IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

LAUREN FARRELL and STEPHEN FARRELL, Plaintiffs,	)	
v.	)	C.A. No. 07C-09-175 PLA
THE UNIVERSITY OF DELAWARE, Defendant.	)	

Submitted: November 10, 2009
Decided: November 24, 2009

UPON PLAINTIFFS' MOTION IN LIMINE TO EXCLUDE EXPERT TESTIMONY OF LEWIS BARBE
GRANTED

Cynthia H. Pruitt, Esquire, DOROSHOW, PASQUALE, KRAWITZ & BHAYA, Wilmington, Delaware, Attorney for Plaintiffs.

Jennifer M. Becnel-Guzzo, Esquire, SAUL EWING, LLP, Wilmington, Delaware, Attorney for Defendant.

ABLEMAN, JUDGE

Before the Court is Plaintiffs' Motion to Preclude the Testimony of a proposed expert witness, Lewis Barbe, based upon the witness's lack of qualifications to offer testimony regarding the standard of care for public ice rinks in management, supervision, and training of ice guards. Defendant University of Delaware ("UD") seeks to present Barbe as its expert witness in this personal injury action stemming from plaintiff Lauren Farrell's ("Farrell") fall on UD's public ice rink during a skating session on January 16, 2006. Plaintiffs object to the presentation of the witness's testimony based upon the fact that he lacks education, training, or experience that would qualify him to provide expert testimony on the management of ice rinks or the actions of ice guards. For the reasons discussed more fully below, the Court is satisfied that the witness does not meet the necessary *Daubert* standards to enable him to testify as an expert. The Motion to Preclude will therefore be granted.

As a threshold matter, expert testimony must be both relevant and reliable.[1] Because Delaware Rule of Evidence (DRE) 702 is substantially the same as its federal counterpart, the Supreme Court of Delaware follows the United States Supreme Court's holding in *Daubert v. Merrill Dow*

[1] *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 521 (Del. 1999) (citing *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579 (1993)).

Pharmaceuticals, Inc. as the correct interpretation of DRE 702.[2] Delaware trial judges act as gatekeepers in deciding whether an expert's testimony "has a reliable basis in the knowledge and experience of [the relevant] discipline."[3] In *Sturgis v. Bayside Health Association*, the Delaware Supreme Court set forth the four factors identified in *Daubert* that the trial court, as the gatekeeper, may consider in determining whether to allow the admission of expert testimony:

1. Whether the theory or technique can be and has been tested;
2. Whether it has been subjected to peer review and publication;
3. Whether a technique has a known or potential, and the existence of standards controlling its operation; and
4. Whether the theory or technique has widespread acceptance within the relevant scientific community.[4]

These standards for admitting expert testimony, as interpreted by *Daubert* and its progeny, apply equally to all experts, regardless of whether their experience is scientific, technological, or comes from specialized knowledge.[5]

Substantial experience and training may also provide a basis for expertise. However, in determining whether expert testimony is admissible

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[2] *See Sturgis v. Bayside Health Ass'n*, 942 A.2d 579, 584 (Del. 2007).

[3] *Bowen v. E.I. duPont de Nemours & Co.*, 906 A.2d 787, 794 (Del. 2006) (quoting *M.G. Bancorporation, Inc.*, 737 A.2d at 523).

[4] *Sturgis*, 942 A.2d at 584.

[5] *See Kubmo Tire Co. Ltd. V. Carmichael*, 526 U.S 137, 147 (1999) (clarifying that the *Daubert* gate keeping function applies to all forms of expert testimony).

under the foregoing standards, a trial court must ensure that the expert's experience can produce an opinion that is sufficiently informed, testable, and verifiable on an issue to be determined at trial.[6] Thus, an expert must possess not only specialized knowledge, but also be able analytically to apply that experience in giving a reliable opinion in the case at bar.[7] Stated another way, Rule 702's requirement that expert testimony assist the trier of fact serves to ensure its relevance or "fit."

The Court's gatekeeping function in this instance involves a two-part inquiry into reliability and relevance. First, the Court must determine whether the proffered expert testimony is reliable. The party offering the testimony bears the burden of establishing its reliability by a preponderance of the evidence.[8] The reliability inquiry requires the Court to assess whether the reasoning or methodology underlying the expert's testimony is valid.[9] The aim is to exclude expert testimony that is based merely on subjective belief or unsupported speculation.[10] Second, the Court must determine whether the expert's reasoning or methodology "fits" the facts of the case

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[6] *Spencer v. Wal-Mart Stores E., LP*, 2006 WL 1520203, at *1 (Del. Super. June 5, 2006) (citing *Goodridge v. Hyster Co.*, 845 A.2d 498, 503 (Del. 2004)).

[7] *Id.*

[8] *See Moore v. Ashland Chem., Inc.*, 151 F.3d 269, 276 (5th Cir. 1998).

[9] *Daubert*, 509 U.S. at 593.

[10] *Id.* at 590.

and whether it will thereby assist the trier of fact to understand the evidence—in other words, whether it is relevant.[11]

The Court has thoroughly reviewed Mr. Barbe's deposition testimony and his expert report, and is convinced that UD has not established that Mr. Barbe's testimony is sufficiently reliable and that his testimony will not assist the jury in understanding the evidence.

Mr. Barbe purports to opine on whether UD met the standard of care for public ice rinks in management, supervision, and training of ice guards, and on the actions or omissions of the ice guards on that day. Mr. Barbe is not qualified to testify on any of the foregoing subjects. He has no education, experience, or training qualifying him to offer expert testimony on the management of ice rinks or the training of ice guards. His education is in fire protection and safety engineering. As a safety engineer, Mr. Barbe's experience and knowledge regarding ice rinks is limited to the construction and design of the rinks—that is, on topics such as the correct hardness of ice, and the design, construction, installation, ventilation, and lighting of an ice rink. He has never been employed by an ice rink. The single case involving an injured skater in which Mr. Barbe has offered an

[11] *Id.* at 591.

expert opinion dealt with a hockey player who was hurt because a safety glass had been removed to facilitate photography—a construction issue.

