

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

ALFRED ROGERS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 03C-03-218-PLA
	)	
DELAWARE STATE UNIVERSITY,	)	
a Delaware corporation, and UMIYA	)	
T/A DOVER INN, a limited partnership,	)	
	)	
Defendants.	)	

Submitted: November 14, 2006
Decided: February 28, 2007

UPON DEFENDANT DELAWARE STATE
UNIVERSITY'S MOTION IN LIMINE.
DENIED.

Philip M. Finestrauss, Esquire, Philip M. Finestrauss, P.A., Wilmington, Delaware. Attorney for Plaintiff.

Christian J. Singewald, Esquire and William L. Doerler, Esquire, White & Williams LLP, Wilmington, Delaware. Attorneys for Defendant Delaware State University.

Kevin J. Connors, Esquire, Marshall Dennehey Warner Coleman & Goggin, Wilmington, Delaware. Attorney for Defendant Umiya t/a Dover Inn.

ABLEMAN, JUDGE

I.

Before the Court is a motion in limine filed by Defendant Delaware State University (“DSU”).¹ DSU seeks to exclude the testimony of David L. Johnston, who has been offered as an expert by Plaintiff Alfred Rogers (“Rogers”). For the reasons that follow, DSU’s motion is **DENIED**.

II.

In 2001, Rogers was a student at DSU. Due to the lack of available student housing on campus, DSU provided Rogers with housing at the Dover Inn. On March 23, 2001, Rogers was in his vehicle in the parking lot of the Dover Inn when a bullet went through the driver's side window of his vehicle and struck him in the face. Not surprisingly, he sustained serious injuries as a result of the gunshot wound.²

Rogers subsequently filed this action against DSU. He alleges that his injuries were caused by DSU’s negligence in that DSU failed to employ reasonable security measures; failed to provide safe premises for its students; failed to utilize security deterrent techniques; and failed to investigate, discover and remove any unreasonable risk of harm to Rogers.³

¹ See Docket 100.

² See Docket 1, ¶ 6.

³ *Id.*, ¶ 7. Rogers originally asserted these same claims against the Dover Inn as well. However, he later stipulated to the dismissal of the Dover Inn. Docket 102.

In support of his claims, Rogers offers the testimony of David L. Johnston, a certified protection professional who has approximately 40 years of experience in related security management and risk assessment matters. Rogers asked Mr. Johnston to conduct a review of the security provided by DSU at the Dover Inn.⁴

Mr. Johnston's ultimate conclusion after performing his review was that the shooting of Rogers "was reasonably foreseeable and preventable by" DSU. He opines that DSU should have conducted a risk assessment/security audit, which would have exposed ongoing and developing crime patterns and security risks that had the potential of victimizing persons residing in DSU's dormitories and the Dover Inn. An assessment/audit, according to Mr. Johnston, would also have revealed to DSU the need to develop adequate deterrent programs to ensure that the Dover Inn premises were safe. Such deterrent programs would include DSU security patrols in and around the Dover Inn, and a DSU employee posted in the lobby of the Dover Inn.⁵

The basis for Mr. Johnston's opinions stems from his examination of DSU's reported crime and incident data, and an examination of DSU's

⁴ See Docket 115, Ex. B, p. 1-7.

⁵ *Id.*

current security program. Mr. Johnston also reviewed DSU “materials,” which indicated that no DSU security patrols or inspections were ever conducted at the Dover Inn.⁶

III.

DSU has filed a motion in limine to exclude the testimony of Mr. Johnston.⁷ It alleges that Mr. Johnston’s opinions lack a proper foundation and methodology. Specifically, DSU argues that the methodology employed by Mr. Johnston is unreliable and does not comport with Delaware law in that his reliance upon crime rates for on-campus residence halls is “simply ridiculous” given the “analytical gap between an on-campus living environment and the Dover Inn.” DSU also maintains that Mr. Johnston’s opinion that a security guard should have been placed by DSU at the Dover Inn is not reliable because the need for a security guard can only be determined after performing a risk assessment, which Mr. Johnston did not do. Further, DSU contends that Mr. Johnston’s causation opinion, that the shooting would not have occurred had a security guard been present, is flawed because he is not an expert in criminal profiling, and he offers no insight as to where the guard should have been placed or how frequently

⁶ *Id.*

⁷ *See* Docket 100.

patrols should have been performed. Finally, DSU claims that, contrary to Mr. Johnston's opinion, the shooting was not foreseeable by DSU because it was not a random crime and had nothing to do with the neighborhood where the Dover Inn was located. Rather, the shooting occurred due to a prior altercation earlier in the day between the parties about which DSU was not informed. In all, DSU argues that Mr. Johnston's testimony should be excluded and, as a result, claims it is entitled to summary judgment since security issues and proximate cause are not matters within the common knowledge of jurors.⁸

Rogers responds that Mr. Johnston's opinions, as expressed in his deposition testimony and written report, have a reliable foundation stemming from his reliance upon relevant crime statistics, case materials, and authoritative treatises and reports. Rogers also claims that, despite DSU's contention that Mr. Johnston should have performed a risk assessment, it was sufficient for him to opine that DSU should have had a security guard at the Dover Inn since he formulated such an opinion based on his experience and knowledge, and his evaluation of the usual and customary security practices of Universities (which, according to Mr. Johnston, calls for the placement of security personnel in dormitory

⁸ *Id.*, ¶¶ 4-9.

premises). In sum, Rogers maintains that he has not offered Mr. Johnston's opinions solely to establish negligence, but rather to assist the jury with facts and information regarding usual and customary security practices. Rogers, therefore, asks the Court to deny DSU's motion.⁹

IV.

