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

VALERIA SPENCER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 04C-08-144-PLA
	)	
WAL-MART STORES EAST, LP,	)	
a Delaware limited partnership,	)	
	)	
Defendant.	)	

Submitted: May 15, 2006
Decided: June 5, 2006

UPON DEFENDANT WAL-MART'S MOTION IN LIMINE
GRANTED.

David R. Scerba, Esquire, Attorney for Plaintiff, Valeria Spencer.

Dylan J. Walker, Esquire, Margaret F. England, Esquire and Karen L. Turner, Esquire, Attorneys for Defendant, Wal-Mart Stores.

ABLEMAN, JUDGE

Before the Court is Defendant Wal-Mart's Motion in Limine to exclude the testimony of Plaintiff's expert, Julius Pereira, regarding proper snow plowing methods. Following a *Daubert* hearing on this motion, at which Mr. Pereira testified regarding his qualifications and methods, the Court ruled the Mr. Pereira did not meet the *Daubert* standards and that the Motion to Exclude must be granted. This is the Court's opinion setting forth the reasons for its decision.

Facts

This is a slip and fall suit wherein Plaintiff apparently slipped on ice in Defendant Wal-Mart's parking lot. Before trial, Wal-Mart filed a Motion in Limine to preclude the testimony of Julius Pereira as an expert for Plaintiff. Plaintiff sought to have Pereira, who is an architect by training who now provides safety evaluations to plaintiffs, testify for the purpose of proving the snow plowing in Wal-Mart's parking lot was negligently performed. Most of Mr. Pereira's work history (from 1979 to 1994) has been as an architect, providing architectural design for commercial and residential projects, though Mr. Pereira also did some work during that time providing evaluation of construction defects.

Law

The proper standard for the admissibility of scientific, technical or other specialized knowledge is set forth in Delaware Rule of Evidence 702. That rule provides that if scientific, technical or other specialized knowledge will assist the trier of fact, a witness may testify in the form of

an opinion if: (1) the testimony is based on sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has applied the principles and methods reliably to the facts.

Daubert v. Merrill Dow[1] provides that when applying Rule 702[2] courts must use a two-fold test: (1) whether the testimony will assist the trier of fact, and (2) whether the testimony amounts to scientific knowledge. 'Scientific knowledge' consists of facts, or ideas inferred from facts, that are accepted as true on reliable grounds and are grounded in science's methods and procedures.[3] The issue of whether testimony amounts to scientific knowledge requires that an expert's testimony rest on both a reliable and a relevant basis.[4]

Therefore, a judge must make a preliminary assessment of whether the testimony at issue is scientifically valid and can properly be applied to the facts at issue. This assessment is based on several factors, which may include: (a) whether the theory in question can be, and has been, tested; (b) whether the theory has been subjected to peer review and publication; (c) the theory's known or potential error rate, and the existence of standards controlling its operation; and (d) whether the

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[1] 509 U.S. 579.
[2] The Delaware Supreme Court has previously held that DRE 702 is identical to its federal counterpart, and adopted the U.S. Supreme Court's holding in *Daubert* as the correct interpretation of DRE 702. *Nelson v. State*, 628 A.2d 69, 75 (Del. 1993).
[3] *Daubert*, 509 U.S. at 589.
[4] *Id.* at 589-90.

theory has widespread acceptance within a relevant scientific community.[5]

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

Analysis

Plaintiff has failed to demonstrate (1) that Mr. Pereira has specialized knowledge that would qualify him to testify as an expert; (2) that his opinions are the product of reliable scientific methods and principles; and (3) that his testimony will assist the trier of fact.

There is no indication that Mr. Pereira has specialized knowledge or experience in the area of maintenance or snow removal. Instead, Mr. Pereira's resume indicates that he was trained as an architect, and that he has spent most of his professional life working as an architect, providing design for renovation and new construction projects. Mr. Pereira started working for his current firm in 1994, where he apparently provides opinions for plaintiffs on topics ranging from construction

[5] *Id.* at 593-94.
[6] *Goodridge v. Hyster Co.*, 845 A.2d 498 (Del. 2004).

quality to playground equipment, mold and water infiltration, to maintenance procedures and snow removal. There is no evidence that Mr. Pereira has any expertise or special training in the area of snow removal, or anything other than architecture.

Mr. Pereira attempted to qualify himself as an expert through experience and training during the hearing by arguing that he had experience with snow plowing because his father owned a snow plow business when he was a child, and because he had taken a two day course to learn snow plowing methods. Mr. Pereira also testified, however, that he had never managed a snow plowing business, nor has he ever operated a snow plow. Rather, Mr. Pereira's opinion is based simply on his culling potentially favorable snippets from various snow plowing and safety publications, instead of an opinion based on the application of facts to a scientific theory, or adequate experience and special training. Mr. Pereira's opinion letter merely cites the County's property code as well as sources like The Snowplowing Handbook and Managing Snow & Ice that provide things like, "Clean up after yourself in the lot."

Mr. Pereira does not possess either the experience or the training to render an opinion on snow and ice removal and any opinion he may have on the issue is outside the scope of his training as an architect. Accordingly, Mr. Pereira's opinions are not based on sufficient experience and training so as to render him a lay expert on proper snow plowing

methods, and his testimony does not meet the standard required by Rule 702.

Finally, the Court notes that "it is exclusively within the province of the trial judge to determine issues of domestic law."[7] That is to say, Delaware law requires the exclusion of expert testimony that expresses a legal opinion.[8] Because Mr. Pereira's testimony mostly consists of a restatement of the legal standard of care, his testimony will not assist the trier of fact. The jury will be provided the standard of care by the Court in the jury instructions. Furthermore, the Court does not believe that expert testimony is required to argue to a jury that a pile of snow in a parking lot is going to melt.

For the foregoing reasons, Defendant Wal-Mart's Motion in Limine to preclude the testimony of Plaintiff's proposed expert, Julius Pereira, on the issue of the negligence in snow removal from Wal-Mart's parking lot is **GRANTED**.

IT IS SO ORDERED.

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PEGGY L. ABLEMAN, JUDGE

Original to Prothonotary
cc: David R. Scerba, Esquire
Dylan J. Walker, Esquire
Margaret F. England, Esquire
Karen L. Turner, Esquire

[7] *In re Walt Disney Co. Derivative Litig.*, 2004 WL 550750 (Del. Ch.).
[8] *N. Am. Philips Corp. v. Aetna Cas & Sur. Co.*, 1995 WL 628447 (Del. Super.).