SUPERIOR COURT
OF THE
STATE OF DELAWARE

WILLIAM L. WITHAM, JR.
RESIDENT JUDGE

KENT COUNTY COURT HOUSE
38 THE GREEN
DOVER, DELAWARE 19901

September 7, 2011

RE: *Cale v. Grotto Pizza, Inc,. et al.*
C.A. No. 09C-04-050 WLW

Dear Counsel:

The following represents my decisions as to the several Motions in Limine related to the captioned matter. They are as follows:

Defendant's First Motion to Exclude Certain Expert Testimony

Facts

Grotto's Pizza, Inc. ("Defendant") has moved to exclude the purported expert opinion testimony of David H. Fleisher regarding his examination and evaluation of the sidewalk outside Grotto's location on Rehoboth Avenue in Rehoboth Beach, Delaware where the Plaintiff Christy Cale's alleged trip and fall occurred on May 6, 2007.

Defendant moves to exclude on grounds that (1) expert's testimony will not assist the trier of fact and that (2) expert's testimony contains impermissible legal conclusions.

Standard of Review

The trial judge stands as the gatekeeper in the admissibility of expert testimony. With regard to the admissibility of expert testimony, Delaware Rule of Evidence 702 tracks the standard set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[1]

[1] 509 U.S. 579, 113 S.Ct. 2786, *Nelson v. State*, 628 A.2d 69, 74 (Del. 1993).

Daubert sets forth a five-part test to determine the admissibility of expert testimony. The test asks whether:

(1) The witness is qualified as an expert by knowledge, skill, experience, training, or education;[2]

(2) The evidence is relevant and reliable;[3]

(3) The expert's opinion is based upon information reasonably relied upon by experts in a particular field;[4]

(4) The expert testimony will assist the trier of fact to understand the evidence or to determine a fact in issue; and

(5) The expert's testimony will not create unfair prejudice or confuse or mislead the jury.[5]

Discussion

Because the purported expert's opinions in the motion will not assist the trier of fact to understand the evidence or determine a fact in issue, and in fact invade the province of the jury, his testimony, objected to in paragraph 8, is not admissible. The expert's opinions in paragraph 8 are impermissible because they invade the province of the finder of fact by making conclusory statements that do not add to the jury's understanding of the issue at hand. These statements include, *inter alia*:

> "Grotto Pizza should have provided safe egress and safe sidewalk conditions, before and at the time of the accident."
>
> "Christy Cale was using the walkway surfaces in a reasonable, foreseeable and intended manner . . . ."
>
> "The actions and/or inactions of Grotto Pizza caused Christy Cale to fall."

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[2] *Ward v. Shoney's, Inc.*, 817 A.2d 799 (Del. 2003).

[3] *Id.*

[4] *Id.*

[5] *Eskin v. Carden*, 842 A.2d 1222, 1227 (Del. 2004) (citing *Cunningham v. McDonald*, 689 A.2d 1190, 1193 (Del. 1997)).

Such statements are of no assistance to the jury.

Conclusion

The expert's opinions, as noted in the discussion above, are inadmissible.

Defendant's Second Motion in Limine to Preclude Certain Testimony (Hearsay) and Plaintiff's Third Motion to Allow Testimony

Facts

Defendant has also moved to exclude a conversation with an undetermined employee of the defendant based upon hearsay without exception. Plaintiffs' third motion, which relates substantially to Defendant's second motion, seeks to allow the Plaintiff to testify regarding the contents of an alleged conversation between the Plaintiff and defendant's employee on grounds of exception to hearsay.

Discussion

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.[6] The statement at issue is what Mr. Cale claims was said by an unidentified, female Grotto employee. In deposition testimony, Mr. Cale stated as follows:

> She just came out and leaned over, I believe, and asked was everything okay, and I said no, my wife fell and she hurt herself. She said – I believe she said something about what happened and I said I believe she tripped on something, caught her toe on something, caught her foot on something and fell. Then the girl said something to me, I'm sorry about that. We've been meaning to fix that, something to that order. Then I believe she said something about we called for some help and let me get you something to cover her up.[7]

Plaintiffs contend that the statement is not hearsay because they claim it is an admission by a party opponent, or in the alternative, an exception to hearsay as a present sense impression, excited utterance, or a then-existing mental, emotional, or physical condition. Each of these arguments are addressed in turn.

