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Case Number 146,2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOEL and IRIS BROWN, Appellants,	:
v.	: Appeal No. 146, 2013
	: Appeal from the Superior Court of the State of Delaware in and for New Castle County, C.A. No. 07C-07-070 JAP
UNITED WATER DELAWARE, INC. Appellee.	:

APPELLANTS' OPENING BRIEF

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Dated: May 1, 2013

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NATURE AND STAGE OF THE PROCEEDINGS

This suit involves a claim by Joel Brown and Iris Brown, hereafter Plaintiff/Appellants, alleging gross negligence by United Water, hereafter Defendant/Appellee, in failing to maintain at least 2 fire hydrants near their home which as a result were inoperable. Consequently, they could not provide water to fight a fire which occurred in their home on December 20, 2005. Because of the lack of water, the house was totally destroyed.

The Plaintiffs have been seeking their day in Court since suit was filed on July 10, 2007. The following is a brief chronology of relevant events leading to this appeal.

After lengthy discovery, trial was scheduled for June 15, 2009. However, on March 10, 2009 Defendant filed a Motion for Summary Judgment based mainly on the Filed Rate Doctrine. On May 9, 2009, the Superior Court ruled that the Doctrine precluded Plaintiffs' claim. That decision was appealed to this Court which on February 15, 2010 remanded the decision for the Superior Court to decide whether the Filed Rate Doctrine would also preclude a claim based on gross negligence or willful conduct and whether there was sufficient evidence of same.

On February 18, 2010, the Superior Court requested memorandum on those issues. On March 3, 2010, Defendant's attorney's letter to the Court conceded that "the persuasive case law clearly holds that the Filed Rate Doctrine would not bar claims for gross negligence or willful misconduct." On March 26, 2010, the

Superior Court responded essentially that it did not agree with Defendant's position and directed Defendant's attorney to:

> 1. Submit an argument that the instant tariff precludes liability for gross negligence, or
>
> 2. Submit a list of the persuasive cases referred to in its letter.

On April 16, 2010, Defendant's attorney complied and submitted the requested memorandum and refused to argue that the tariff precluded liability for gross negligence.

On May 25, 2010, the Superior Court decided that there was sufficient evidence for a jury to find that Defendant was grossly negligent but not willful. The Court also found that the Filed Rate Doctrine would also bar a claim on gross negligence but that Defendant had waived any argument to that effect. On February 15, 2010, the Supreme Court affirmed the Court's decision. Consequently, trial was once again scheduled for December 13, 2010. On November 10, 2010, Defendant filed a Motion in Limine to exclude the testimony of Plaintiffs' expert Jeffrey Morrill. On December 8, 2010, the Court's ruling from the Bench granted Defendant's motion and continued the trial but allowed Plaintiffs to obtain another expert after it issued a written opinion. On October 7, 2011, the Superior Court issued a written opinion stating the basis for its decision. That decision is attached as Exhibit A and is part of this appeal.

Thereafter, Defendant filed an interlocutory appeal to this Court which was refused on March 13, 2012. Trial was once again scheduled for the third time for

June 11, 2012 and the parties once again issued subpoenas, etc. in preparation for trial.

On March 15, 2012 the Superior Court asked the parties to send their expert reports to the Court. A-100 Thereafter, the Court "allowed the sort of late filing of Motion in Limine". A-101 On May 23, 2012, Defendant moved to exclude the testimony of Plaintiffs' experts. At the pre-trial conference on June 4, 2012, the Superior Court granted Defendant's Motion in Limine and dismissed the case but stated it would not be final until it issued a written decision.

On February 26, 2013, the Court issued a written decision. A copy of the Superior Court's opinion is attached hereto as Exhibit B. The Plaintiffs appealed to this Court and this is Appellants' Opening Brief.

SUMMARY OF THE ARGUMENT

I. THE SUPERIOR COURT ERRED IN EXCLUDING THE TESTIMONY OF PLAINTIFFS' EXPERTS

II. THE SUPERIOR COURT ERRED IN DISMISSING PLAINTIFFS' CLAIM

STATEMENT OF FACTS

At 4:52 a.m. on December 20, 2005, a fire at Plaintiffs' home was reported by a neighbor who testified and signed an affidavit that at that time and when the fire engines arrived at 4:59 a.m. only the living room, and "nowhere else", was on fire. A-20-21 Another neighbor, Michael Hoffman, signed an affidavit that there was only "a small fire in the front left side of the house". A-22 Fire Chief at the scene, Eric Haley, told Ronald Gray, an insurance investigator, only hours after the fire, the following:

> "...The chief maintained that when the responding suppression units arrived, they attempted to hook up to a fire hydrant only three houses away from the fire. The hydrant did not produce any water, so they went to another hydrant several hundred feet away, and that hydrant, too, did not produce any water.
>
> The chief said he called for tanker trucks to respond with self-contained water to suppress this fire. It was a very long time before they arrived and said it was frustrating to have to stand there and watch the house burn down due to no water." Emphasis added Ronald G. Gray deposition testimony at page 19 A-23

The Fire Marshall's investigation undisputedly determined that Defendant failed to maintain the fire hydrants as they were required to do. One hydrant was apparently turned in the wrong direction because the arrow on top of the hydrant which shows the direction that they hydrant must be turned in order to open was covered up with paint and not visible. After this incident the paint was chipped off. The next closest hydrant also did not work "due to lack of maintenance". Defendant's records that were produced revealed that a required yearly examination of this hydrant found that on November 12, 2004 this hydrant was

"very hard to open". A second maintenance examination on April 18, 2005 found that this hydrant was "hard to open". Simple lubrication would have corrected the problem but the Defendant's maintenance people took no action both times to lubricate the hydrant although they could have easily done so nor did they give any reason why it was not lubricated. There clearly was ample evidence of gross negligence. The lower Court agreed there was sufficient evidence of gross negligence (although it ruled that even gross negligence would bar recovery except for Defendant's concession to the contrary.)

