

**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 State of Delaware, and EDDIE MENA,)	
Individually and as a representative of Luxe)	
Communications, LLC.,)	
Defendants.)	

**ON DEFENDANTS’ MOTIONS *IN LIMINE*
GRANTED**

Submitted: April 26, 2012
Decided: June 20, 2012

I. Introduction

Defendants DirecTV, Inc. (“DirecTV”), Luxe Communications, LLC (“Luxe”), and Eddie Mena (“Mena”) (collectively, “Defendants”) have filed six motions *in limine* seeking to exclude (1) Plaintiffs’ claim that Defendants’ work was unprofessional; (2) Plaintiffs’ claim of violation of the Home Solicitation Sales Act; (3) Plaintiffs’ Consumer Contracts Act claim; (4) Plaintiffs’ claim of consumer fraud; (5) Plaintiffs’ claim that Douglas Erhart is disabled; and (6)

Plaintiffs' claim for attorneys' fees. For the reasons set forth below in this Opinion, the motions *in limine* are hereby GRANTED.

II. Background

This litigation arises from a home cable installation gone awry. In response to a flyer left at their home in March 2009, Plaintiffs Deborah Erhart and Douglas Erhart (collectively, "Erharts") attempted to order fiber optic cable service ("FiOS") from Verizon. Verizon informed the Erharts that FiOS service was not available in their area and offered them a package with DirecTV cable satellite service instead. On March 28, 2009, the Erharts ordered DirecTV cable service for three rooms in their home for a price of \$53.99 per month.

Since the Erharts elected "professional installation" rather than attempting to install the necessary equipment for DirecTV themselves, Mena, an employee of Luxe, a subcontractor of DirecTV, came to the Erharts' home on March 9, 2009 to install DirecTV. He worked from 9:00 AM to 5:00 PM. Mena installed the satellite dish on the roof of the garage and ran cable into a two-inch hole that he cut into the side of the house. Unfortunately, the hole was placed in a wall leading into the Erharts' bathroom and the cut damaged a flexible vent line for an exhaust fan in the bathroom. The Complaint alleges that this hole and one other hole cut during the installation process resulted in water leaking into the house during each rain storm. Plaintiffs also allege that the vent fan no longer discharged moisture

properly, which dramatically increased the moisture content of the house. Plaintiffs also allege that a large hole cut in the firewall board of the attic allowed automobile exhaust fumes to enter into the attic. Finally, Plaintiffs allege that the installation was not complete when Mena left their home.

Shortly after the installation, the Erharts observed water staining and blistering around ceiling lamps and other openings from the attic down into the house. The Erharts traced the leaks and other water damage back to the openings cut by Mena. In response to the Erharts' complaints, DirecTV sent an installation supervisor to the Erharts' home on May 4, 2009. The supervisor found the cable splitter mounted in a place where it was exposed to weather and moved it to a more concealed location. The supervisor also fixed some problems with the holes Mena had drilled and directed the Erharts to file a claim with DirecTV. On June 22, 2009, the Erharts filed the claim, in which they demanded that DirecTV and Luxe repair the damage to the house caused by Mena's installation, which DirecTV and Luxe refused to do. Eventually, a third party repaired the damage to the interior of the Erharts' house at a cost exceeding \$8,000. The Erharts have estimated that repair to the exterior of their home will cost \$6,100.

On September 10, 2010, the Erharts filed a complaint in this Court related to the damage to their house allegedly resulting from Mena's installation. Count I alleges negligence and recklessness against the defendants. Specifically, Count I

alleges that the defendants negligently cut and left holes in the house that allowed water to penetrate and damage the interior of the house; that the defendants were reckless in that they consciously disregarded the risk that water penetration to the house would damage its interior, and in failing to properly perform or supervise the installation; and that Defendants owed Plaintiffs a duty of good quality and workmanship as well as a duty to exercise reasonable care not to damage Plaintiffs' property.