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[6] D.R.E. 801(c).

[7] Ex. B at 21-22.

An admission by a party opponent occurs when "[t]he statement is offered against a party and is . . . a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship . . . ."[8] In Defendant's motion to preclude, defendant states that "there is no indication that the employee was acting in the scope of her employment at the time the statement was allegedly made."[9] Despite this statement, in the Defendant's response to Plaintiffs' Fifth Motion in Limine, Defendant notes that the managers on duty on the date of the incident, did have responsibility for inspecting the exits to the restaurant.[10]

The difficulty in addressing the Plaintiffs' admission by a party opponent argument is that the Plaintiffs have not yet identified the employee. Plaintiffs' argument that " . . .so long as the employee's acts arise in or are of the nature, conditions, obligations or incidents of or to his employment or have a reasonable relation to it, he is acting within the scope of his employment"[11] is well taken. However, without the identity of the alleged employee or her job description, the Court cannot evaluate the relationship between the nature of the employee's employment and the alleged statements made. Thus, it is not possible at this juncture for the Court to evaluate the scope of employment argument without first identifying the employee.

A present sense impression is defined as "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter."[12] The Defendant's employee did not observe the event as it occurred. Further, the statement that "We've been meaning to fix that . . ." is unclear as to what the employee is referencing. Thus, the alleged statements of the Defendant's employee do not qualify for the exception here.

An excited utterance has the following elements: "(i) a startling occasion; (ii) a statement relating to the circumstances of the startling occasion; (iii) a declarant who appears to have had opportunity to observe personally the events; and (iv) a

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[8] D.R.E. 801(d)(2)(D).

[9] Def. Mot. ¶ 9.

[10] Def. Mot. in Resp. to Pl's Fifth Mot. ¶ 5.

[11] *Groves v. Marvel*, 209 A.2d 462, 467 (Del. Super. 1965).

[12] D.R.E. 803(1).

statement made before there has been time to reflect and fabricate."[13] There is no indication that the Defendant's employee was startled or excited by the event. The argument thus fails on the first prong.

A then-existing mental, emotional, or physical condition is defined as "a statement of the declarant's then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed . . . ."[14] As with present sense impression, this argument also fails on the ground that it is unclear as to what the Defendant's employee was referring. She could have been referencing the hole in question, or the seam in the sidewalk, or something else entirely. The pronoun "that" simply is not specific enough to qualify for the exception.

Conclusion

The statement the Plaintiffs attempt to introduce is inadmissible hearsay given that scope of employment cannot be determined to allow admission by a party opponent and present sense impression, excited utterance, and then-existing mental, emotional, or physical state are all inapplicable under the facts as submitted.

Plaintiff's First and Second Motions in Limine to Exclude Bipolar Disorder and Alcoholism

Facts

Plaintiffs have filed five motions. Plaintiffs' first motion seeks an order to prohibit mention or inference suggesting that Plaintiff Bruce Cale has bipolar disorder. Plaintiffs' second motion seeks a court order to prohibit mention or inference suggesting that Plaintiff Bruce Cale has an alcohol problem or is an alcoholic. The reference to Mr. Cale having bipolar disorder and allusions to his drinking were made by Mrs. Cale to her doctor at medical appointments.

Discussion

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[13] *State v. Burley*, 2007 WL 2309747 (Del. Super. 2007). An excited utterance is "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." D.R.E. 803(2).

[14] D.R.E. 803(3).

Given that there is no evidence on the record that the Plaintiff, Mr. Cale, has been diagnosed with either bipolar disorder or alcoholism, such an assertion would be more prejudicial than probative and would lead to confusion of the issues under Delaware Rule of Evidence 403. This evidence is barred.

