwards through the crash sequence and chain of events to determine the initial speed of the Mercedes when it entered the pre-impact phase.

- Focusing first on the Post-impact phase in this case, a dynamics (motion) analysis is performed using the working scale drawing along with documented roadway evidence, data on the environment and roadway frictional characteristics to determine the speeds of the Mercedes and pickup at the beginning of the Post-impact phase as they left the area of impact.
- Next an analysis of the impact phase is accomplished using the law of Conservation of Momentum, to determine the speed of the Mercedes as it just began to impact the pickup at the beginning of the Impact phase.
- Finally, another dynamics analysis is performed to determine speed lost or gained, if any, during the Pre-impact phase.
- This analysis protocol will yield a *minimum speed* for the Mercedes because the energy spent in damaging and moving the dolly has not been accounted for.

Mercedes Initial Speed.

- Using existing data as input to appropriate physics equations, I performed the calculations described in the above protocol and I found that the *minimum speed* for the Mercedes at the beginning of the crash sequence was between the 56 and 58 mph.

- The energy spent in damaging and moving the dolly should be taken into account, which makes the likely speed for the Mercedes consistent with Mr. Barth's deposition testimony and with witnesses who stated that the Mercedes was traveling between 65 and 70 mph in the seconds leading up to the crash. Clearly this speed range was in excess of the posted 60 mph speed limit.

Avoidability.

- Gary Fury, the driver of the pickup, indicated that the tow dolly had somehow become unhitched as he was traveling on I-71 and remained attached to his pickup by means of the emergency safety chains only. Mr. Fury indicated that the result of this emergency situation was that the dolly was swinging from side to side wildly and was encroaching into adjacent lanes endangering other traffic.
 - Mr. Fury indicated that because of the volume of traffic in adjacent lanes he was unable to safely move to the shoulder, and so he activated his four-way flashers, slowed and stopped his combination vehicle in the #2 lane to keep his dolly from striking traffic in the adjacent lanes.
 - If Mr. Fury had been able to safely move his combination vehicle to the shoulder this crash would have been prevented. However, he indicated that in his opinion the density of traffic in adjacent lanes precluded maneuvering to the shoulder in this case.
 - Witnesses confirmed that there was relatively heavy traffic in the northbound lanes of I-71 at the time of the crash. Without having been on the scene at that time I cannot challenge Mr. Fury's opinion that traffic precluded his ability to move safely onto the shoulder to remedy his situation with the dolly.
 - Mr. Fury indicated that in his opinion the area where he stopped was fairly well illuminated by overhead lighting: "It wasn't pitch black or nothing, but I mean it was light, it was light outside...I thought it was fair - he should be able to see...There's a lot of lights going down there."²
 - After he stopped his combination vehicle in the #2 lane there were two options: (1) abandon the vehicle and have all three occupants attempt to dodge traffic in the northbound lanes on foot in order to cross to the shoulder; or (2) attempt to reattach the trailer as quickly as possible and resume driving northbound. Both options involved significant risk to the occupants and to other motorists. The occupants of the pickup ultimately executed option #2.
 - In an effort to reduce the risk of a collision while the trailer was being reattached to the hitch Jesse Fury, Gary Fury's son, moved to a position behind the combination vehicle and began flagging traffic with his white T-shirt. While this action in and of itself was risky, the movement of Jesse and his white T-shirt served to enhance his conspicuity and provided an

² Deposition transcript of Gary Fury, pages 9 and 15

additional visual cue in conjunction with the emergency flashers on the rear of the pickup of the hazard posed by the stopped vehicle. The dolly was so low that it did not obscure the lights on the rear of the pickup.

