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

VIRGINIA ARGENTIERI and DENNIS AGENTIERI, husband and wife,	)	
Plaintiffs,	)	
v.	)	**C.A. No. N10C-10-052-PRW**
APPLE AMERICAN GROUP, LLC,	)	
Defendant.	)	

Submitted: August 2, 2013
Decided: August 27, 2013

Upon Defendant's Motion for Summary Judgment,
DENIED.

Upon Defendant's Motion to Preclude Expert Testimony of Plaintiff's Liability Expert,
DENIED.

OPINION AND ORDER

James J. Haley, Jr., Esquire, Ferrara & Haley, Wilmington, Delaware, Attorney for Plaintiffs Virginia and Dennis Argentieri.

Christine Kane, Esquire, White & Williams, LLP, Wilmington, Delaware, Attorney for Defendant Apple American Group, LLC.

WALLACE, J.

I. INTRODUCTION

Plaintiffs Virginia and Dennis Argentieri ("The Argentieris") have sued Defendant Apple American Group, LLC ("Defendant"), in connection with a slip-and-fall accident at Defendant's restaurant ("Applebee's"), alleging Defendant was negligent in its failure to rectify a hazardous condition, and that Defendant was negligent in its design and layout of the tile walkway where the incident occurred.

For the following reasons, Defendant's Motion for Summary Judgment and Defendant's Motion to Preclude Expert Testimony of Plaintiff's Liability Expert are both **DENIED**.

II. FACTUAL BACKGROUND[1]

On Friday, June 5, 2009, Mrs. Argentieri slipped and fell in Applebee's in Camden, Delaware. It was raining on the date of the incident. The fall occurred as Mrs. Argentieri made her way over a tile walkway to the women's restroom. The tile walkway led customers from the bar area of the restaurant en route to the restroom. The walkway also led to the kitchen, so servers would traverse the same walkway when exiting the kitchen. Just when Mrs. Argentieri was walking to the restroom, servers with large trays of food and drink were exiting the kitchen. Mrs. Argentieri stepped aside to avoid collision with the servers. Upon stepping out of

[1] *See generally* Pltf's Opposition to Deft's Mot. for Summary Judgment, Ex. D, Deposition Transcript of Virginia Argentieri [hereinafter V. Argentieri Depo. Tr.].

the servers' path, Mrs. Argentieri slipped and fell. Mrs. Argentieri testified that although she did not see any water or liquid prior to slipping, after she fell, she felt moisture on her leg and saw a footprint left by her sneaker. Mrs. Argentieri claims she fell on her left side, resulting in injuries to her left wrist, left shoulder, and right knee. Mrs. Argentieri asserts claims for pain and suffering, past and future medical expenses, and lost income. Mr. Argentieri claims loss of consortium.

III. PROCEDURAL BACKGROUND

In March 2012, the Court heard oral argument on Defendant's Motion for Summary Judgment, which was deferred, and Defendant's Motion to Preclude Expert Testimony, which was denied without prejudice due to the Court's grant of permission for Plaintiffs to file an amended complaint.[2] Following the Court's decision, Plaintiffs filed an Amended Complaint.[3] In early February 2013, Mrs. Argentieri underwent shoulder surgery allegedly stemming from the incident upon which this suit is based. To allow time for Mrs. Argentieri's injury to be evaluated for permanency, the Court continued the trial. Before the continuance, however, Defendant filed a Renewed Motion to Preclude the Testimony of Plaintiff's

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[2] *See Argentieri v. Apple American Group, Inc.*, Del. Super. Ct., C.A. No. N10C-10-052, Jurden, J. (Mar. 28, 2012) (ORDER).

[3] The Amended Complaint alleged 1) negligence by failure to inspect, discover, and eliminate a hazardous condition, or to warn Mrs. Argentieri; and 2) negligence by providing an unsafe layout and/or design for the walkway leading to the restroom and kitchen. Amended Complaint at ¶ 7.

Liability Expert, Ronald J. Cohen, P.E., and a Renewed Motion for Summary Judgment, which are both now before the Court.

