

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

DEBORAH and DOUGLAS ERHART,)	C.A. NO: N10C-09-019 PLA
wife & husband)	
)	
Plaintiffs,)	
v.)	
)	
DIRECTV, INC., a Corporation of the)	
State of California, and LUXE)	
COMMUNICATIONS, LLC, a)	
Corporation of the State of Delaware, and)	
EDDIE MENA,)	
Individually and as a representative of)	
Luxe Communications, LLC.,)	
Defendants.)	

**ON PLAINTIFFS’ APPLICATION FOR CERTIFICATION OF
INTERLOCUTORY APPEAL
DENIED**

Submitted: August 15, 2012
Decided: August 30, 2012

On this 30th day of August, 2012, it appears to the Court that:

1. Plaintiffs Douglas and Deborah Erhart (collectively, “Erharts”) have filed this application for certification of an interlocutory appeal pursuant to Supreme Court Rule 42, seeking review of this Court’s decisions excluding Plaintiffs’ claims for unprofessional cable installation and violation of the Home Solicitation Sales Act, the exclusion of which barred Plaintiffs’ dependent claims alleging violation of other consumer protection statutes. Upon review of the

application, the Court finds that Plaintiffs have failed to satisfy the criteria for certifying an interlocutory appeal pursuant to Supreme Court Rule 42(b). Accordingly, the application for certification of an interlocutory appeal is DENIED.

2. This lawsuit arises from the installation of DirecTV satellite cable television service at the Erharts' home in March 2009. Plaintiffs allege that defendant Eddie Mena, an employee of defendant Luxe Communications, LLC, a subcontractor of DirecTV, Inc., negligently performed the installation of the satellite equipment, resulting in significant damage to the Erharts' home. Plaintiffs initially filed a Complaint alleging, *inter alia*, unprofessional installation of the cable equipment and violation of the Home Solicitation Sales Act.¹ Plaintiffs also alleged that defendants violated their rights under various other consumer protection statutes, including the Consumer Contracts Act,² and the Consumer Fraud Act.³ Plaintiffs' claim based on the alleged violation of the Home Solicitation Sales Act centered upon the defendants' alleged failure to provide documentation and cancellation notices in compliance with the Act.

3. On April 26, 2012, after the deadline for dispositive motions under the Trial Scheduling Order had passed, Defendants filed six motions *in limine* seeking

¹ 6 Del. C. §4403.

² 6 Del. C. §§2731-2736.

³ 6 Del. C. §§2511-2527.

to exclude Plaintiffs' claims for unprofessional installation, violation of the Home Solicitation Sales Act, and other consumer protection statutes. The Court noted that the motions *in limine* should have been presented as dispositive motions and reminded the defendants that it could have elected not to consider them as such. By opinion issued June 20, 2012, the Court granted the motion to exclude Plaintiffs' unprofessional installation claim and claim based on violation of the Home Solicitation Sales Act.⁴ In its Opinion, the Court largely agreed with the defendants' position that Plaintiffs could not prove their claim of "unprofessional installation" without expert testimony and that the transaction complained of did not fall within the statutory definition of a "door-to-door sale" under the Home Solicitation Sales Act.⁵ The Court's decision to exclude Plaintiffs' claim under the Home Solicitation Sales Act effectively eliminated Plaintiffs' other statutory consumer protection claims. Plaintiffs subsequently filed a motion for re-argument, asking the Court to reconsider its decision with respect to their unprofessional installation claim and their claim under the Home Solicitation Sales Act. The Court denied the motion in an Opinion issued August 7, 2012.⁶ Plaintiffs now seek certification of an interlocutory appeal challenging the Court's decision.

⁴ *Erhart v. DirecTV, Inc.*, 2012 WL 2367426 (Del. Super. June 20, 2012).

⁵ *See* 6 Del. C. §4403(3).

⁶ *Erhart v. DirecTV, Inc.*, 2012 WL 3518121 (Del. Super. Aug. 7, 2012).

