

1 State of Florida)
2 County of Broward) :ss

COPY

3
4 IN THE CIRCUIT COURT
5 OF THE SEVENTEENTH JUDICIAL CIRCUIT,
6 IN AND FOR BROWARD COUNTY, FLORIDA

7 STATE OF FLORIDA,)
8 Plaintiff,)
9 vs.) Case No. 94-12133 CF 10A
10 SCOTT HIRSCH,)
11 Defendant.)
-----X

12
13
14 Fort Lauderdale, Florida

15 February 5th, 1996

16 10:45 o'clock a.m.

17
18 -----
19 DEPOSITION
20 OF
21 RICK A. SWOPE
22 -----

23 APPEARANCES:

24 CATHERINE MAUS, Attorney at Law,
25 Assistant State Attorney,
Appearing on behalf of the State.

MICHAEL J. ENTIN, Esquire,
Appearing on behalf of the Defendant.

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I-N-D-E-X

Witness

Rick A. Swope

Direct Examination

Page

By Ms. Maus

3

1 1 Deposition of RICK A. SWOPE, a witness
2 2 herein, taken on behalf of the Plaintiff herein, for the
3 3 purpose of discovery and for use as evidence in this
4 4 cause, pending in the Circuit Court of the Seventeenth
5 5 Judicial Circuit, in and for Broward County, Florida,
6 6 before JENNIFER I. RITTENHOUSE, a Notary Public within and
7 7 for the State of Florida at Large, pursuant to notice
8 8 heretofore filed, at the Broward County Courthouse, State
9 9 Attorney's Office, 201 Southeast 6th Street, Room 640,
10 10 Fort Lauderdale, Broward County, Florida, on Monday, the
11 11 5th day of February, 1996, commencing at the hour of 10:45
12 12 o'clock a.m.

13

- - -

14 14 Thereupon,

15

 RICK A. SWOPE,

16 16 having been first duly sworn, was examined and testified
17 17 upon his oath as follows:

18

 DIRECT EXAMINATION

19 19 BY MS. MAUS:

20 20 Q. Please state your name for the record and
21 21 spell your last name.

22 22 A. Rick Swope, S-w-o-p-e.

23 23 Q. Okay. We are here on State of Florida versus
24 24 Scott Hirsch. It's a vehicular homicide case. The Case
25 25 Number is 94-12133 CF 10A.

1 And have you been hired by the defense in
2 this case as an expert?

3 A. Yes, ma'am.

4 Q. In what area?

5 A. They asked me to reconstruct the accident.

6 Q. What material did you look at in complying
7 with that request?

8 A. I have a list of everything that I reviewed
9 to date. Do you want me to read it or just --

10 Q. Yes.

11 A. I was provided with the homicide report and
12 all attachments from the Sunrise Police Department.

13 Q. Who did the homicide report?

14 A. Don Fellicella.

15 Q. And?

16 A. Probable Cause Affidavit that was prepared by
17 the officer. An EMS report prepared by Florida EMS.
18 Traffic and signalization and engineering plans of the
19 intersection. Deposition of Steven Weyrauch,
20 W-e-y-r-a-u-c-h. A deposition of Deborah Gates. A
21 deposition of Donald Fellicella. And a deposition of
22 Michael Palmar. And deposition of Michael Linalester
23 (phonetic). I don't know if I'm saying that right.

24 MR. ENTIN: Mikalina (phonetic). It's a
25 woman.

1 THE WITNESS: And I did some additional work
2 besides what I have listed here.

3 BY MS. MAUS:

4 Q. Did you review the depo of Anthony Gates?

5 A. I think I reviewed a statement from him but
6 let me just check. Yes, I did. I don't know why I don't
7 have it on here, but I have it here.

