EFiled: Jun 14 2013 11:01AM EDT
Filing ID 52839032
Case Number 146,2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOEL and IRIS BROWN, Appellants, v. UNITED WATER DELAWARE, INC. Appellee.	: : : : 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 : : :

APPELLANTS' REPLY BRIEF

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Dated: June 14, 2013

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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.

The Plaintiffs/Appellants (hereinafter Plaintiffs) contend that the lower Court erred by assuming the role of a fact finder rather than a gatekeeper in assessing the expert testimony as to causation. Plaintiffs contend that this was clearly demonstrated in the lower Court's opinions and its actions. In the Answering Brief the Defendant/Appellee (hereinafter Defendant) however summarily dismisses Plaintiffs' contention and stated that Plaintiffs did not "cite a single example of the Trial Court's 'opinion and actions'". Page 24 of Answering Brief

Contrary to Defendant's statement the Plaintiffs cited examples of the lower Court's atypical action that reflected a fact finding approach rather than a gatekeeper's role. As the Plaintiffs discussed in their Opening Brief 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 nor was there any indication that a motion would be filed. A100 The Court also "googled" the Plaintiffs' home the night prior to the argument on Defendant's motion. A102 These are indicative of a fact finding pursuit.

The lower Court's opinions and reasoning also reflected a fact finding approach. The lower Court's scrutiny and essentially cross examination of the factual basis of the experts' testimony and opinion is not the role of a gatekeeper.

As stated in *Perry v. Berkley*, 996 A.2d 1262 (Del.Supr.,2010):

> "We recognize that, as a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is for the opposing party to challenge the factual basis of the expert opinion on cross-examination."

In this case the lower Court clearly questioned and challenged the factual basis of the experts' opinions and the experts' credibility which resulted in the Court's ruling of inadmissibility.

In its Answering Brief the Defendant follows the same path and essentially argues credibility and factual issues. The lower Court's opinions and the Defendant's brief are full of factual issue disputes that can only be decided by a jury and not the Court.

In its Statement of Facts at page 8 the Defendant cites the testimony of Chief Haley that in his opinion the house was "fully-involved" and his testimony that therefore he decided to "stay outside". That ignores the fact that the dispatcher was told that the firemen upon arrival were "taking a line in" B-001; and that Chief Haley's own report states:

> "Crews began to push into the house when tank water ran out in Engine 135 and Medic 629 advised that the hydrant was broken."

Plaintiff's expert Morrill testified that:

> "It was then that the decision was made that it was going to be an externally fought fire." Morrill, Pages 40-41 A-28-29

Defendant also ignores Morrill's testimony that Chief Haley's own photograph of the fire upon his arrival rather than showing the house as being fully-involved shows that the garage side of the house was not on fire and his testimony that there were firemen inside the garage when they discovered they had no water to fight the fire with and had to get out of the garage. A30 In fact hours after the fire Chief Haley told an investigator that:

> "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." Ronald G. Gray deposition testimony at Page 19 A-23

Plaintiffs other expert Keefer also 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

Moreover, 2 neighbors signed affidavits that clearly contradict Chief Haley. One neighbor, Anthony Truscello swore that 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 These are factual or credibility issues that

only a jury can decide and not issues that have any have any relevancy to the admissibility of the experts' testimony.

An example of the lower Court's deciding factual issues and the expert's credibility can be found in the Court's opinion regarding Morrill and the Court's Footnote 12 as reiterated by the Defendant at Page 16 of the Answering Brief:

> "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."

The lower Court stated that this "doubling factor seems to contradict his ultimate conclusion." Defendant repeats the Court's statement that given the passage of time:

> "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."

There is no factual support for the Court's conclusion and speculation and Defendant's argument that Morrill's testimony is contradictory. That factual issue and Morrill's credibility can only be decided by the jury and not the Court.

Moreover, the lower Court also stated that Morrill:

> "...never relates this to his contention that the basement could have been saved."

Consequently, at page 17 Defendant contends that Morrill did not address the

damage to the garage and basement foundation if there had been water available. Again this is a factual and/or credibility issue since Morrill clearly 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
> 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

The lower Court and Defendant contend that Morrill had "no expertise in structural engineering". (Page 18 of Answering Brief) Defendant makes the same contention as to Plaintiffs' other expert, Keefer & Davidson even though the lower Court did not express this alleged deficiency in its opinion as to Keefer & Davidson. However there is no absolute requirement that only a structural engineer can render an opinion as to what could have been saved if water was available. In fact, generally structural engineers are not needed or used for house

construction.[1] Moreover, a structural engineering degree is not an absolute requirement to render an opinion on what could have been saved. In fact, even the lower Court does not go so far as to require a structural engineering degree. The lower Court stated that all that was needed were "skills akin to those of a structural engineer" which all 3 experts stated they had.

