

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

MARK ALPERN and	)	
LINDA ALPERN,	)	
Husband and Wife,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	C.A. No. 08C-12-137 PLA
	)	
BIGGER FISH, LLC,	)	
	)	
Defendant.	)	

UPON DEFENDANT’S MOTION TO STRIKE PLAINTIFF’S EXPERT  
AND FOR SUMMARY JUDGMENT  
**DENIED**

Submitted: July 22, 2011  
Decided: September 9, 2011

This 9th day of September, 2011, it appears to the Court that:

1. Plaintiff Mark Alpern (“Alpern”) brought this premises liability action against Defendant Bigger Fish, LLC (“Bigger Fish”) after he allegedly fell on a metal rod that was protruding from in the ground outside a side door to property owned by Bigger Fish and occupied by Neva’s Café in Rehoboth Beach. The rod had been placed there to operate as a door stop. Alpern was on the property to deliver bread to Neva’s Café, which leased its portion of the property from Bigger Fish. Alpern filed suit against Bigger Fish, alleging that he had sustained injuries as a result of the fall, which he

attributes to defendant's negligence in allowing the dangerous condition at the entryway to exist.

2. Following the untimely death of its original expert, which necessitated a continuance of the trial date, Alpern retained Walter Green ("Green") as a substitute expert. Bigger Fish now moves to exclude Green's testimony, and, if that relief is granted by the Court, it submits that it is entitled to summary judgment in its favor.

3. In Delaware, "a property owner owes a business invitee a duty to provide safe ingress and egress."<sup>1</sup> The applicable standard of care is to insure that "such portions of his premises as would naturally and ordinarily be used by his customers are kept in a reasonably safe condition for their use."<sup>2</sup> In order to be successful, a plaintiff must show that the possessor of land: (a) knows of, or by the exercise of reasonable care would discover, the condition, and should realize that it involves an unreasonable risk of harm to invitees; and (b) should expect that they will not discover or realize the

---

<sup>1</sup> *Ward v. Shoney's, Inc.*, 817 A.2d 799, 803 (Del. 2003) (quoting *Wilmington Country Club v. Cowee*, 747 A.2d 1087, 1092 (Del. 2000)).

<sup>2</sup> *Ward*, 817 A.2d at 801–2 (quoting *Robelen Piano Co. v. DiFonzo*, 169 A.2d 240, 244 (Del. 1961)).

danger, or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect them against the danger.<sup>3</sup>

4. Green intends to offer two opinions in aid of the jury's deliberations in connection with the foregoing standard. First, it is Green's opinion that Alpern fell "because he was not provided a reasonable, appropriate, and safe means of egress/ingress" from the property. Second, it is Green's opinion that Alpern's injury occurred as a result of the property owner's actions or inactions in that reasonable, safer alternatives existed as a substitute for the metal rod. For example, he opines that the metal rod could have been rendered more visible by painting it a vibrant color. Furthermore, Green concludes that the use of the metal rod violated specific sections of the Delaware State Fire Prevention Regulations ("Fire Code"), as well as nationally recognized, generally accepted standards and practices of building maintenance and construction.<sup>4</sup>

5. In its argument to strike Green's testimony, Bigger Fish argues that the Fire Code provisions and generally accepted national standards relied upon by Green do not specifically apply to the building that is the subject of this litigation, and that, therefore, Green can offer no opinion

---

<sup>3</sup> *Ward*, 817 A.2d at 802 (quoting Restatement (Second) of Torts § 343 (1965)).

<sup>4</sup> Def.'s Mot. for Summ. J., Ex. A, at 9–10.

relevant to this matter. Bigger Fish submits that without the testimony of an expert “there is no basis of liability against the defendant Bigger Fish” because the “jury would be asked to speculate that the door stop was in violation of a standard.”<sup>5</sup>

6. In his response, Alpern argues that the Court should not strike Green’s testimony because “many of Mr. Green’s expert opinions are based entirely outside of any existing codes or regulations.”<sup>6</sup> Alpern contends that Green may express an opinion based primarily on his education, training, and experience, and that, in so doing, Green may rely upon certain nationally recognized standards and codes to help form the basis of his opinions about the applicable standard of care and the reasonableness of the door stop used in this case in contrast to available alternatives.<sup>7</sup> Alpern asserts that Green’s failure to establish a violation of the applicable Fire Code should not preclude him from offering a valid opinion. Lastly, Alpern argues in the alternative that, even if the Court were to strike Green’s expert testimony, the circumstances of this case are not so far beyond the pale of common

---

<sup>5</sup> Def.’s Mot. for Summ. J. at 4.

<sup>6</sup> Pl.’s Resp. to Mot. for Summ. J. at 1.

