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Case Number 146,2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOEL and IRIS BROWN,	:	
	:	
Plaintiffs Below,	:	No. 146, 2013
Appellants	:	
	:	APPEAL FROM THE SUPERIOR
v.	:	COURT OF THE STATE OF
	:	DELAWARE IN AND FOR NEW
UNITED WATER DELAWARE	:	CASTLE COUNTY
INC.	:	C.A. No. 07C-07-070-JAP
	:	
Defendant Below,	:	
Appellee.	:	

APPELLEE'S ANSWERING BRIEF

Dated: May 31, 2013

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NATURE AND STAGE OF THE PROCEEDINGS

Appellants Joel and Iris Brown ("Plaintiffs") initiated this action on July 10, 2007, against Appellee United Water Delaware Inc. ("UWDE"). (A2 at Dkt. 1). On March 10, 2009, following the close of fact and expert discovery, UWDE filed its motion for summary judgment. (A9 at Dkt. 103). UWDE's motion for summary judgment was based on: (i) the filed rate doctrine; (ii) lack of proximate causation; (iii) lack of damages on the intentional infliction of emotional distress claim; and (iv) failure to prove property damages recoverable under the law. (*Id*.). On May 5, 2009, the Trial Court issued its Letter Opinion granting UWDE's motion based on the filed rate doctrine. (A11 at Dkt. 114).

On May 21, 2009, Plaintiffs filed their first Notice of Appeal. On February 15, 2010, this Court issued its Opinion affirming the Trial Court's decision that the filed rate doctrine barred Plaintiffs' negligence claims. The Court's Opinion remanded the matter to the Trial Court to "determine whether [Plaintiffs] stated a claim for gross negligence or willful misconduct, and, if so, whether those claims also are barred by the filed rate doctrine." (A11 at Dkt. 115).

On remand, the Trial Court requested supplemental memoranda addressing two issues, namely: "(1) is there some evidence in the record upon which a reasonable trier of fact could determine that United Water acted willfully with gross neglect; and (2) if so, are those claims barred by the filed rate doctrine."

(A11 at Dkt. 117). On March 3, 2010, UWDE requested guidance from the Trial Court on the scope of supplemental briefing. (A11 at Dkt. 119). In that letter, UWDE identified that it would not argue that claims of gross negligence or willful misconduct are barred by the filed rate doctrine because the "persuasive case law clearly holds that the filed rate doctrine would not bar claims for gross negligence or willful misconduct." (*Id.*).

On March 30, 2010, the Trial Court addressed a letter to counsel asking that UWDE either: (i) submit an argument that its tariff precludes liability for gross negligence or (ii) submit a list of cases referred to in UWDE's March 3, 2010 letter to the court. (A12 at Dkt. 122). The Trial Court then allowed Plaintiffs the opportunity to respond to UWDE's submission. On April 6, 2010, UWDE selected the Trial Court's second option and submitted a list of cases. (A12 at Dkt. 123). Through its submission, UWDE identified that "[b]ecause the issue is not settled in Delaware, UWDE will also identify several decisions holding that the filed rate doctrine does preclude claims for gross negligence." (*Id.*).

On May 20, 2010, the Trial Court issued its Memorandum Opinion on Remand (the "Remand Opinion"). (A12 at Dkt. 127). In its Remand Opinion, the Trial Court concluded that: "(1) a reasonable trier of fact could find that United Water was grossly negligent but could not find that its misconduct was willful; (2) United Water has waived any argument that the filed rate doctrine bars claims for

gross negligence; and (3) in Delaware a filed tariff can bar claims for gross negligence." (*Id.*). The case would therefore proceed under a theory of gross negligence. Initial expert discovery was completed and a three-day trial set for December 13, 2010. (A12 at Dkt. 129).

On November 10, 2010, UWDE filed a motion *in limine* to exclude the expert testimony of Plaintiffs' causation expert, Jeffrey Morrill ("Morrill"). (A12 at Dkt. 130). On December 3, 2010, oral argument was held on UWDE's motion *in limine*. The Trial Court reserved its decision and continued trial to a new date. (A14 at Dkts. 149, 150).