8 Q. Okay. What else did you look at?

9 A. Well, I looked at the intersection itself. I
10 prepared a diagram and a time/distance chart.

11 Q. Does this list the printed material that you
12 reviewed?

13 A. Yes.

14 Q. Okay. What else did you do?

15 A. I went to the scene and did a site survey,
16 prepared a scale diagram. I contacted Aerial Photography
17 and had aerials of the intersection taken. And I also
18 spoke with the investigating officer, and I reviewed
19 photographs, both police and some additional photographs.

20 Q. All right. Are you relying on the survey in
21 forming your opinion in this case?

22 A. Well, I'm relying on the time/distance. In
23 other words, the distances that I have on the chart are
24 based on a survey, yes.

25 Q. Is the survey and the diagram two different

1 things?

2 A. Well, the diagram is a part of the survey.
3 In other words, a survey was conducted to make the
4 diagram.

5 Q. Do you have the diagram with you?

6 A. I have several of them.

7 Q. Have you prepared a written report in this
8 case?

9 A. No, ma'am.

10 Q. Why not?

11 A. I haven't been asked to.

12 Q. Do you ever prepare -- How many times do you
13 prepare written reports in these cases when you're hired
14 as an expert?

15 A. Criminal cases probably about ten percent of
16 the time. Civil cases about five percent, unless it's
17 like an affidavit or something like that. Affidavits I
18 consider not a report.

19 Q. When did you go to the scene?

20 A. I went to the scene in June, sometime in June
21 of '95, and I went back to the scene in July, sometime
22 after I received the timing sheets. And I also went back
23 to the intersection not specifically for this case but
24 just a few other times when I passed through. I use that
25 roadway quite often.

1 Q. So you didn't visit the scene until
2 approximately one year after the accident?

3 A. Correct.

4 Q. All right. What opinions - what opinions
5 will you be testifying to in this case?

6 A. Well, I assume the opinion that I'll be
7 giving is the fact that -- a couple different ones.
8 Number one --

9 Q. You started out by saying you assumed. Have
10 you formed your opinions in this case?

11 A. Yes.

12 Q. What specifically will you be testifying to?

13 A. I'll be testifying to the fact that the
14 intersection traffic control signals were operating in a
15 flash mode at that time due to weather conditions, that
16 Mr. Hirsch had a yellow traffic signal, flashing light, I
17 should say, for east and westbound traffic, and that north
18 and south traffic had a flashing red. That's confirmed by
19 the Broward County Traffic and Engineering Department, and
20 all witnesses in this case, including the police officer,
21 indicated that the light was on flash.

22 Q. Those are not necessarily opinions that an
23 expert in accident reconstruction would testify to, right?
24 You are basing that on your conversations with officers
25 who are telling you what other people told them?

2 1 MR. ENTIN: I'm going to object to the
2 question. It's part of his hypothetical. He's an
3 expert and when given those facts he's going to
4 give his opinion as to what those circumstances
5 were at the time. Whether the hypothetical is
6 incorrect or not, I guess is another question.

7 THE WITNESS: No, I'm not testifying to what
8 other people told the police officer. I'm
9 testifying to the information that was given to me
10 in writing by the Broward County Traffic and
11 Engineering Department --

12 MR. ENTIN: That will come in through other
13 documentation.

14 THE WITNESS: -- and the flash.

15 All the depositions indicated the light was
16 in the flash mode including the police officer in
17 the homicide report.

18 BY MS. MAUS:

19 Q. Would one necessarily have to be an expert in
20 accident reconstruction to determine what the lights were
21 flashing in on that day?

22 A. Probably not, but it relates directly to my
23 opinion. When you asked me that question, that's why I
24 gave you that background.

25 Q. Okay.

2 1 A. And I could complete that first opinion,
3 2 answer.

4 3 Q. Okay, great.

5 4 A. Would be that the victim in this case who was
6 5 driving the Honda failed to yield to Mr. Hirsch who had
7 6 the right-of-way at the intersection. That would be the
8 7 first opinion.