The issue on appeal is the admissibility of Plaintiffs' experts' testimony. Plaintiffs' first expert, Jeffrey Morrill, hereafter Morrill, reviewed the available evidence and wrote a report on January 9, 2008. A-24-26

In his deposition Morrill testified that according to the dispatcher's records and the Fire Chief's report, initially the Chief was going to do an "internal" attack meaning that it was safe to go inside the house.

> "He ordered an interior attack because he believed that he could fight that fire internally and extinguish it." Morrill Deposition Transcript, hereafter Morrill, Page 54... A-27

He testified that Chief Haley's own report states:

> "'crews stretched a two and a half inch line to the house and a two-inch preconnect. Crews began to push into the house when tank water ran out in Engine 135 and Medic 629 advised that hydrant was broken. Engine 253 was ordered to stretch a supply line from the hydrant at 2732 Chinchilla Drive. Several engines supplied tank water to Engine 135. Engine 230 - - 253 advised that second hydrant was broken and could not be charged.'
> It was then that the decision was made that it was going to be an externally fought fire." Emphasis added Morrill, Pages 40-41 A-28-29

Mr. Morrill testified that the photograph taken by Chief Haley confirmed that the garage section of the house was not on fire:

> "The - - Exhibit-9 you can see the exterior siding on the garage, but that is not involved in fire.
> The audiotape says that there are firefighters in the garage calling for water, and that there is some firefighting going on - - interior firefighting going on in the garage or from the garage area." Morrill, Page 85 A-30

Moreover, the 911 tape made it clear that the firemen were inside the garage expressing their frustration that they had no water as they tried to save the house. In his report Morrill explained that:

> "Fires typically double in size (megawatts of energy) every 60 seconds...The time wasted from 0508 when a water supply should have been established to 0532 when one finally was, accounts for a fire growing uncontrolled for 26 minutes. That relates to a 5600% larger fire by the time a water supply was established thereby requiring that much more water for extinguishment." A-26

He explained that if they had water they would have done an interior attack and put the fire out. He testified:

> "They attempted to do an interior attack until they ran out of water, then they backed out and went to an exterior attack." Morrill, Page 40 A-28

However, even with an exterior attack the garage portion of the house could have been saved. He testified:

> "Q. ...if a continuous water supply was established at 05:08, and only an exterior attack was conducted, it is your opinion that any part of that house could have been saved?
> A. Absolutely.
> Q. With an eternal attack only?
> A. Absolutely.
> * * * * *
> Q. What portions could be saved?...

A. The portions of the house that were not involved in the fire yet could certainly have been saved. Morrill, Pages 85-86 A-30-31

* * * * *

A. The bedrooms and master bedroom and bathrooms on the right-hand side of the house.
Q. Could have been saved if an external attack was conducted at 05:08 with a continuous water supply?
A. Yes.
Q. And what, again, do you base that opinion on?
A. Well, it is based on the photographs that I am being represented as what the house looked like, knowing fire suppression strategies and tactics, and knowing what it takes to put out a fire of the magnitude depicted in Exhibits-8 and 9. Morrill, Page 89 A-32

He also testified that the basement area could have been saved if the hydrants were operable. He testified:

A. Had they been able to get hydrant one open, the Fire Department would have extinguished this fire prior to the damage to the basement, and prior to the damage to the right side of the structure, as far as destroyed.
If they had opened hydrant one and established a water supply from the very beginning, they would have actively engaged the fire and suppressed it.
They would have saved a large portion of the right side of the house, and they certainly would not have damaged the basement." Morrill, Page 137 A-33

He explained that if they had water the water would not have damaged the basement:

"A. Typically, water is not what damages basements. It is thermal events." Morrill, Page 129 A-34

* * * * *

A. I don't believe a continuous water flow would have damaged the basement." Morrill, Page 129 A-34

* * * * *

Q. Now, you also voice in your report - - talk about the basement, the foundation that you said could have been saved, you said if they had water, either the first or the second or both. Now, what do you base this on?
A. It is based on my experience of fighting and suppressing fires, and

it is also based on my experience of investigating fires, and seeing fires that start on the main level. Morrill Page 146-147A-35-36

* * * * *

A. That's correct. The physics of fire and the chemistry of fire are the same.
Q. And the physics of fire and chemistry of fire is what you are basing your opinion, with the reasonable degree of scientific certainty that, basically, the foundation or the basement could have been saved?
A. Yes." Morrill, Page 148 A-37

As to his experience with structures and therefore his ability to testify as to what part of the house would have been saved if the hydrants were operable he testified:

"In looking at structural fire damage, that is part of what I do." Morrill Deposition Page 23 A-38

He had 20 years of experience in investigating fires and presumably looking at structural fire damage.

