SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

SUSSEX COUNTY COURTHOUSE
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December 9, 2013

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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. and Delaware Racing Association d/b/a Delaware Park ("Defendants'") Motion *in Limine* to Exclude Testimony of Plaintiff's Expert Witness Julius Pereira ("Pereira"), filed against Plaintiff Audrey E. Sweiger ("Plaintiff"). For the reasons that follow, Defendants' Motion is **GRANTED** in part and **DENIED** in part.

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.

Plaintiff hired Pereira, a licensed architect, to opine on the conditions of the site of her injury. In his report, Pereira, who visited the site, first described the layout of Defendants' casino area and the glass alcove at the time of Plaintiff's injury.[1] He also noted that building codes do not address injuries relating to walking into glass windows, but stated that national publications, architectural references, and materials which specifically address the racetrack, casino, and restaurant industries all advise that glass windows be identified, either by special design within the glass, such as etching, or by artificial means, such as decals, in order to avoid human contact. Additionally, Pereira stated that materials related to the casino industry warn

[1] Apparently, two sets of double doors marked as emergency exits were on the glass wall in between the casino and the alcove, and at the time of Plaintiff's injury and Pereira's inspection, one set was missing, which provided the entryway onto the alcove.

businesses of the presence of elderly customers. This, he claimed, became particularly problematic when confronting the hazards of subtle glass paneling. Pereira further noted that at night, while standing inside the casino, the reflections from the casino's lights made the glass conspicuous, but while standing in the alcove, the lights within the casino overpowered any reflections on the glass, rendering it inconspicuous.

Ultimately, Pereira opined that the window's inconspicuous nature impaired Plaintiff's ability to detect it, that Defendants' failure to install decals on the window in an area foreseeably used by elderly patrons deprived Plaintiff of a necessary warning, that Defendants' failure to place decals on the window did not comply with reasonable safety standards and created a hazardous condition, and that Plaintiff's actions were neither unusual nor unforseeable.

Analysis

Parties' Contentions

Defendants contend that Pereira's other opinions should be excluded for lack of an application of a heightened sense of knowledge to the facts of this case. Defendants claim that no reliable, methodical analysis can be gleaned from Pereira's conclusions. Rather, his positions "are based upon . . . potentially favorable snippets

from various publications,"[2] all of which constitute non-binding, secondary source literature. Furthermore, Defendants claim that some of these publications are not the sort relied upon by experts in Pereira's field.[3]

Defendants also note three prior instances in which they claim a court disqualified Pereira as an expert, as well as an "unspecified number" of times when his testimony was limited.[4] Additionally, Defendants classify Pereira as a "professional expert" without any special experience or qualifications, other than his status as a licensed architect, which would allow him to render an expert opinion.[5]

Defendants assert that Pereira's conclusions cannot survive the rigorous strictures of the Delaware Rules of Evidence, as interpreted by both federal and Delaware case law. Specifically, Defendants argue that Pereira, who has no medical training and cannot be classified as a "human factors" expert, has no basis to opine about the behavior of the elderly clientele in casinos, both in general and in relation

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[2] Mot. Limine Exclude Test. Pl.'s Expert Witness at 2.

[3] *Id.* (noting "Best's Guide for Casinos" is an insurance underwriting manual, rather than a publication upon which an architectural expert would rely).

[4] *Id.* at 3–4 (citing, *inter alia*, *Spencer v. Wal-Mart Stores East*, 930 A.2d 881 (Del. 2006); *Mendler v. Aztec Motel Corp.*, 2011 WL 6132188 (D.N.J. Dec. 7, 2011); *Freiman v. Evans*, 1997 WL 719318 (Del. Super. Aug. 19, 1997)).

[5] *Id.* at 4–5 (noting, additionally, that "Pereira acknowledges he is not a human factors expert[,] but[] believes he is competent to express opinions regarding human factors issues as a result of his training as an architect.").

to Plaintiff. Furthermore, Defendants assert that Pereira, who is being used by Plaintiff to establish an industry standard, impermissibly implies that Defendants owed a duty to warn Plaintiff of the glass window, based solely on irrelevant "industry" publications, which could only confuse the jury.[6]

Defendants also contend that Pereira has no basis to opine on reflections on the glass. They state that Pereira did not perform any lighting analysis of the injury site, and his "testimony in support of his report revealed absolutely no scientific analysis and/or evaluation of the lighting in the area upon which his opinions regarding reflections could be based."[7]

Plaintiff asserts that Pereira possesses the requisite knowledge to render an expert opinion, having done so in prior cases involving "glass and illumination issues;"[8] and that Pereira's extensive research in this case establishes a standard of conduct which the jury should be permitted to consider.[9] Plaintiff argues that Pereira used appropriate sources in forming his opinions; and Defendants' lack of any code

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[6] Defendants cite *Goodridge v. Hyster Co.*, 845 A.2d 498 (Del. Super. 2004) for the proposition that an expert cannot form an opinion simply by piecing together various passages from material.