- Witnesses estimated that 10 – 20 drivers perceived the hazard and were braking and swerving into other lanes, thereby avoiding the stopped combination vehicle.
- Unfortunately, while other drivers did perceive the hazard posed by the stopped combination vehicle, for some reason Dr. Barth, the driver of the Mercedes, did not perceive Jesse's flagging movements, the pickup's tail lights, emergency flashers, the stationary dolly or the pickup itself prior to the actual impact.
- Dr. Barth indicated in his deposition that he was driving at 65 mph in the "middle" lane for about 15 – 20 minutes prior to this crash. He indicated that he did not see anything unusual before feeling the impact. "I simply told him (the investigating officer) I didn't know what happened."³
- One witness, Mr. Meeks, believed that there may have been a tractor-trailer rig in front of Dr. Barth's Mercedes, and that this tractor-trailer rig swerved violently to the right just prior to the Mercedes' collision with the stopped combination vehicle.
 - However, Dr. Barth did not mention to police or in deposition that a tractor-trailer rig swerved from in front of him just prior to the collision, and it would have been likely that he would have perceived and recalled a violent swerve by such a large vehicle if it had, in fact, swerved out from in front of him.
 - Furthermore, another witness, Mr. Angey, indicated that he was driving a Dodge pickup about three car lengths behind Dr. Barth's Mercedes and he did not report seeing a tractor-trailer rig swerve from in front of the Mercedes at any time.
 - In my opinion, more likely than not, there was no tractor-trailer rig in front of the Mercedes that would have obscured Dr. Barth's view of the flagger or of the stopped combination vehicle with its tail lights and emergency flashers on.
- According to my analysis and calculations, even without perceiving a flagger, hazard flashers or any other vehicles that were braking or swerving ahead, a normally alert driver paying reasonable attention to his driving duties should have begun to perceive that he was closing rapidly on this stationary combination vehicle from a distance of at least 276 feet away.
- By virtue of the fact that drivers in the northbound (and southbound) lanes perceived the hazard posed by the stopped combination vehicle with enough time to analyze the situation and take appropriate action, there must have been an

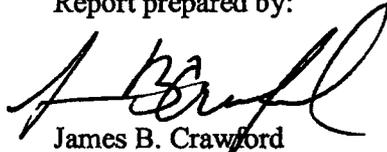
³ Barth deposition transcript, pages 47 & 48

adverse human factor that led to Dr. Barth failing to see anything unusual before impact in this case.

- o Dr. Barth indicated in his deposition and statement to police that he was listening to loud music, that he had consumed no alcohol prior to this trip, and that he had had ample sleep the night before this crash. In the absence of evidence to suggest any other adverse human factor, in my opinion Dr. Barth was simply not paying reasonable attention to his driving duties at the time of this crash, and if he had been paying reasonable attention this crash should have been avoidable.

Degree of certainty. The opinions expressed in this preliminary report are based on a reasonable degree of engineering and reconstruction certainty and on the information currently available for review and analysis. As additional information becomes available, please forward it to me for continued analysis.

Report prepared by:

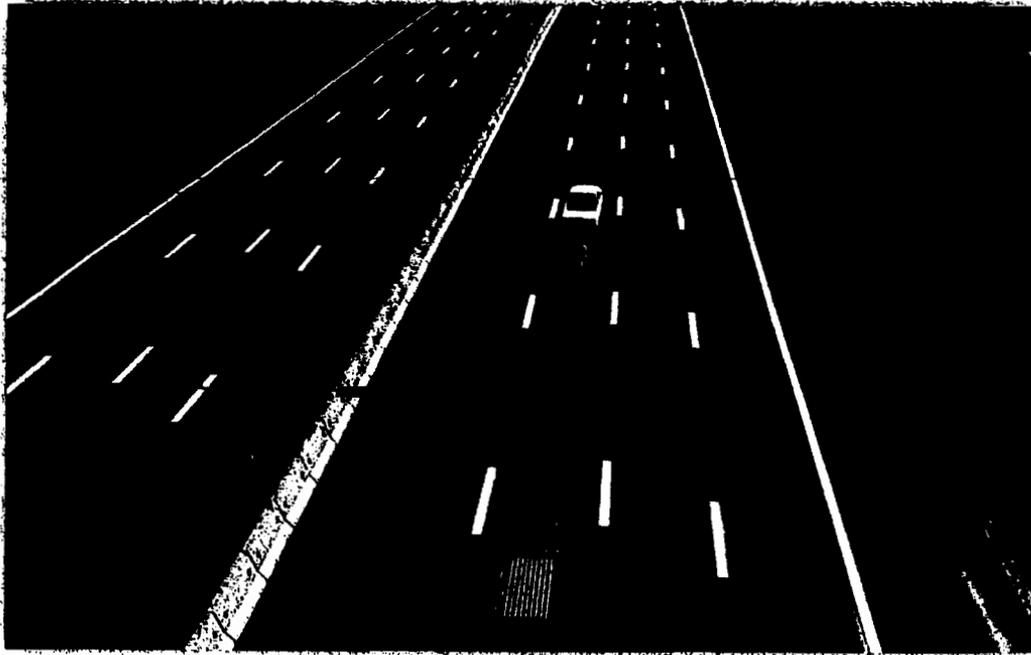


James B. Crawford
Reconstructionist
ACTAR #1030

Reviewed and assisted by:



Choya R. Hawn
Reconstructionist
ACTAR #1592



Impact



Final Rest

Reconstructionists

Henry P. Liplan
President
ACTAR #83

Dale K. Dent
ACTAR #853

James B. Crawford
ACTAR #1030

Dale W. Meyer
ACTAR #1179

Choya R. Hawn
ACTAR #1592

Thomas G. Walker
ACTAR #1802



CRASH RECONSTRUCTION SERVICES

1006 Vivian Drive, West
Grafton, Ohio 44044

(440) 926-2627 Phone • (440) 926-2684 FAX

Direct email:

JCrawford@IntrotechCrash.com

www.IntrotechCrash.com

Technical Investigators

R. Scott Danniger
Tom Tomasheski
Steven P. Maurer

James M. Drozdowski
Forensic Mechanic

Office Manager

Timothy P. Kallah

December 9, 2013

Mr. Craig Bashein
Bashein & Bashein Company, L.P.A.
35th Floor, Terminal Tower
50 Public Square
Cleveland, Ohio 44113

RE: Junior Lane (deceased)
Our File Number: 09-198

Supplemental Reconstruction Report

Dear Mr. Bashein:

Since my original reconstruction report dated May 9, 2013 I have I visited the scene of the crash on the night of December 4, 2013 where I took lighting measurements and performed rudimentary testing. I reviewed the deposition transcript of Detective Walentik and visited Brook Park Police station where I inspected the light bulbs from the dolly trailer involved in this crash.

Considering the afore-mentioned additional information, I was asked to perform further analysis to verify lighting conditions at the crash scene and to ascertain whether the tail light bulbs for the dolly trailer were illuminated at the time of the crash.

My light measurements were taken on the east paved shoulder because traffic density precluded taking readings in the travel lane of the freeway where the crash occurred. My measurements indicated that there were about 0.4 to 0.6 foot candles of light on the east shoulder, which was consistent with the design lighting for urban freeways according to the IESNA Lighting Handbook. Practically speaking, while I was on the east paved shoulder that night I was easily able to read a type written sheet with only the ambient light provided by the streetlights. This was what I considered to be a well lit road.

The tail lights for the dolly trailer were inspected in the presence of LT. Dolan of the Brook Park Police Department. The driver's side (left) tail light assembly sustained heavy damage from being struck by the Barth Mercedes. The passenger side (right) tail lamp assembly was not in the direct area of impact.

The trailer's passenger side bulb was still contained within the plastic tail light assembly enclosure, and a hole had been previously broken in the side of the plastic assembly, presumably to gain visual access to the bulb inside. LT. Dolan did not allow disassembly of the plastic tail light assembly, which precluded a thorough inspection of the bulb. With the limited inspection of this bulb I was not able to discern any damage to the glass envelope, the filament or the filament support posts, and so the result for the passenger side bulb was indeterminate.