IV. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

A. Standard of Review

In a personal injury negligence action arising from circumstances like this, Plaintiffs bear the burden to show "(1) there was an unsafe condition in the defendant's [business establishment] (2) which caused the injuries complained of, and (3) of which the [business]keeper had actual notice or which could have been discovered by such reasonable inspection as other reasonably prudent [business]keepers would regard as necessary."[4] To obtain summary judgment in such a negligence action, Defendant must show 1) there are no genuine issues of material fact, and 2) those "undisputed material facts legally preclude a finding of negligence on the part of the defendants."[5]

Summary judgment is appropriate where the record indicates that there are no genuine issues of material fact and where, viewing the facts in the light most

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[4] *Hazel v. Delaware Supermarkets, Inc.*, 953 A.2d 705, 709 (Del. 2008) (citing *Howard v. Food Fair Stores, Inc.*, 201 A.2d 638, 640 (Del. 1964)) (internal quotation marks omitted); *Burris v. Penn Mart Supermarkets, Inc.*, 2006 WL 2329373, at *1 (Del. Super. Ct. July 13, 2006) (same).

[5] *Hazel*, 953 A.2d at 709 (movant's burden is to produce "evidence of necessary certitude demonstrating that there is no genuine issue of fact relating to the question of negligence and that the proven facts preclude the conclusion of negligence on its part." (quoting *Howard v. Food Fair Stores, New Castle, Inc.*, 201 A.2d 638, 640 (Del. 1964))); *see also Ebersole v. Lowengrub*, 180 A.2d 467, 469-470 (Del. 1962) ("Generally speaking, issues of negligence are not susceptible of summary judgment.").

favorable to the non-moving party, the moving party is entitled to judgment as a matter of law.[6] The moving party has the burden of proof to show there are no genuine issues of material fact.[7] If the moving party meets that burden, summary judgment is warranted unless the non-moving party then proves the existence of a genuine issue of material fact.[8]

"Because a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial,"[9] "[i]f the non-moving party fails to make a sufficient showing on an essential element of his or her case for which he or she has the burden of proof, the moving party is entitled to judgment as a matter of law."[10] If plaintiff has made a *prima facie* showing of each element, summary judgment is inappropriate.[11]

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6 Del. Super. Ct. Civ. R. 56(c).

7 *Charlton v. Wal-Mart Stores, Inc.*, 2008 WL 5206775, at *1 (Del. Super. Ct. Nov. 25, 2008).

8 *Ebersole*, 180 A.2d at 470; *Norton v. Food Lion, Inc*., 2009 WL 1580261, at *1 (Del. Super. Ct. June 4, 2009) (citing *Moore v. Sizemore*, 405 A.2d 679, 681 (Del. 1979)).

9 *Hazel*, 953 A.2d at 709 (citing *Burkhart*, 602 A.2d 56, 58-59 (Del. 1991) (internal quotation marks omitted).

10 *Balzereit v. Hocker's SuperThrift, Inc.,* 2012 WL 3550495, at *1 (Del. Super. Ct. July 24, 2012) (citing *Burkhart*, 602 A.2d at 59).

11 *Hazel*, 953 A.2d at 709-10.

B. Parties' Contentions

The Argentieris complain there was a liquid on Applebee's tiled floor that constituted an unsafe condition. Mrs. Argentieri stated in her deposition that she slipped on a wet spot, which was on the floor before her fall, but which she did not see it until after her fall. Mrs. Argentieri stated that after she fell, she could see the imprint of her sneaker's tread in the water spot.[12] After she got up from the fall, Mrs. Argentieri stated that she had a wet spot on her left pant leg.[13] The Argentieris further claim that Defendant's employees should have been on notice of the wet spot because it was they who most likely created it.

Defendant argues that there is no evidence of an unsafe condition. In particular, Defendant claims there is no direct evidence of the size of the alleged wet spot before the fall, how the supposed wet spot came to be on the floor, or how long any wet spot may have been on the floor prior to the fall. The record developed thus far suggests Matthew Kreck ("Kreck"), the Applebee's manager, filled out an incident report in which he stated the floor was not wet after Mrs. Argentieri's fall. Then, contrary to the incident report, Kreck stated in his deposition that there was a half-dollar sized wet spot resembling the imprint of a

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12 V. Argentieri Depo. Tr. at 31.

