IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

LISA VOHRER and	:	
LOUIS VOHRER,	:	C.A. No. K12C-07-004 WLW
Plaintiffs,	:	
	:	
v.	:	
	:	
GARY KINNIKIN and DELAWARE	:	
STATE HOUSING AUTHORITY,	:	
Defendants.	:	

Submitted: December 10, 2013
Decided: February 26, 2014

ORDER

Upon Defendant Delaware State Housing
Authority's Motion for Summary Judgment.
Granted in part; Denied in part.
Upon Defendant Delaware State Housing Authority's
Motion in Limine to Exclude Testimony of Dr. Babigumira.
Dismissed as Moot.
Upon Defendant Delaware State Housing
Authority's Motion in Limine to Exclude
Expert Testimony of Carl White. *Granted.*

Edward C. Gill, Esquire of Law Office of Edward C. Gill & Associates, Georgetown, Delaware; attorney for Plaintiffs.

Jeffrey A. Young, Esquire of Young & McNelis, Dover, Delaware; attorney for Defendant Gary Kinnikin.

Jennifer D. Smith, Esquire of Tybout Redfearn & Pell, Wilmington, Delaware; attorney for Defendant Delaware State Housing Authority.

WITHAM, R.J.

Before the Court is Defendants' Motion for Summary Judgment, as well as two motions *in limine* filed by Defendants. After carefully considering the record, case law and the filings of the parties, the Court has set forth its ruling on the motions below.

FACTUAL AND PROCEDURAL BACKGROUND

At all times relevant to this case, Plaintiffs Lisa and Louis Vohrer (individually "Lisa" and "Louis," collectively "Plaintiffs") resided in a rental unit in Milford owned and operated by Defendant Delaware State Housing Authority (hereinafter "DSHA"). Defendant Gary Kinnikin (hereinafter "Kinnikin") was employed by DSHA as a maintenance worker. Plaintiffs moved into the rental unit on November 29, 2010; the unit contained an electric stove. The stove had a three-pronged plug that was manipulated into a four-pronged electrical outlet. Plaintiffs claim this was done by improperly jury-rigging the three-pronged plug into the four-pronged outlet.

Lisa allegedly received an electric shock while attempting to use the stove on December 8, 2010. Plaintiffs claim that DSHA and Kinnikin (collectively "Defendants") assured Plaintiffs that the stove "was in good working order and that they could continue to use the stove." Based on these assurances, Lisa continued to use the stove. Lisa was allegedly shocked on multiple different occasions as she continued to use the stove, and was ultimately shocked a total of eight times, including the first shock on December 8. Plaintiff claims she was diagnosed with Chronic Regional Pain Syndrome (hereinafter "CRPS") as a result of the shocks.

Lisa alleges that each time she complained to DSHA about the stove, Kinnikin

would come to Plaintiffs' apartment to examine the stove, but Kinnikin failed to resolve the issue. Kinnikin replaced the stove's burners and otherwise attempted to recreate the circumstances under which Lisa was shocked, but Kinnikin was ultimately unsuccessful in determining the cause of the shocks.

Plaintiffs also claim that Kinnikin engaged in a pattern of persistent sexual harassment against Lisa. Plaintiffs allege that Kinnikin sent Lisa lewd and vulgar images and text messages via phone, made inappropriate sexual comments to Lisa, and went through Lisa's undergarments on at least one occasion. DSHA ultimately terminated Kinnikin's employment in October of 2011; Kinnikin denies these allegations.

On July 5, 2013, Plaintiffs filed a complaint against DSHA and Kinnikin alleging causes of action for negligence, intentional infliction of emotional distress, negligent infliction of emotional distress, and a loss of consortium claim on behalf of Louis. Plaintiffs also seek punitive damages. It is unclear from the face of the complaint which claims are based on the electric shocks Lisa allegedly received and which are based on Kinnikin's alleged sexual harassment. The parties' briefings appear to address the negligence claims as arising from the electric shocks and the distress claims as arising from the sexual harassment.