The driver's side tail light assembly was in pieces. There was an evidence envelope that contained fragments of the plastic tail light assembly and containers with the insulator that surrounded the base of the filament support posts and fragments of filaments. Two of the filament support posts were discolored, which was indicative of the attached filament being *hot* when the glass envelope was broken during the impact. Furthermore, there was a very short piece of filament attached to one of the discolored posts that showed the beginning of stretching of the filament coils before they were broken off. Stretching of the filament coils only occurs when the filament is hot and ductile. Cold filaments break apart cleanly without stretching. The physical evidence on this bulb showed that it was most likely incandescent (light on) at the time of impact.



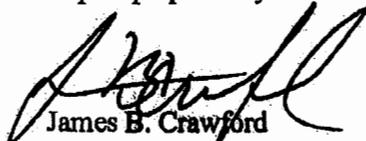
Introtech photograph of damaged filament and filament support posts from dolly's driver's side tail light bulb

The opinions expressed in my original report remain valid:

- Mr. Fury encountered an emergency situation where his trailer dolly was swinging from side to side wildly and was encroaching into adjacent lanes endangering other traffic. His decision to stop in his lane of travel to stop the trailer from encroaching into adjacent lanes was reasonable and prudent given the high traffic density which precluded changing lanes and the relatively well lit nature of the environment in that area of the freeway.
- By virtue of the fact that drivers in the northbound (and southbound) lanes perceived the stopped combination vehicle with enough time to analyze the situation and take appropriate action, there must have been an adverse human factor that led to Dr. Barth failing to see anything unusual before impact in this case. In my opinion Dr. Barth was simply not paying reasonable attention to his driving duties at the time of this crash, and if he had been paying reasonable attention this crash should have been avoidable.

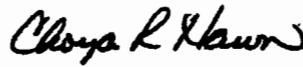
The opinions expressed in this *supplemental report* are based on a reasonable degree of engineering and reconstruction certainty and on the information currently available for review and analysis. As additional information becomes available, please forward it to me for continued analysis.

Report prepared by:



James B. Crawford
Reconstructionist
ACTAR #1030

Reviewed & assisted by:



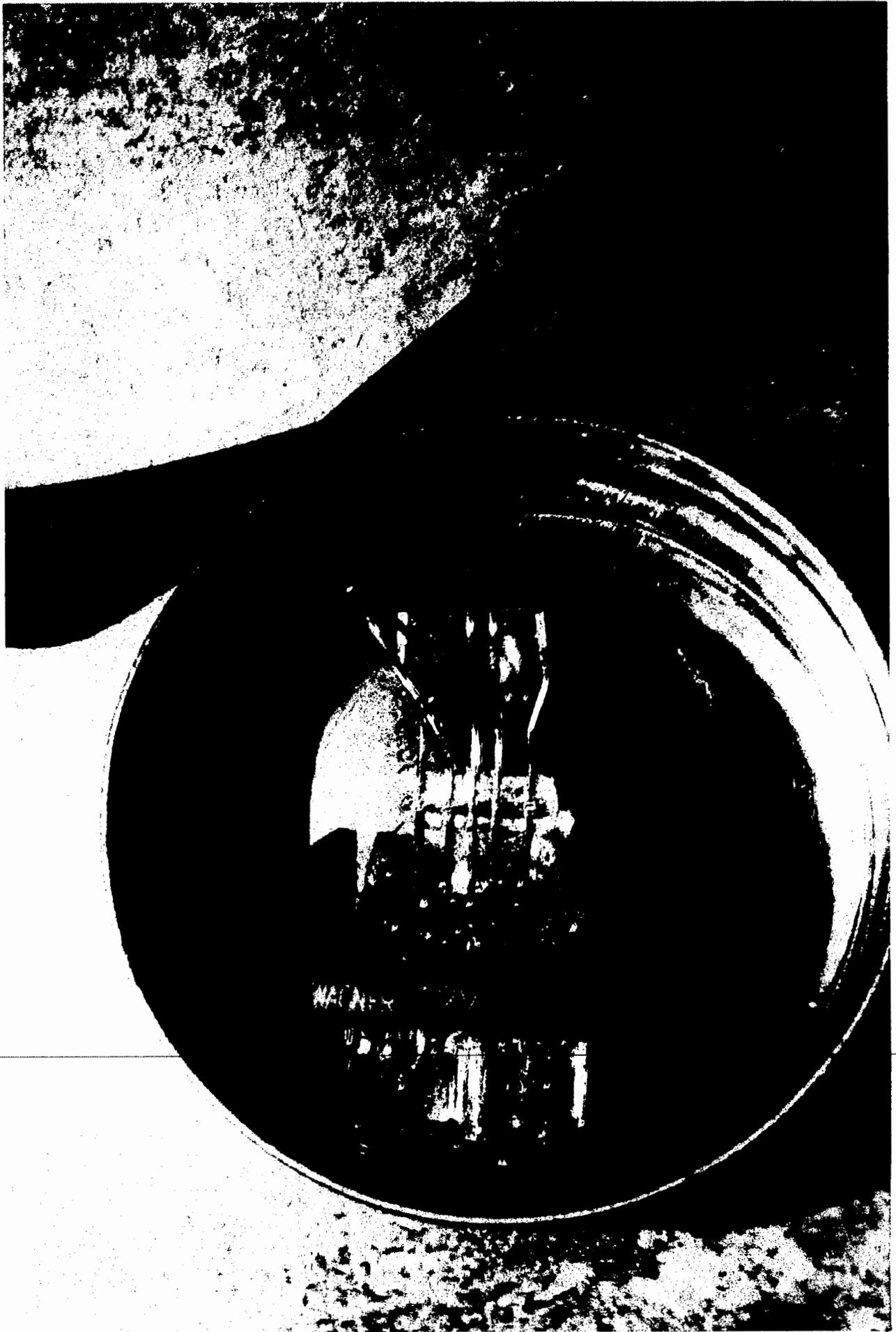
Choya R. Hawn
Reconstructionist
ACTAR #1592



















Collision Research & Graphics, Inc.

Timothy J. Tuttle
111 W. Washington St.
Norwalk, OH 44857
419-660-0548

April 11, 2013

Christopher P. Conomy, Esq.
Assistant Attorney General
Court of Claims Defense Section
150 East Gay Street, The 18th floor
Columbus, OH 43215

RE: Collision Research & Graphics, Inc. preliminary report concerning *Ferraro v. OSUMC*, Court of Claims Case No. 2011-10371.

Dear Mr. Conomy:

As requested, I have investigated and completed a reconstruction pertaining to *Ferraro v. OSUMC*, Case No. 2011-10371.

As you are aware, this case stemmed from a fatal traffic crash, which occurred on September 10, 2009. The crash occurred on Interstate 71 (I-71) approximately 300 feet north of milepost 254, in the city of Brook Park, county of Cuyahoga.

The crash involved two vehicles, a 1997 Dodge Ram pickup truck driven by Gary Fury, and a 2004 Mercedes G240 driven by Dr. Rolf Barth. At the time of the crash, at approximately 9:25 p.m., Mr. Fury's pickup truck was stopped on I-71 north, just north of Snow Road. Dr. Barth was also traveling northbound on I-71 and struck the rear of Mr. Fury's stopped pickup truck.

Prior to the collision, Jesse Fury and Junior Lane had exited Mr. Fury's pickup truck and were in the roadway attempting to reconnect a tow dolly, which had come loose from its connection at the back of Mr. Fury's pickup truck. This was the reason Gary Fury stopped his pickup in the roadway.

When the collision occurred, Junior Lane was located in the area where the two vehicles came in contact with each other and he was subsequently killed. Jesse Fury was not injured. Both Dr. Barth and Gary Fury sustained non-life threatening injuries resulting from the collision of the two vehicles.

You requested I address the speed of Dr. Barth's Mercedes at the time of the collision, and if Dr. Barth could have avoided striking the rear of Mr. Fury's pickup truck, as it was dark at the time of the crash.