Plaintiffs' second experts were David C. Keefer, hereafter Keefer, and James S. Davidson, Jr., hereafter Davidson. These experts had many years of fire protection and/or prevention as well as suppression experience. Both experts, because of their training and experience and profession have knowledge of construction, construction materials and requirements and testified extensively concerning same. (Keefer deposition transcript Pages 36-37, hereafter Keefer Page ___ A-39, Davidson deposition transcript Pages 74 - 76, hereafter Davidson Page ___ A-40). The Court also had Keefer and Davidson report (A-40-59) and resumes which detailed their vast fire protection and suppressive training, education and experience. A-60-73

Keefer testified that he had spent 40 hours in reaching his opinion in this case. Keefer Page 12. A-74 Keefer went through his extensive experience, education and training and that he had been a firefighter since 1973. Keefer, Page 21-22. A-74-75 He testified that the fire in this case when the firemen arrived was not through the roof. He testified that the firemen were in the garage when they discovered they had no water Keefer, Page 91. A-76

He testified with water they could have contained the fire:

> "A. If a continuous water supply was available and the interior attack initiated, then you would have been able to knock down or stop that fire with only the portions of the building that had already been burned being damaged." Keefer, Page 108 A-77

He stated that at that point the fire was contained only in the kitchen, living room and dining room. He testified:

> "I believe and the photographs show that the left-hand side of the house, the living room portion of the house, is the portion of the house that is engaged in the fire." Keefer Page 115-116 A-78
>
> * * * * *
>
> "A. ...the rest of the structure was undamaged. You wouldn't have needed to replace the rest of the structure because it was undamaged." Keefer, Page 108 A-77

Keefer testified as to how his firefighting experience assisted his analysis:

> "...I have the experience as a firefighter. I have the experience and training to look at a fire to see where it is, where it's going to go, where the average layperson would not look at a fire in the same light that I do. Keefer, Page 27-28 A-79

As to "scientific testing", Keefer replied that the only scientific testing they utilized was the Underwriter Laboratories (UL) testing which was commissioned and paid for by the Department of Homeland Security. The report is labeled

"Report on Structural Stability of Engineered Lumbar in Fire Conditions." This UL testing was conducted and the report was prepared by 4 engineers of the Fire Protection Division and reviewed by a Fire Resistive Construction Engineer. These engineers were assisted by the Chicago Fire Department, Fire Chief Association and Michigan State University. A-52-59

UL conducted five tests of various construction including "regular gypsum board" or "plaster ceiling". The test was designed to "represent typical conditions during a fire". The purpose was to establish "benchmark fire resistance performance between different types of building assemblies." The UL report has a disclaimer that warns readers that the results cannot be used for fire "rating". However, nevertheless, the "test method does provide a benchmark that enables a comparison of fire performance between test samples." A-56

The Plaintiffs experts used the worst test result, the worst case scenario, to reinforce and/or corroborate their finding and opinion that the gypsum walls and/or ceiling would protect the structure (the wooden frame) from a fire for at least 14 minutes. Keefer testified that:

> "...UL is a certified listed testing agency. They were full-scale tests on full-scale fires in those rooms. That's about as scientific as you can get." Keefer, Page 30 A-80

He explained how they utilized the photos and the recordings and correlated that with the UL testing results and were able to do a "timeline" as to when structural damage occurred or would occur. Keefer, Pages 42-45 A-81 He testified:

> "...having the timeline, the recording, the pictures and the UL testing all coming together, all three of those items collaborated (sic)(corroborated) our conclusion." Keefer, Page 44 A-81

However he explained that he could have reached the same conclusion without the UL report but it was "much more confident" with the report. A-81 He related his fire protection and construction experience and testified:

> "Basically in our opinion, we were basing our report conclusions on our engineering education, experience and training to come up with the conclusions on this report." Keefer, Page 35 A-39

As to his structural experience he testified:

> "...I gained experience in how buildings are constructed and it includes residential, commercial, industrial-type buildings. Keefer, Page 37 A-39

He testified that the garage section and basement could have been saved if the fire hydrants were operable. He confirmed what he states in his report that:

> "...The analysis further shows that the bedrooms, garage and basement portions of the structure were not damaged by the fire until the fire department found they could not establish a continuous water supply and a defensive tactical approach was ordered in fighting the fire. Keefer, Page 44 A-81

He testified that with water they could have some damage:

> "Q. Could have been some smoke damage?
> A. Yes.
> Q. Which would have meant - - maybe discoloring?
> A. At least, yes." Keefer Page 122 A-82

He testified that the Plaintiff's home was "standard wood frame construction with drywall." Keefer, Page 31 A-80 Using UL worst case scenario he testified that the fire would be contained and was contained outside of the bedroom/garage and basement for at least 14 minutes and therefore:

> "...compartments including the bedrooms, garage and basement are being exposed to significant heat conditions but are not being structurally damaged due to the protection of the gypsum wallboard." Keefer, Page 72 A-83

He testified that his experience with fire fighting supported their findings. As to the use of the UL test results he explained that:

> A. We took the worst case scenario, meaning we took the UL listing test with delamination from the structure in the least amount of time. If the bedroom was built with type X drywall, fire-resistant drywall in it, only means that they bedroom may have been able to resist fire to the structure above, but it doesn't mean that the hallway or the adjacent structure would not have you know, succumb to the fire damage within that UL listing timeframe." Keefer, Pages 65-66 A-84-85

He testified concerning his experience with drywall protecting the structure which supported the UL test results:

> A. We've extinguished a lot of fires and in the process of extinguishing that fire, we check for extension. We pull the drywall off of structure. There have been a number of - - a good number of fires where we go into a room that is totally burned out, pull the drywall off and the wood underneath is not damaged." Keefer, Page 69 A-85

He testified he was involved in 6 comparable fires and in each one they were able to save a "part of the dwelling". Keefer, Page 23-24 A-75

He explained how the decision to have an interior attack through the garage clearly indicated that at that point the garage and bedroom was not on fire and could have been saved. Keefer, Pages 75-77 A-86 Any structure damage would not have occurred in the bedroom and garage until 5:18 Keefer, Pages 79-80 A-87