By letter dated July 24, 2013, counsel for Plaintiffs informed Defendants that Plaintiffs would be "calling employees from Solar Electric and Sears to testify of the dangerous condition presented by the plugs and outlet socket and the necessity of having the stove changed due to the dangerous condition." The letter stated that "[t]o

the extent that this constitutes expert testimony please consider this as plaintiff's expert disclosure." Plaintiffs never specifically identified these purported experts by the expert disclosure deadlines, and Defendants subsequently filed a motion to compel identification of these experts with this Court. By Order dated October 3, 2013 this Court granted the motion to compel identification, and required Plaintiffs to identify a specific liability expert by November 15, 2013. Plaintiffs did not disclose a liability expert by the deadline, and to date have not disclosed a liability expert.

DSHA filed the instant motion for summary judgment on November 21, 2013. DSHA raises three grounds for summary judgment: (1) expert testimony is also needed to establish the standard of care as to Kinnikin, because Kinnikin is a professional; (2)the testimony of a liability expert is needed in order to assist the jury in determining whether the jury-rigged plug/outlet setup of the stove was a dangerous condition that could cause an electric shock; and (3) DSHA cannot be liable under *respondeat superior* for Kinnikin's harassing conduct because such conduct is outside the scope of his employment. Kinnikin joins DSHA in the motion. Plaintiffs respond that whether "improper jury-rigging caused an actual shock to the plaintiff is not a matter which should require additional expert testimony." Plaintiffs also contend that there is a jury question as to whether Kinnikin was acting within the scope of his employment.

DSHA has also filed two motions *in limine*; Kinnikin joins DSHA in these motions as well. Defendants first move to exclude the expert testimony of Dr.

Edward Babigumira (hereinafter "Dr. Babigumira"), Plaintiffs' proffered medical expert. Dr. Babigumira submitted an expert report dated April 9, 2013 which consists of two sentences that merely state that Lisa's CRPS was caused by "what patient describes as being electrocuted multiple times by faulty wiring with her stove." Defendants argue that Dr. Babigumira's expert report is insufficient under *Daubert* and is mere *ipse dixit*. Defendants also move to exclude the expert testimony of Carl White (hereinafter "White"), a licensed clinical social worker and Plaintiffs' proffered psychiatric expert. In a series of evaluations of Lisa, White opines that Lisa suffers from post traumatic stress disorder as a result of the electrocutions, as well as anxiety and fear as a result of Kinnikin's harassment. Defendants argue that White is not qualified to render an opinion as to causation or permanency based on his lack of any formal training as a physician or psychiatrist. Defendants also a raise a *Daubert* challenge to White's testimony.

STANDARD OF REVIEW

Summary judgment will be granted when, viewing all of the evidence in the light most favorable to the nonmoving party, the moving party demonstrates that "there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law."[1] This Court shall consider the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the

[1] *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991 (citing *Benge v. Davis*, 553 A.2d 1180, 1182 (Del. 1989)); *see also* Del. Super. Ct. Civ. R. 56(c).

affidavits, if any" in determining whether to grant summary judgment.[2] When material facts are in dispute, or "it seems desirable to inquire more thoroughly into the facts, to clarify the application of the law to the circumstances," summary judgment will not be appropriate.[3] However, when the facts permit a reasonable person to draw but one inference, the question becomes one for decision as a matter of law.[4]

DISCUSSION

Negligence claims

The general rule in Delaware is that "the standard of care applicable to a professional can only be established by way of expert testimony."[5] A "professional" is one who possesses a certain skill or other specialized knowledge that the average lay juror does not possess.[6] The parties dispute whether Kinnikin, as a maintenance person responsible for performing repairs on DSHA's rental units, was a professional at the time of the events in question, thus requiring expert testimony to establish the standard care applicable to Kinnikin. Plaintiffs point out that Kinnikin has no

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[2] Del. Super. Ct. Civ. R. 56(c).

[3] *Ebersole v. Lowengrub,* 180 A.2d 467, 468-69 (Del. 1962) (citing *Knapp v. Kinsey*, 249 F.2d 797 (6th Cir. 1957)).