9 8 Q. All right. And there were, based on your
10 9 review of the documents in the case, Mr. - the victim -
11 10 I'm not sure what his name is - Mr. Samaya (phonetic), or
12 11 something, the victim was not the only one in the
13 12 intersection, correct?

14 13 A. That's correct. There was also another
15 14 person who had illegally entered the intersection as well.

16 15 Q. Okay. Have you examined the speeds in the
17 16 case?

18 17 A. Yes.

19 18 Q. And do you have an opinion regarding speed in
20 19 the case?

21 20 A. Yes.

22 21 Q. What is the opinion?

23 22 A. Well, I have two opinions related to speed in
24 23 this case, and that's based on the police officer's
25 24 measurements, the police officer's measurements of two
26 25 things: Actually the crush damage of the victim's

2 1 vehicle; and also the final point of rest of the victim's
2 vehicle. The Vehicle Number Two which is listed in the
3 report as the third vehicle actually, but it's listed as
4 Vehicle Number Two, and that Mr. Hirsch's vehicle.

5 And I have two different opinions based on
6 that. Number one is that the impact between the victim's
7 vehicle and Mr. Hirsch, the impact speed that Mr. Hirsch
8 struck the victim's vehicle was 19.12 miles per hour.

9 I have a second opinion related to speed and
10 that's based on the fact that the measurement - and I'll
11 explain this to you - from the police officer indicated
12 the speed of 35.65 miles per hour on the victim's vehicle.
13 However --

14 Q. What was that number again?

15 A. 35.65. However, I don't consider that
16 reliable, and I'll tell you why.

17 Q. That's a measurement -- Based on the
18 officer's measurement you came up with a speed on the
19 victim's car?

20 A. No, between - impact between Mr. Hirsch and
21 the victim's vehicle, meaning Mr. Hirsch would have been
22 going 35 miles per hour.

23 Q. Pre-impact?

24 A. No, impact.

25 Q. Okay. Then I'm confused here. You said your

2 1 first opinion was impact speed 19.12 miles?

2 A. Right. I did two different things, and one I
3 consider to be reliable and the other one is I just took
4 the information that the officer had and ran another check
5 on it.

6 In other words, when you do linear momentum
7 which is the first speed I gave you, which is 19.12,
8 that's a -- When you do crush damage, you do that to base
9 it on your linear momentum speed. In other words, if the
10 speed is close, then you know that all your measurements
11 and all your information is correct.

12 Now, the officer only took one measurement of
13 the crushed damage. You're supposed to take a minimum of
14 four to ten, and you're supposed to list the area that you
15 take the measurement in and put that into your computer
16 with your "A" and "B" parameters of what type of vehicle
17 it is.

3 18 Now, since the officer only took one
19 measurement, I knew that that would be unreliable but I
20 decided to try it anyway to see what it would come up
21 with. The difference is between 19 and 25, meaning the
22 crush element can't be used because I don't have that
23 information, but I just ran that program anyway to check.

24 Q. The second opinion you gave which is a speed
25 of 35.65 miles of which car --

3 1 A. Mr. Hirsch.

2 Q. -- is based on the one crush measurement?

3 A. Correct.

4 Q. And you -- In your opinion that's an
5 unreliable estimate?

6 A. Yes, absolutely.

7 Q. What did you rely on in forming the first
8 opinion of an impact speed 19.12?

9 A. Can I grab these from you here, these
10 diagrams?

11 Q. Yes.

12 A. I relied upon basically two different things.
13 Number one is I relied upon the officer's measurements as
14 to where the approximate point of impact occurred between
15 Mr. Hirsch and the victim; and secondly, the final point
16 of rest of Mr. Hirsch's vehicle and the victim's vehicle.

17 Q. All right. The second opinion, the 35.65
18 miles per hour of Defendant is his speed at what time?

19 A. That would be at impact. Although, again, I
20 want to point out that that speed is not used. It's just
21 something that I ran to check the officer's one
22 measurement.