> "At this point in the fire time line the compartments including the bedrooms, garage and basement are being exposed to `significant heat conditions but are not being structurally damaged due to the protection of the gypsum

wallboard." Keefer, Page 72 A-83

He testified he was "99 percent sure" of his opinion. Keefer, Page 85 A-88

Because it took almost 1/2 hour to obtain water "By the time a continuous water supply was established the structure was destroyed." Keefer, Page 51 A-89

He was asked about the language in the UL report that it cannot be used to determine "fire rating" but Keefer explained the difference that:

> "...we are talking apples and oranges... the UL test shows us what portion of the assembly is comprised. And they're not saying, you know, that this is a rated assembly." Keefer, Page 100 A-90

He explained that rating deals with "when the structures failed" but they are talking about when it "starts to sustain damage" only - - not total failure.

> "A. We are trying to convey when the structure was - - started to be damaged by the fire, not that when the structure failed, but when the structure began to sustain damage. And that's what this report shows, is when the - - even on these fire-resistive assemblies, it shows when that assembly starts to sustain damage, but it doesn't - - we are not going all the way through as far as to say the structure had a fire-resistive rating.
> Q. So you are saying there's a difference between their phrase 'the actual time a specific structure will withstand a fire.' as compared to your terminology 'when a structure will sustain damage'?
> A. Yes.
> Q. You are saying in your opinion there's a difference between those?
> A. Yes." Keefer, Pages 101-102 A-90-91

The other expert Davidson testified he was an engineer and:

> "But in my engineering opinion, if they had water at the time of arrival, it would have limited the damage, if not had extinguished the fire." Deposition transcript, hereafter Davidson, Page 12 A-92

He explained the analysis that they did. Davidson, Page 14-17 A-93 He testified:

> "...we looked at the photos. Then we had the voice transmissions of

> the fire department. We matched the photos with the voice transmissions of the fire department to try and see where everything was interrelated and made a timeline that's shown in our report based on that." Davidson, Page 17 A-93

He explained the construction of the house. He explained the difference between fire rating and what the UL report was used for, namely to determine how long the sheetrock would protect the structure. As to the use of the UL report:

> "A. ...All we used the UL report was to give us a determination since it's the only report I know of that actually tells me when the sheetrock has come off the structural supports that it's protecting, i.e., the wood studs or stiff studs or wood truss laminate. We are not saying it's a fire-resistive rating. We are saying this is a test that said after 13 minutes and 45 seconds or 14 seconds (sic) the sheetrock came off the wood stud and then that stud is now supposed (sic exposed) to structural damage. That's what we used that report form". Davidson, Page 21 A-94
>
> * * * * *
>
> A. We just used the table of the UL report to tell us tell us when the gypsum board delaminated or came apart from the structure. We are not using the report as a fire-rated assembly - - to confirm a fire-rated assembly. Davidson, Page 47 A-95

As to the UL disclaimer language Davidson testified:

> "A. We weren't using it as a fire - - as a fire test rating. We didn't use anything in the fire-resistive rating column. We only used the part that said the sheetrock came off the supporting member at 13 minutes and 45 seconds.
> Q. So you are saying that this cautionary statement doesn't apply to your opinion?
> A. No.
> Q. What's the basis for that again?
> A. Because we were not looking at it as a total fire-resistive rating. We were only looking at it to see when the sheetrock came off of the support structure, because once it comes off, then the damage starts." Davidson, Pages 73-74 A-96-A-40

He testified that all he needed to know about the house was that it was sheetrock on wood studs. He testified that he had a civil engineer degree but he

was also licensed in Pennsylvania as a fire protection engineer. Davidson, Pages 24-25 A-97 He used his 39 years of experience, (A66-73) the photos and the timeline and UL report to conclude “that the structure ... in the bedroom and garage compartments was not damaged” and “could have been saved”. Davidson, Page 37 A-98

ARGUMENT I

THE SUPERIOR COURT ERRED IN EXCLUDING THE TESTIMONY OF PLAINTIFFS' EXPERTS

(1) Question Presented

Did the Superior Court err in excluding the testimony of Appellants' experts (Preserved in Appellant's Opposition to Defendant's Motion in Limine to exclude the testimony of Plaintiffs' experts (Docket Entry 136 and 184 and the presentation of Defendant's Motions December 3, 2010 and June 4, 2012.)

(2) Scope of Review

The Superior Court's decision excluding the testimony of Appellants' expert's is reviewable for abuse of discretion. *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 522 (Del.1999). Since the exclusion of the experts' testimony resulted in granting summary judgment Appellants contend that the lower Court's decision should be reviewable de novo as a Motion for Summary Judgment. *Shea v. Matassa*, 918 A.2d 1090, 1093, (Del.Supr.2007).

(3) Merits of Argument

The Superior Court committed reversible error in granting the Defendant's Motions in Limine to exclude the testimony of Plaintiffs' experts.

On December 20, 2005 an electric defect in the Christmas tree lights started a fire that completely destroyed Plaintiffs' home. The fire could have been contained and should have been since the evidence indicated that when the

firemen arrived in a few minutes the fire was limited to the living room area. However the 2 fire hydrants closest to their home were not operable and an operable fire hydrant could not be utilized for almost ½ hour. During that time the firemen had to stand there without any water and watch the house burn down. United Water was legally obligated to maintain the hydrants so that they were operable but failed to do so and the lower Court found that there was sufficient evidence of gross negligence.