[4] *Wootten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

[5] *Seiler v. Levitz Furniture Co. of E. Region, Inc.*, 367 A.2d 999, 1008 (Del. 1976).

[6] *See Small v. Super Fresh Food Mkts., Inc.*, 2010 WL 530071, at *3 (Del. Super. Feb. 12, 2010).

electrician background, has not gone to any trade school, nor has any other specialized training relating to his prior work as a maintenance person.

This Court has previously addressed this issue in *Vandiest v. Santiago*.[7] In that case, this Court was confronted with the issue of whether an apartment property manager was a "professional" for purposes of determining the applicable standard of care.[8] The property manager's duties included arranging and directing repair work for the plaintiff's residence.[9] This Court concluded that expert testimony was not required to establish the standard of care applicable to property managers because "this Court does not consider property managers as 'professionals' in the sense that they are held to an elevated standard of care. . . ."[10]

The Court fails to see any meaningful distinction between the property manager in *Vandiest* and Kinnikin in the instant case. Perhaps Kinnikin, as an on-site maintenance worker, was more hands-on than the property manager in *Vandiest*. However, viewing the record in the light most favorable to Plaintiffs, it does not appear that Kinnikin held himself out as a specialist or expert in electrical work, nor did Kinnikin receive any specialized training in order to work as an apartment maintenance worker. The Court concludes that expert testimony is not required to

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[7] 2004 WL 3030014 (Del. Super. Dec. 9, 2004).

[8] *Id.* at *7.

[9] *Id.* at *2.

[10] *Id.* at *7.

establish the standard of care applicable to Kinnikin. This is consistent with this Court's holding in *Vandiest.*

That is not the end of the inquiry. Defendants contend that expert testimony is required in order to establish that the jury-rigged system by which the stove's three-pronged plug was inserted into the four-pronged wall outlet was the proximate cause of Lisa's injuries (*i.e.*, that the plug set-up caused the electrical shocks). Plaintiffs respond that "[t]he fact that improper jury-rigging caused an actual shock to the plaintiff is not a matter which should require additional expert testimony."

Rule 702 of the Delaware Uniform Rules of Evidence provides in pertinent part:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise. . . .[11]

A plaintiff will satisfy his burden to establish a *prima facie* case that the defendant's conduct was the proximate cause of the plaintiff's injuries when such a finding "relates to a matter within a lay person's scope of knowledge."[12] When "the matter in issue is one within the knowledge of experts only and not within the common

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[11] D.R.E. 702.

[12] *Abegglan v. Berry Refrigeration Co.*, 2005 WL 6778336, at *2 (Del. Super. Dec. 2, 2005) (citing *Money v. Manville Corp. Asbestos Disease Comp. Trust Fund*, 596 A.2d 1372, 1375 (Del. 1991)).

knowledge of laymen, it is necessary for the plaintiff to introduce expert testimony in order to establish a *prima facie* case."[13]

In *Hazel v. Delaware Supermarkets*, the Delaware Supreme Court reversed the Superior Court's grant of summary judgment in a grocery store slip-and-fall case on the grounds that a reasonable jury, without the aid of expert testimony, could conclude that a pallet stocked with frozen food products could create a dangerous and slippery floor if left out for too long.[14] Likewise, in *Brown v. Dollar Tree Stores*, the plaintiff's thumb was severed by the jagged edge of a mop, and the defendant argued that expert testimony was required to establish a design defect in the mop.[15] The Superior Court rejected this argument because a mop is a "common household item," and jurors could understand the design and use of such a common item "without the assistance of expert testimony."[16]

Conversely, in *Abegglan v. Berry Refrigeration*, in which the plaintiff was injured by falling ceiling tile that resulted from a leaking ice machine, the plaintiff argued that a repairman's mistake in blowing out the line of an ice machine and allowing water to leak from the machine, was "obvious and thus within the common

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[13] *Id.*

[14] *Hazel. v. Delaware Supermarkets, Inc.*, 953 A.2d 705, 711 (Del. 2008).