Count II, Breach of Contract, alleges that Defendants expressly promised a "professional installation," which "as a matter of law" implies a promise to complete the work to a standard of good quality and workmanship and to correct errors within a reasonable period of time and following a reasonable number of attempts. Plaintiffs contend that Defendants breached the contract by performing the installation work in a shoddy and un-workmanlike manner and by refusing to make or pay for the repairs necessitated by the faulty installation. Count III, Breach of Express Written and Implied Warranties, alleges that Defendants breached their warranty obligation to perform a "professional installation."

In Count IV of the Complaint, Plaintiffs claim that Defendants violated the Home Solicitation Sales Act,¹ which provides consumers certain protections against high-pressure door-to-door sales. Plaintiffs allege that the transaction with

¹ 6 *Del. C.* §4403 *et seq.*

DirecTV comes within the Home Solicitation Sales Act because the contracts were entered into at a place other than Defendants' place of business. It is further alleged that Defendants violated the Act by failing to provide adequate notice of their right to cancel the contract, and by failing to refund the contract at Plaintiffs' request, both of which are required by the statute. Count V asserts a Consumer Contracts Act violation based on the alleged violation of the Home Solicitation Sales Act.²

Count VI of the Complaint alleges a violation of the Consumer Fraud Act ("CFA").³ Specifically, Plaintiffs allege that the contracts through which Plaintiffs purchased satellite television service and installation of DirecTV equipment each constituted a "sale" for purposes of the CFA. Plaintiffs further allege that Defendants committed an unlawful practice as defined in the CFA in that Defendants by deception, fraud, false pretense, false promise, or misrepresentation promised the installation of DirecTV equipment in a professional manner and to the standard of "good quality and workmanship," and subsequently failed to perform the installation in the promised manner, resulting in damage to the house.

Count VII seeks to recover treble damages under the Disabled Victims Enhanced Penalties Act ("DVEPA").⁴ Plaintiffs assert that Mr. Erhart is a disabled

² See 6 Del. C. §§2731-2736.

³ 6 Del. C. §§2511-2527.

⁴ 6 Del. C. §2580.

person within the meaning of the act and that the act provides him with a private right of action against Defendants under the DVEPA for violations of the CFA.

Trial in this matter was originally scheduled to begin July 2, 2012. The deadline for filing dispositive motions was on January 20, 2012. On April 23, 2012, however, the Court granted Defendants' motion for a continuance due to Mena's previously planned trip to the Dominican Republic during the week of the trial. The trial is now scheduled for August 2013.

III. Discussion

Defendants have filed six separate motions *in limine*. Taken together, the motions would vitiate all of Plaintiffs' claims except for the negligence and recklessness alleged in Count I. This opinion addresses each motion *in limine* in the order in which it was presented to the Court.⁵

Motion in Limine to Exclude Claim that Defendants' Work was Unprofessional

Defendants first bring a motion *in limine* to exclude Plaintiffs' claim that Defendants' work was unprofessional on the ground that Plaintiffs failed to identify an expert to establish the standard of care for "professional" installation and good quality and workmanship in the context of cable installation. Defendants

⁵ The majority of these motions *in limine* should have been filed as motions to dismiss or motions for partial summary judgment. Since the deadline for dispositive motions has long since expired, the Court could just as easily have declined to decide these matters. Counsel for defendants are hereby advised that a motion *in limine* is not a substitute for a timely filed dispositive motion and, in the future, such motions will be denied as untimely.

contend that expert testimony is necessary in this case because cable installation is not within the common knowledge of laymen. In support of this argument, Defendants point out that Mena himself received specialized training in cable installation while employed at Broadband Communications in Florida and had seven years' experience installing cable. Moreover, Defendants argue that the average layperson would not know the standards applicable to installing and pulling cables for a satellite dish, especially considering that cable installers must undergo specialized training before installing cables and satellite dishes. Furthermore, Defendants contend that the fact that DirecTV offers instructions for self-installation demonstrates that there are applicable standards and methods known to a professional installer that would not be familiar to the average layperson. Similarly, Defendants submit that the average layperson does not know the manner in which a professional would install cables throughout the residence and the manner in which cables from outside the residence should be extended to the interior in order for an installation to be considered "professional."