Despite the finding of gross negligence the lower Court ruled that the Plaintiffs would not be entitled to a recovery because their claim was barred by the Filed Rate Doctrine. The claim however was allowed to proceed because the Defendant was not willing to make that argument and waived same. The lower Court however subsequently dismissed Plaintiff's claim because it found that Plaintiffs' experts' testimony was not admissible.

The Appellants contend that the lower Court erred in its analysis and application of its obligation pursuant to *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579 (1993). *Daubert* was intended to preclude juror's consideration of "junk science" not for the Court to assume a fact finding role.

The law is clear that the Court's gatekeeper's role does not include a weight of the evidence analysis. Second guessing an expert's application of his judgment necessarily requires an assessment of his credibility and evidence analysis which is the role of the jury not the judge.

In *Kapetanakis v. Baker,* 2008 WL 3824165 (Del.Super.) the Court made it

clear that the trial judge's role is limited and "only determines 'whether the proponent of the evidence has demonstrated that scientific conclusions have been generated using sound and reliable approaches.'" *(*citing *State v. McMullen,* 900 A.2d 103, 114 (Del.Super.2006)).

The limited role of the trial judge in applying *Daubert* was clearly stated by the First Circuit Court of Appeal in *Milward v. Acuity Specialty Products Group, Inc., et al.,* 639 F.3d 11, 15 (2011):

> "So long as an expert's scientific testimony rests upon " 'good grounds,' based on what is known," [citing *Daubert*], it should be tested by the adversarial process, rather than excluded for fear that jurors will not be able to handle the scientific complexities, [citation omitted]
> "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." [citation omitted]

In *In re Adams Gold, Inc., Securities Litigation,* 2009 WL 1913241 (D. Del.), the Delaware District Court stated that in applying the *Daubert* factor:

> "The court must 'solely focus on the principles and methodology, not on the conclusions they generate.' *Daubert, 509 U.S. at 595.* 'The analysis of the conclusions themselves is for the trier of fact when the expert is subjected to cross-examination.' *Kannankeril v. Terminix International Inc.,* 128 F. 3d 802, 806 (3d Cir. 1997)*."*

This Court in *Bowen v. E.I. DuPont De Nemours & Co., Inc.,* 906 A.2d 797 (Del.Supr.2006)

likewise ruled that:

> "The foci of a *Daubert* analysis are the 'principles and methodology' used in formulating an expert's testimony, not on the expert's resultant conclusions. To help determine whether an expert's 'principles and methodology' are rooted in science and derived from the scientific method,..."

In this case however the lower Court assumed the role of the fact-finder rather than as a gatekeeper in assessing the expert's testimony as to causation. That is clearly demonstrated in the Court's opinions and its actions. In its opinions the lower Court sought to explain the basis for its ruling but a review of the opinions demonstrate that the Court misapplied *Daubert* by assuming the role of a fact finder and in doing so abused its discretion.[1]

In their analysis Keefer/Davidson utilized tests conducted by UL with the result contained in a report titled "Report on Structural Stability of Engineered Lumbar in Fire Conditions". The tests were of various construction material including "regular gypsum board" or "plaster ceiling" so as to establish a "benchmark fire resistance performance between different types of building assemblies." The UL report however contained what was essentially a disclaimer that warns readers that the results cannot be used for fire "rating". Nevertheless the disclaimers did not nullify the test results and they could be used as a measure of fire structural protection.

The Court however excludes their testimony because it "is predicated upon a comparative analysis by Underwriters laboratories of the relative fire resistance of certain types of construction" and because of the aforesaid disclaimer language as to ratings. The Court states that the report only deals with "comparative resistance of the tested material", in other words 'A is better than B which is better

[1]The Court's opinions also include the fact that many years ago Mr. Brown was convicted of insurance fraud and also that Mrs. Brown was accused of bankruptcy fraud even though that is not relevant to the issue of the admissibility of the experts' testimony.

than C, etc." The Court therefore found that the UL tests were not meant to measure the time a specific structure will withstand fire. This was based on what essentially is a disclaimer that "These ratings are not intended to convey the actual time a specific structure will withstand fire. All fires are different." However, the fact that it is a comparative test does not nullify the test's accuracy. "A" may be better than "B" but that does not detract from the fact that A may withstand fire for 18 minutes and B will withstand fire for 14 minutes. To be conservative Keefer/Davidson used 14 minutes in their analysis.

The disclaimer expressly refers to "ratings". It does not disclaim or question the accuracy of their test results as to the amount of time gypsum will protect the structure. The disclaimer language simply warns readers that the results cannot be used for fire "rating". Nevertheless, the report expressly states that the "test method does provide a benchmark that enables a comparison of fire performance between test samples." Those results or benchmarks is what the experts used in their analysis.

Morever, Plaintiffs' experts Keefer and Davidson whose qualification, knowledge and experience are not questioned by the Court repeatedly explained that the "ratings" disclaimer and their use of the test results were completely different. The "ratings" disclaimer language had no application to what they were using the test results for. It was comparing "apples and oranges".

> "...we are talking apples and oranges... the UL test shows us what portion of the assembly is comprised. And they're not saying, you know, that this is a rated assembly." Keefer, Page 100 A-90

Keefer explained that rating deals with "when the structures failed" but in forming their opinion they are talking about when it "starts to sustain damage" only - - not total failure.