Mr. Barbe's opinion regarding the absence of construction defects in UD's rink is irrelevant and of no assistance to the trier of fact. This litigation is not about a poorly constructed ice rink or a design flaw that caused Farrell to fall. It is not about the hardness of the ice or the quality of the air. The case is about the responsibilities of ice guards and the management of a public skating rink, topics that Mr. Barbe has no expertise to address.

Mr. Barbe also impermissibly offers opinions on legal issues such as assumption of the risk,[12] on the credibility of the individuals involved (*i.e.*, whether Ms. Farrell or the skate guards were telling the truth),[13] on the speed at which the young child was skating (*i.e.*, 30-40 miles per hour, a ludicrous calculation), on medical issues such as an opinion that the injury suffered by plaintiff is typical of an ice arena,[14] and on Farrell's awareness "that ice is

[12] Dep. Tr. of Lewis C. Barb, at 70 ("[Farrell] didn't take any steps to save her own safety, saying to the guard, hey, there is a kid doing this. She's the only one that saw that. And why she didn't react, it would be a normal situation to react . . . you know, tell the guard and the guard would go over and correct it immediately. But she didn't do that, and none of the guards ever saw this.").

[13] *Id.* at 59, 75.

[14] *Id.* at 57.

slippery."[15] All of these opinions are conclusory, beyond the scope of Mr. Barbe's limited expertise, and unsupported by facts or law.

Just one example of Mr. Barbe's testimony sufficiently illustrates why his alleged expertise consists of opinions so conclusory as to be of no value to the trier of fact:

> Q. What should the skate guards or the supervisors at the rink have done?
> A. They should have complied with Ms. Farrell's wishes when she would tell skate guard, which is her duty and responsibility to say, and take remedial action and take corrective action.[16]

Mr. Barbe repeatedly responds to questions such as "what is the basis for your opinion?" by stating "my work experience and my education and everything I have done to prepare myself for the deposition."[17] Yet, he has no such experience or education in managing skate rinks, or in supervision of skate guards, and only inspected the UD rink for first time the morning of his deposition, which was after he had rendered his expert opinion and filed his report.[18] Mr. Barbe stated that he is "a specialist in the causation of accidents,"[19] but nowhere in his report or his deposition is there any

[15] *Id.* at 57.

[16] *Id.* at 74.

[17] *Id.* at 67.

[18] *Id.* at 37.

[19] *Id.* at 81.

indication of how he brought his safety engineering expertise to bear in reaching his conclusions. His opinion that the ice rink was "properly staffed and supervised" is offered without any basis except "custom and practice in the industry." When asked, "what specific facts did you rely on in this case for your conclusion that the ice rink was properly staffed?" he gave a conclusory answer referring predominantly to rink construction, design, and environment, which was neither helpful nor responsive.[20] His opinion that the rink was properly staffed and supervised is offered despite the fact that nowhere does he indicate the number of ice guards on duty that day, their level of experience or training, or the content of their training program. He states, for example, that "there was a very limited number of people on the ice . . . this incident probably occurred within a minute or two, or less, of the shutting down of the ice rink for the Zanboni,"[21] although he is never able to provide even a rough estimate of how many people were on the ice. His conclusion that the "ice guards are there to assure the quality of the ice, to provide for reasonable skating by the people" is hardly an opinion that requires expertise. Moreover, he admitted that he relied on no particular document to determine the duties of the skate guards in this case.[22]

[20] *Id.* at 30-34.

[21] *Id.* at 43-44.

[22] *Id.* at 46.

Most remarkably, Mr. Barbe provides an astonishing opinion concerning the speed of the child skater involved in this fall, who Farrell believed to be approximately seven or eight years old. Based on "the number of feet per second," Barbe concludes "he's probably doing may be 30, 40 miles an hour, 58 feet a second."[23] Even Olympic champions would have difficulty measuring up to that speed.

Finally, Mr. Barbe's proposed expert testimony does not satisfy DRE 702. Rule 702 requires that expert testimony "assist the trier of fact to understand the evidence or to determine a fact in issue." The Supreme Court has made it clear that if the trier of fact is as capable of answering a question as an expert, without the expert's help, then the expert's opinion would not be admissible under Rule 702. Mr. Barbe's rambling commentary on just about every common-sense matter in the case (*e.g.*, "ice is slippery") would be of no assistance to trier of fact. Even the defendant concedes in its brief that the jury does not need anything more than its own common sense to decide issues in this case.

Additionally, the Court notes that "it is exclusively within the province of the trial judge to determine issues of domestic law.[24] That is to say, Delaware law requires the exclusion of expert testimony that expresses

[23] *Id.* at 49.

[24] *In re Walt Disney Co. Derivative Litig.*, 2004 WL 550750 (Del. Ch. Mar. 9, 2004).

a legal opinion. To the extent that Mr. Barbe has undertaken to provide an opinion on the plaintiff's responsibility to advise the guards, and on which party is telling the truth, he usurps both the judge's role to provide the legal standard of care and the jury's function to decide the credibility of the witnesses and the weight to give to the evidence.

For all of the foregoing reasons, plaintiff's Motion in Limine to Exclude the expert testimony of Lewis Barbe is hereby **GRANTED**.

IT IS SO ORDERED.

PEGGY L. ABLEMAN, JUDGE

Original to Prothonotary
cc: Cynthia H. Pruitt, Esquire
Jennifer M. Becnel-Guzzo, Esquire