In response, Plaintiffs argue that the standard for professional cable installation is within the common knowledge of the jury and does not require expert testimony. Plaintiffs assert that the jurors could reasonably conclude, based on their common knowledge and experience, that the extensive damage to the home is not consistent with a "professional installation." Indeed, Plaintiffs argue

that expert testimony is unnecessary because jurors may use common sense to recognize that the installer erred by failing to examine the walls where he planned to drill holes and by failing to recognize that drilling holes in the siding was unnecessary because the house was pre-wired for cable. Plaintiffs also point out that Mena's own supervisor testified that he should not have left open holes in the walls. Finally, Plaintiffs contend that the fact that DirecTV offers consumers a choice between installing the equipment themselves and hiring a professional to install it shows that installation matters are within the common knowledge and experience of laypersons.

In the Court's judgment, Plaintiffs should have identified an expert who could testify as to the technical and/or ethical standards associated with professional cable installation. Ordinarily, a plaintiff must rely on expert testimony to establish a *prima facie* case for matters in issue that are within the knowledge of experts only and not within the common knowledge of laymen.⁶ Expert testimony is only deemed unnecessary for extremely commonplace matters that can safely be assumed to be within the experience of the average layperson,

⁶ See, e.g., *Jackson v. Hopkins Trucking Co.*, 3 A.3d 1097 (Del. 2010) (holding that expert testimony was required to establish the standard of care applicable to a pre-trip inspection of a trailer loaded at port because laypersons were not familiar with the frequency, method, and requirements for conducting pre-trip inspections of commercial trailers that were used in off-loading cargo at port); *Money v. Manville Asbestos Disease Comp. Trust Fund*, 596 A.2d 1372, 1376 (Del. 1991) ("When the issue of proximate cause is presented in a context which is not a matter of common knowledge, expert testimony may provide a sufficient basis for a finding of causation, but in the absence of such expert testimony it may not be made").

who presumably lacks the benefit of specialized knowledge or training.⁷ Plaintiffs' arguments here that the specifics of cable installation are within the common knowledge and experience of the average juror are unpersuasive. Even after reviewing the record in this case and the parties' briefs, this Judge cannot definitively appreciate the standards for "professional installation" of digital satellite television cables. Installing cable television wiring requires a degree of specialized knowledge, as evidenced by Mena's training and experience, and is therefore dissimilar from matters not requiring expert testimony, such as whether adults are likely to cut corners when walking, or how an ordinary kitchen mop is designed and used, or even how to operate a grocery store.

Plaintiffs' argument that only common sense is necessary to conclude that Mena erred in the installation process, because of the degree of damage to the house, misses the point. While it may be true that a juror could infer from the alleged damage to the house that something went wrong in the installation process, it is just as likely that the process required additional follow-up from other artisans.

⁷ *E.g.*, *Ward v. Shoney's, Inc.*, 817 A.2d 799 (Del. 2003) (finding that expert testimony in human behavior is not required as to whether adults can be expected to cut corners while walking); *Brown v. Dollar Tree Stores, Inc.*, 2009 WL 5177162 (Del. Super. Dec. 9, 2009) (finding that expert testimony is not required to establish that design of a standard kitchen mop was defective because the design of a mop is within the scope of common knowledge and jurors could understand how a mop is designed and used without the assistance of an expert witness); *Small v. SuperFresh Food Markets, Inc.*, 2010 WL 530071 (Del. Super. Feb. 12, 2010) (finding that patron was not required to produce expert testimony to establish standard of care owed by 'reasonably prudent grocer' in connection with any duty of grocery store owner to keep store safe from alleged dangerous condition of water that had leaked from refrigerator because owner was not required to undergo special training to become a grocer and did not possess other specialized knowledge that would be outside common juror's experience).

