IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

JOEL BROWN and IRIS BROWN, Husband and Wife,	)	
Plaintiffs,	)	
	)	C.A. No. 07C-07-070-JAP
v.	)	
	)	JURY TRIAL DEMANDED
UNITED WATER DELAWARE, INC.	)	NON-ARBITRATION CASE
Defendant.	)	

Upon Defendant's Motion in Limine to Exclude Testimony of Plaintiffs' Expert
Defendant's Motion in Limine ***GRANTED***

MEMORANDUM OPINION

Appearances:

L. Vincent Ramunno, Esquire, Wilmington, Delaware
Attorney for Plaintiffs Joel Brown and Iris Brown

Sean J. Bellew, Esquire, Wilmington Delaware
Attorney for Defendant United Water Delaware, Inc.

JUDGE JOHN A. PARKINS, Jr.

Defendant has moved to exclude Plaintiffs' expert on causation and has also moved for summary judgment. The court finds that Plaintiffs' expert is not qualified to give expert testimony and that his methodology is unreliable. Defendant's motion is therefore granted.

Facts and Procedural History

This case arises from a fire which destroyed Plaintiffs' home. Plaintiffs aver that when firefighters arrived at their home they were unable to open the valve on the nearest fire hydrant, which is owned and maintained by defendant United Water. According to the complaint, firefighters were again unsuccessful when they tried to open the valve on the next nearest fire hydrant, which was also owned and maintained by United Water. Firefighters were finally able to open the valve on a third hydrant, but by then it was too late–Plaintiffs' home was a complete loss. According to Plaintiffs, had the first hydrant been in working order, firefighters would have at least saved the basement and garage of their home.

This case has a somewhat complex procedural history. United Water moved to dismiss on the basis that the enrolled tariff doctrine barred Plaintiffs' claims. This court granted that motion and, on appeal, the Delaware Supreme Court affirmed. The Supreme Court remanded the matter to this court, however, in order to give Plaintiffs the opportunity to argue that the enrolled tariff doctrine did not bar a claim for gross negligence. This court determined that there was sufficient evidence in the record to make out a claim for gross negligence and that United Water waived any argument that the enrolled tariff

doctrine barred any such claim. The Supreme Court also affirmed these rulings.

Upon return of the case, this court ruled on several motions in limine. Plaintiff Joel Brown had previously been convicted of insurance fraud for feigning his own death, and this court ruled that United Water could bring this to the attention of the jury if Mr. Brown testified about damages in this case. The court precluded United Water from introducing evidence purporting to show that Mrs. Brown perpetrated a fraud on the local Bankruptcy Court.

Among the motions in limine presented by United Water was a motion to preclude the expert testimony of Jeffrey Morrill from offering expert testimony on causation. This is the court's ruling on that motion.

Discussion

There are two reasons why Mr. Morrill's testimony that the basement and garage could have been saved. 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.

A. Mr. Morrill's methodology is unreliable

Delaware Rule of Evidence 702 provides that:

> [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, skill, experience, training or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable

> principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.[1]

Delaware courts follow the standards applied by the United States Supreme Court when applying Rule 702[2] In *Daubert v. Merrell Dow Pharmaceuticals*, that Court adopted an approach which requires the trial judge to act as gatekeeper and determine whether the expert testimony is relevant and reliable and whether it will assist the trier of fact.[3] The Delaware Supreme Court recognizes this Court's role as a gatekeeper and has applied the following five-part test to determine admissibility of expert testimony:

(1) whether the expert qualifies as such through either knowledge, skill experience or training and education;

(2) whether the testimony is reliable;

(3) whether the testimony is supported by that which is relied upon by experts in a particular discipline;

(4) whether the testimony will assist the trier of fact; and

(5) whether the testimony will be unfairly prejudicial or confusing to the jury.[4]

For scientific evidence to be deemed reliable, the expert testimony must be supported by scientific knowledge and derive from the scientific method.[5] If, in fact, such testimony is challenged as to either the data, principles, or

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[1] Del. R. Evid. 702.
[2] *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 521 (Del. 1999); *Podrasky v. T&G, Inc.*, 2004 WL 2827710, *6 (Del. Super. October 7, 2004).

[3] 509 U.S. 579, 589-591, 597 (1993); *M.G. Bancorporation, Inc.*, 737 A.2d at 521.
[4] *Goodridge v. Hyster Co.*, 845 A.2d 498, 503 (Del. 2004).
[5] *Podrasky,* 2004 WL 2827710 at *6.

methodology used, the trial judge must determine if the testimony is supported by "the knowledge and experience of the relevant discipline."[6] In order to determine such sufficient support, the trial judge must look to whether the testimony "(1) has been tested; (2) has been subjected to peer review or publication; (3) is a result of a technique with a known or potential rate of error; and (4) is generally accepted within the scientific community."[7]

However, a trial judge has "broad latitude to determine whether *Daubert's* specific factors are, or are not, reasonable measures of reliability in a particular case."[8] *Daubert* does not require a court "to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert."[9] Thus, "[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered."[10]

Mr. Morrill's methodology is unreliable. His report contains no description of his methodology so the court is limited to the manner in which he described it in his deposition. Reduced to essentials, his methodology consisted of reviewing a handful of photographs taken at the scene and projecting--based solely on his "experience"--that the basement and garage could have been saved if water from a working hydrant had been available earlier.

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[6] *M.G. Bancorporation, Inc.*, 737 A.2d at 523.

[7] *Podrasky,* 2004 WL 2827710 at *6 (citing *Daubert*, 509 U.S. at 591); *M.G. Bancorporation, Inc*, 737 A.2d at 521.

[8] *M.G. Bancorporation, Inc.*, 737 A.2d at 522.