[7] Mot. Limine Exclude Test. Pl.'s Expert Witness at 9.

[8] Pl.'s Resp. Defs.' Mot. *in Limine* Exclude Test. Pl.'s Expert Witness at 4.

[9] *Id.* at 10–11 (citing, *inter alia*, Prosser, Torts § 35, at 203 (3d ed. 1964) (referring to the admissibility of regulations)).

violation is irrelevant because Plaintiff does not allege negligence *per se*.

Plaintiff explains that Pereira's process consisted of first viewing background material such as video footage and scene photographs. He then conducted a sight inspection under circumstances similar to Plaintiff's injury, taking photographs and measurements. Pereira then examined numerous amounts of research, and culminated his work into a formal opinion. Such methodology, comparable to the methodology of Defendants' expert Todd T. Breck ("Breck"), who Plaintiff points out based his conclusions on common, rather than professional knowledge, clearly establishes the requisite reliability necessary to render an expert opinion.

Plaintiff further argues that, contrary to Defendants' argument, an expert opinion need not be based on scientific principles. Rather, "a proper safety and risk management assessment involves researching as well as being knowledgeable about the hazards associated with large glass panels in particular environments and the applicable industry practices related to such issues, and to then apply that information in a consistent manner."[10]

Plaintiff contends that Defendants incorrectly cite the three instances in which Pereira was disqualified as an expert because, according to Plaintiff, each instance presented questions of law and fact different from this case, and in no instance was

[10] *Id.* at 9.

Pereira's credentials viewed as lacking.[11] Plaintiff states that Pereira's status as a licensed architect, his continuing education courses, and his publications qualify him to opine on how human beings interact with architectural design.

Regarding elderly patrons in the gaming industry, Plaintiff contends that Pereira merely discusses a fact readily available in the research he examined, which goes to the issue of the forseeability of Plaintiff's injury.

Regarding reflections on the glass at the time of Plaintiff's injury, Plaintiff points to Pereira's testimony that Plaintiff would not have seen reflections on the glass when she came into contact with it, to which Breck concurs.

Discussion

The parties advance several reasons as to why Pereira's principal opinion, which harps on Defendants' failure to place decals on the glass window, should or should not be barred. In its decision denying Defendants' Motion for Summary Judgment, this Court held that Plaintiff was precluded from arguing that Defendants' failure to place decals on the window constituted negligence because, under the Delaware Supreme Court case of *Talmo v. Union Park Automotive*, Defendants were

[11] *Id.* at 4–5 (*Spencer v. Wal-Mart Stores East*, 930 A.2d 881 (Del. 2006); *Mendler v. Aztec Motel Corp.*, 2011 WL 6132188 (D.N.J. Dec. 7, 2011); *Freiman v. Evans*, 1997 WL 719318 (Del. Super. Aug. 19, 1997)).

not required to warn Plaintiff of the existence of the glass window.[12] Therefore, as an initial matter, Pereira may not testify at trial as to the window's lack of decals. The Court also held, however, that based on the circumstances of her case, Plaintiff could present a visibility argument regarding improper lighting and distractions on the other side of the glass.[13] Therefore, Pereira's expert testimony, if permitted at all, must be so tailored.

The rule regarding expert testimony is codified in Delaware Rule of Evidence 702:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to 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, if (1) the testimony is based upon 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 of the case.[14]

In applying Rule 702, Delaware courts follow the guidelines laid out by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[15] and

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[12] *See Sweiger v. Delaware Park, L.L.C.*, C.A. No. S11C-10-020 RFS, at 9 (Del. Super. Dec. 3, 2013) (citing *Talmo v. Union Park Automotive*, 2012 WL 730332, at *3 (Del. Mar. 7, 2012)).

[13] *Id.* at 9.

[14] D.R.E. 702.

[15] 509 U.S. 579 (1993).