Indeed, it is not known to the Court, nor would it be to a jury, whether professional cable installation also includes patching and painting any drywall or other structures that may have to be altered to make room for the equipment. For example, if one hires a carpenter to install shelving it is not necessarily implied that painting of the shelves is also a part of that carpentry work rather than requiring a separate artisan to be brought in to finish the job. In fact, the latter scenario is far more common.⁸

Plaintiffs appear to be basing their claim of unprofessional installation on a general and generic notion of “professional” that assumes that work that has been poorly done, or perhaps unfinished, is automatically unprofessional.⁹ While it may be the case that Mena’s work at the Erharts’ home did not meet the standards of professional cable installation, Plaintiffs have provided no guidance as to what those standards might be. As such, the jury cannot determine whether Defendants breached any obligation to provide “professional installation” because it is not clear, in the absence of clearly articulated standards, what standards of the

⁸ Other analogies abound. An orthodontist who performs a root canal surgery on a tooth generally requires the patient to return to his or her dentist for the final filling.

⁹ Interestingly, Plaintiffs’ notion of “professional installation” does not comport with a standard dictionary definition of “professional.” The Merriam-Webster dictionary defines “professional” as “(1) of, relating to, or characteristic of a profession; (2) engaging in one of the learned professions; [or] (3) characterized by or conforming to the technical or ethical standards of a profession.” Either of the applicable definitions requires some expert testimony as to what would be “characteristic” of the profession of cable installation or what are the technical or ethical standards of cable installation. The Court cannot infer that specialized matters such as the technical standards of professional installation are within the common knowledge or experience of laypersons. See <http://www.merriam-webster.com/medical/professional>.

profession Defendants might have breached. Expert testimony is required to establish the standards for “professional installation” and “good quality and workmanship.” Because the plaintiffs have failed to designate an expert who can testify to these matters, Defendants’ motion *in limine* to exclude the claim of unprofessional installation is granted.

Motion to Exclude Claim of Violation of the Home Solicitation Sales Act

Defendants next move to exclude Plaintiffs’ claim that Defendants violated the Home Solicitation Sales Act (“HSSA” or “the Act”).¹⁰ Defendants argue that this transaction is not a door-to-door sale within the meaning of the Act, and even if it were, Defendants substantially complied with the HSSA’s notice of cancellation requirements. Under the HSSA, sellers involved in a door-to-door sale must provide buyers with a conspicuous notice of cancellation on the face of the contract (or on a receipt if a contract is not used) advising consumers of their right to cancel the transaction at any time before midnight on the third business day following the transaction.¹¹ Additionally, sellers must provide a separate notice of cancellation reiterating that the consumer has the right to cancel a transaction within three days of the contract date and providing for the return of payment to the buyer and the consumer goods delivered under the contract to the seller.¹²

¹⁰ 6 *Del. C.* §§4401-04.

¹¹ 6 *Del. C.* §4404(1).

¹² 6 *Del. C.* §4404(2).

Sellers must also advise the consumer orally, at the time the buyer signs the contract or purchases the goods or services, of the right to cancel and may not misrepresent the buyer's right to cancel.¹³ The purpose of the statute is to protect Delaware citizens from "high-pressure door-to-door sales tactics and the resultant inequities to the consumer."¹⁴ As such, the statute mandates that the Act "shall be interpreted and administered so as to give the greatest effect to the public policy of this State."¹⁵

The HSSA imposes certain limitations on "door-to-door" sales, defined as a

sale, lease, or rental of consumer goods or services with a purchase price of \$25 or more, whether under single or multiple contracts, in which the seller or the seller's representative personally solicits the sale, including those in response to or following an invitation by the buyer, and the buyer's agreement or offer to purchase is made at a place other than the place of business of the seller.¹⁶

Under the statute, door-to-door sales include sales solicited and consummated by telephone.¹⁷ However, the statute excludes transactions in which "the buyer has initiated the contact and the transaction is conducted and consummated entirely by mail or telephone" and those in which "the buyer has initiated the contact and

¹³ 6 Del. C. §4404(5)-(6).