Plaintiff's Fourth Motion in Limine to Permit Testimony Regarding Subsequent Remedial Measures

Facts

Plaintiffs' fourth motion seeks to allow testimony that Defendant placed a mat over the area of the sidewalk in question and ground down the sidewalk. This information comes via Plaintiffs' expert, David Fleisher, whose report, on pages 5-7, summarizes deposition testimony of several deponents that a mat was placed on the area of the alleged incident and that the sidewalk was ground down.[15]

Discussion

Delaware Rule of Evidence 407 states, "When, after an injury or harm allegedly caused by an event, measures are taken which, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence . . . . This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control or feasibility of precautionary measures, if controverted, or impeachment." If the defendant does not controvert ownership, control, or feasibility of precautionary measures,[16] then all mention of subsequent remedial measures shall be prohibited.

Plaintiff's Fifth Motion in Limine to Prohibit Introduction or Suggestion of Lack of Previous Falls

Facts

Plaintiffs' fifth motion seeks to prohibit reference to or inference of a lack of previous falls at the site of Christy Cale's fall.

Standard of Review

[15] Ex. A at 5-7.

[16] Def. Mot. in Resp. ¶ 2.

> [A] party who wishes to offer evidence as to the absence of other accidents must show that, during the period in question, the physical circumstances prior to the accident were reasonably comparable to those in issue. Additionally, it must be shown that the person offering the testimony is one who would, in the ordinary course of events, have either personal knowledge of the condition or that he is the person to whom reports as to accidents would ordinarily be made.[17]

Discussion

Plaintiffs utilize Delaware Rules of Evidence 402 (Relevance) and 403 (Exclusion of Relevant Evidence) to attempt to prohibit the evidence. As the Defendant notes,[18] the absence of an accident during the period in which the sidewalk was installed up until the Plaintiff's injury does have some relevance to the case at hand. In *Pippin v. Ranch House S., Inc.*,[19] a key case in terms of premises liability and offering evidence of absence of prior accidents, the Delaware Supreme Court found that where "a plaintiff alleges that a dangerous condition has existed over a period of time, a defendant should be permitted to offer evidence showing that the condition is not defective and/or that any defect has not existed for the time period alleged."[20] The Plaintiffs here allege that there is a defect in the sidewalk for which the Defendant is liable. Thus, according to *Pippin*, the Defendant should be allowed to offer evidence that the defect was not dangerous and/or that the Defendant was not reasonably chargeable with knowledge of its dangerous character.[21]

To offer evidence of absence of previous accidents, however, the Defendant must meet two burdens. First, the Defendant must show that during the period in question the physical circumstances prior to the accident were *reasonably comparable* to those at issue.[22] Second, the person offering testimony must be one who would, in the ordinary course, have either personal knowledge of the condition

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[17] *Pippin v. Ranch House S., Inc.*, 366 A.2d 1180, 1183 (Del. 1976).

[18] Def. Mot. in Resp. ¶ 2.

[19] 366 A.2d 1180, 1183 (Del. 1976).

[20] *Id.* at 1182.

[21] *Id.* at 1183.

[22] *Id.* (emphasis added).

or would be the person to whom reports of such accidents would be made.[23] Defendant asserts that it has witnesses qualified to provide such information.[24] Given a proper foundation, the Defendant should be permitted to testify as to the lack of previous accidents.[25] The Court will defer decision as to the qualification of Defendant's witnesses until the time of trial as the frequency of such inspections required for personal knowledge and the Defendant's reporting system for such accidents remain in question.

Conclusion

Given proper foundation at trial, the Defendant will be permitted to testify as to the lack of previous incidents during the time period after the sidewalk was modified until the Defendant's alleged injury.

SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dsc
Via LexisNexis File & Serve
oc: Prothonotary
cc: Counsel

[23] *Id.*

[24] Def. Mot. in Resp. ¶ 5.

[25] A further helpful quotation from *Pippin* is as follows: "Rarely will a defendant be able to produce evidence that the place in question was under such continuing scrutiny that *personal knowledge* of its condition throughout the time period can be shown. But whether a defendant can do so is not controlling on whether a manager or other superintendent may be permitted to testify as to the *absence of complaints*. Given a proper foundation, we conclude that such a person should be permitted to testify." *Pippin v. Ranch House S., Inc.*, 366 A.2d 1180, 1183 (Del. 1976) (emphasis added).