CAUSE NO. D-1-GN-07-000682

JOHN DOE,	§	**IN THE DISTRICT COURT**
Plaintiff,	§	
	§	
v.	§	**250TH JUDICIAL DISTRICT**
	§	
I.E.S.I. CORPORATION,	§	
Defendant.	§	**TRAVIS COUNTY, TEXAS**

PLAINTIFF'S MOTION TO EXCLUDE TESTIMONY OF LEONARD R. CARNEY, M.D.

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, JOHN DOE, Plaintiff in the above-styled cause, and hereby files this Motion to Exclude Testimony of Leonard R. Carney, M.D., and in support thereof, would respectfully show the Court as follows:

I.
FACTUAL BACKGROUND

Plaintiff John Doe (hereinafter, "Plaintiff") brought this lawsuit against Defendant I.E.S.I. Corporation (hereinafter, "Defendant") for serious personal injuries suffered in an automobile collision, on or about March 23, 2005, between Plaintiff's vehicle and Defendant's garbage truck being driven by one of Defendant's employees. Suit was filed in early 2007, and the case was originally set for trial on February 25, 2008.

On or about December 18, 2007, just a day before mediation was scheduled between the parties, Defendant designated and disclosed, for the first time, its retained expert, Leonard R. Carney, M.D. (hereinafter, "Dr. Carney"), a neurologist, to provide causation opinions in favor of Defendant, i.e., that Plaintiff's injuries and medical treatment were not proximately caused by the collision. Trial has been continued twice, and is presently set for November 3, 2008.

Plaintiff's counsel took the deposition of Dr. Carney on March 18, 2008. Plaintiff now moves to strike several of Dr. Carney's opinions, for reasons set forth in detail below.

II.
ARGUMENT & AUTHORITIES

This Court has the authority and responsibility of determining which expert opinion testimony shall be admitted into evidence. *E. I. Dupont de Nemours & Co. v. Robinson,* 923 S.W.2d 549, 553 (Tex. 1995). While it is the duty of the jury to decide what weight to give evidence in its deliberations, it is the function of the Court to ensure that expert testimony is of sufficient validity to warrant its admission into evidence. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993). The rules of evidence in Texas permit an expert witness to testify on "scientific, technical, or other specialized" subjects if the testimony "will assist the trier of fact to understand the evidence or determine a fact in issue." Tex. R. Evid. 702. To meet these standards, a party must establish that its expert is not only qualified, but that the proposed testimony is both relevant and reliable. *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 499 (Tex. 2001).

The Supreme Court of Texas has interpreted Texas Rule of Evidence 702 in order to formulate the standards for admissibility of expert testimony. In particular:

> [I]n addition to showing that an expert witness is qualified, Rule 702 also requires the proponent to show that the expert's testimony is relevant to the issues in the case and is based on a reliable foundation. … In order to constitute scientific knowledge which will assist the trier of fact, the proposed testimony must be relevant and reliable. … [T]he underlying scientific technique or principle must be reliable. Scientific evidence which is not grounded "in the methods and procedures of science" is no more than "subjective belief or unsupported

speculation." Unreliable evidence is of no assistance to the trier of fact and is therefore inadmissible under Rule 702.

Robinson, 923 S.W.2d at 556-57 (emphasis added).

Robinson identified a list of non-exclusive factors the trial court must consider in making the threshold determination of admissibility:

(1) extent to which the theory has been or can be tested;

(2) extent to which the technique relies upon subjective interpretation of expert;

(3) whether the theory has been subjected to peer review and/or publication;

(4) the technique's potential rate of error;

(5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and,

(6) the non-judicial uses which have been made of the theory or technique.

Id. at 557 (emphasis added).

When a party objects to the proposed expert's testimony, the proponent of the expert bears the burden of demonstrating the admissibility of the testimony. *Id.* The Court has a crucial "gate-keeping" obligation to ensure that the testimony satisfies the requirements set forth above before being ruled admissible. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).

Plaintiff asserts that the Court should exercise its gate-keeping role and exclude the testimony of Dr. Carney as to proximate causation, because it does not meet the judicial and evidentiary standards for admissibility. Defendant now bears the burden and must establish the expertise and reliability of Dr. Carney's opinions. For the reasons that follow, Plaintiff is quite certain that Defendant cannot meet this burden.

