

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

SUSSEX COUNTY COURTHOUSE
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January 6, 2014

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RE: *Audrey E. Sweiger v. Delaware Park, L.L.C. & Delaware Racing
Association d/b/a Delaware Park,*
C.A. No. S11C-10-020 RFS

_____ Date submitted: October 8, 2013

Dear Counsel:

Before the Court is Defendants' Delaware Park, L.L.C. & Delaware Racing Association d/b/a Delaware Park ("Defendants'") Motion to Preclude Photographs Taken by Julies Pereira ("Pereira"), expert witness for Plaintiff Audrey E. Sweiger ("Plaintiff"). Defendants' Motion is **DENIED**.

Facts

This Motion stems from an incident which occurred on the evening of January 13, 2010. On that date, Plaintiff, an eighty-one-year-old woman, visited Defendants' establishment, and was present in Defendants' casino at about 6:20 p.m. Plaintiff

claims that she left the casino area and entered an adjacent glass-enclosed alcove, which Plaintiff believed to be a smoking room. Plaintiff then attempted to re-enter the casino through a different entrance and in doing so, walked into an unmarked glass window and fell to the floor. She suffered bodily injuries as a result. Other glass windows within the wall contained decals, but the one causing Plaintiff's injury did not.

Pereira is Plaintiff's expert witness in this case.¹ He visited the site of Plaintiff's injury and took photographs, which are the subject of this Motion.

Analysis

Defendants contend that the Court should find that Pereira's photographs, which they assert constitute the only evidence supporting his theory of improper lighting, should not be permitted because they are unreliable and, on balance, their prejudicial effect outweighs their benefit. Specifically, Defendants claim that the pictures do not accurately depict what the human eye would have seen at the time the pictures were taken, and thus do not accurately depict the conditions of the site of Plaintiff's injury when she was injured. Defendants note that Pereira could not identify the attributes of the camera he used, could not identify which photographs

¹ In a prior decision, the Court addressed the admissibility of Pereira's expert testimony. *See Sweiger v. Delaware Park, L.L.C.*, C.A. No. S11C-10-020 RFS, at 9 (Del. Super. Dec. 9, 2013).

were taken with the camera's flash on, although some photographs were taken with a flash and some without, and did not know the camera's settings when the photographs were taken.

Plaintiffs counter that Pereira took the photographs under conditions "as close as possible" to the time of Plaintiff's injury,² and that Pereira did provide the information regarding the photographs that Defendants claim his testimony lacked.³ Additionally, Plaintiff notes that while she provided clear copies of the photographs which accurately depicted the scene, Defendants "inexplicably attached to this [M]otion such poor quality copies that they are virtually useless."⁴ Plaintiff claims that the photographs will allow her to demonstrate the existence of an unsafe condition, which is necessary to her claim of negligence.

Delaware Uniform Rule of Evidence 403 lays out the standard for excluding otherwise relevant evidence:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of

² Defendants respond that this fact does not negate their argument that the pictures are untrustworthy because of Pereira's inability to attest to the unreliability of his camera.

³ Pl.'s Resp. to Defs.' Mot. *in Limine* to Preclude Photographs Taken by Julius Pereira at 2. Defendants' argue that Pereira's testimony provides minimal information regarding his taking of the photographs. Additionally, they claim that any attempt of Pereira's to verify the photographs by looking at his records cannot be allowed because of the close of discovery.

⁴ *Id.* at 3.

the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.⁵

Delaware Uniform Rule of Evidence 901 lays out the standard for authentication and identification of evidence:

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.⁶

Pereira's photographs are relevant and probative evidence because they illustrate the seminal issue in this case (*i.e.*, the state of the site of Plaintiff's injury).⁷

When photographs depict an issue in dispute, they may be admitted into evidence.

Further, a court may instruct the jury that the photographs are not direct evidence of the disputed issue, but rather illustrative evidence of one side's testimony.⁸ This

⁵ D.R.E. 403.

⁶ D.R.E. 901(a).

⁷ D.R.E. 401–02; *Green v. St. Francis Hosp., Inc.*, 791 A.2d 731, 737 (Del. 2002) (“The photographs and videotape of the hospital room are probative evidence, because the arrangement of the room was an integral part of each party's case at trial.”).

⁸ *See id.* at 737–38 (finding no error in the admission of photographs and videotape because the trial judge admitting the evidence “for illustrative purposes with a limiting instruction to the jury”) (citation omitted); *see also Ariz., Dep't of Law, Civil Rights Div. v. ASARCO, L.L.C.*, 844 F. Supp. 957, 979 (D. Ariz. 2011) (denying a motion *in limine* regarding photographs because, *inter alia*, “[a]ny potential prejudice from those circumstances can be adequately addressed by a limiting instruction reminding jurors that it is for them to determine what the photographs show.”) (citations omitted); *Metro. Dade Cnty. v. Zapata*, 601 So. 2d 239, 244–45 (Fla. Dist. Ct. App. 1992) (finding a photograph to be admissible, but suggesting that “the trial court, on remand, issue a cautionary instruction to the jury reminding them that the photograph is only one party's version of the facts”) (citation omitted)).

Court will consider an appropriate instruction; and the parties may submit one with their jury instructions.

Balancing the parties' interests under Rule 403, the Court finds that the possible harm of admitting Pereira's photographs does not substantially outweigh their probative value. The Court is satisfied that all of the problems relating to the photographs to which Defendants complain can and should be addressed through cross-examination of Pereira.⁹

The Court also finds that the photographs can be properly authenticated under Rule 901 because, as a threshold matter, Pereira provided enough to establish that the photographs are an accurate depiction of the site of Plaintiff's injury at the time of the incident.¹⁰ During his deposition testimony, Pereira testified as to the photographs:

Q: An you wanted to do the inspection at the same time that you believed . . . [Plaintiff's] incident took place, correct?

A: I wanted to replicate or be able to see for myself and to be able to record as closely as possible the conditions that she would have

⁹ In *Graham v. A. C. & S. Co., Inc.*, a medical malpractice case, this Court noted, in the context of Rule 403, the danger of admitting "an opinion from a person who will not testify at trial and who will not have been subjected to cross-examination on his opinion." 1990 WL 124039, at *1 (Del. Super. July 31, 1990). The Court stated that "[i]t may be viewed by the jury as equal in weight or of greater weight than the testimony of physicians who appear and testify. Such reference is not a proper way to bring before the jury evidence which is required to be presented by live testimony from a physician." *Id.* (citations omitted). The Court finds in this case, however, that cross-examination of Pereira can effectively handle any concerns Defendants have regarding Pereira's photographs.

¹⁰ See *Lecato v. State*, 2000 WL 1535288, at *3 (Del. Oct. 10, 2000).

encountered at that time, which was the reason for not using the flash on all the pictures.

Q: So is the accuracy and the reliability of the photographs relevant to your analysis and your opinion?

A: Yes.

Q: So if the photographs were not accurate, would that affect your opinion in a negative way?

A: I took the photographs, they're accurate.¹¹

Based on the above, Defendant's Motion is **DENIED**.

IT IS SO ORDERED.

Very truly yours,

/s/ Richard F. Stokes

Richard F. Stokes

Cc: Prothonotary
Judicial Case Manager

¹¹ Tr. of Julius Pereira III at 105: 21–24, 106: 1–15.