> "We are trying to convey when the structure was - - started to be damaged by the fire, not that when the structure failed, but when the structure began to sustain damage. And that's what this report shows, is when the - - even on these fire-resistive assemblies, it shows when that assembly starts to sustain damage, but it doesn't - - we are not going all the way through as far as to say the structure had a fire-resistive rating. Keefer Page 101 A-90

He explained that the gypsum was protecting the structure:

> "...compartments including the bedrooms, garage and basement are being exposed to significant heat conditions but are not being structurally damaged due to the protection of the gypsum wallboard." Keefer Page 72 A-83

In his testimony, Davidson also repeatedly explained the difference between "rating" and their use of the test results:

> "A. ...All we used the UL report was to give us a determination since it's the only report I know of that actually tells me when the sheetrock has come off the structural supports that it's protecting, i.e., the wood studs or stiff studs or wood truss laminate. We are not saying it's a fire-resistive rating. Davidson Page 21 A-94
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> A. We just used the table of the UL report to tell us tell us when the gypsum board delaminated or came apart from the structure. We are not using the report as a fire-rated assembly - - to confirm a fire-rated assembly. Davidson, Page 47 A-95
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> "A. We weren't using it as a fire - - as a fire test rating. We didn't use anything in the fire-resistive rating column. We only used the part that said the sheetrock came off the supporting member at 13 minutes and 45 seconds.
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> Q. So you are saying that this cautionary statement doesn't apply to your opinion?
> A. No." Davidson Page 73 A-96

The UL study and report that was conducted by 5 engineers with the help of Fire Chiefs, etc. found that the shortest time that a fire could destroy gypsum and then damage the structure was 14 minutes. Therefore, it logically follows that the firemen had ample time if they had adequate water to put out the fire before the structure was damaged. Even though the expert's qualification, knowledge and experience are not questioned by the Court nevertheless the Court ignored or disregarded their repeated testimony that the "ratings" disclaimer did not apply to their use of the test results. Apparently, the Court did not believe Keefer and Davidson but credibility as previously stated is the jury's prerogative.

Moreover, despite the disclaimer there is no evidence that the test results conducted by 5 Fire Protection engineers was defective in any way. The case law is clear that an expert can rely on another expert.

In *Stewart v. Dept. of Service for Children, Youth and Their Families*, 991 A.2d 750, 757-58 (Del.Supr.2010) the Court citing Delaware Rule of Evidence 703 ruled that an expert "may rely upon the records of another expert in formulating his own opinion." That is so even if the "facts or data" are not admissible in evidence. Rule 703

The case law is clear that the Court's function is to ascertain the relevancy and reliability of the experts testimony not weight the evidence or decide credibility issues. The UL test results were relevant and reliable as were Keefer/Davidson's opinions or conclusions. The lower Court however decided the experts' credibility by not believing their testimony that there was a difference

between ratings that the disclaimer dealt with and their use of the test results. The lower Court abused its discretion and overstepped its *Daubert* obligation by simply deciding the experts were not credibie. Morever, there was no factual basis for the Court's disbelief of their testimony.

The lower Court also apparently did not believe Keefer's testimony that even without the use of the UL test results his opinion would be the same based on his 35 years of firefighting experience and comparable fires. He explained that he could have reached the same conclusion without the UL report but it was "much more confident" with the report. He made it clear that:

> "Basically in our opinion, we were basing our report conclusions on our engineering education, experience and training to come up with the conclusions on this report." Keefer, Page 35 A-39
>
> A. We've extinguished a lot of fires and in the process of extinguishing that fire, we check for extension. We pull the drywall off of structure. There have been a number of - - a good number of fires where we go into a room that is totally burned out, pull the drywall off and the wood underneath is not damaged." Keefer, Page 69 A-85

He testified he was involved in 6 comparable fires and in each one they were able to save a "part of the dwelling". Keefer, Page 24 A-75

As to his structural experience he testified:

> "...I gained experience in how buildings are constructed and it includes residential, commercial, industrial-type buildings. Keefer, Page 37 A-39

The Court does not address Keefer's testimony that he would reach the same conclusions without using the UL test results but apparently the Court did not believe his testimony that his opinion would be the same.

The Court also excluded their testimony because it ruled that it "does not take into account structural damage occurring between the time when water was first applied to the fire until the fire was extinguished." There is absolutely no factual basis whatsoever for the Court's decision that they did not take into account structural damage after water was applied if they had had adequate water. All 3 experts were adamant that with adequate water the basement and garage area would have suffered no structural damage. The Court ruling ignores the repeated testimony of all 3 experts. The Court may not believe them but credibility is for the jury to decide not the Court.

Moreover, all 3 experts did not just assume there would be no further damage they considered what other damage could occur with adequate water Keefer testified that if they had adequate water there could have been some damage:

> "Q. Could have been some smoke damage?
> A. Yes.
> Q. Which would have meant - - maybe discoloring?
> A. At least, yes." Keefer Page 122 A-82

Davidson also testified:

> "Q. It's your opinion that the bedroom, garage and basement could have been saved?
> A. Yes, sir.
> Q. Is it your opinion that had they been saved, they could have been used again?
> A. Yes.
> Q. What's the basis for that opinion?
> A. Based on fact that they would not have been damaged if there was an adequate supply of water. Davidson Page 63 A-99
>
> * * * * *
>
> A. I'm saying my expert opinion is stating that the structure was not

> damaged if it had a continuing supply of water. Davidson Page 64 A-99

Plaintiffs' first expert, Morrill, also considered what damage could have occurred with adequate water and testified that if they had water the water would not have damaged the basement and garage area as discussed hereafter.