[15] *Brown v. Dollar Tree Stores, Inc.*, 2009 WL 5177162, at *1 (Del. Super. Dec. 9, 2009).

[16] *Id.* at *1, *4.

knowledge of jurors to determine negligence."[17] The Superior Court rejected this argument, and explained:

> the causal nexus between Abegglan's injuries and the repairman's actions is not obvious and is not within the common knowledge of a layperson. A lay jury's finding that the repairman's conduct caused Abegglan's injuries would be mere speculation. Therefore, this Court finds that expert testimony is needed to establish that the tile would not have fallen but for the repairman's actions.[18]

Based on the foregoing, the Court finds that the stove in the instant case is more akin to the ice machine in *Abegglan* rather than the frozen food pallet in *Hazel* or the mop in *Brown*. While a kitchen stove may be a common household item, the stove's electrical wiring and circuitry, as well as the wiring of the outlet to which the stove is connected, are not matters within the common knowledge of a layperson. It cannot be said that an ordinary layperson would know that inserting a three-pronged plug into a four-pronged outlet could result in an electric shock. Perhaps the ordinary juror could speculate that this would create an unsafe condition, but it would be just that–speculation. Without the aid of expert testimony, a lay jury would be left unable to determine with certainty whether the jury-rigging system involved here could have created the electric shocks received by Lisa.

Plaintiffs had the opportunity to identify experts on whether the stove's plug

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[17] *Abegglan*, 2005 WL 6778336, at *2.

[18] *Id.* at *3.

set-up could have resulted in an electric shock, but ultimately failed to do so. Without such expert testimony, the Plaintiffs are unable to make a *prima facie* showing of proximate cause. Accordingly, Defendants' Motion for Summary Judgment as to Plaintiff's negligence claims is **GRANTED**.

Distress claims

In order to establish a claim for negligent infliction of emotional distress, the plaintiff must show: (1) negligence causing fright to someone; (2) that person is in the zone of danger; and (3) that person suffers physical consequences as a result of the contemporaneous shock.[19] Conversely, a defendant is liable for the tort of intentional infliction of emotional distress when he "by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another."[20]

Under the doctrine of *respondeat superior*, an employer may be held liable for the tortious acts of an employee if the conduct occurred during the scope of the employee's employment.[21] Tortious conduct is within the scope of employment if: (1) the conduct is of the type the employee was hired to perform; (2) the conduct takes place within the authorized space and time limits; and (3) the conduct was at least partially motivated by a purpose to serve the employer.[22]

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[19] *Doe v. Green*, 2008 WL 282319, at *1 (Del. Super. 2008) (citing *Rhinehardt v. Bright*, 2006 WL 2220972, at *5 (Del. Super. July 20, 2006)).

[20] *Id.* (citing Restatement (Second) of Torts § 46).

[21] *Drainer v. O'Donnell*, 1995 WL 338700, at *3 (Del. Super. May 30, 1995).

[22] *Id.* (citations omitted).

It is unclear from the complaint which conduct forms the basis for Plaintiffs' distress claims. As stated *supra*, Plaintiffs cannot establish negligence on the part of Kinnikin or DSHA pertaining to the stove's jury-rigged plug set-up in the absence of expert testimony. Thus, to the extent Plaintiffs' distress claims pertain to Lisa's electric shocks, those claims are dismissed.

To the extent that these claims are based on Kinnikin's alleged harassment of Lisa, the Court finds that intentional infliction of emotional distress is the more appropriate claim that applies to this conduct. Viewing the record in the light most favorable to Plaintiffs, there appear to be genuine issues of material fact as to whether Kinnikin actually went through Lisa's undergarments and sent her sexually explicit text messages. Such conduct could certainly be called outrageous. There also appears to be a genuine issue of material fact as to whether Lisa's resulting distress was severe. Accordingly, the intentional infliction of emotional distress claim survives against Kinnikin.