Investigation

Your office provided the following items to me for my review:

- 1) The traffic crash report, BP0921131, completed by the Brook Park Police Department.
- 2) 150 Pictures taken by the Brook Park Police Department on the night of the crash, and subsequent to the crash.
- 3) The written transcripts of the recorded interviews of Anthony Angey, Peter Jung, Gary Fury, Chad Meeks and Dr. Barth, which were taken by Brook Park Police Department Detective Valentic.
- 4) The deposition transcripts of Dr. Barth, Gary Fury, Chad Meeks, Anthony Angey, Patrolman Thomas Chmura, Patrolman Joseph Klemenc, and Sergeant Myron Sulminski. The exhibits from Gary Fury's deposition were included, as well as the plaintiff's exhibits.
- 5) Evaluation of the Office of the Cuyahoga County Coroner's Toxicology Report, Dated January 26, 2010, for Junior Lane.
- 6) Criminal history of Gary Fury from records obtained from the Brook Park Police Department and the Berea Municipal Court.
- 7) Criminal history of Jesse Fury from records obtained from the Berea Municipal Court.

In addition to the above information, I obtained the following additional information:

- 1) The vehicle specifications for a 1997 Dodge Ram pickup truck, Gary Fury's vehicle, obtained from Vehicle Information Profiles.
- 2) The vehicle specifications for a 2004 Mercedes C240, Dr. Barth's vehicle, obtained from Vehicle Information Profiles.
- 3) Sun and moon data for one day for September 18, 2009, and April 6, 2013, which was obtained from U.S. Naval Observatory Astronomical Applications Department.
- 4) Illumination and luminance data I obtained from the crash scene on April 6, 2013.
- 5) Satellite photographs of the crash dated September 2009, obtained from Google Earth.

I-71 in the area where the crash occurred is an eight-lane highway consisting of four northbound lanes and four southbound lanes, which are divided by a four-foot high concrete wall. The Google Earth satellite photograph of the crash area, dated September 2009, indicates the pavement was in good condition.

The roadway is straight and has a slope of approximately -2%. The only lighting of the crash area comes from a luminaire (light) mounted on a dual-mast arm attached to a pole anchored to the top of the concrete dividing wall. The mast arm extends approximately 15 feet into the northbound lane, placing the luminaire approximately eight feet into the left-most lane, lane 4. The light poles are spaced approximately 233 feet apart.

The police investigators did a good job of identifying the location of the post-crash evidence. Surveying technology was used, referred to as forensic mapping, to locate the post-crash evidence. They then completed an after-crash scale diagram of the scene.

After reviewing the forensic mapping data and the after-crash scale drawing, which were included in the police report, I determined the area of impact was approximately 300 feet north of mile post 238, and was located in the 3rd lane - lane 1 would be the lane adjacent to the right shoulder. This places the area of impact approximately 68 feet north of a light pole. The illumination from the luminaire at this location was taken with a Minolta TL-1 illuminance meter, and was found to be .89 fc (foot-candles).

Reconstruction -- The Speed of the Vehicles at Impact

Once I identified where the impact area was, and knowing where the vehicles came to final rest from the P.D.'s measurements, I could then use the EDSMAC4 simulation program to determine the speed of the Mercedes when it struck the rear of the pickup truck. The speed of the Mercedes, driven by Dr. Barth, was determined to be approximately 50 mph when the collision occurred.

Gary Fury stated that when he had brought the pickup truck to a stop, that it was still in "drive," and he was holding his foot on the brake when the collision occurred. The results from the simulation analysis were consistent with Mr. Fury's statement.

Reconstruction -- The Visibility Analysis

On September 10, 2009, Sunset was at 7:45 p.m., and the end of Civil Twilight occurred at 8:13 p.m. The time of the crash was at 9:23 p.m., 70 minutes after the end of Civil Twilight, which would place the center of the sun more than 18 degrees below the horizon. This time is identified as Astronomical Twilight, which is the darkest part of the night.

On the night of the crash, the moon did not rise until 10:41 p.m., and at the time of the crash, was 11 degrees below the horizon - no moonlight was present. Therefore, the only illumination/lighting of the roadway was from the luminaire/s and vehicle headlights.

To determine if Jesse Fury, Junior Lane, and the pickup truck were visible and discernable to Dr. Barth as he approached them, the luminance of their clothing and the pickup truck needed to be determined.

The luminance can be calculated if the available light is known, and the reflectivity of the object, or the clothing the individual is wearing, is known. The calculated luminance values are then compared to luminance values categorized for daytime vision (Photopic), middle range vision (Mesopic), and nighttime vision (Scotopic).

The light level for each level is:

Photopic	003.4 cd/m ² or greater	During day time - minimum
Mesopic	00.34 cd/m ² to 003.4 cd/m ²	At the end of civil twilight
Scotopic	0.034 cd/m ² to 00.34 cd/m ²	Darkness

The luminance of objects which fall into the Mesopic to Scotopic range are unlikely to be visible, or discernable. The contrast ratio is typically less than 11, and the luminance is less than 3.4 cd/m², which does not allow objects to be visible, or discernable¹, until an approaching vehicle's headlights cast additional light on the object.

As you may recall, I visited the scene during the early morning hours of April 6, 2013. I chose this night, as the conditions would be the same as the night of the crash - clear skies, no moonlight, and the sun was more than 18 degrees below the horizon. The available light was measured, which was found to be .89 foot-candles (fc) at the collision area.

The reflectivity values that were used in the analysis are published values, which were consistent with my own testing of the surfaces and clothing pertaining to this case. A reflectivity of 5% was used for denim, 60% was used for the white surfaces, and 13% was used for the pavement - the background.

The luminance was calculated for denim (blue jeans) and the white shirt Jesse Fury was wearing on the night of the crash. Junior Lane was wearing blue jeans (denim) as well. And the pickup was white.

The calculated luminance values all fell within the Scotopic range, or the lower Mesopic range. Therefore, these objects were not visible, or discernable, to the eye.

The contrast ratios were all less than 11, except for the comparison of denim against the background of white, which was 12. However, the low light conditions fell into the lower range of the Mesopic range, which creates a condition where there is not enough light for the eye to discern what the object is.

In summary, without the additional light from an approaching vehicle's headlights, neither Jesse Fury, Junior Lane, or the pickup were visible, or discernable, by a northbound driver approaching the stopped pickup truck.

The taillights of the pickup were reported to be on. However, from a visual analysis standpoint, this doesn't mean a driver could discern the pickup was stopped, allowing the driver to take evasive action in sufficient time. At distances in excess of 150 feet, the width of the vehicle's taillights would seem to be at a consistent width by the eye in

relationship to the surrounding traffic. Therefore, there is no alarm to the approaching driver that the stopped vehicle is a hazard until the driver is approximately 150 feet from the vehicle. At a distance less than 150 feet to the stopped vehicle, the separation of the taillights increases, signaling to the mind a problem exists.

It is at this same distance -- approximately 150' -- the vehicle's headlights would provide the additional lighting needed to discern the pickup was stopped, and evasive action was required.

Traveling at 60 mph, and at a distance of 150 feet from the stopped pickup truck, the approaching driver only has approximately 1.7 seconds to react and take evasive action. This is why the witnesses stated they either were required to swerve to miss the pickup as they almost hit it, or they observed vehicles swerving erratically to avoid the stopped pickup.

Reconstruction -- The Actions of the Occupants of the Pickup Truck.

Prior to the crash occurring, Gary Fury, with the assistance of Jesse Fury and Junior Lane, attempted to load a car onto the tow dolly at Gary Fury's Engle Road address. As the car would not fit onto the dolly -- Gary Fury's testimony -- they departed the Engle Road location to return the tow dolly.