23 Q. Where did the officer take the measurement
24 from?

25 A. He indicated that he took it from the left

3 1 side of the victim's vehicle. I believe the area was --
2 He measured the deepest intrusion into the vehicle and he
3 measured that over an area that he said of five feet six
4 inches, I think it was sixty-six inches -- yeah, sixty-six
5 inches was the crush width. In other words, from Point
6 "A" to Point "B".

7 But the problem is he only took the one
8 measurement deep in and you can't average out what the
9 other measurements were. In other words, the deepest
10 measurement was 30 inches that he took, so I don't know if
11 the next measurement would have been thirty or would it
12 have been sixteen or ten or whatever, and that's how you
13 average out the crush.

14 Q. So he took a measurement of the width of the
15 impact?

16 A. Yes, ma'am.

17 Q. And he took one measurement of the depth?

18 A. Yes, ma'am.

19 Q. Where he should have not only taken one
20 measurement of the depth, he should have moved to
21 different parts within that width and also taken a
22 measurement?

23 A. That's correct.

24 Q. Okay. Did you look at the car in this case,
25 Mr. Hirsch's car?

3 1 A. No, I looked at a picture but Mr. Hirsch's
2 vehicle was repaired when I received the case.

3 Q. Did you look at the victim's car?

4 A. No, I could not locate the victim's car, and
5 I was told through Mr. Entin that the State did not have
6 the car.

7 Q. Okay. Did you attempt to locate that car?

8 A. Yes.

9 Q. All right. What other opinions will you be
10 testifying to in this case?

11 A. That's really the only opinion with the speed
12 and also the failing to yield. I assume that you or
13 Mr. Entin may have different questions as to
14 time/distance. In other words, if you ask me a time based
15 on a speed I can tell you where Mr. Hirsch was at, but
16 other than that that's what I'm going to base the opinions
17 on.

18 I also have one diagram that I use, and I
19 just put a couple notations on it as to where braking
20 begins or where the perception, I should say, would begin
21 for Mr. Hirsch and how long it would take the victim's
22 vehicle to go from crossbar up to the point of impact. I
23 have those measurements down for you on this piece of
24 paper.

25 Q. Okay. Did you determine a pre-impact speed

3 1 of Mr. Hirsch?

2 A. Well, the pre-impact speed would be the same
3 as the impact speed, because unless there's some evidence
4 of braking, which there is none in this case -- In other
5 words, I don't know, nor does the officer, if there was
6 braking that took place prior to the collision.

7 Q. Did you look at photographs of the scene?

8 A. Yes, ma'am, I did.

9 Q. Did you see any evidence of skid marks?

10 A. No, the road was wet at the time.

11 Q. My understanding is that means that once the
12 road dries there will be evidence of skid marks, right?

13 A. No, absolutely not.

14 Q. The water eliminates the ability for skid
15 marks to be left?

4 16 A. No, this vehicle had an anti-lock braking
17 system on it, so I would not expect to see skid marks
18 anyway unless the --

19 Q. So you're assuming that because your impact
20 speed is 19.12 miles per hour, that that's the speed he
21 was traveling at?

22 A. That's the speed he was traveling at impact.
23 I can't tell you what he was traveling before that, but I
24 can tell you going back -- In other words, to get a 19
25 mile per hour speed at impact, what I did was, if you look

4 1 at this particular diagram, I just made a couple marks so
2 I know where they're at. This cross mark here
3 (indicating) right in the crosswalk, so to speak, would be
4 a perception reaction time.

5 So assuming that from this point to the point
6 of impact there would be no braking at all because that's
7 how long Mr. Hirsch would take him to perceive that this
8 vehicle's coming out and react.

9 So by going back I picked up a couple
10 different spots and I was trying to figure out, well, if
11 if he was going 40 - let's say I picked a number - let's
12 say he was going 40 or 45, could he have braked on a wet
13 pavement and hit this vehicle at 19 miles per hour, the
14 answer was no, the impact would have been greater, like 25
15 or 30.