As to Morrill the lower Court ruled that Morrill's "methodology is unreliable and not subject to testing or verification" and consisted of "reviewing a handful of photographs". The lower Court stated that Morrill's "opinion is little more than "it is because I say it is". On the contrary, Morrill detailed in a report and a 156 page deposition the factual basis for his opinion that sufficient water would have saved the garage section of the house and the basement and foundation. He used the photographs as one of the basis for his opinion as well as his expertise, education, training and experience as to the effect of adequate water on a fire. He also reviewed and used as a basis the testimony or statements of the witnesses as included in the Fire Marshall investigation reports. He also reviewed the 911 telephone log and tape that indicated an "internal attack" was initiated and the firemen in the garage complaining of lack of water and the significance of same, namely that when they arrived the fire was contained in the living room.

He also considered Chief Haley's report indicating they began to "push into" the house and his contemporaneous statements that "it was frustrating to have to stand there and watch the house burn down due to no water." A-23 He also testified that he did a "cognitive analysis" of the fire growth. He discussed his "analysis" of same and applied his vast knowledge of fires and his 20 years

experience, etc. He referred to the physics of fire which he also utilized in reaching his opinion.

The Court noted that he testified that "he employed scientific analysis in reaching his conclusion" but then went on to state that "this testimony [the scientific analysis] is contradicted by the rest of his deposition". Apparently the Court did not believe Morrill but credibility is the jury's prerogative. The alleged contradiction is material for cross examination not for the Court as gatekeeper.

The Court explained its basis for finding that Morrill's testimony was contradicted was that "The Court has reviewed the deposition in its entirety and can find only two references to a principle of physics" and therefore the Court disregarded and excluded his testimony. The Court does not explain why 2 references to science are insufficient and how many references would be needed to allow Morrill to testify. It would appear however that the Court is weighing the evidence and assuming the role of a fact finder.

Moreover, the Court's approach that "scientific analysis" is required by *Daubert* fails to consider that we are not dealing with "junk science" but we are dealing with putting out fires and since the cavemen discovered fire, it is well known that water will put out a fire. Morrill, however, is certainly qualified by training, education and experience to render his professional opinion that water would have saved the foundation and basement as well as the garage area of the house which were not on fire when the firemen arrived.

Nevertheless Morrill did demonstrate the use and knowledge of the "physics

of fire and the chemistry of fire" in his report and testimony. For example in his report he explained the drastic consequences of not having water when needed:

> "Fires typically double in size (megawatts of energy) every 60 seconds...The time wasted from 0508 when a water supply should have been established to 0532 when one finally was, accounts for a fire growing uncontrolled for 26 minutes. That relates to a 5600% larger fire by the time a water supply was established thereby requiring that much more water for extinguishment." A-26

In his deposition he testified:

> "Q. The damage fire do to material, I mean, is going to be no different no matter where you are.
> A. That's correct.....The physics of fire and the chemistry of fire are the same.
> Q. And the physics of fire and chemistry of fire is what you are basing your opinion, with the reasonable degree of scientific certainty that, basically, the foundation or the basement could have been saved.
> A. Yes." Morrill, Pages 147- 148 A-36-37

The Court also ruled that:

> "...Morrill is not qualified to testify whether the structural members not consumed by the fire would have been sound and capable of reuse in the rebuilding of Plaintiffs' home."

The Court ruled that to do that "requires skills akin to those of a structural engineer." The Court does note that Morrill testified that "In looking at structural fire damage, that is part of what I do". Nevertheless the Court does not believe that he is "qualified to testify whether the remaining portions of the structure would have been sound enough to salvage." The Court's disregard of his 20 years of experience dealing with structural damage because he does not have a degree is unreasonable and contrary to case law.

In *Rodas v. Davis, et al.,* 2011 Del. Super. Lexis 589 the Court allowed an

orthopedic doctor to testify concerning Plaintiff's neurology, psychiatric and ophthalmology care and medical bills were reasonable. The Court ruled that:

> "Although Defendants are correct that he does not have specialties in neurology, psychiatry, or ophthalmology, the Court is satisfied that his 27 years of experience in treating patients who have had similar complaints along with his general background in medicine allows Dr. DuShuttle to provide relevant and reliable evidence..."

If an orthopedic surgeon can testify as to neurology, psychiatry, or ophthalmology certainly Morrill was also qualified to render an opinion as a result of his training, education and 20 years of experience in fire suppression and "structural fire damage". That also applies to Keefer and Davidson who also had extensive experience, education and training in fire suppression and had engineering degrees.

Moreover, the Court ignored the fact that Morrill testified repeatedly that if there had been adequate water there would have been no structural damage. He explained for example why the basement and foundation would not have been damaged. He testified:

> "A.....Fire burns ....up and out. Fire doesn't typically burn down. Therefore, there shouldn't have been any thermal activity in the basement area." Morrill, Page 147 A-36
>
> * * * * *
>
> "A. Typically, water is not what damages basements. It is thermal events." Morrill, Page 129 A-34
>
> A. I don't believe a continuous water flow would have damaged the basement." Morrill, Page 129 A-34

Apparently the Court did not believe him but again that is the function of the jury. If the Court has the ability to decide an expert's credibility it can exclude

an expert's testimony no matter how qualified and thereby depriving a litigant of a decision on the merits. Obviously that would also deprive a victim of his constitutional rights to a jury trial.

The Court opinions clearly demonstrate that the lower Court assumed the role of the fact finder rather than the gatekeeper. The lower Court acting as a jury decided credibility of the experts. The lower Court's essential cross examination of the experts' opinions or conclusions is the role of the defense attorney.

The lower Court's approach in assuming the role of the fact finder in this case is not only evident in the Court's opinions but is also demonstrated by the Court's atypical actions in this case.