At the Engle Road location, Gary Fury stated Junior Lane had unhooked the tow dolly after they determined they would not be able to use it. Once Gary realized this occurred, he told Junior to reattach it. Gary Fury stated he never checked to make sure Junior correctly attached the tow dolly, which was Gary Fury's responsibility to do before leaving the Engle Road address.

It is 1.8 miles from the Engle Road address to where the Snow Road ramp enters I-71 north. Within .3 of a mile after entering I-71 north, Gary Fury changed from lane 1 to lane 3, realized there was a problem with the trailer, and brought the pickup to a stop in lane 3.

After stopping in lane 3, Jesse Fury and Junior Lane exited the vehicle. Jesse Fury attempted to warn traffic the truck was stopped in the roadway by waving his white shirt, as he was standing in the roadway. However, as I discussed earlier, oncoming traffic could not see Jesse Fury, so his actions served no purpose, other than putting himself in harms way.

According to Gary Fury, it was Junior Lane's intent to reattach the trailer. My investigation indicates Junior had disconnected the tow dolly's safety chains from the pickup, and then he rested the tow dolly's ball hitch on the pintle hitch behind the ball.

Prior to the impact occurring, Junior Lane had jumped/moved to the left, towards lane 4, to avoid being struck by Dr. Barth's Mercedes - Gary Fury's testimony. However, the Mercedes struck the left side of the tow dolly and then the left side of pickup truck, which is how Junior became trapped under the Mercedes.

Stopping in the road, and then allowing Junior and Jesse to exit the vehicle, was not an appropriate choice for Gary Fury to make. If the vehicle could truly not be moved to the right shoulder, they all should have exited the vehicle and moved to the right shoulder, as it was certain the vehicle was going to be hit by an approaching vehicle after the pickup was brought to a stop. This is evident by Jesse Fury's frantic actions to try and get traffic to avoid hitting the stopped truck; he realized the stopped truck, and Junior Lane, were in grave danger of being hit by an oncoming vehicle.

Reconstruction - The Actions of Dr. Rolf Barth

There is no evidence to indicate Dr. Barth was operating his Mercedes in an unsafe manner, or an unsafe speed. Dr. Barth stated he wears contact lenses, and that he was wearing them the night of the crash.

Dr. Barth and the witness testimony, indicate a vehicle may have been in front of him prior to the crash occurring. If this was the case, and this vehicle swerved to avoid the stopped pickup truck, he would have been put in a position where he had no opportunity to see the stopped pickup truck before striking it.

He stated to the police that all he recalled was the impact, which is consistent with a vehicle blocking his view of the stopped pickup, or as I stated previously, the stopped pickup wasn't discernable.

Conclusions

- 1) This traffic crash occurred during nighttime hours, under minimal lighting conditions.
- 2) Jesse Fury, Junior Lane, and the pickup truck were not discernable at a distance that would allow an approaching driver to safely move around the stopped pickup.
- 3) Although the taillights on the stopped pickup truck may have been on, they would not have given ample warning to an approaching driver that the pickup was stopped in the roadway.
- 4) Although several drivers did manage to avoid striking the stopped pickup, it was inevitable that the pickup was going to be struck by an oncoming vehicle -- based on conclusions 2 & 3.
- 5) Dr. Barth was operating his vehicle in a safe and prudent manner prior to the crash occurring.
- 6) The proximate, exclusive cause of this crash was Gary Fury's failure to make sure the tow dolly was correctly attached to the rear of his truck, prior to leaving the Engle Road address, and then entering I-71 north.

7) The secondary contributing cause to this crash was Gary Fury's decision to stop in lane 3 of I-71, a heavily traveled freeway, rather than pulling the vehicle to the right shoulder.

These opinions are based on a reasonable degree of scientific, engineering and traffic crash reconstruction certainty.

If additional information becomes available subsequent to the submission of this report, I reserve the right to amend or expand upon the conclusions and opinions provided at this time.

Sincerely,


Timothy J. Tuttle

¹ Abrams, Bernard S. *Forensic Aspects of Vision and Highway Safety, Forensic Vision and Human Factors in the Courtroom*, 14:283-320, 1996