13 V. Argentieri Depo. Tr. at 40.

foot or shoe – but not a full wet footprint – after Mrs. Argentieri fell.[14] On the issue of notice, Defendant argues that there is no evidence that Defendant had any notice of a liquid substance on the floor prior to Mrs. Argentieri's fall.[15] Defendant further contends that there is no evidence that Defendant should have discovered the wet spot by reasonable inspection.[16]

C. Discussion

In order to prove Applebee's liability here, the Argentieris must demonstrate that: (1) the Applebee's floor was in a dangerous or unsafe condition, i.e. had a slippery substance on it, at the time of Mrs. Argentieri's fall; (2) that the dangerous or unsafe condition caused Mrs. Argentieri's fall and resulting injuries; and (3) that Defendant had actual notice of the dangerous or unsafe condition or it was discoverable through reasonable inspection by Applebee's employees.[17] But having filed this motion for summary judgment, it is the Defendant who carries the initial burden. Viewing the evidence in the light most favorable to the non-moving parties, the Argentieris, the Court finds Defendant has not demonstrated that "there

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14 Deft's Renewed Mot. for Summary Judgment, Ex. E, Matthew B. Kreck, at 56.

15 Deft's Motion for Summary Judgment at 2.

16 *Id.* at 3.

17 *Hazel v. Delaware Supermarkets, Inc.*, 953 A.2d 705, 709 (Del. 2008); *Burris v. Penn Mart Supermarkets, Inc.*, 2006 WL 2329373, at *1 (Del. Super. Ct. July 13, 2006).

is no genuine issue of fact relating to the question of negligence and that the proven facts preclude the conclusion of negligence on its part."[18]

First, the Argentieris have put forth sufficient evidence to defeat summary judgment on the question of a hazardous condition. Mrs. Argentieri testified that after she fell, her left pant leg was wet and she saw a wet spot on the floor.[19] "[T]his testimony alone creates an issue of fact that must be resolved by the trier of fact."[20] Moreover, Applebee's own manager testified in his deposition that there was a small wet spot resembling half of a wet footprint on the ground after Mrs. Argentieri's fall. The question of whether the liquid on the floor constitutes a hazardous condition is a question of fact for the jury.[21]

Second, there is a genuine issue of material fact with respect to actual or constructive notice. Mrs. Argentieri's testimony suggests that both servers carrying plates and glasses and customers walking to the restrooms would have traversed at least some of the same area. This testimony presents a genuine issue of material fact; a reasonable juror could conclude that Defendant knew or should

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18 *Hazel*, 953 A.2d at 709.

19 V. Argentieri Depo. Tr. at 31, 40.

20 *Burris*, 2006 WL 2329373, at *2 (holding testimony that Plaintiff was wet after fall created issue of fact properly left to the trier of fact); *see also Hazel*, 953 A.2d at 709 (finding testimony that Plaintiff felt water on her calf following fall sufficient to show an unsafe condition).

21 *See Upshur v. Bodie's Dairy Mkt.*, 2003 WL 21999598, at *3 (Del. Super. Ct. Jan. 22, 2003).

have known that liquids had spilled or could spill on the tile floor causing a hazardous condition.[22] Moreover, how long any liquid might have been on the floor and whether any liquid should have been discovered by Defendant's employees prior to the fall are additional questions of fact properly resolved by the jury.[23] For these reasons, Defendant's Motion for Summary Judgment is **DENIED**.

V. DEFENDANT'S MOTION TO PRECLUDE EXPERT TESTIMONY OF PLAINTIFF'S LIABILITY EXPERT

A. Standard of Review

Defendant moves to exclude the testimony of Plaintiffs' liability expert, Ronald J. Cohen ("Cohen"). Claims of defective installation or improper layout or design usually "rely on facts beyond a layperson's knowledge," and thus expert testimony is appropriate.[24] Under D.R.E. 702, where such specialized knowledge will assist the trier of fact, an expert witness may testify in the form of an opinion if, "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the

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[22] *See Hazel*, 953 A.2d at 710 (holding testimony suggesting source of water to be sufficient to establish a question of fact for jury as to notice); *See also* V. Argentieri Depo. Tr. at 22-32 (describing servers' pattern of movement).