The Court's actions also reflected a fact finding approach rather than a gatekeeper's role. For some reason on March 15, 2012 the Court asked to see the expert's reports even though at that time no motion relating to the reports had been filed. A-100 No issue or dispute concerning the new experts and their reports had been brought to the Court's attention. Typically the Court only reviews the experts' reports when required to do so after the filing of the motion and not before. Defendant's Motion in Limine was not filed until May 23, 2012.

Thereafter, the lower Court allowed the late filing of motions in limine:

> "THE COURT:...Given the pendency of the trial, I owe you a quick decision in this particular matter, and in part, I owe it to you because I'm the one who allowed the sort of late filing of Motions in Limini." Page 52 Transcript of the June 4, 2012 argument. A-101

The Court also "googled" the Plaintiffs' home the night prior to the argument on Defendant's motion on June 4, 2012. During the argument the Court

asked about "re-configuration" of the basement and Plaintiffs' attorney responded "I don't know that" prompting the following statement by the Court:

> "THE COURT: I do know it, because I did look last night at photographs of the building,..."
> * * * * *
> "THE COURT: Well, actually, the aerial photographs show a markedly different footprint. It's not slightly."
> * * * * *
> "MR. RAMUNNO: Well, I don't know what aerial photograph Your Honor is looking at, cause I didn't see any anywhere."
> * * * * *
> "THE COURT: - - It's on Google.
> MR. RAMUNNO: Well, okay. So, Your Honor went on Google. I understand, Your Honor." Argument Transcript Page 22-23 A-102

Both Plaintiffs' and Defendant's experts based their opinions on their experience, training, education as well as whatever else that was available, namely, photos, recordings and reports and Plaintiffs' experts also used the UL testing results. If what they did was inadequate, then nothing can be adequate and the Plaintiffs would be left without a remedy and Defendant is free to continue to be grossly negligent leaving the victims of its negligence without a remedy.

The Superior Court abused its discretion in excluding the testimony of Plaintiffs' 3 experts. The Court's criticism of the experts' opinions goes to their credibility and/or weight of the experts' testimony only and not admissibility. It is for the jury to decide the experts' credibility and to decide Plaintiffs' claim on the merits. Since that resulted in granting summary judgment the Appellants contend that this Court should review the lower Court's decisions *de novo*. Either way justice requires that the Superior Court's decision be reversed.

ARGUMENT II

THE SUPERIOR COURT ERRED IN DISMISSING PLAINTIFFS' CLAIM

(1) Question Presented

Whether the lower Court erred in dismissing Plaintiffs' claim. (Preserved in Appellants' Opposition to Defendant's Motions in Limine) (Docket Entries 136 and 184 and the presentation of the motion on June 4, 2012)

(2) Scope of Review

The Superior Court's granting of Summary Judgment and dismissing Plaintiffs' claim should be reviewable de novo. *Shea v. Matassa*, 918 A.2d 1090, 1093, (Del.Supr.2007)

(3) Merits of Argument

The Superior Court erred in dismissing Plaintiffs' claim.

In addition to excluding the testimony of Plaintiffs' experts the Court also dismissed Plaintiffs' claim. The decision however to dismiss the claim was based on the lower Court's mistaken belief that it had warned Plaintiffs' that an expert was needed. The Court stated:

> "Here Plaintiffs have had three chances: first, they were going to proceed without any expert testimony and were told by the court that would result in dismissal of their claims..." Page 12 of the Court's February 26, 2013 opinion.

The lower Court explained the basis for the initial or first warning as follows:

> "They claimed in a proposed pretrial order cost $152,000 just to replace the basement. According to Plaintiffs it was not necessary for them to call an expert to establish their damages - - they contended that all that was necessary was to have Mr. Brown and perhaps a few contractors testify about the cost of replacing the basement and the bedroom. The court ruled, however, that whether *any* of the house could have been salvaged (and if so, the extent of the house which could have been salvaged) was beyond the key of lay persons and thus required supporting expert testimony.
>
> Thereafter Plaintiffs identified Jeffrey Morrill as an expert." Emphasis Added Page 4 of the February 26, 2013 Court opinion

The lower Court was clearly mistaken. Plaintiffs had from the very outset realized the need for an expert and very soon after the suit was filed on July 10, 2007 had retained Morrill who on January 9, 2008 prepared a report. A-24-26 Moreover the $152,000 figure that is quoted in the Court's opinion as being contained in a pretrial order could not possibly have been presented to the Court until May or June of 2009 since the trial was scheduled for June 11, 2009, at least 16 months after Morrill's report and at least 6 months after Morrill's deposition on November 11, 2008. Obviously, Morrill could not have been identified "thereafter."[2]

The lower Court's dismissal of the case was based on the Court's clearly mistaken belief that this was Plaintiffs' third strike. Consequently, if the decision to exclude the experts' testimony is not reversed then the dismissal of the case should nevertheless be reversed since it was based on the lower Court's mistaken belief. At the very least it should be remanded so the lower Court can decide in light of its mistaken belief that Plaintiffs had 3 strikes whether to still dismiss this

[2]In fact, Morrill was identified on February 2, 2008.

case or not.

Dismissing Plaintiffs' claim is denying them their constitutional right to a jury trial. Our judicial system's aim is to correct a wrong and decide cases on their merits. In this case, to deprive the Plaintiffs' their day in Court and a jury trial on a claim that clearly has merit would be a miscarriage of justice.

CONCLUSION

For all of the foregoing reasons, the lower Court's ruling excluding the testimony of Appellants' experts should be reversed and the dismissal of the Appellants' claim should be vacated and the case remanded to the Superior Court for trial.

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INDEX OF EXHIBITS ATTACHED