On April 26, 2011, the Trial Court delivered a letter to the parties identifying that it would issue an opinion granting UWDE's motion *in limine* to exclude the expert testimony of Morrill because he was "not qualified to give opinion testimony on causation and that his methodology [was] flawed." (A15 at Dkt. 153). In addition, the Trial Court identified that it would "give Plaintiffs sixty days in which to identify a new expert." (*Id.*). On October 7, 2011, the Trial Court issued its Memorandum Opinion (the "Morrill Opinion") further addressing its ruling on UWDE's motion *in limine*. (A15 at Dkt. 158). The Trial Court more specifically held that Morrill's testimony had to be excluded because:

> First, Mr. Morrill's methodology is unreliable and not subject to testing or verification. Second, Mr. 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.

(Morrill Opinion at 1).

The Trial Court held that Morrill's testimony could have been independently excluded under either one of the two reasons. (*Id.* at 3-4). Regarding the second reason, the Court recognized that "[w]hat is germane is what portion of the building, if any, would have remained structurally sound had the hydrants [been] functioning properly." (*Id.* at 4). The Court found that this analysis "requires skills akin to those of a structural engineer, and Mr. Morrill does not possess those skills." (*Id.* at 3).

Following the Trial Court's charitable grant of additional time to find another expert witness, Plaintiffs furnished UWDE with the curriculum vitae of two experts they proposed to call as substitutes for Morrill.[1]

On December 13, 2011, UWDE filed its motion for clarification and/or correction of the Morrill Opinion to expressly incorporate (if correct) the leave granted Plaintiffs to reopen expert discovery and issue substitute expert reports. (A15 at Dkt. 159). UWDE argued that "it would be an abuse of the Court's discretion to reopen the expert discovery phase of this litigation after the evidentiary record was set, the proposed pretrial order filed and pretrial motions *in*

[1] While the *curriculum vitae* were furnished on December 5, 2011, the actual reports were not furnished to UWDE until December 15, 2011 (eight days late).

limine were exchanged and decided" and that it intended "to pursue an interlocutory appeal of the Court's decision" if that was the Trial Court's actual ruling. (*Id.* at p. 3) (UWDE's motion was also, in the alternative, a renewed motion for summary judgment). On January 27, 2012, the Trial Court held oral argument on UWDE's motion. At the January 27, 2012 hearing, the Trial Court issued an oral order ruling it had granted Plaintiffs sixty days to produce substitute causation experts. (A16 at Dkt. 162). On February 6, 2012, UWDE filed its Application for Certification of Interlocutory Appeal of the January 27, 2012 oral order arguing that it was an abuse of discretion to reopen the expert discovery phase after the evidentiary record was set, the proposed pretrial order filed, and pretrial motions *in limine* were exchanged and decided. (*Id.* at Dkt. 165). The Trial Court denied UWDE's Application for Interlocutory Appeal on March 2, 2012. (*Id.* at Dkt. 167). On March 13, 2012, this Court denied the same. (*Id.* at Dkt. 165).

Subsequently, Plaintiffs identified and produced the expert testimony of David Keefer ("Keefer") and James Davidson ("Davidson") (collectively, the "Keefer/Davidson Report"). On May 23, 2012, UWDE filed its motion *in limine* to exclude the Keefer/Davidson Report. (A17 at Dkt. 182). The Trial Court issued its Memorandum Opinion on February 26, 2013 (the "Keefer/Davidson Opinion"), excluding, in its entirety, the Keefer/Davidson Report because the proposed

testimony was unreliable and would not assist the trier of fact in determining causation. (A19 at Dkt. 190). Through the Keefer/Davidson Opinion, the Trial Court also dismissed the case since Plaintiffs were again unable to produce expert testimony on the issue of causation.

On March 22, 2013, Plaintiffs filed their Notice of Appeal with this Court. (A19 at Dkt. 192). On May 1, 2013, Plaintiffs filed their Opening Brief. This is UWDE's Answering Brief.

SUMMARY OF ARGUMENT

I. The Trial Court properly excluded the testimony of Plaintiffs' expert witnesses because none of the experts demonstrated adequate knowledge, skill, or experience in the area of structural engineering and neither report was based on sound, scientific methodology that would assist the trier of fact. UWDE therefore denies each and every allegation in paragraph 1 of Plaintiffs' Summary of Argument.

II. The Trial Court properly dismissed the case because despite multiple chances, Plaintiffs failed to procure and produce tenable expert testimony, which left Plaintiffs unable to prove their claim for damages. UWDE therefore denies each and every allegation in paragraph 2 of Plaintiffs' Summary of Argument.

STATEMENT OF FACTS

A. The Incident

At approximately 04:52 a.m. on December 20, 2005, Plaintiffs' neighbor called 911 and reported a fire at Plaintiffs' home. (B1-3). At 04:55 a.m., Fire Chief Eric Haley ("Chief Haley") and two paramedics were dispatched to the scene. (*Id.*). At 04:59 a.m., Chief Haley was the first responder on the scene, establishing command at 05:00 a.m. (*Id.*); (B21). Upon arrival, Chief Haley determined Plaintiffs' home was "fully involved." (B21-29). Based on this assessment, Chief Haley made the decision to "stay outside;" specifically testifying to the following at deposition:

> I made the decision based on the involvement of the house and the danger to the personnel.
>
> Q. [By Plaintiffs' counsel:] I see.
>
> A. It's clear by the picture that I believe you have from the front of my car [attached hereto as Exhibit B] when I get there that the house is fully involved. There is a radio transmission from my deputy that there is a partial collapse in the rear. . .
>
> Q. So your crews never pushed into the house?
>
> A. No, they never pushed towards the house with the hand lines.

(B22-23). The existence or non-existence of a continuous water supply had nothing to do with Chief Haley's decision to conduct an external attack on the fire.

(B4-6). Even if a continuous water supply had been immediately established, the house could not have been saved. (B28)

> Q. So regardless of the water you had, you don't believe that anything could have been saved if you had water?
>
> A. A continuous water supply. You're saying any water.
>
> Q. A continuous water supply, yes?
>
> A. A continuous water supply, no, I don't believe it.

(*Id.*). Water does not always put out fires.

B. The Morrill Report

Morrill, Plaintiffs' first expert, was not present at the fire and, in fact, never physically viewed the damage to Plaintiffs' home prior to issuing his expert report. (B10-12). In fact, Morrill never spoke with any of the firefighting professionals, including Chief Haley, the other firefighters present on the night of the fire, or any of the fire investigators who studied the fire. (B11). Importantly, Morrill admitted he has no expertise in structural engineering. (B8-9). Morrill further admitted that he failed to undertake any analysis or reach any conclusion as to the nature or extent of the damage that would have been caused to the garage and foundation of Plaintiffs' home if the firefighters had a continuous supply of water. (B13-19).

C. The Keefer/Davidson Report

In Plaintiffs' second attempt at providing a viable expert report, they produced the jointly-authored Keefer/Davidson Report. (A41-51). Both experts

conceded they have no expertise in structural engineering. (B34; B31; A99). In fact, Davidson testified that he would need to rely on a structural engineer to determine whether the dwelling remained structurally sound:

> Q. Are you rendering an expert opinion as to whether or not those compartments could be used?
>
> A. I'm saying my expert opinion is stating that the structure was not damaged if it had a continuous supply of water.
>
> Q. Are you rendering an expert opinion that those compartments could be reused?
>
> MR. RAMUNNO: He said yes already.
>
> MR. FELICE: I'm entitled to explore it with him.
>
> THE WITNESS: Can I ask you my -- other comment -- what I --
>
> BY MR. FELICE: Q. It's a very simple question.
>
> A. Here's my question -- they were structurally sound, but I would still get a structural engineer and to look at the load-carrying capabilities for the rebuild. That's all.
>
> Q. You're not a structural engineer; correct?
>
> A. No.

(A99). Keefer testified in a similar fashion when questioned by Plaintiffs' counsel:

> Q. . . . Is there any science in this business about what's damaged and what's not damaged?
>
> A. I believe there is.
>
> Q. Okay. What's the –
>
> A. When, you know, a structural engineer can examine the building after the event and can determine what's usable and not usable, but that's after the event, that what's possible and not

> possible, you know, with what happened is -- is not something that you can predict by science.

(B37). Thereafter, Keefer simply said that he presumed the bedrooms, garage and basement could be reused because, in his unsubstantiated opinion, they should not have suffered any structural damage. (A82).

Keefer and Davidson both testified they had no knowledge of the contents of Plaintiffs' home, its exact dimensions (especially height), the ventilation or construction. (B36; A85; A91; A93; A95; A96). Knowledge of these variables is crucial because the underlying UL Report is based on the existence of specific construction materials for the frame, drywall and roof. (B1-3; A91; A96). Without a fundamental knowledge of the home's contents, dimensions, ventilation or construction (or how the dimensions and construction may have changed between the different "compartments"), the experts' opinions are not reliable.

Indeed, Keefer could not identify a scientific basis supporting the application of the UL Report to this particular fire as a reliable method to determine what "compartments" of the home would not have been damaged by the fire. (A80). To be sure, Keefer responded "no" when asked if "there are any scientific principles that apply to make the connection between the UL Report and [his] act of applying it to the Brown's house fire." (*Id.*).

The UL Report itself expressly identifies that "[t]hese time ratings are not intended to convey the actual time a specific structure will withstand a fire. All

fires are different. Variations result from room size, combustible content and ventilation conditions." (B1-3). The experts also testified that they were not asked to and could not render an opinion on how much damage the bedrooms, garage and basement would have suffered from water, smoke or indirect fire exposure. (B35). Clearly, the areas would have suffered some damage from these elements even if an unlimited supply of water was available to extinguish the fire that started in the family room.

Keefer and Davidson further testified to the fact they are unaware of any other expert in their field utilizing the UL Report to render an opinion of the type or scope they furnished in this proceeding. (A79; A95). Even more, the experts did not undertake any independent modeling or testing of their conclusions. (A79; A92).

The Trial Court's decisions to exclude both the Morrill and Keefer/Davidson Reports were well-founded in the record.

ARGUMENT

I. THE TRIAL COURT PROPERLY EXCLUDED THE REPORTS OF PLAINTIFFS' EXPERT WITNESSES

Question Presented

Whether the Trial Court (i) properly excluded the expert testimony of Morrill because the expert was unqualified as a structural engineer and his proffered testimony was equally unreliable; and (ii) properly excluded the expert testimony of Keefer and Davidson because their testimony was similarly unreliable and would not assist the trier of fact.

Scope of Review

A trial court's decision to admit or exclude expert testimony is reviewed for abuse of discretion. *Goodridge v. Hyster Co.*, 845 A.2d 498, 503 (Del. 2004). This deferential standard of review recognizes that a trial court undertakes a vital gatekeeping function and therefore "must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Bowen v. E.I. duPont de Nemours & Co., Inc.*, 906 A.2d 787, 795 (Del. 2006), *quoting Garden v. State*, 815 A.2d 327, 338 (Del. 2003). This Court therefore "may not substitute its own notions of what is right for those of the trial judge, if his judgment was based upon conscience and reason, as opposed to capriciousness or arbitrariness." *Dover Historical Soc'y, Inc. v. City of Dover*

Planning Comm'n, 902 A.2d 1084, 1089 (Del. 2006), *quoting Chavin v. Cope*, 243 A.2d 694, 695 (Del. 1968).

Merits of Argument

A. The Trial Court Correctly Held That Morrill's Report Was Unreliable And He Was Not Qualified To Give Expert Testimony

The Trial Court correctly held that Morrill's methodology was unreliable and he was not qualified to give expert testimony. The Trial Court's decision and rationale that (i) Morrill lacked the necessary structural engineering credentials, and (ii) his proffered testimony was unscientific, at best reflecting an insufficient *ipse dixit* reasoning and methodology, is well-founded in the record. Because the scope of Morrill's proposed testimony exceeds the bounds of his expertise and because his methodology falls far short of the standards required by this Court, the Trial Court's holding excluding the Morrill Opinion should be affirmed.

The Delaware Supreme Court adopted the United States Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) as the official interpretation of Delaware Rule of Evidence 702 where the Court held that an expert's opinion must be based upon proper factual foundation and sound methodology meaningfully applied to the facts at issue in order to be admissible at trial. *M.G. Bancorporation v. LeBeau*, 737 A.2d 513, 522 (Del. 1999). In keeping with *Daubert*, the trial judge must act as the gatekeeper to determine whether a

proffered expert's testimony meets the requisites for admissibility. *Perry v. Berkley*, 996 A.2d 1262, 1267 (Del. 2010).

In determining the admissibility of expert testimony, Delaware courts utilize a five-pronged test. *Sturgis v. Bayside Health Ass'n Chartered*, 942 A.2d 579, 584 (Del. 2007). Before admitting expert testimony, the trial judge must determine that (1) the witness is qualified as an expert by knowledge, skill, experience, training, or education; (2) the expert's opinion is based upon information reasonably relied upon by experts in the particular field; (3) the expert testimony will not create unfair prejudice, confuse, or mislead the jury; (4) the evidence is relevant, and (5) the expert testimony will assist the trier of fact to understand the evidence or determine a material fact in issue. *Id.*

To be admissible, expert testimony must therefore be both relevant and reliable. *Price v. Blood Bank of Del. Inc.*, 790 A.2d 1203, 1210 (Del. 2002). For the expert's opinions to be deemed reliable, the opinions "must be supported by scientific knowledge and derive from the scientific method." *Goodridge v. Hyster Co.*, 845 A.2d 498, 503 (Del. 2004)). This Court has "broad latitude to determine whether *Daubert's* specific factors are, or are not, reasonable measures of reliability in a particular case." *M.G. Bancorporation*, 737 A.2d at 522. Under *Daubert*, this Court is not required "to admit opinion evidence that is connected to

existing data only by the *ipse dixit* of the expert." *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

i. Morrill's Report Is Unreliable

The Trial Court correctly found no methodology description in Morrill's report. (Morrill Opinion at p. 5). A peer review of Morrill's methods would, quite simply, consist of reviewing a handful of photographs taken at the scene of the fire. Morrill considered only still photographic images of a blazing and destructive house fire to reach his rudimentary "cognitive analysis" opinion that the basement and garage could have been saved had the hydrants been properly working. Morrill's elementary investigation and failure to utilize all information at his disposal makes his opinion incapable of being tested and verified. In short, his report is rife with gaps in logic and conclusory statements separate from any clearly testable hypothesis.

The Trial Court also found Morrill's report to be self-contradicting. For example, Morrill's conclusion that the basement could have been saved assuming adequate hydrant access is inconsistent with his contention that the energy of fire doubles every sixty seconds. Assuming that water, at the earliest, would have been available to fight the fire approximately six minutes after firefighters arrived on the scene, when applying the factoring constant, the energy of this particular fire

would have increased thirty-two times; yet, Morrill's report still concludes the basement would have somehow been saved.

Morrill also admitted that he did nothing to quantify the nature or extent of damage to the garage and foundation had firefighters enjoyed an unlimited supply of water. To be clear, Morrill's report does not address (i) damage that continued to occur after application of water and (ii) damage that would have occurred assuming timely access to the hydrants: both critical to the issue of causation.

In sum, Morrill's proposed testimony offers nothing more than a barebones, insufficient, *ipse dixit* report "not subject to testing nor [] based on reliable scientific principles." (Morrill Opinion at 8). Accordingly, Morrill's opinions are unreliable, irrelevant and not likely to assist the jury in understanding the evidence or determining a fact in issue.

ii. Morrill Is Not Qualified

As the record clearly demonstrates, Morrill is wholly unqualified to issue an expert opinion on matters ordinarily reserved for structural engineers. It is uncontroverted that Morrill's realm of expertise is fire investigation; that is, determining the cause and origin of fires, not assessing and expertly analyzing any resultant structural damage, particularly when called upon to predict those damages under an alternative set of facts.

The Trial Court has repeatedly and succinctly stated the issue in dispute: "What is germane is what portion of the building, if any, would have remained structurally sound had the hydrants [been] functioning properly." (Morrill Opinion at 9). Given the strictly framed issue of structural damages and Morrill's admission that he possessed no expertise in structural engineering, there is no question that Morrill's testimony is inadmissible. Therefore, in exercising its sound discretion, the Trial Court properly excluded Morrill's testimony. This Court should affirm the same.

B. The Trial Court Correctly Held That The Keefer/Davidson Report Was Unreliable And Would Not Be Helpful In Assisting The Trier Of Fact

The Trial Court was correct that the Keefer/Davidson Report fatally relied on the UL analysis in contravention of its accepted and customary use, deeming the Keefer/Davidson Report unreliable. The Trial Court was further correct that because the Keefer/Davidson Report ignores the continued destruction of the home as water was being applied to the fire, the expert testimony would not assist the trier of fact in determining the issue of damages. Because the Keefer/Davidson Report is unreliable and would not aid the jury in its damages consideration, the testimony is inadmissible. This Court should affirm the Trial Court's exclusion of Plaintiffs' second expert report.

Again, the issue here is the admissibility of Plaintiffs' proposed exert testimony addressing the extent to which the home would have been saved had the hydrants been working. Plaintiffs failed once again to produce expert testimony addressing this precise issue. Nothing in the Keefer/Davidson Report would help the jury decide damages based on the extent of destruction to the home either (i) after access to a necessary water supply or (ii) assuming full access to water upon arrival at the scene. Both critical issues are also missing from Morrill's Report.

Like the proposed Morrill testimony, the Trial Court found that Keefer and Davidson's methodology and opinions are unreliable because the experts lack basic and fundamental knowledge regarding the home's construction, dimensions, contents and ventilation. Even if the experts' opinions were grounded in a rudimentary knowledge of the facts and the UL Report could be used to determine when Plaintiffs' home would succumb to fire, the experts conceded their methodology has not been tested, subjected to peer review, nor generally accepted in their field of expertise. Serving in its gatekeeper role, a trial court is perfectly within its discretion to exclude expert testimony that fails to meet these clearly-defined conditions for admissibility.

Plaintiffs again produced expert testimony from experts who lack the necessary background in structural engineering. As expressly set forth in the Trial Court's Morrill Opinion, "skills akin to those of a structural engineer" are required

to determine "what portion of the building, if any, would have remained structurally sound had the hydrants [been] functioning properly." (Morrill Opinion at pp. 3-4). Here, both experts conceded that they have no expertise in structural engineering. Plaintiffs failed to rectify a very clear and unmistakable deficiency that led the Trial Court to exclude their first expert – the need to retain a structural engineer. Without the aid of a structural engineer to address causation, the experts' opinions are inadmissible. The Court should therefore affirm the Trial Court's ruling.

C. Plaintiffs Fail To Show That The Trial Court Improperly Excluded The Expert Testimony

Plaintiffs argue that the experts' lack of knowledge goes to the weight and credibility, rather than the admissibility, of the evidence (Plaintiffs' Op. Brf. at pp. 23-24). That argument is without merit. D.R.E. 702 requires the trial court to make a preliminary determination that the expert witness is able, as a factual matter, to provide the proffered opinion. If the testimony is not based upon "sufficient facts or data," the trial court must disqualify the expert. The Trial Court therefore properly held that the experts lacked an understanding of the underlying facts of the case, which completely undermines the foundation of their opinions, not just their credibility. As the Virginia Supreme Court stated in *Vasquez v. Mabini*, "expert testimony founded upon assumptions that have no basis in fact is not merely subject to refutation by cross-examination or by counter-

experts; it is inadmissible." *Vasquez v. Mabini*, 606 S.E.2d 809, 811 (Va. 2005) (cited in *Perry v. Berkley*, 996 A.2d at 1271).

Furthermore, where an expert opinion is not based upon an understanding of the fundamental facts, it will be no help to the jury. Such testimony must be excluded. The five-pronged test Delaware courts utilize in determining whether to exclude expert testimony includes whether the expert testimony will assist the trier of fact to understand the evidence or determine a material fact in issue. *Sturgis*, 942 A.2d at 584. There is no question that Plaintiffs have failed to show how the facts relied on, and the opinions reached, could possibly help the fact-finder determine the integral issue of causation.

If an expert's opinion "is challenged as to either the data, principles, or methodology used, the trial judge must determine if the testimony is supported by 'the knowledge and experience of the relevant discipline.'" *Id.* (Morrill Opinion at pp. 4-5) (citing *M.G. Bancorporation*, 737 A.2d at 523). The party offering the testimony bears the burden of establishing admissibility by a preponderance of the evidence. *Id.* However, all three of Plaintiffs' experts admitted to having no particular skills in the relevant discipline: structural engineering.

It is undisputed that Plaintiffs' experts possess no structural engineering degrees or proficiency. Instead, Plaintiffs cite *Rodas v. Davis* for the proposition that an expert can deliver admissible evidence outside the scope of his experience,

knowledge, training, or discipline. *Rodas v. Davis*, S10C-04-028 (Del. Super. January 31, 2012). Reliance on *Rodas* completely misses the mark. In *Rodas*, the court allowed a medical expert to give medical testimony relating to his patient that fell outside the expert's specific medical specialty. Here, however, Plaintiffs are offering experts who have a background in fire investigations for the purpose of delivering expert opinions that stretch far into the field of engineering. Fire investigations and structural engineering are clearly two distinct disciplines and not at all comparable to a doctor offering medical testimony, regarding his own patient, that falls outside his specialty.

Plaintiffs cite *Milward v. Acuity Specialty Products Group, Inc.*, for the proposition that:

> 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.

639 F.3d 11, 15 (1st Cir. 2011); (Plaintiffs' Op. Brf. at 19). Plaintiffs' reliance on this First Circuit Court of Appeals decision flatly ignores the qualifying clause "so long as an expert's testimony rests upon 'good grounds'". Here, the Trial Court makes it clear that the experts' testimony does not rest upon good grounds therefore obviating the remainder of the quotation. Plaintiffs contend that judging the experts' conclusions rather than methodology places improper emphasis on

credibility. However, Plaintiffs confuse credibility with reliability, and ultimately conflate the two. What the Trial Court properly refers to as reliability, Plaintiffs spin as credibility. This approach is specious. It is clear that the Trial Court anchored its decision on the process—the information used and how it was analyzed—rather than any believability factor. The Court should be careful to not equally confuse these two principles.

Plaintiffs further cite *In re Adams Golf, Inc.* for the proposition that courts must not solely focus on an expert's conclusions as opposed to his methodology. *In re Adams Golf, Inc.*, 2009 WL 1913241, *2 (D. Del.) (citing *Daubert*, 509 U.S. at 595); (Plaintiffs' Op. Brf. at 19). This standard, however, must be considered along with the corollary found in *Milward* that:

> 'Although *Daubert* stated that trial courts should focus on the conclusions that they generate,' the Court subsequently clarified that this focus 'need not completely pretermit judicial consideration of an expert's conclusions,' *Ruiz-Troche v. Pepsi-Cola of P.R. Bottling Co.*, 161 F.3d 77, 81 (1st Cir. 1998)(citing *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). In *Joiner*, the Court explained that 'conclusions and methodology are not entirely distinct from one another' and 'nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to the existing data only by the *ipse dixit* of the expert.'

639 F.3d at 15. Even if this Court concludes that the Trial Court's exclusions were based on the experts' conclusions rather than their methodology, in light of *Milward, Ruiz-Troche, Joiner, Daubert* and the remaining prevailing case law,

Plaintiffs have not sufficiently demonstrated the extent the Trial Court relied on such conclusions and the extent to which this reliance would be improper.

Plaintiffs cite *Bowen v. E.I. DuPont De Nemours & Co., Inc.*, for the proposition that the court's focus should be on "principles and methodology." (Plaintiffs' Op. Brf. at pp. 19-20). There is no dispute here. UWDE and the Trial Court both clearly focused on methodology in arguing and deciding, respectively, to exclude the testimony. Any argument to the contrary is a red herring and should therefore be ignored. Plaintiffs argue that "[i]n this case however the lower court assumed the role of fact-finder rather than as a gatekeeper in assessing the experts' testimony as to causation. That is clearly demonstrated in the court's opinions and its actions." (Plaintiffs' Op. Brf. at 20). In refusing to cite a single example of the Trial Court's "opinions and [] actions", Plaintiffs' argument is just as guilty of *ipse dixit* analysis as their proposed expert reports.

Finally, Plaintiffs resort to an over-simplified and rather unsophisticated argument 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." (Plaintiffs' Op. Brf. at 27). This faulty logic is the same faulty logic and ignorance of the issues that doomed Plaintiffs' experts. Water is not a panacea. Nor is water a light switch capable of immediately "turning off" a fire. As the UL Report disclaims: all fires are different. Not all water extinguishes

every fire at the same rate nor does water instantaneously quell a fire. Plaintiffs, like their experts, continue to ignore the critical issue regarding the damage that would have continued to occur to the home after water was applied. The failure to address this issue alone is sufficient to affirm the Trial Court's exclusions.

II. THE TRIAL COURT PROPERLY DISMISSED THE CASE BECAUSE WITHOUT EXPERT TESTIMONY PLAINTIFFS HAVE FAILED TO PROVE DAMAGES

Question Presented

Whether the Trial Court properly dismissed the case after Plaintiffs repeatedly failed to find and produce satisfactory expert witnesses to adequately prove damages.

Scope of Review

Because the Trial Court's decision to dismiss the case was a natural and proper result of the exclusion of Plaintiffs' expert testimony, this issue should also be reviewed for abuse of discretion. *See, e.g.*, *Perry v. Berkley*, 996 A.2d 1262, 1267 (Del. 2010) (review for abuse of discretion of a trial court's dismissal of a case for lack of causation evidence after exclusion of expert testimony). A review of a trial court's decision to admit or exclude expert testimony under D.R.E. 702 is for abuse of discretion. *Spencer v. Wal-Mart Stores East, LP*, 930 A.2d 881, 888 (Del. 2007).

Merits of Argument

A. The Trial Court Correctly Dismissed The Case After Multiple Failed Attempts To Produce Expert Testimony To Prove Damages

The Trial Correctly dismissed the case after exclusion of Plaintiffs' expert testimony left Plaintiffs unable to prove their claim for damages. In support of its

decision, the Trial Court cited Plaintiffs' failure to comply with specific instructions, on multiple occasions, on the type and scope of evidence Plaintiffs needed to produce in order to establish a *prima facie* case for gross negligence.

Ultimately, the Trial Court was rightfully perplexed at Plaintiffs' disregard for these instructions and Plaintiffs' waste of the Trial Court's generosity in granting additional attempts to get it right. Because Plaintiffs' second round of expert testimony suffered from the same fatal flaws as the Morrill testimony, and because Plaintiffs are left unable to prove damages after the exclusion of both reports, this Court should affirm the Trial Court's dismissal.

B. Plaintiffs Fail To Show Why The Case Should Proceed And Why Plaintiffs Should Be Awarded Yet Another Chance To Produce Expert Testimony

In *Perry*, this Court affirmed the trial court's finding that plaintiff's expert testimony was inadmissible upon concluding that the expert demonstrated a "complete lack of knowledge of the most fundamental relevant facts." *Perry*, 996 A.2d at 1271. Accordingly, the trial court determined that the expert's opinion as to causation was "without an accurate factual predicate" and, therefore, inadmissible under *Daubert* and D.R.E. 702. Because the plaintiff in *Perry* failed to offer any admissible expert testimony on the issue of causation, the trial court properly dismissed the case. *See also Kardos v. Harrison*, 980 A.2d 1014, 1019 (Del. 2009) (case dismissed where expert's opinion was speculative).

It is immaterial whether the Trial Court confused the circumstances surrounding the pretrial order. The Trial Court made perfectly clear that its failure to secure Morrill's testimony was sufficient to dismiss the case: "Ordinarily the preclusion of this expert's testimony would have resulted in dismissal of Plaintiffs' case because, without it, Plaintiffs could not prove their damages." (Keefer/Davidson Opinion at 2).

CONCLUSION

For the reasons set forth herein, Defendant Below, Appellee United Water Delaware Inc. respectfully requests that this Court affirm the Trial Court's decision.

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