16 Q. This mark here (indicating) in the crossbar,
17 is that the point that you feel is the place where he
18 should have first been able to perceive this car in the
19 intersection?

20 A. Yes, ma'am, at that point is where he would
21 have seen the vehicle pulling out.

22 Q. And you feel that prior to that point it
23 would not have been possible for him to see this car in
24 the intersection?

25 A. Not that it wouldn't have been possible.

4 1 What I'm saying is that taking the acceleration factor and
2 the way the witnesses indicated that the victim came out
3 onto the roadway, I came up with a time that it would take
4 the victim to go from the crosswalk northbound to the
5 point of impact. And then all I did was just backed up
6 Mr. Hirsch, in other words, to indicate where would he see
7 him at a certain point in time.

8 Then what I did was I wanted to find out how
9 much speed could he lose. In other words, if he did brake
10 fully to get to impact speed of 19 miles per hour, and I
11 come up with a speed, the fastest speed that he could be
12 going would be 30 miles per hour, that would be the
13 fastest. He could have been going 25. He could have been
14 going 28, whatever, but he could not have been going above
15 that particular speed.

16 Q. All right. Did you review the statements of
17 the witnesses who made their own estimates of the speed
18 the Defendant was traveling?

19 A. I did.

20 Q. And your speed is approximately 15 miles less
21 than --

22 MR. ENTIN: How many?

23 MS. MAUS: Fifteen miles less than their
24 estimates?

25 THE WITNESS: Once we estimated, yes, ma'am,

4 1 it is.

2 BY MS. MAUS:

3 Q. Do you discount their estimates?

4 A. I don't discount anything that anyone sees.
5 I'm just telling you what mathematically I came up with
6 based on the physical evidence that I have.

7 Q. All right. Did you determine, based on your
8 review of the material and evidence, that the Defendant
9 braked prior to impact?

10 A. I can't tell one way or the other.

11 Q. So you have no opinion regarding whether or
12 not he'd brake prior to impact?

13 A. No, I don't know.

14 Q. Now, are there any rules of the road or
15 driver duties regarding flashing yellow and flashing red
16 lights in the State of Florida?

17 A. Yes, I have those with me.

18 Q. What are they?

19 A. I have the statute if you want to look at,
20 it's 316.076.

21 Q. Can I see it, please?

22 A. Sure.

23 Q. Do you know why the lights -- That
24 intersection was not operating as it should, correct, the
25 lights?

4

1 A. Yes, ma'am, that's correct.

2 Q. Do you know why it wasn't?

3 A. I only know why from speaking with the
4 custodian of records from Broward Engineering. I did
5 speak with them about that.

6 Q. Is that Harry Wolf (phonetic)?

7 A. Yes, ma'am.

8 Q. Why? What did he tell you?

9 A. He told me that there had been a power outage
10 in the area due to some type of storm, and the lights
11 automatically go into the flash mode when the power goes
12 out, and they had to be reset manually and I think it was
13 several hours before they got someone out there.

14 Q. Do you know what kind of storm that was that
15 day?

16 A. No, ma'am.

5

17 Q. Do you know whether or not it was a severe
18 storm or a light storm?

19 A. I don't know.

20 Q. Did you look into the storm at all?

21 A. No, ma'am.

22 MR. ENTIN: You're talking about at the time
23 of the accident or before?

24 MS. MAUS: I think it was right before.

25 MR. ENTIN: Yes, because at the time of the

5 1 accident I don't think it was raining.