¹⁴ 6 Del. C. §4401.

¹⁵ *Id.*

¹⁶ 6 Del. C. §4403(3).

¹⁷ *Id.*

specifically requested the seller to visit the buyer's home for the purpose of repairing or performing maintenance upon the buyer's personal property.”¹⁸

Plaintiffs contend that Defendants violated the Act by failing to provide a contract with the appropriate cancellation notices required by the Act and that Verizon refused to honor their request to cancel the DirecTV contract after the installation because the seven-day window for cancellation provided in the contract had already expired. Furthermore, Plaintiffs argue, the Erharts' transaction comes within the protections of the HSSA because the Erharts received a flyer from Verizon delivered to their door and were required to sign documents at their home presented by Mena before he proceeded with the installation of DirecTV satellite equipment. Plaintiffs assert, in conclusory fashion, that the absence of high-pressure sales tactics in the transaction is irrelevant.

Plaintiffs' arguments are unpersuasive. It is clear to the Court that the Erharts initiated the transaction by calling Verizon to order the Triple Play service and then requested that Mena come to their home to install the necessary equipment. As such, this transaction falls within the exemptions described in section 4403(d) and (e), which exclude from the protections of the HSSA telephone transactions initiated by the consumer. The fact that Verizon distributed an advertising flyer to the Erharts' house does not mean that Defendants initiated

¹⁸ 6 *Del. C.* §4403(d)-(e).

the transaction or engaged in door-to-door sales. Such impersonal sales tactics do not pose the same risk of manipulating consumers as high-pressure door-to-door sales techniques practiced face-to-face, or even over the phone. Plaintiffs could easily have ignored the flyer or thrown it away. Instead, they called Verizon and sought to sign up for the Verizon Triple Play package because they were interested in changing cable providers. The fact that a technician employed by a subcontractor of DirecTV came to the Erharts' house to install the equipment does not render this transaction a door-to-door sale, even under a liberal interpretation of the statute. There is no evidence to suggest that the Erharts were subject to high-pressure sales tactics at any point, whether on the phone with a DirecTV representative or when interacting with Mena during the installation process. The Court finds that the evidence in this case does not support Plaintiffs' claim that they are entitled to the protections of the HSSA. While Defendants should have filed a dispositive motion on this claim under Superior Court Civil Rule 12(b)(6) or 56, their motion at this late stage does have merit and will serve to streamline the proof at trial. Defendants' motion to exclude Plaintiffs' HSSA claim is therefore granted.

Motion in Limine to Exclude Consumer Contracts Act Claim

Defendants have also filed a motion *in limine* to exclude Plaintiffs' Consumer Contracts Act ("CCA") claim. Plaintiffs asserted that Defendants

violated the CCA by failing to include the information and notices required by the HSSA. Defendants also contend that they did not engage in any deceptive practices under the CCA because the Erharts currently have DirecTV service at their home, and Mrs. Erhart testified at her deposition that she is pleased with the system. Plaintiffs contest this allegation.

Regardless of whether the Erharts have continued to subscribe to DirecTV or whether or not they are satisfied with the service, the Court finds that the motion *in limine* to exclude the CCA claim should be granted. The CCA claim is dependent on the HSSA claim, and the Court has already concluded that the HSSA does not cover the transaction at issue here. Moreover, the Court finds no evidence in the record to support allegations of deceptive practices independent of the alleged HSSA violation. The Defendants' motion *in limine* to exclude the CCA claim is therefore granted.