A. Dr. Carney's opinions cannot have a reliable foundation as a matter of law,

because they consciously and deliberately ignore the facts in evidence.

Dr. Carney's initial expert opinion report, attached hereto as "Exhibit A," was disclosed to Plaintiff on December 18, 2007. On the last page of that report, under the heading OPINION, Dr. Carney delivers a number of impressive-sounding conclusions as to why Plaintiff's major injuries and neuro-surgery were not proximately caused by the accident. *See* Exhibit A (Report of Dr. Carney), at 4. Specifically, he makes the following very definitive pronouncements, the problem being that the factual bases for those pronouncements are completely false:

(1) "The patient's symptoms and signs were obviously early regarding involvement of the right upper extremity and in my opinion, were in no way related to his MVA of 3-23-05. Specifically, the complete lack of cervical symptomatology at that time [Seton ER] with a targeted exam to the area in question, the documentation of lack of pain and full neck range of motion and no evidence of root problems, is highly suggestive that the only injury that occurred as a result of the said accident was some low back pain…." Exhibit A, at 4 (emphasis added).

(2) In the latter part of the opinion, he goes on to state: "There is no evidence because of the chronologic sequence of events that aggravation of the cervical spondylosis occurred as a result of the MVA in my opinion. There were no early signs of significant cervical trauma present, either at his emergency room visit, his first visit to Dr. Queng post-accident, or anytime thereafter." *Id.* (emphasis added).

The major problem with the reliability and foundation for Dr. Carney's opinions is that the opinions rely on factual assertions that are both objectively and demonstrably false. Plaintiff would draw the Court's attention to the first medical record referred to, the emergency room (E.R.) record of Seton Hospital, attached hereto as "Exhibit B." Specifically, the fifth page of

the E.R. records, not counting the affidavit of business records, clearly displays on the bottom half of the page, under the heading 'Differential Dx' (or, differential diagnosis) that head injury, cervical strain, and muscle spasm are listed. *See* Exhibit B (Seton E.R. record), at 5. This renders Dr. Carney's factual assertion in his above-quoted opinion letter, that there was a "complete lack of cervical symptomatology at that time [Seton ER]," objectively false. Further confirmation is found in the type-written discharge instructions given to Plaintiff by the Seton E.R. staff, specifically at the bottom of the eighth page to the middle of the ninth page, wherein it begins by saying, "You have suffered injuries in a car crash," and goes on to clearly state, "Neck muscle strains are very common with car crashes and can cause moderate pain and spasm. … Please see your doctor or return here for follow-up care as advised." *Id.* at 8-9. Obviously, Plaintiff presented cervical pain to the Seton E.R. doctor and staff, otherwise cervical strain would not have been prominently circled on page 5, muscle spasm would not have been prominently hand-written just under that, and discharge instructions would not have been specifically given regarding neck strain, pain, and spasm, on pages 8-9. *See id.* at 5, 8-9. For Dr. Carney to rely on the sweeping assertion that there was a "complete lack of cervical symptomatology" (Exhibit A, at 4, emphasis added), and then base his opinions about proximate causation on that supposedly factual assertion, demonstrates that this opinion is completely unreliable and without foundation.

Furthermore, the second medical record referred to in the above-quoted opinions of Dr. Carney is Plaintiff's post-accident visit to Dr. Queng, his primary care physician, attached hereto as "Exhibit C." Again, Dr. Carney makes the bold-faced assertion that there were "no early signs of significant cervical trauma present, either at the emergency room or at the first visit to Dr. Queng, post-accident….." Exhibit A, at 4 (emphasis added). The first part of that assertion