The same cannot be said for DSHA. It appears from the record that Kinnikin's inappropriate text messages were not sent while Kinnikin was performing maintenance at Lisa's apartment; this conduct is clearly beyond the scope of Kinnikin's employment. Further, even if the other alleged conduct occurred while Kinnikin was at Lisa's apartment during a maintenance job, it cannot be said that such conduct was of the type that Kinnikin was hired to perform, or was at least partially motivated by a purpose to serve the employer. Thus, Kinnikin's alleged harassment of Lisa fell outside the scope of his employment with DSHA; DSHA cannot be held

liable for Kinnikin's conduct.

Defendants' Motion for Summary Judgment on Plaintiffs' negligent infliction of emotional distress claims is **GRANTED** as to both Defendants, and is **GRANTED** in part as to DSHA and **DENIED** in part as to Kinnikin on Plaintiffs' intentional infliction of emotional distress claims.

Motions in limine

Based on the foregoing, the Court does not need to address Defendants' motion *in limine* pertaining to Dr. Babigumira. Dr. Babigumira's report pertains only to Lisa's electric shocks. This Court's ruling on Plaintiffs' negligence claims renders the need for Dr. Babigumira's expert testimony moot,[23] because even with Dr. Babigumira's testimony, Plaintiffs' claim would still fail without the testimony of a liability expert.

White's evaluations also focus primarily on Lisa's conditions pertaining to the electric shocks; accordingly, for the same reasons, there is no need to consider Defendants' motion *in limine* to exclude White's testimony as to the negligence claims. However, White's evaluation dated July 11, 2013 mentions that Lisa exhibits "anxiety and fear when discussing the flagrant sexual harassment by [Kinnikin]." This could be construed as an expert opinion on causation between Kinnikin's alleged harassment and Lisa's anxiety.

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[23] *See Gen. Motors Corp. v. New Castle Cnty.*, 701 A.2d 819, 823 (Del. 1997) (citing *Glazer v. Pasternak*, 693 A.2d 319, 320 (Del. 1997)) (describing mootness doctrine as applying when there is no longer a justiciable controversy).

The criteria for the admissibility of expert testimony under *Daubert v. Merrell Dow Pharms.* and other cases is well settled and shall not be recounted *in toto* here.[24] When a trial judge exercises his or her "gatekeeper" function to determine the admissibility of expert testimony, some factors the judge considers includes the expert's basis for the opinion, and whether the expert is qualified to give an expert opinion based on his knowledge, skill, experience, training, or education.[25]

White is a licensed clinical social worker, but does not appear to possess any specialized training in psychology or psychiatry. Nor is there any evidence in the record of any particular skills or qualifications White possesses that would enable him to render an expert opinion on the causal link between Lisa's anxiety and Kinnikin's alleged harassment. Further, the basis for White's opinion that Lisa's anxiety and fear is linked to Kinnikin's harassment is conspicuously absent from White's evaluations. Based on this, the Court in exercising its gatekeeper function must find White's expert opinion on Lisa's anxiety inadmissible for lack of qualification and lack of basis for the opinion. Defendants' motion *in limine* as to White is **GRANTED.**

CONCLUSION

Defendants' Motion for Summary Judgment is **GRANTED** in part as to the following: (1) Plaintiffs' negligence claims against DSHA and Kinnikin; (2)

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[24] *See Minner v. Amer. Mortg. & Guar. Co.*, 791 A.2d 826, 841-43 (Del. Super. Apr. 17, 2000) (describing in detail the admissibility of expert opinion under *Daubert* and its progeny).

[25] *Id.* at 842; *see also* D.R.E. 702.

Plaintiffs' negligent infliction of emotional distress claims against DSHA and Kinnikin; and (3) Plaintiffs' intentional infliction of emotional distress claim against DSHA. Defendants' Motion for Summary Judgment is **DENIED** in part as to: (1) Plaintiffs' intentional infliction of emotional distress claim against Kinnikin, and (2) Louis' corresponding loss of consortium claim.

Defendants' motion *in limine* to exclude the testimony of Dr. Babigumira is dismissed as moot. Defendants' motion *in limine* to exclude the testimony of White is **GRANTED**.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh