IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

YVETTE D. GRINNELL and WILLIAM GRINNELL	)	
Plaintiffs,	)	
v.	)	C.A. No. N19C-09-202 CLS
DAVID ALAN POUTRE,	)	
Defendant/Third-Party Plaintiff,	)	
v.	)	
DOUGH MANAGEMENT LLC and DUNKIN DONUTS LLC,		
Third-Party Defendants,		

Date Submitted: April 13, 2022
Date Decided: June 1, 2022

Upon Third-Party Defendants' Motion in Limine to Exclude Expert Witness.
GRANTED.

ORDER

Jonathan B. O'Neill, Esquire, Kimmel, Carter, Roman, Peltz & O'Neill, Newark, Delaware, 19702, Attorney for Plaintiffs, Yvette and William Grinnell.

Robert A. Ranieri, Esquire, Allstate Insurance Company Staff, Newark, Delaware 19713, Attorney for Defendant/Third-Party Plaintiff, David Alan Poutre.

Anthony N. Forcina, Esquire, Casarino Christman Shalk Ransom & Doss, P.A., Wilmington, Delaware, 19899, Attorney for Third-Party Defendants Dough Management and Dunkin Donuts LLC.

SCOTT, J.

INTRODUCTION

Before the Court is Third Party Defendants Dough Management LLC and Dunkin Donuts' ("Third Party Defendants") Motion in Limine to Exclude All Evidence from Walker Wysowaty, P.E. ("Mr. Wysowaty"). The Court has reviewed Plaintiffs Yvette D. and William Grinnell's ("Mr. and Mrs. Grinnell") and Third-Party Plaintiff David Alan Poutre's ("Mr. Poutre") submission, as well as the present motion. For the reasons that follow, the Third Party Defendants' Motion in *Limine* is **GRANTED.**

FACTS

This suit stems from a two-vehicle accident in a Dunkin Donuts parking lot on Route 40 in New Castle Delaware on October 6, 2017. Mr. and Mrs. Grinnell's Complaint alleges Mr. Poutre, while operating his vehicle, collided with Mrs. Grinnell.

On April 6, 2020, Mr. Poutre filed a third-party complaint alleging that the design and operation of the parking lot somehow contributed to the accident.

On November 12, 2021, Mr. Poutre produced an expert report from Mr. Wysowaty regarding the design of the parking lot the accident occurred in. Mr. Wysowaty is a licensed Professional Engineer in New York, New Jersey and Pennsylvania. He is not licensed in the State of Delaware and does not recall being consulted on any Delaware cases. His work includes designing and supervising the

construction of parking lots. On January 5, 2022, Mr. Wysowaty's deposition was taken.

On February 16, 2022, Third Party Defendants filed this Motion, taking issue with Mr. Wyowaty's testimony on the grounds he should not be considered an expert. Mr. and Mrs. Grinnell subsequently moved in agreement with Third Party Defendants. Mr. Poutre responded in opposition on April 18, 2022.

PARTIES' CONTENTIONS

Third Party Defendants argue there is no scientific basis for Mr. Wyowaty, he merely refers to his generalized knowledge of parking lots, and a story provided by Mr. Poutre's counsel. Additionally, Third Party Defendants assert Mr. Wyowaty could not cite to any knowledge, specifically about his understanding of Delaware law, or methodology used to form his conclusions so his opinions cannot be confirmed as a product of reliable principles and methods. Third Party Defendants argue that such a lack of an articulated basis for his opinion should bar admissibility.

Mr. Poutre, in opposition, asserts Mr. Wyowaty, in making his reports, relied on subpoenaed records, an exchange with counsel, an on-site inspection of the parking, public records for the subject property, initial development plans for the property, codes and rules adopted nationally and the plans for the Dunkin Donuts established in 2003. Further, Mr. Poutre asserts Mr. Wyowaty's testimony and

report reasonably relied upon the basis of experts in the field as Mr. Wyowaty describes how he designs parking lots, what he looks for in their design, literature, plans and materials he relied on in drafting his opinion. Mr. Poutre asks the Court, if it finds in favor of this Motion, that it find the operation of a parking lot and drive-through would be common knowledge and allow Mr. Wyowaty to testify regarding custom in the area as well as his experience with parking lots.

STANDARD OF REVIEW

The admissibility of expert testimony is governed by Delaware Rule of Evidence 702 which provides:

> [i]f 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, skills, 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.[1]

The federal standard is identical to the Delaware standard which was interpreted by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[2] and *Kumho Tire Co., Ltd. v. Carmichael*.[3] In *Kumho Tire*, the Supreme Court

[1] D.R.E. 702.
[2] 509 U.S. 579 (1993).
[3] 526 U.S. 137 (1999).

extended the holdings in *Daubert* to encompass all expert testimony including, "scientific, technical or other specialized" knowledge.[4]

The holdings in *Daubert* and *Kumho* have been adopted by the Delaware Supreme Court as "correct interpretations" of D.R.E. 702.[5] "The inquiry envisioned by Rule 702 is, we emphasize, a flexible one ... [t]he focus, of course, must be solely on principles and methodology, not on the conclusions that they generate."[6]

Daubert held that the trial judge must act as a "gatekeeper" and determine whether the proffered expert testimony is both relevant and reliable.[7] Several factors are considered in this determination, but they are not viewed as a "definitive checklist or test."[8] Those factors are:

> (1) whether a theory of technique has been tested;
> (2) whether it has been subjected to peer review and publication;
> (3) whether a technique had a high known or potential rate of error and whether there are standards controlling its operation; and
> (4) whether the theory or technique enjoys general acceptance within a relevant scientific community.[9]

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[4] 526 U.S. at 141.
[5] *M.G. Bankcorporation, Inc. v. LeBeau*, 737 A.2d 513, 522 (Del.1999).
[6] *Daubert*, 509 U.S. at 594.
[7] *Id.*
[8] *Bowen v. E.I. DuPont de Nemours & Co., Inc.*, 906 A.2d 787, 794 (Del.2006).
[9] *Daubert*, 509 U.S. at 592–93.

In addition to the *Daubert* factors, the trial court must determine the admissibility of an expert witness using a "five-step test:"

> 1. The witness is qualified (D.R.E.702);
> 2. The evidence is otherwise admissible, relevant, and reliable (D.R.E. 401 and 402);
> 3. The bases for the opinion are those reasonably relied upon by experts in the field (D.R.E.703);
> 4. The specialized knowledge being offered will assist the trier of fact to understand the evidence or determine a fact in issue (D.R.E.702); and
> 5. The evidence does not create unfair prejudice, confuse the issues, or mislead the jury (D.R.E.403).[10]

The focus of the *Daubert* analysis concerns the principles and methodology used to form the expert's opinion and not on the resulting conclusions.[11] The party seeking to introduce the expert testimony bears the burden of establishing its admissibility by a preponderance of the evidence.[12]

DISCUSSION

In applying the "five-step test" to Mr. Wyowaty's testimony, the Court finds Mr. Poutre did not established the admissibility of his testimony by a preponderance of the evidence.

[10] *Nelson v. State*, 628 A.2d 69, 74 (Del.1993).
[11] *Daubert*, 509 U.S. at 594.
[12] *Bowen*, 906 A.2d at 794–95.

First, an expert witness is qualified to testify through any of the following: knowledge, skill, experience, training or education.[13] Third Party Defendants do not raise an argument regarding Mr. Wyowaty qualifications to engineering related opinions in their motion. Thus, the Court need not analyze whether Mr. Wyowaty is qualified to render such engineering opinions.

Here, the Court takes issue with Mr. Wyowaty's opinions being admissible, relevant and reliable due to his lack of methodology as this is the main contention between the parties. Even if Mr. Wyowaty was qualified to testify to engineering based opinions, his statements alone, without providing methodology, will not be sufficient to admit the opinion.[14] There is no dispute that within Mr. Wyowaty's report, he cites to specific chapters within an Eno Transportation Foundation published document titled *Parking* by Robert A. Weant and Herbert S. Levinson. However, even if this document is a well-recognized and accepted document for designing parking lots, it does not provide for methodology to support Mr. Wyowaty's opinion. Mr. Wyowaty's opinion after providing generalized excerpts from *Parking* are "It is evident that confusion can and did occur between drivers waiting on the queue that regularly extends around the building blocking parking

[13] D.R.E. 702.
[14] *Jones v. Astrazeneca, LP*, 2010 WL 1267114, at *9 (Del. Super. Ct. Mar. 31, 2010).

spaces adjacent to the buildings and those parked in those blocked spaces, contributing to this collision," "The queue for the drive-thru that extends around all four sides of the building blocking vehicles from backing out of the parking spaces adjacent to the Dunkin' Donuts resulted in confusion and inefficiencies that ultimately caused or contributed to the collision between the two vehicles in this case," "the parking lot at Dunkin' Donuts cannot be discounted as a causal factor in the subject collision," and "Had the Fire Lane been kept free of standing traffic, this accident would have been avoided."

In terms of methodology, *Daubert* demands only that the proponent of the evidence show that the expert's conclusions have been arrived to in a sound and methodologically reliable manner.[15] In reading Mr. Wyowaty's report, there is no systematic way Mr. Wyowaty arrives at his opinions about what contributed to the accident. In fact, the opinions reached by Mr. Wyowaty are more in line with opinions that should come from an accident specialist rather than a parking lot design specialist. Beyond his report, even when asked in a deposition about his methodologies, Mr. Wyowaty could not point to anything particular in how he

[15] *Ruiz–Troche v. Pepsi Cola of Puerto Rico Bottling Co.*, 1st Cir., 161 F.3d 77, 85 (1998). (citing *Kannankeril v. Terminix International, Inc.*, 3d Cir., 128 F.3d 802, 806 (1997); *In re Paoli R.R. Yard PCB Litigation*, 3d Cir., 35 F.3d 717, 744 (1994)).

arrived at his conclusions other than getting the accident information other than reviewing documents and getting information from the attorney who hired him.

Additionally, this Court may exclude relevant evidence if its probative value is substantially outweighed by a danger of confusing the issues and/or misleading the jury.[16] Here, in Mr. Wyowaty's report, he states in his findings that based on his observations, the property conforms with the approved plans. However, continues on to discuss parking lots, in general, such as shopping centers and other large traffic generators but not fast-food restaurant lots that would similarly situated to the facts before him. The Court finds such testimony would confuse the issues and further mislead the jury. Mr. Poutre failed to show the expert's conclusions have been arrived to in a sound and methodologically reliable manner and the testimony will confuse the issues and mislead the jury. Mr. Wyowaty is precluded from testifying regarding his conclusions supplied in his report.

[16] D.R.E. 403

CONCLUSION

Based on the forgoing reasons, Third Party Defendants' Motion *in Limine* to exclude opinions of Third Party Plaintiff's expert is **GRANTED.**

IT IS SO ORDERED.

/s/ Calvin L. Scott

Judge Calvin L. Scott, Jr.