[23] *See Upshur*, 2003 WL 21999598, at *3.

[24] *Polaski v. Dover Downs, Inc.,* 2012 WL 3291783, at *2 (Del. Aug. 14, 2012); *See also Delmarva Power & Light v. Stout*, 380 A.2d 1365, 1368 (Del. 1977) ("[E]xpert testimony is only relevant when the matter in issue is not one of common knowledge").

product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."[25]

D.R.E. 702 requires the trial judge to operate as "gatekeeper," ensuring that scientific testimony is both relevant and reliable.[26] The trial court must consider five factors "to determine the admissibility of scientific testimony": 1)Whether the witness is qualified as an expert by knowledge, skill, experience training or education; 2) Whether the evidence is relevant and reliable; 3) Whether the expert's opinion is based upon information reasonably relied upon by experts in the particular field; 4) Whether the expert testimony will assist the trier of fact to understand the evidence or to determine a fact in issue; and 5) Whether the expert testimony will create unfair prejudice or confuse or mislead the jury.[27]

Beyond these five factors, this Court has the discretion to decide which, if any of the factors articulated in *Daubert* should guide the Court's determination of

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[25] D.R.E. 702.

[26] *Gen. Motors Corp. v. Grenier*, 981 A.2d 531, 544 (Del. 2009) (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993)); *see also Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). *Daubert* required scientific testimony to be relevant and reliable, and *Kumho* expanded that ruling to all expert testimony, not just scientific testimony. *See State v. Jones*, 2003 WL 21519842, at *2 (Del. Super. Ct. July 2, 2003) (providing brief summary of function of *Daubert* and *Kumho*); *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 522 (Del. 1999) (adopting holdings of *Daubert* and *Kumho* "as the correct interpretation of D.R.E. 702").

[27] *Cunningham v. McDonald*, 689 A.2d 1190, 1193 (Del. 1997) (citing *Nelson v. State*, 628 A.2d 69, 74 (Del. 1993).

whether testimony is reliable.[28] The Argentieris here have the burden of establishing the admissibility of Cohen's testimony by a preponderance of the evidence.[29]

B. Parties' Contentions

The Argentieris urge that Cohen's testimony is admissible pursuant to D.R.E. 702 based on his experience and use of industry-standard testing procedures. They also contend that under Delaware law, expert testimony generally is required for a premises-liability negligent-design claim. Defendant argues that Cohen's expert testimony with respect to whether Defendant adhered to industry standards in the layout and design of its tile walkway is "unfounded and lack[s] validity."[30] Moreover, Defendant contends that admission of Cohen's expert testimony at trial will unfairly prejudice the Defendant and will confuse and mislead the jury.

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[28] *Kumho*, 526 U.S. at 153 ("[W]hether *Daubert's* specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine"). The *Daubert* factors for determining the reliability of expert scientific testimony are as follows: (1) whether a theory or technique can be (and has been) tested; (2) whether the theory or technique has been subject to peer review and publication; (3) whether a technique had a high known or potential rate of error and whether there are standards controlling its operation; and (4) whether the theory or technique enjoys general acceptance within a relevant scientific community. *Daubert,* 509 U.S. at 592-94 (1993).

[29] *Bowen v. E.I. DuPont de Nemours & Co., Inc.,* 906 A.2d 787, 795 & n.48 (Del. 2006) (internal citations omitted).

[30] Deft's Motion to Preclude Expert Testimony at 4.

C. Discussion

Under the five-step test articulated by the Delaware Supreme Court, this Court finds that Cohen's testimony meets the applicable admissibility standards. First, Cohen is qualified as an expert by way of his experience, skill, training, and education. Cohen has a civil engineering degree and is a licensed professional engineer.[31] He has participated in continuing education courses with regularity throughout his career, has maintained regular employment in the field of civil engineering since receiving his degree, is a member of several professional societies relating to his field, and regularly evaluates structural failures and slips-and-falls.[32] Cohen is not only qualified in his field, he has ample experience conducting the specific type of testing upon which his opinions in this case are based.