Motion in Limine to Exclude Plaintiffs' Claim of Consumer Fraud

Next, the Court turns to Defendants' motion in limine to exclude Plaintiffs' claim of consumer fraud. The Consumer Fraud Act ("CFA" or "Act") makes it unlawful to use "deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale, lease or advertisement of any merchandise, whether or not any person has

in fact been misled, deceived, or damaged thereby.”¹⁹ The purpose of the Consumer Fraud Act is “to protect consumers and legitimate business enterprises from unfair or deceptive merchandising practices in the conduct of any trade or commerce.”²⁰ The Act provides victims of consumer fraud with a private right of action.²¹ A plaintiff need not establish a party’s intent to defraud to prevail under the CFA.²² Nonetheless, a plaintiff must produce at least some evidence that a misrepresentation, omission, or other deceptive practice occurred.²³

Plaintiffs base their CFA claim on their allegation that Verizon and its partner DirecTV circulated a written advertisement fraudulently guaranteeing “professional installation” of the cable TV system. Plaintiffs also assert that installation of cable throughout the house was unnecessary because the home was prewired for cable. Plaintiffs’ arguments with respect to their consumer fraud claim expose the fatal flaw in their case: the term “professional installation,” in this context, is meaningless and does not impose on Defendants any particular set of obligations. Plaintiffs have further failed to designate an expert witness who can clarify the technical and ethical standards applicable to “professional” cable

¹⁹ 6 Del. C. §2513(a).

²⁰ 6 Del. C. §2512.

²¹ *Id.*; *Iacono v. Barici*, 2006 WL 3844208 (Del. Super. Dec. 29, 2006).

²² *In re Brandywine Volkswagen, Ltd.*, 306 A.2d 24, 29 (Del. Super. 1973).

²³ *See Middlesex Mut. Assurance Co. v. Delaware Elec. Signal Co.*, 2011 WL 1225686, at *4 (Del. Super. Mar. 25, 2011 (“The case at bar differs significantly from [*In re Brandywine Volkswagen Co.*], where the ‘undisputed record show[ed] an untrue statement made by Brandywine in connection with an anticipated sale and Brandywine’s having had within its possession material from which the untruth of the statement could have been ascertained.’”).

installation. As such, Plaintiffs cannot prove that they did not receive a “professional installation,” and therefore, they are unable to prove that Defendants made any sort of fraudulent representation with respect to the installation. Plaintiffs’ argument is conclusory and nonsensical. Accordingly, the Court grants Defendants’ motion *in limine* to exclude Plaintiffs’ Consumer Fraud Act claims.

Motion to Exclude Plaintiffs’ Claim that Plaintiff is Disabled

Plaintiffs have alleged that they are entitled to collect treble damages pursuant to the Elder or Disabled Victims Enhanced Penalties Act (“EDVEPA”).²⁴ The EDVEPA provides a private right of action to elderly or disabled victims of consumer fraud and provides that an eligible victim is “entitled to recover 3 times the amount of the victim’s compensatory damages if a violation of this subchapter is established.”²⁵

Defendants have filed a motion *in limine* to exclude Plaintiffs’ DVEPA because Plaintiffs have not designated an expert who will testify that Mr. Erhart was legally disabled. In response, Plaintiffs contend that no expert testimony is necessary because Mr. Erhart testified that he suffers from severe pain in his neck, shoulder, and back that was caused by two automobile accidents and that he is prescribed narcotics to manage his pain. Further, Plaintiffs assert that a letter from Mr. Erhart’s physician dated January 7, 2011 stating that Mr. Erhart is totally

²⁴ 6 Del. C. §4602(10).

²⁵ 6 Del. C. §2583.

unable to work because of his disability establishes that Mr. Erhart is legally disabled. Finally, Plaintiffs argue that Mr. Erhart is entitled to protection under the DVEPA because the pain medication prescribed by his physician impairs his mental status.