Kumho Tire Co., Ltd. v. Carmichael.[16] The Delaware Supreme Court has explained the functions of these holdings:

> *Daubert* held that the trial judge is a 'gatekeeper,' who must determine whether the proffered expert testimony is both relevant and reliable. The *Daubert* [C]ourt identified several factors, such as testing, peer review, and publication, that contribute to a finding of reliability." In *Kumho*, the Supreme Court held that *Daubert* applies to all expert evidence, not just scientific evidence.[17]

Concerning the present Motion, the first question to be decided is whether Plaintiff's case requires expert testimony at all. "Expert opinions are appropriate where they will assist the jury in understanding the facts or the evidence."[18] Matters of common understanding, however, do not require expert testimony.[19] As this Court has framed the issues, Plaintiff may only present arguments relating to glass visibility, which excludes any reference to Plaintiff's age, as such is not relevant to whether Defendants were negligent.[20] The Court finds that an expert opinion could be helpful

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[16] 526 U.S. 137 (1999).

[17] *Ward v. Shoney's, Inc.*, 817 A.2d 799, 802 (Del. 2002).

[18] *Id.* at 803.

[19] *Id.*

[20] *See Brown v. Dover Downs, Inc.*, 2011 WL 3907536, at *7 n.71 (Del. Super. Aug. 22, 2011) ("The Court does not find the alleged elderly age of the clientele to which Defendant caters to be a relevant factor in assessing the existence of a duty . . . . The applicability of this rationale is not contingent on the age of the putative plaintiff, as the inherent danger [involved] . . . applies equally to children, adults, and elderly adults.").

to the trier of fact in determining the narrow factual issue of glass visibility.

The second question is whether Pereira's opinion is indeed reliable. The Court finds that it is. Although Pereira did not perform an analysis of the lighting at the injury site, he did visit the site during conditions similar to when Plaintiff was injured. He also took photographs and watched videos. Most significantly, Pereira opined, based on some source of knowledge, that Breck's photographic renderings of lack of a reflection on the glass were inaccurate. Such an assertion comes from a licensed architect, and even though this architect could be labeled a "professional expert," the Court considers the assertion sufficiently reliable. Rather than going to the issue of ultimate reliability, the various problems with Pereira's opinions to which Defendants point are issues that should be brought out on cross examination.

The Court notes that although most of Pereira's opinions focus on Defendants' failure to place decals on the glass, an impermissible subject, the Court finds that throughout his deposition, Pereira has, more or less, opined on glass visibility:

> Q. All right. So your opinion with regard to [Defendant's expert] Mr. Breck's report is that he overlooked certain evidence that you didn't overlook?
>
> A. Part of my criticism of Mr. Breck's report has to do with his method of photography, where he took pictures close-up of the glass looking down at the floor so that he could document certain reflections, that if you were standing at the window, close to the window, that you might be able to see some form of reflection.

Those photographs are not reflective of what . . . [*Plaintiff*] *would have seen as she was walking normally. They're not taken at eye level, they're specifically looking at the ground.*

Q. Do you know what . . . [Plaintiff] was looking at when she hit the window?

A. *My understanding, she was walking back into the casino and looking forward.*

Q. Do you know what she was looking at? Do you – have you seen any photographs that show what she was looking at?

A. Other than the video portions that were provided to me of the incident, no. *My understanding from talking to her was that she was looking at where she was going, into – back into the casino, and she thought she had come across an open area and proceeded to walk that way. That was her description.*

. . . .

Q. Did you conduct any scientific analysis in this case?

A. Yes, I did.

Q. And describe for me what that analysis was.

A. Well, that included a review of the material, the research involved; that's all part of the methodology in dealing with a situation like this.
The background research in terms of the casino, the photographs taken that replicate what . . . [*Plaintiff*] *was looking at, as opposed to other photographs looking at the floor which do not reflect that situation.*

. . . .

Q. What's your understanding of scientific analysis?

A. Is providing that methodology, which I actually did. Making sure I review all the facts, *making sure that I depicted the conditions as they would have been seen by . . .* [*Plaintiff*] *at the time of the incident . . . .*

. . . .

Q. Before . . . [Plaintiff] hit the glass pane, was there anything obstructing her view, her ability to perceive it?

A. Not that I'm aware of, no.

Q. *Was there anything in that room to distract her*?

A. Yes.

Q. What's that?

A. *As she walked through that room looking back into the casino, she would have seen all the flashing lights.* That could have been – since you're dealing with a hypothetical, I have to check my own, you know – could have had an aspect or it would have had an aspect in this.

Q. And as far as the real testimony now from . . . [Plaintiff], did she explain that she was distracted by anything?

A. No, not that a I recall.[21]

Based on the above, Defendants' Motion is **GRANTED** in part and **DENIED** in part.

[21] Tr. of Julius Pereira III at 121:10–24, 122:1–19, 124:14–24, 125:1–4, 126:6–12, 131: 10–24, 132: 1–4 (emphasis added).

IT IS SO ORDERED.

Very truly yours,

/s/ Richard F. Stokes

Richard F. Stokes

Cc: Prothonotary
Judicial Case Manager