Morrill testified "In looking at structural fire damage, that is part of what I do." Morrill Deposition Page 23 A-38 As stated the lower Court's opinion on Keefer & Davidson does not include a "structural engineer" deficiency as a basis for the Courts inadmissability decision. That may be because Keefer and Davidson did have skills akin to those of a structural engineer. Because, of their training and experience and profession, they clearly have knowledge of construction, construction materials and construction requirements and testified extensively concerning same. A39-40

As to his structural experience Keefer testified:

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

Davidson testified:

> "Q. I understand you are not a structural engineer, but you need to

[1]Plaintiffs do not believe that Defendant's own experts were structural engineers and Chief Haley certainly was not a structural engineer.

have some structural knowledge in order to do what you're doing, don't you?
A. Yes, sir.
Q. You need knowledge of the requirement - - knowledge of a building, even a single-family building, that is constructed; right?
A. Yes, sir.
Q. And what type of material is used to construct it; right?
A. Yes, sir.
Q. And what requirements there are to construct it; right?
A. Yes, sir.
Q. There are requirements that for - - for example, two-by-four, half-inch gypsum and so forth and so on?
A. Yes, sir." Pages 75-76 A-40

At Page 18 Defendant also contends that:

> "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."

There is absolutely nothing in the record that supports Defendant's statement as to what was the UL analysis' "accepted and customary use". Moreover, the lower Court did not make any such statement or finding and the Defendant does not cite a reference to any such finding. The lower Court simply seized upon the UL disclaimer that the tests were not to be used for "rating" purposes.

The Court however ignored the testimony of Keefer & Davidson that they were not using the test results for rating and that "rating" and their use of the test results was like comparing "apples and oranges".

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
>
> * * * * *
>
> 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." Davidson, Pages 73 A-96

The lower Court apparently did not believe their testimony as to the factual basis for their opinion and therefore excluded their testimony but credibility is the jury's function not the gatekeeper's.

At Page 19 of the Answering Brief Defendant contends that:

> "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."

The Court made no such express finding and the Defendant does not provide a citation for such a finding. Moreover, the expert did have information as to the dimensions, etc. and in fact their report includes a diagram of the house. A47

Moreover, Keefer testified that the Plaintiff's home was "standard wood frame construction with drywall." Keefer, Page 31 A-80 He testified that all he needed to know about the house was that it was sheetrock on wood studs.

There can be no question that the factual basis for the experts' opinions were adequate and that their opinions were relevant and reliable. Certainly their testimony on causation was sufficient to make a *prima facie* case on the issue of causation allowing the jury to decide their credibility. The Defendant cited *Kardos v. Harrison*, 980 A.2d 1014 (Del.Supr.,2009). However in that case the Court ruled that:

> "The Superior Court dismissed the case because the plaintiff's only evidence on causation as, by her own expert's admission, speculative. Consequently, the plaintiff failed to make a *prima facie* case on the issue of causation."

In this case, the Plaintiffs' experts certainly made a *prima facie* case.

The other cases cited by the Defendant are not controlling. For example, the facts giving rise to the Court's decision in *Goodridge v. Hyster Company.*, 845 A.2d 498 (Del.Supr.2004) are a far cry from the evidence in this case and *Price v. Blood Bank of Delaware, Inc.*, 790 A.2d 1203 (Del.Supr.,2002) primarily deals with the Court's obligation to be neutral.

The Superior Court abused its discretion in excluding the testimony of

Plaintiffs' 3 experts. 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 support of its argument seeking to justify dismissal of Plaintiff's claim the Defendant at Pages 26-27 of the Answering brief made the following statement:

> "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."

Defendant's statement is perplexing because the lower Court expressly found that there was sufficient evidence of gross negligence. The issue was not gross negligence but causation. However, there is absolutely no factual basis for the statement that "the Trial Court cited Plaintiffs' failure to comply with specific instructions, on multiple occasions." If Defendant is referring to the need for an expert to prove causation, the record is totally devoid of any such "multiple" citations or warnings. On the contrary, the Defendant seems to concede that the Court's alleged warning that Plaintiffs needed an expert simply does not exist and that the lower Court's reference to same was in error.

The cases cited by the Defendant, *Perry* and *Kardos* are neither factually or legally controlling as to the issue presented in this Argument.

The lower Court ruled that the Plaintiffs had been given "three chances" to obtain an expert and therefore dismissal was justified. It appears that Defendant is not disputing that the lower Court was simply wrong in the belief that Plaintiffs had been given "three chances" and that the lower Court's expressed basis for the dismissal does not exist. Since it is clear that the lower Court's dismissal was based on the mistaken belief that Plaintiffs had three strikes and since that is clearly incorrect, the lower Court's decision should be reversed.

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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