Second, Cohen's testimony is relevant because it tends to make more likely the fact that the floor plan layout was improperly designed. With respect to reliability, *Daubert* considerations are helpful. The scholarly research Cohen

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[31] *See* Pltf's Opposition to Deft's Motion to Preclude, Ex. C, Deposition Transcript of Ronald Cohen [hereinafter Cohen Depo. Tr.].

[32] *See* Pltf's Opposition to Deft's Motion to Preclude, Ex. A, Curriculum Vitae of Ronald Cohen. This court has found that *lacking* things such as experience related to a particular topic, knowledge of studies or reputable information sources, and membership in professional societies weighs against a finding that someone is qualified to testify as an expert on a particular topic. *See Bowen v. E.I. Du Pont De Nemours & Co., Inc.,* 2005 WL 1952859, at *12 (Del. Super. Ct. June 23, 2005) *aff'd sub nom. Bowen v. E.I. DuPont de Nemours & Co., Inc.,* 906 A.2d 787 (Del. 2006).

references in his original report suggests that his methods are testable.[33] In addition, the existence of scholarly research on the slip-resistance testing method suggests that there are at least some publications on this issue. Whether those publications are subject to peer review is unknown. Also, it seems based on Cohen's deposition testimony that the slip-resistance testing method he employed is one that is generally accepted in the civil engineering community. Defendant does not refute the reliability of the testing method, at oral argument it was clear that its quarrel is with Cohen's execution of the method – a matter that goes far more to the weight of the evidence than its admissibility.

Third, Cohen's opinion is based upon information reasonably relied upon by experts in the particular field. Cohen testified that he used slip-resistance testing, which is and has been the industry practice for more than fifty years.[34] Moreover, in his report, Cohen cites several studies that confirm this industry practice.[35] Fourth, Cohen's testimony will assist the trier of fact to understand the evidence or determine a fact at issue. Design defect claims normally require expert testimony

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[33] Cohen Depo. Tr. at 58-59 (discussing recreation and further testing of slip-resistance testing method).

[34] Cohen Depo. Tr. at 18-19, 58.

[35] Cohen Depo. Tr. at 58-59 (examining testing method and subsequent studies).

to explain evidence which is not "common knowledge."[36] Whether either the restaurant floor plan or the installation of the tiles was improper is not a matter usually within the scope of a layperson's knowledge. Cohen's testimony will help the jury determine the critical question of whether the walkway was improperly designed for the intended use and foot traffic.

Fifth and finally, any prejudice resulting from Cohen's testimony is outweighed by its probative value. Cohen's testimony is probative with respect to whether or not Defendant was negligent in its selection of flooring and traffic design. While Defendant takes issue with Cohen's methods, that is best taken up on cross-examination. Those quibbles do not warrant exclusion.

Though expert testimony is not required for all of the Argentieris' negligence claims – for example no expert is needed to explain whether there was a slippery substance on the floor that Applebee's should have known of and rectified – Cohen's testimony is relevant to whether the layout and/or design of the walkway was defective. The combination of employee and patron traffic and the potential for spills and moisture on that walkway creates a situation where the type of flooring used and the layout of that flooring is relevant. Cohen's testimony regarding these issues is probative, and Defendant has not demonstrated that the probative value thereof "is substantially outweighed by the danger of unfair

[36] *Delmarva Power & Light v. Stout*, 380 A.2d 1365, 1368 (Del. 1977)

prejudice, confusion of the issues, or misleading the jury."[37] For these reasons, Defendant's Motion to Exclude Testimony of Plaintiffs' Liability Expert is **DENIED**.

VI. CONCLUSION

For the forgoing reasons, Defendant's Motion for Summary Judgment and Defendant's Motion to Exclude Testimony of Plaintiffs' Liability Expert are hereby **DENIED**.

IT IS SO ORDERED.

/s/ Paul R. Wallace
Paul R. Wallace, Judge

Original to Prothonotary
cc: All counsel via File & Serve

[37] D.R.E. 403; *See Nelson v. State*, 628 A.2d 69, 74 (Del. 1993) (When adopting the 5-step test to determine the admissibility of expert testimony, the Delaware Supreme Court made it clear that analysis at the last step is governed by the Rule 403 standards).