<sup>7</sup> *Id.* at 3–4.

sense and knowledge that a lack of expert testimony should justify summary judgment in Defendant's favor.<sup>8</sup>

7. Expert testimony is appropriate where it will assist the trier of fact in understanding the facts or the evidence.<sup>9</sup> The Delaware Supreme Court has adopted the United States Supreme Court's holding in *Daubert*<sup>10</sup> as the correct interpretation of the trial judge's role in assessing the admissibility of expert evidence.<sup>11</sup> Under that standard, the trial judge serves as a "gatekeeper" who must evaluate the reliability and relevance of the proffered testimony. The essential purpose of this gatekeeping function is "to make certain that an expert, whether basing his testimony upon professional studies *or personal experience*, employs in the courtroom the

---

<sup>8</sup> *Id.* at 4.

<sup>9</sup> Rule 702 of the Delaware Rules of Evidence governs the admissibility of expert testimony:

If 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.

<sup>10</sup> 509 U.S. 579 (1993).

<sup>11</sup> *Ward v. Shoney's, Inc.*, 817 A.2d 799, 802 (Del. 2003) (citing *Daubert*, 509 U.S. 579 and *Kumho Tire Co., Ltd. V. Carmichael*, 526 U.S. 137, 151 (1999)).

same level of intellectual rigor that characterizes the practice of an expert in the relevant field.”<sup>12</sup>

8. In the Court’s judgment, expert testimony regarding a violation of the applicable fire code or any other building standards is not strictly necessary to assist the jury’s deliberations in this case, nor is it required for a finding of liability on the part of defendant Bigger Fish. In *Ward v. Shoney’s, Inc.*, 817 A.2d 799 (Del. 2003), the Supreme Court of Delaware determined that the fact that people tend to “cut corners,” rather than follow a designated pathway, was a matter of common knowledge such that technical or behavioral data was not required to support the expert’s testimony as to this basic fact of human nature.<sup>13</sup> In *Ward*, the Supreme Court observed that the expert’s testimony could be properly limited to the opinion that designers, when engineering pedestrian pathways, should take into consideration pedestrian walking habits, including the tendency of people to cut corners, without the need for scientific or behavioral data on the corner-cutting phenomenon.<sup>14</sup>

---

<sup>12</sup> *Id.* at 803 (emphasis added).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

9. As in *Ward*, the fact that a metal rod protruding from the ground near a doorway could pose a danger to pedestrian traffic is a fact which can be considered common knowledge, without the assistance of expert testimony. As such, expert testimony regarding the existence of a technical violation of the Fire Code or other building standards is not required. Alpern is correct that without reference to fire or building codes, Green could still properly testify that, based on his personal and professional experience as an architect, reasonable alternatives to the use of the metal rod existed that were capable of achieving the same purpose, and that when landowners construct or maintain buildings on their property they generally should not impede means of ingress and egress from the building. Such testimony could be helpful to the jury's determination of an ultimate fact in this case, namely, whether a metal rod protruding next to an exit constituted an unreasonably unsafe condition on the premises.

10. When considering a motion for summary judgment, the Court examines the record to ascertain whether genuine issues of material fact exist and to determine whether the moving party is entitled to judgment as a matter of law.<sup>15</sup> Initially, the burden is placed upon the moving party to

---

<sup>15</sup> Super Ct. Civ. R. 56(c).

demonstrate that his legal claims are supported by the undisputed facts.<sup>16</sup> If the proponent properly supports his claims, the burden “shifts to the non-moving party to demonstrate that there are material issues of fact for resolution by the ultimate fact-finder.”<sup>17</sup> Summary judgment will not be granted if, after viewing the evidence in the light most favorable to the non-moving party, there are material facts in dispute or if judgment as a matter of law is not appropriate.<sup>18</sup>

11. Defendant Bigger Fish’s argument for summary judgment consists only of a two-sentence assertion that, without expert testimony of a code violation, there can be no basis for liability on the part of Bigger Fish. As noted above, such testimony is not necessary. Indeed, summary judgment is not appropriate here as the determination of whether the metal rod constituted an unsafe and unreasonable condition on the premises is a disputed material fact that is appropriate for determination by the jury.

12. For the foregoing reasons, Defendant Bigger Fish, LLC’s Motion to Strike Plaintiff’s Expert and to Grant Summary Judgment is **DENIED**.

---

<sup>16</sup> *E.g.*, *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 879 (Del. Super. 2005).

<sup>17</sup> *Id.* at 880.

<sup>18</sup> *Id.* at 879–80.

**IT IS SO ORDERED.**

*/s/*

---

**Peggy L. Ableman, Judge**

Original to Prothonotary

cc: Gary S. Nitsche, Esq.  
Stephen P. Casarino, Esq.