2 MS. MAUS: Right.

3 BY MS. MAUS:

4 Q. Okay. Did you look at the Defendant's
5 driving with regards to the law on flashing yellows?

6 A. Yes, ma'am.

7 Q. And do you believe in your opinion that he
8 complied with the law?

9 A. Yes, I do.

10 Q. You believe that he proceeded through that
11 intersection with caution?

12 A. Yes, I do.

13 Q. What cautionary measures did he take as he
14 proceeded through that intersection?

15 A. Well, he was certainly traveling lower than
16 the posted speed limit of 45 miles per hour. There are
17 differences in testimony from the depositions as to actually how
18 many vehicles were moving north and south, and how many
19 vehicles were moving east and west.

20 There's testimony that there were some
21 vehicles moving east and west. There was an individual
22 who was westbound on Sunrise and he was making a
23 right-hand turn, he indicated a south turn but if he's
24 going right he must have been mistaken because the depo
25 indicates he's making a right-hand turn, and he says south

5 1 and obviously he's going north. He's indicating traffic
2 was moving east and west.

3 And then some other people indicated that
4 traffic was moving north and south, and one of the
5 witnesses indicated nobody was really moving in the
6 intersection.

7 So I think that he did have a flashing
8 yellow, flashing yellow --

9 Q. What witnesses indicated -- Tell me the
10 witnesses who indicated there was anyone in this
11 intersection other than Cars One and Two that you have
12 marked here and Car Three.

13 MR. ENTIN: I'm going to tell my client to go
14 back to the courtroom.

15 (Thereupon, a brief break was had.)

16 THE WITNESS: Weyrauch, W-e-y-r-a-u-c-h.

17 BY MS. MAUS:

18 Q. And who else does he indicate is moving?

19 A. He doesn't indicate who it is, just that
20 there's traffic moving.

21 Q. In the intersection?

22 A. Through the intersection, yes.

23 Q. Okay.

24 A. And I believe Mrs. Gates also indicated that
25 vehicles were moving through the intersection but they had

5 1 began to slow down, not to a complete stop but began
2 slowing down when they were traveling eastbound and then
3 Mr. Hirsch passed them on the right.

4 Q. How many -- Let me go back to some of the
5 expert stuff, Rick. How many hours do you have in on this
6 case?

7 A. I would estimate about seventeen to eighteen
8 at this point.

9 Q. Have we covered each expert opinion that you
10 expect to testify to at trial? We've talked about impact
11 speed, that the Defendant -- that the victim failed to
12 yield to the Defendant?

13 A. I believe that's it, yeah.

14 Q. Okay. Who did you talk to on this case in
15 person?

16 A. I spoke with Mr. Entin. I spoke with
17 Mr. Hirsch. I spoke with Mr. Wolf (phonetic). I spoke
18 with Donald Fellicella, the police officer who handled the
19 case. I spoke with Chet from your office.

20 Q. What did Mr. Hirsch tell you about his memory
21 of the accident?

22 A. He just indicated to me that he was traveling
23 eastbound on Sunrise Boulevard, that the roadway was wet,
24 that he was traveling approximately twenty to twenty-five
25 miles per hour as he approached the intersection. He saw

5 1 no cars moving north and south, traffic was moving through
2 the intersection east and west, and as he neared the
3 intersection he saw what he thought was one or two
4 vehicles that pull out and he attempted to take action to
5 stop, and he could not stop in time and struck the
6 vehicle.

7 Q. Where was the Defendant when he saw the cars
8 move out into the intersection?

9 A. He said he first saw it to his right. He
10 didn't know exactly if the car had -- was ten or fifteen
11 or twenty feet from the stop bar.

12 Q. His car.

13 A. Oh, his car? Said he was near the
14 intersection. He didn't know a point. He couldn't
15 pinpoint for me if he was in the stop bar, or he said he
16 was right at the intersection. He said somewhere around
17 the line but he's not sure.

18 Q. He -- So he's saying he was approximately in
19 this area but he can't say for sure if he was in the
20 intersection or behind the crossbar?

21 A. Yes, ma'am.

6 22 Q. And what speed did he say he saw those two
23 cars traveling at?

24 A. He didn't know.

25 Q. He doesn't know how fast they were moving?