[9] *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997); *Goodridge*, 845 A.2d at 503.

[10] *Gen. Elec. Co.*, 522 U.S. at 146.

Q. And there was no modeling or analysis undertaken as to how far the fire may have progressed as of 05:06?

A. Well, certainly there was an analysis. There was cognitive analysis of that fire growth that was done.

Q. Okay. And where is that?

A. Well, cognitive analysis is done in your brain.

* * *

Q. Show me where you put it in your report.

A. On page two of the report, third paragraph it states that the Browns saw the fire in one room.

The 911 call was made as soon as possible.

There were photographs taken of the firefighter's standing around doing nothing.

These are all part of the analysis of the fire growth.

Q. Show me the analysis that appear to be observations.

A. That is the analysis.

Q. That is your analysis?

A. Sure.[11]

[11] Morrill Dep. 60 – 61.

Near the end of his deposition Mr. Morrill testified, in response to questions from Plaintiffs' counsel, that he employed scientific analysis in reaching his conclusions:

> Q. And physics of fire and chemistry of fire is what you are saying 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.

This testimony is contradicted by the rest of his deposition. The court has reviewed the deposition in its entirety and can find only two references to a principle of physics. Mr. Morrill testified that heat from a fire rises and that most of the damage from a fire occurs above the level of the fire. However, he never relates this to his contention that the basement could have been saved. Indeed, he never even identifies the nature and cause of the damage to the basement except to rule out water damage as the reason the foundation could not be reused. The second reference to a principle of physics is his contention that the energy of a fire doubles every sixty seconds. Once again, he never relates this to his conclusions. Indeed his doubling factor seems to contradict his ultimate conclusion.[12]

[12] The records show that the Claymont Fire Company arrived at the scene at 5:01 a.m., and Mr. Morrill concluded that if the hydrant had been functioning properly, the firefighter would have had water from the hydrant at 5:08. Assuming conservatively that only six minutes elapsed from the time the fire company arrived until the time it should have had water from the hydrant, using Mr. Morrill's doubling factor identified by Mr. Morrill the fire would have 32

In short, Mr. Morrill's opinion is little more than "it is because I say it is." This sort of *ipse dixit* reasoning is insufficient to allow the testimony. It is not subject to testing nor is it based on reliable scientific principles. Therefore in the exercise of its gatekeeper function, the court will exclude it.

B. Mr. Morrill is not qualified to render an opinion on whether the "saved" portions of the building would have been structurally sound.

Even assuming for the sake of argument that Mr. Morrill is capable of determining how much of the structure would have not been engulfed in flames had the hydrant been functioning properly, there is nothing in his background which suggests he is qualified to render an opinion about whether the portions of the building which were not consumed could have been used in the rebuilding of the house. This requires skills akin to those of a structural engineer, and Mr. Morrill does not possess those skills. After graduating from high school Mr. Morrill received 11 credit hours in Mechanical Engineering from the University of Southern Maine between 1978 and 1979. Thirteen years later he resumed his formal education and received 26 credit hours in Mechanical Engineering from the Southern College of Technology. The record does not reflect how many of those credit hours were for engineering courses as opposed to courses unrelated to engineering which are typically required of candidates for a college degree. Between 1991 and 2010 Mr. Morrill attended various seminars, but judging from their titles, none appear to be pertinent to

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times more energy when water from the hydrant would have been available than that when the firefighters arrived.

the issue before the court. For example, seminars on such as "Appliance Fires" and "Vehicle Fires" while important in other contexts, are simply not relevant to the issue at hand.

This is not to demean Mr. Morrill. It appears to the court he has expertise in investigating the cause of fires, including arson investigations. He has been certified by multiple agencies as a fire investigator. According to his curriculum vitae, since January 1991 Mr. Morrill has been associated with firms which provide "[c]omplete services in the field or origin and causes of fires, explosions and asphyxiations." His curriculum vitae further states that "[s]ince 1993 Mr. Morrill has given expert testimony in both civil and criminal proceedings involving origin and cause [of fires] as well as automotive mechanics." But none of this is germane to the present issue. What is germane is what portion of the building, if any, would have remained structurally sound had the hydrants were functioning properly. Nowhere does Mr. Morrill's curriculum vitae mention the sort of expertise required to make this determination..

Mr. Morrill was not asked to undertake any analysis other than "contribution of negligence" by the fire company or United Water. According to his report Mr. Morrill's employer "was requested to review the facts surrounding the fire loss at the Brown's [sic.] residence and any contribution, negligence or failure of the [Claymont Fire Company] . . .or United Water Company in the execution of their duties." The remainder of the report consists of a description of what allegedly occurred and a criticism of United

Water.[13] The only portion of the report which is even remotely pertinent to the issue here is a single sentence that if adequate water had been available the firefighters would "likely stop the spread of the fire damage to any adjacent structure including the foundation below the main level of the Brown's home." No explanation is provided in the report about how this seemingly throw-away conclusion was reached.

Notably Mr. Morrill disavowed any expertise in structural engineering in his deposition:

> Q. Do you have any expertise in structural engineering?
>
> A. No specific expertise in structural engineering.
>
> In looking at structural fire damage, that is part of what I do.
>
> Q. But for purpose of structural engineering, you don't have any expertise in that field?
>
> A. None that I can render expert opinion about.

In sum, even if Mr. Morrill could predict the spread of the fire if adequate water had been available, he is not qualified to testify whether the remaining portions of the structure would have been sound enough to salvage.

[13] Mr. Morrill's criticisms of United Water are not the subject of this opinion and he is free to offer them at trial.

CONCLUSION

United Water's motion to exclude certain expert testimony from Mr. Morrill is therefore **GRANTED.**

October 7, 2011

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John A. Parkins, Jr., Judge