The EDVEPA provides for enhanced penalties when an elderly or disabled person is targeted for deceptive, fraudulent, or unfair trade practices as identified in Title 6, Chapter 25 of the Delaware Code. The alleged violation of the CFA is the only violation of the relevant chapter asserted by Plaintiffs for purposes of their EVEPA claim. As the Court has already determined that Plaintiffs' CFA claim has no merit, the EDVEPA claim necessarily fails because there is no claim available under which Plaintiffs could legally recover treble damages. Similarly, the Court has concluded that all of Plaintiffs' other statutory claims, including violation of the HSSA and the CCA, are without merit and should be excluded from the trial of this case and therefore could not be used as a basis for awarding treble damages.

Even assuming, however, that Plaintiffs had any remaining claims that could trigger the enhanced penalties available under the EDVEPA, Plaintiffs have presented insufficient evidence to show that Mr. Erhart is legally disabled. The legal definition of disability provides that a person is disabled if he can show that he (a) is substantially limited in performing a major life activity; (b) has a record of

such impairment; or (c) is regarded as having such an impairment.²⁶ Expert testimony is not necessary to establish a person's disability where testimony from lay witnesses is sufficient to demonstrate the degree of the individual's impairment.²⁷ A notation from a doctor characterizing a plaintiff as disabled may not be sufficient evidence to support a finding that an individual is disabled.²⁸

Here, Plaintiffs have presented insufficient evidence to show that Mr. Erhart's condition meets the legal definition of disability and, more importantly for purposes of this case, how his alleged disability is relevant to Defendants' alleged violation of consumer protection statutes. Plaintiffs have submitted nothing more in support of their EDVEPA claim than a letter from Mr. Erhart's physician stating that he is unable to work because of his back injuries and deposition testimony indicating that his back injuries have prevented him from holding a job, from which the jury could conclude that Mr. Erhart suffered from back pain as of 2011. Plaintiffs have also asserted, in conclusory fashion, that Mr. Erhart takes "powerful narcotic medication" prescribed to him by his physician for his pain but provide no other evidence supporting their implied assertion that Mr. Erhart does not have the

²⁶ 6 *Del. C.* §2580; 6 *Del. C.* §4602(10).

²⁷ *Bennett v. State*, 933 A.2d 1249, 2007 WL 2286055 (Del. 2007) (TABLE) (holding that expert testimony to establish that an individual met the statutory definition of an infirm adult was unnecessary where there was testimony from lay witnesses that the victim was diabetic, had balance problems, was completely incontinent

²⁸ *See Dennis v. State Farm Mut. Auto Ins. Co.*, 2008 WL 4409436 (Del. Super. Feb. 13, 2008) (finding that insured's medical records, billing summary and testimony did not amount to expert testimony which could be used to establish that insured's period of work disability was caused by the automobile accident).

full benefit of his mental faculties. On such thin evidence as this, the jury has no way of determining whether Mr. Erhart truly suffered from a disability or whether his alleged disability disadvantaged him in any way in the course of his transaction with Defendants. Because the jury cannot be allowed to speculate as to matters beyond their competence, the motion *in limine* to exclude Plaintiffs' EDVEPA claim must be granted.

Defendants' Motion in Limine to Exclude Attorneys' Fees

Finally, Defendants have filed a motion in limine to exclude attorneys' fees. Attorney's fees are generally not recoverable unless there is a specific statutory authorization for such an award. As the Court has determined that there is insufficient evidence to support any of Plaintiffs' statutory claims and that such claims will be excluded from the trial of this case, their claim for attorneys' fees must be excluded as well. Defendants' motion *in limine* is granted.

IV. Conclusion

For the reasons set forth above, all of Defendants' motions *in limine* are hereby GRANTED.

IT IS SO ORDERED.

/s/ Peggy L. Ableman

PEGGY L. ABLEMAN, JUDGE

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