has already been thoroughly refuted above, because there were signs of significant cervical trauma in the Seton E.R., specifically, cervical strain, muscle spasms, and neck pain noted. *See* Exhibit B, at 5, 8-9. The second part of that assertion is also demonstrably and objectively false, because Plaintiff did present with cervical pain to Dr. Queng; specifically, on the third page of the Austin Regional Clinic records, not counting the affidavit of business records, is the record of the March 28, 2005 visit to Dr. Queng, five (5) days after the accident and Seton E.R. visit. In that record, it is noted that there was an MVA on March 23, 2005, and the patient was complaining of spine tingling. *See* Exhibit C, at 3. It goes on to state, under the subjective history section, that the patient was complaining of, "Some neck pain with forward flexion." *Id.* Again, for Dr. Carney to base his opinions regarding proximate causation on the glaringly false statement that there was no sign of cervical trauma present, either in the E.R. (addressed above) or in the first visit to Dr. Queng (which specifically mentions the patient complaining of neck pain with forward flexion and tingling of the spine), speaks volumes about the credibility, reliability, and foundation for his testimony, or lack thereof.

B. Under questioning, Dr. Carney further exposes the lack of reliability and foundation for his opinions with absurdly strained subjective interpretations of the facts in evidence.

Plaintiff's counsel took the deposition of Dr. Carney on March 18, 2008, and the transcript of the deposition is attached hereto, as "Exhibit D." In it, Dr. Carney was questioned as to the above-mentioned glaring errors. His absurdly strained subjective interpretations of the medical records, combined with other answers given in his deposition which Plaintiff will highlight below, demonstrate just how far this supposed expert goes in advocating for Defendant. Furthermore, one of the more comical interpretations he came up with was also objectively

proven false when Plaintiff's counsel subsequently deposed Plaintiff's treating doctor, Dr. Queng. The following excerpts from Dr. Carney's deposition almost speak for themselves:

(1) Regarding the notations of cervical strain and muscle spasm in the Seton E.R. report, Dr. Carney claimed to have talked to a 'Dr. Snyder' in the Seton E.R. and had an informative discussion regarding what was meant by the 'Differential Dx' section of the E.R. record. *See* Exhibit D (Deposition of Dr. Carney), at 22 (line 9) – 23 (line 20). However, when questioned further by Plaintiff's counsel, it became clear that this "conversation" was not detailed at all, and Dr. Carney certainly did not ask the vital questions that would be necessary to laying a foundation for his opinions about the E.R. report:

> Q. Okay. And why is muscle spasm on the report; did you ask him that?
>
> A. No, I didn't ask him that. I only referred to the differential diagnosis.
>
> Q. Well, under differential diagnosis, there's a – written in, muscle spasm.
>
> A. Yes.
>
> Q. Okay. Did you ask him why he wrote in muscle spasm?
>
> A. <u>I didn't need to.</u>
>
> Q. So what do you think is the reason he wrote in muscle spasm?
>
> A. <u>Because it wasn't there.</u>

Id. at 24 (line 23) – 25 (line 10) (emphasis added).

> Q. Did he tell you that cervical strain wasn't there, that's why he circled it?
>
> A. No, he didn't say that specifically.

Q. Did he say that muscle spasm wasn't there, that's why he wrote it in and circled it?

A. No.

Id. at 25 (lines 16-21).

In other words, Dr. Carney is attempting to give a completely subjective interpretation to the fact that the words "cervical strain" and "muscle spasm" are prominently circled in the E.R. record, under the differential diagnosis (and in fact, muscle spasm is actually handwritten in and circled). His subjective opinion is that they are written in and circled to show that they were <u>not</u> there, i.e., the Plaintiff was not suffering those symptoms. When asked for his basis for that opinion, he testifies that he had a conversation with an E.R. doctor at Seton, yet upon questioning, he admits he did not even ask the very questions of that doctor that would have definitively answered the question and established whether, in fact, the patient had those symptoms or not. Dr. Carney is so "sure" of his opinions that he does not even feel the need to seek out the information that is crucial to laying a foundation for those opinions.

(2) This same line of questioning is revisited later in the deposition, and again Dr. Carney's stubborn refusal to acknowledge that he did no inquiry to seek or confirm the very information he was using to form his opinions is clear to see:

Q. Okay. So then if we – so then we really need to find out from the doctor who did the emergency room, the doctor or the nurse practitioner who did the emergency room workup as to what was meant in this differential diagnosis of head injury, muscle spasm, and cervical strain;

right?