The Court “serves as the gatekeeper for expert testimony.”¹⁰ This gatekeeping function requires that the Court only allow a “witness [to] testify as an expert when [the witness is] qualified as an expert and [when] the witness has scientific, technical or other specialized knowledge that will assist the trier of fact[.]”¹¹ To reach these admissibility determinations, the Delaware Supreme Court has crafted a “five-step test.”¹² This test provides that a witness' proffered opinion testimony will be admissible if this Court makes the following findings: (i) the witness is qualified as an expert by knowledge, skill, experience, training or education; (ii) the evidence is relevant and reliable; (iii) the expert's opinion is based upon information reasonably relied upon by experts in the particular field; (iv) the expert

⁹ See Docket 115, ¶¶ 2-5, 9.

¹⁰ *Potter v. Blackburn*, 850 A.2d 294, 299 (Del. 2004).

¹¹ *Eskin v. Carden*, 842 A.2d 1222, 1227 (Del. 2004). See also Delaware Rule of Evidence 702.

¹² See *Eskin*, 842 A.2d at 1227.

testimony will assist the trier of fact to understand the evidence or to determine a fact in issue; and (v) the expert testimony will not create unfair prejudice or confuse or mislead the jury.¹³

V.

In applying the “five-step test” to this case, the Court finds Mr. Johnston’s proffered testimony admissible. First, it is clear that Mr. Johnston has the knowledge, skill, experience, training and education to qualify him as an expert as is evidenced by his service over the past 40 years as a Director of Security for several corporations, a Director of Public Safety for two Universities, and a police officer.¹⁴ Mr. Johnston also has a masters degree in criminal justice, a bachelors degree in police administration, and is a certified protection professional. Therefore, his qualifications certainly elevate him to the level of expert in matters relating to security.

Mr. Johnston’s opinions are also reliable. The underlying factual basis for Mr. Johnston’s opinions, as articulated in his written report, was his examination of DSU’s reported crime and incident data, and an examination of DSU’s current security program. Mr. Johnston applied this data and information to the facts of this case, and relied on several authoritative texts,

¹³ See *Eskin*, 842 A.2d at 1227. See also *Daubert v. Merrill Dow*, 509 U.S. 579 (1993); *Kuhmo Tire Co. v Carmichael*, 526 U.S. 137 (1999); *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513 (Del. 1999).

¹⁴ See Docket 115, Ex. A.

treatises, and reports, as a foundation for his opinions. This foundation is adequate and imparts an objective and sound methodology in the formulation of Mr. Johnston's opinions. Contrary to DSU's argument, the fact that the Dover Inn is not an on-campus residence hall (even though DSU was using it as one), and that crime data from the Dover Inn was not used in Mr. Johnston's analysis, does not make his opinions unreliable. Rather, these are facts that can be brought out during DSU's cross examination of Mr. Johnston in an attempt to impeach his testimony. What is more, the data and information relied upon by Mr. Johnston, namely DSU's crime statistics, appears to be the exact type of information that would be reasonably relied upon by other experts in the security field.

Lastly, Mr. Johnston's opinions are relevant. As was stated by the Delaware Supreme Court in this very case, "a reasonable juror could conclude that the failure of DSU to follow usual and customary student safety and security measures was a proximate cause of Rogers' injuries."¹⁵ Therefore, Mr. Johnston's testimony with respect to security at the Dover Inn, and his testimony regarding DSU's and other Universities' security practices, will certainly be relevant and will assist the jury in understanding

¹⁵ *Rogers v. Delaware State Univ.*, 2006 WL 2085460, at *2 (Del. July 25, 2006). This Court previously entered summary judgment in favor of DSU. The Supreme Court subsequently reversed that order in the preceding decision.

the evidence and/or determining a fact in issue.¹⁶ Such testimony will in no way create unfair prejudice or confuse or mislead the jury.

VI.

Based on the foregoing, DSU's motion in limine to exclude the testimony of Mr. Johnston is **DENIED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary

¹⁶ See *State v. McMullen*, 900 A.2d 103, 113 (Del. Super. Ct. 2006) (citation omitted) (“[E]xpert testimony must be relevant by requiring that it ‘assist the trier of fact to understand the evidence or to determine a fact in issue.’”).