5. Under Delaware Supreme Court Rule 42, an interlocutory appeal will not be certified unless the trial court's order determines a substantial issue, establishes a legal right, and meets one of five additional criteria set forth in Rule 42(b).⁷ Plaintiffs argue that the Court's decision established substantial legal rights by preventing the plaintiffs from establishing proof of their claims of unprofessional installation and violation of the Home Solicitation Sales Act. Moreover, Plaintiffs contend that the appeal satisfies the criteria set forth in Supreme Court Rule 42(b)(i) because both claims present an original question of law.

6. Contrary to Plaintiffs' assertions, whether expert testimony is required to assess whether cable installation was performed negligently is *not* an original question of law. Plaintiffs have attempted to distinguish their claim by characterizing it as a claim based on "unprofessional" installation and arguing that expert testimony is unnecessary to establish the standards of "professional"

⁷ The five criteria provided under the rule are as follows:

- (i) *Same as Certified Question*. Any of the criteria applicable to proceedings for certification of questions of law set forth in Rule 41; or
- (ii) *Controverted Jurisdiction*. The interlocutory order has sustained the controverted jurisdiction of the trial court; or
- (iii) *Substantial Issue*. An order of the trial court has reversed or set aside a prior decision of the court, a jury, or an administrative agency from which an appeal was taken to the trial court which had determined a substantial issue and established a legal right, and a review of the interlocutory order may terminate the litigation, substantially reduce further litigation, or otherwise serve considerations of justice; or
- (iv) *Prior Judgment Opened*. The interlocutory order has vacated or opened a judgment of the trial court; or
- (v) *Case Dispositive Issue*. A review of the interlocutory order may terminate the litigation or may otherwise serve considerations of justice.

installation. As far as the Court is aware, however, no Delaware court has ever ruled on the necessity of expert testimony to establish a claim of unprofessional installation because “unprofessional” cable installation has never been recognized as a cause of action in this state. Plaintiffs’ claim is, at its core, an ordinary negligence claim. As the Court recognized in its original opinion granting Defendants’ motion *in limine*, plaintiffs in negligence cases ordinarily must supply an expert to demonstrate that a breach of duty occurred.⁸ Expert testimony only becomes unnecessary where the alleged breach of duty is so within the realm of common, everyday experience of the average juror that expert testimony would be redundant.⁹ Here, while common sense would permit a reasonable juror to draw the conclusion that damage occurred, expert testimony is still necessary to explain what constitutes exercising reasonable care in the context of installing satellite cable equipment and how defendant Mena failed to fulfill that duty.

7. Similarly, Plaintiffs’ claim based on the alleged violation of the Home Solicitation Sales Act fails to satisfy the criteria for certification of an interlocutory appeal. Plaintiffs assert that the Court’s decision granting Defendants’ motion to exclude evidence relating to the alleged violation of the Home Solicitation Sales Act determined a substantial issue and established a legal right by depriving them

⁸ *Erhart*, 2012 WL 2367426, at *4.

⁹ *Id.* (citing *Ward v. Shoney’s*, 817 A.2d 799 (Del. 2003), *Brown v. Dollar Tree Stores, Inc.*, 2009 WL 517762 (Del. Super. Dec. 9, 2009), and *Small v. SuperFresh Food Markets, Inc.*, 2010 WL 530071 (Del. Super. Feb. 12, 2010)).

of access to the remedies available under the various consumer protection statutes in this state. In reality, the Court's original decision reflected its conclusion that the Plaintiffs had failed to present sufficient evidence to show that the transaction complained of falls under the protection of the Home Solicitation Sales Act. In the Court's view, this is a straightforward question of statutory interpretation that does not present an original question of law for certification to the Delaware Supreme Court.

8. Upon review of Plaintiffs' application for certification of an interlocutory appeal, the Court finds that Plaintiffs have failed to meet the criteria under Supreme Court Rule 42. Accordingly, the application for certification of an interlocutory appeal is hereby DENIED.

IT IS SO ORDERED.

/s/ Peggy L. Ableman

PEGGY L. ABLEMAN, JUDGE

Original to Prothonotary
cc: Counsel via File & Serve