A. I did that for you.

Q. No. But when I take his deposition, if his conclusions are different than yours, would it impact your opinions?

A. No, I don't think it would. But I asked him for you.

Q. Well, you – you've told the jury and I want to make sure. You didn't ask the jury – you didn't ask him whether or not he had the cervical muscle spasm, did you?

A. No. But it's obvious from the record.

Q. You didn't ask him.

A. There are a lot of things I didn't ask him.

Q. Okay. You didn't ask him whether he had cervical strain at the time, did you?

A. No, I reviewed the records.

Id. at 49 (line 14) – 50 (line 11) (emphasis added).

Again, Dr. Carney makes the strained subjective interpretation of the E.R. record that the reason cervical strain is circled, and the reason muscle spasm is specifically handwritten in and then circled, is to show that they were not present. In fact, he is so sure of his opinion that he says it is "obvious from the record," above. Yet, when he had the opportunity to ask and clarify once and for all from the E.R. doctor, he specifically chose not to do so, presumably because he might not have liked the answer. Plaintiff would assert to the Court that the only thing that is "obvious from the record" is that the E.R. doctor or staff at Seton made a

specific point of circling 'cervical strain,' and handwriting and circling 'muscle spasm' directly underneath that (*see* Exhibit B, at 5), and also specifically gave the patient written discharge instructions regarding neck muscle strain and spasms (*see* Exhibit B, at 8-9). Any testimony from Dr. Carney to the contrary is nothing more than baseless speculation, insofar as he had the opportunity to confirm or deny his opinions with the Seton E.R. doctor and specifically chose not to do so. This is not the type of testimony that can be considered reliable under a *Daubert/Robinson* analysis.

(3) The crushing blow is when Dr. Carney admits that his opinion relies upon this assertion:

> Q. Okay. All right. Now, you say – also you say specifically the complete lack of cervical symptomatology at that time with a target exam to the area in question. So your opinion relies upon there being a complete lack of symptomology at the E.R.?
>
> A. Related to the neck.
>
> Q. Correct.
>
> A. Yes.

Exhibit D, at 65 (lines 10-17) (emphasis added).

In other words, Dr. Carney has actually performed the *Daubert/Robinson* analysis for the Court, and has made the Court's determination easy: he himself admits that his opinion relies on the foundation that there was no cervical symptomatology in the Seton E.R. record, when in fact that very record clearly indicates the cervical symptoms already described at length above, both in the

chart and in the written discharge instructions to the patient. He further admits in testimony above that he did not inquire with the Seton E.R. doctor about the cervical strain or muscle spasms when he had the chance; he instead chose to rely on his own subjective interpretation of the record, and goes so far as to stubbornly and arrogantly declare that it is "obvious from the record." The *Robinson* court has made clear that one of the key factors in adjudging the reliability and admissibility of an expert's testimony is the extent to which it relies upon an expert's purely subjective interpretations. *Robinson*, 923 S.W.2d at 557.

(4) Plaintiff's counsel also questioned Dr. Carney regarding the fact that the patient came into his first visit with Dr. Queng, his primary care physician, five days post-accident, on March 28, 2005 with complaints of neck pain. This would seem to belie Dr. Carney's opinion regarding complete lack of cervical symptomatology and no signs of cervical trauma. What follows are excerpts of the deposition on that topic, which are almost comical in nature, demonstrating the absurd lengths to which this expert will go in advocating for the defense:

> Q. That's correct. Okay. And – so here we have five days after a collision, Mr. Doe has symptoms; correct?
>
> A. He had symptoms.
>
> Q. Okay.
>
> A. But wait, can I finish my answer on that?
>
> Q. You can go ahead.
>
> A. Okay, when a doctor – it is possible and probable that his neck actually was not significantly bothering him. But when a doctor does forward

flexion – I don't know why you're laughing. I'm just trying to give you an honest answer. When a doctor does forward flexion on a patient who has severe cervical spondylosis, of course, it's gonna pain him.

Exhibit D, at 33 (line 20) – 34 (line 9).

In other words, Dr. Carney is now re-interpreting the medical record of Plaintiff's visit to Dr. Queng to put forth the absurd theory that Plaintiff had no real neck problems, but once Dr. Queng examined him and flexed his neck forward, this is when all the cervical symptoms began and his neck became symptomatic:

Q. Okay. Thank you. Now, but your opinion here is that he must have become symptomatic because the doctor pushed his neck forward; is that right?

A. That is very common in cervical spondylosis.

Q. Is this what your –

A. <u>That is my opinion</u>.

Id. at 35 (lines 17-23) (emphasis added).

Q. Well, but I want to know what your answer to that question is, within reasonable medical probability.

A. In reasonable medical probability, this patient had progressive cervical spondylosis and the doctor moving his head forward elicited some of the symptoms because of the underlying degenerative disease.

Id. at 39 (lines 1-6).

The medical record of the visit to Dr. Queng is clear and unambiguous in noting that the patient came in complaining of "neck pain with forward flexion" as well

as "spine tingling," and the complaint of neck pain is located within the 'subjective history' section before the doctor's 'exam' section. *See* Exhibit C (March 28, 2005 visit to Dr. Queng), at 3. Nevertheless, in an attempt to advocate for the defense as much as possible, Dr. Carney here suggests it was Dr. Queng's exam itself, in which he flexed the patient's neck forward, that caused Plaintiff's neck to become symptomatic. In order to show how nonsensical this theory is, Plaintiff's counsel had to take Dr. Carney through the medical record of March 28, 2005, line by line, in order to establish what part of the medical record consists of 'history' (i.e., the subjective complaints that the patient made upon coming in to see the doctor) and what part consists of 'exam' (i.e., the objective determinations that the doctor made upon actually examining the patient):

Q. Evaluated at Seton Main E.R., is that history?

A. That's history.

Q. What does that fourth one say?

A. Basically that he was treated with Vicodin and muscle relaxers.

Q. Is that history?

A. That's history.

Q. Is some neck – I'm sorry – some mid-back pain with prolonged sitting, is that history?

A. That's history.

Q. Okay. Is this – what's – skip the next one. Let's go to the next one. It says something no bowel, bladder –

A. Symptoms.

Q. – symptoms, is that history?

A. History.

Q. Okay, and the next one says something –

A. Something about getting relief with the medications above.

Q. That's history?

A. That's history.

Q. Okay. And then it says no prior meds?

A. Meds.

Q. No prior neck and what else?

A. Back.

Q. – problem, is that history?

A. That's history.

Q. So what you're telling this jury is this entry that says some neck pain with forward flexion isn't just Mr. – the doctor just recording that Mr. Doe has told him that when he flexes his neck forward, he has pain?

A. It is more likely that that was detected on examination.

Q. Well, he hasn't even started examination yet, Doc. He's – he's – everything you've indicated this indicates history and every – every entry here is historical.

A. Yes.

Q. And what you want to tell the jury right now is that every entry that has a line behind it under history is historical except for some neck pain with forward flexion?

A. Right. He brought that forwards and upwards. If you look down where you've marked with the yellow pencil, you'll see where it was recorded on his exam then it was extrapolated afterwards.

Q. Well, I – so you're saying, then, that he wrote the exam first and then did the history?

A. No. I imagine he did this all at the same time, but what I'm saying is that he did the forward flexion maneuver. That's clearly in the exam part.

Id. at 69 (line 15) – 71 (line 16)

Thus, Dr. Carney, after being shown that the medical record of Dr. Queng, dated March 28, 2005, five days after the accident, showed that the patient was complaining of neck pain with forward flexion, proffers the absurd explanation that the neck pain must have started when Dr. Queng flexed his neck. When shown that the initial complaint of neck pain was located in the 'history' section of the medical record, Dr. Carney does his best to make a strained and ridiculous suggestion that, even though every other entry around the neck entry, all located under the 'history' heading, is historical, the neck entry is not historical in nature, but pertains to the exam.

(5) Fortunately for the Court, Plaintiff's counsel has also made this issue very easy to resolve and rule upon. Plaintiff's counsel subsequently proceeded to take the deposition of Dr. Queng, on July 31, 2008, in order to expose how nonsensical and factually baseless Dr. Carney's opinion was. The deposition of Dr. John Queng is attached hereto as "Exhibit E." In it, Plaintiff's counsel put the issue to rest once and for all:

Q. Okay. Could you explain for the jury for each paragraph, what – what each paragraph represents in terms of the way you've organized your medical note?

A. So the top part, which is on that third line, which is labeled "/S," stands for subjective, and it's the – basically the history that we write down from the patient's perspective.

Q. Okay.

A. And then the second section, which is kind of midway down, which says "O" and the hash marks, stands for objective, which is basically the physical exam.

Q. Okay.

A. And then the bottom part, which is "A/P," is the assessment and plan, which is the assessment of what we think is going on and then the plan for whatever the diagnosis is.

…

Q. Okay. Now, do you make a practice of taking the patient's history before conducting any type of exam or assessment or plan?

A. Yes.

Exhibit E (Deposition of Dr. Queng), at 9 (line 24) – 11 (line 2).

Q. All right. If there were an expert medical witness, such as a doctor, retained by the defense in this case who testified an opinion that what this particular line means is that Mr. Roy – Mr. John Doe had neck pain that developed upon the doctor flexing his neck forward, is that an accurate

interpretation of what this sentence in this section means?

A. No. Because I haven't checked him out yet. I'm just talking to him.

Q. Right. So what would be the accurate interpretation in your opinion, Doctor?

A. That – he told me that when he moves his head – neck forward it hurts.

Id. at 14 (line 11) – 15 (line 1) (emphasis added).

Q. Okay. So that's – that's the history that he's coming into you with, and that's before you actually perform any physical examination on him, correct?

A. Right.

Q. Okay. So then if a doctor were interpreting it to say – if there were a doctor who interpreted this medical record to note that the patient never complained of any neck pain until after – the patient had no history of neck pain until after you performed forward flexion on his neck, is that a correct reading of this record? Or has – or has the patient made a complaint of neck pain before your physical examination?

A. The patient has complained of neck pain before my physical exam.

Id. at 19 (line 11) – 20 (line 3) (emphasis added).

Despite his best efforts, Dr. Carney's attempt to subjectively re-characterize the March 28, 2005 medical note of Dr. Queng falls flat. In the subsequent deposition, Dr. Queng clearly and unambiguously states what any reasonable person reading his medical record could have already determined: that Plaintiff clearly reported cervical symptomatology before coming in to see Dr. Queng and

complained of the neck pain before Dr. Queng performed any type of physical examination upon him. It was most definitely not the case that Plaintiff only began suffering cervical symptoms after Dr. Queng manipulated or flexed his neck, despite Dr. Carney's most zealous attempts to proffer this fanciful theory.

(6) Other parts of the deposition go to show Dr. Carney's evident leanings and dispositions toward the defense. As the deposition was concluding, Plaintiff's counsel wanted to make sure that all of Dr. Carney's opinions on the case had been discussed:

> Q. Okay. So all of your opinions that – that – regarding this patient, this person, Mr. Doe, are contained in your report?
>
> A. They are.

Exhibit D (Deposition of Dr. Carney), at 97 (lines 14-17).

Dr. Carney emphatically denied being an advocate for the defense:

> Q. I want you to answer my questions because – I mean, let me ask you this, are you an advocate for the defense or –
>
> A. Absolutely not.
>
> Q. – are you an independent witness here to tell the truth?
>
> A. I'm independent. I'm not an advocate.

Id. at 98 (lines 18-24).

However, when given the opportunity at the end, Dr. Carney betrays his eagerness to say all that he can:

> Q. Do you want to discuss anything else?
>
> A. Plenty. I could go to town on this case.

Q. Good. Go ahead. I want you to go to town.

[Defense Counsel: Objection, form.]

Q. No, I'm not done. I want – you said you could go to town on this case. I want you to state any other opinions that you have. You can say anything else you want to say about Mr. Doe.

A. No, I –

[Defense Counsel: Objection, asked and answered. He said his opinions were in the report.]

A. The opinions are in the report. I'll leave it there.

Id. at 99 (line 24) – 100 (line 11).

Clearly, Dr. Carney is eager to do all that he can for the defense, but it was only after being shut down by his own defense counsel that he restrained himself.

C. Dr. Carney's causation opinions fail to meet the *Robinson* standards, and he should be prohibited from providing such opinions at trial.

The above excerpts of deposition testimony, compared against the facts in evidence, demonstrates that Dr. Carney's testimony fails to pass muster under *Robinson*, and must be excluded in this case. Particularly:

(1) Dr. Carney's opinions about proximate causation rely upon two flatly untrue statements, which are not simply matters of interpretation or disagreement, but which are objectively, demonstrably, and provably false. He states that there was a "complete lack of cervical symptomatology" in the Seton E.R., and that the patient had "no early signs of significant cervical trauma" either at the E.R., or in his first visit post-accident to Dr. Queng, five days later.

(2) The E.R. record speaks for itself, in that 'cervical strain' was circled by the doctor and/or nurse preparing the chart, and furthermore, 'muscle spasms' were handwritten in and circled, directly under that. Furthermore, the patient was given discharge instructions specifically referencing neck muscle strains and muscle spasm, how to treat them, and to follow up with his own doctor as instructed. Dr. Carney is free to be delusional and deny this fact, but he cannot deny that his opinion lacks all factual foundation or reliability, particularly when he opted to call the Seton E.R. doctor but conveniently neglected to ask the very questions that would have put to rest this issue once and for all.

(3) Dr. Queng's medical note also speaks for itself in that the patient came in to see him, five days after the accident, complaining of "spine tingling" and "neck pain with forward flexion." The doctor's examination of him confirmed the patient's subjective complaints. Thus, all indications here are also that the patient had signs of neck trauma at this visit. In characteristic zealous advocacy style, Dr. Carney proffers the theory that the patient did not become symptomatic with neck pain until after Dr. Queng manually flexed his neck forward. The absurdity of this theory and its complete lack of basis in reality are self-evident. However, in order to put the issue to rest, Plaintiff's counsel took the deposition of Dr. Queng and confirmed, through Dr. Queng's explicit and unambiguous testimony, that the patient came in complaining of the neck symptoms well before Dr. Queng actually performed any physical exam on him.

In light of the above, Dr. Carney must be excluded from offering any testimony on proximate causation of the neck injury and surgery. Under a *Robinson* analysis, Dr. Carney's

testimony fails because he has put forth nothing more than, at best, strained subjective interpretations, and at worst, outright denial of basic facts. There can be no reliability or foundation for such opinions.

The best analogy Plaintiff can offer is this: suppose there were a case where the plaintiff and defendant were involved in an automobile collision where the defendant ran a stop sign. The defense counsel then retained an accident reconstruction "expert" to testify that nothing the defendant did caused the accident, because there was no stop sign. Despite there being an unambiguous police officer's report and testimony that there was a stop sign, the "expert" simply refused to believe that fact and instead proffered the theory that what the officer really meant to say was that there was a stop sign only after the officer himself installed it there at the intersection. No matter what credentials the "expert" had, the Court would be forced to throw out such testimony as being devoid of any factual support whatsoever and lacking any foundation and reliability. The same must be done here, notwithstanding that Dr. Carney puts forth a very impressive resume, and has the initials "M.D." after his name. The Court simply cannot allow such outlandish and unfounded opinions to be admitted into evidence without totally abdicating its role as the gate-keeper of expert testimony.

III.
CONCLUSION

Dr. Carney's opinions and testimony are exactly the type of speculation and unsupported opinion addressed by the courts in *Robinson* and *Daubert*. Because his causation opinions are completely without foundation, these opinions are unreliable. Without a reliable basis, his opinions cannot satisfy the minimum standards set forth in the Texas Rules of Evidence. *See, in particular*, Tex. R. Evid. 705(c) ("If the court determines that the underlying facts or data do not provide a sufficient basis for the expert's opinion under Rule 702 or 703, the opinion is

inadmissible."). Fundamentally unsupported opinions such as those offered by Dr. Carney offer no expert assistance to the trier of fact; therefore, Dr. Carney's opinion testimony should be stricken.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that upon hearing, this Court enter an order excluding the testimony of Defendant's expert, Leonard R. Carney, M.D., as to any issue of proximate cause, and for such other and further relief, at law or in equity, to which Plaintiff may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 12th day of September, 2008, a true and correct copy of the foregoing document was served on the following counsel of record, via electronic filing service provider and via facsimile, in accordance with the Texas Rules of Civil Procedure:

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