

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

TINA A. ATWELL and ASHLEY ATWELL, :
a minor by her next friend, TINA A. ATWELL, : C.A. No. 02C-12-003WLW
:
Plaintiffs, :
:
v. :
:
RHIS, INC. d/b/a RELIABLE HOME :
INSPECTION SERVICE, a Delaware :
corporation, RICHARD DAVIS, and LITITZ :
MUTUAL INSURANCE COMPANY, a :
foreign corporation, :
:
Defendants. :

Submitted: March 10, 2006
Decided: September 11, 2006

ORDER

Upon Defendants Richard Davis and RHIS's Motions in Limine to
Exclude the Testimony of Frederick M. Blum.
Granted in part; Denied in part.

William D. Fletcher, Jr., Esquire of Schmittinger & Rodriguez, P.A., Dover, Delaware and
Mary F. Higgins, Esquire, Odessa, Delaware; co-counsel for Plaintiffs.

Robert K. Pearce, Esquire of Ferry Joseph & Pearce, P.A., Wilmington, Delaware; attorneys
for Defendant Richard Davis.

Norman H. Brooks, Esquire of Marks O'Neill O'Brien & Courtney, P.C., Wilmington,
Delaware; attorneys for Defendant RHIS.

Steven P. Casarino, Esquire of Casarino Christman & Shalk, P.A., Wilmington, Delaware;
attorneys for Defendant Lititz Mutual Insurance Company.

WITHAM, R.J.

Defendants, Richard Davis and RHIS filed separate motions to exclude the testimony of Mr. Blum, a forensic mechanical engineer. Defendant Davis only seeks to preclude the admission of a select few sentences of testimony.¹ Defendant RHIS seeks to exclude Mr. Blum from testifying at all. Plaintiffs assert that all of Mr. Blum's testimony is admissible. The primary issue is that Mr. Blum based his conclusions regarding Defendant Davis' conduct based solely on information provided to him by Plaintiff, Tina Atwell ("Ms. Atwell").² However, Mr. Blum did have other knowledge upon which he based his finding that the excessive chronic humidity problem was due to ground water leaking into the sub-slab air ducts. He based his finding on conditions that he personally observed, as well as information provided to him by Ms. Atwell.

For the reasons set forth below, Defendant Davis' motion in limine to limit Mr. Blum's testimony and Defendant RHIS' motion in limine to exclude Mr. Blum's entire testimony are *granted* in part and *denied* in part.

¹The statements in question are:

"In my opinion, responsibility for the situation falls to the prior owner. . . . The prior owner was aware of the chronic humidity situation, but (a) failed to seek professional assistance to determine the true cause, and (b) failed to notify Ms. Atwell of the problem. . . ."

"(3) Water permeation into the slab was aided by improper grading, attributable by defective maintenance by prior owner Richard Davis. . . . (4) The house and its occupants would not have suffered the consequences of prolonged excessive humidity (e.g. mold) if the house was not defectively maintained by prior owner Richard Davis. . . . (5) Ms. Atwell was deceived into purchasing the house in damaged condition because prior owner Richard Davis failed to (a) correct the chronic humidity problem, and (b) disclose the chronic humidity problem to Ms. Atwell."

²Ms. Atwell's daughter, Ashley, is also a plaintiff.

Discussion

The trial judge serves as a gatekeeper in the admissibility of expert testimony and must determine whether such testimony is reliable and relevant. The objective of this gatekeeping function is “to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.”³ As set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,⁴ the trial judge must determine at the outset whether the expert is proposing to testify to scientific knowledge that will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning and methodology can be properly applied to the facts in issue.⁵ The Delaware Supreme Court has adopted a five-part test to determine the admissibility of expert or scientific testimony which requires the trial judge to decide whether:

- (1) The witness is qualified as an expert by knowledge, skill, experience, training or education;
- (2) The evidence is relevant and reliable;
- (3) The expert’s opinion is based upon information reasonably relied upon by experts in a particular field;
- (4) The expert testimony will assist the trier of fact to understand the

³*Ward v. Shoney’s, Inc.*, 817 A.2d 799 (Del. 2003).

⁴509 U.S. 579 (1993).

⁵*Crowhorn v. Boyle*, 793 A.2d 422, 433 (Del. Super. 2002).

evidence or to determine a fact in issue; and

- (5) the expert testimony will not create unfair prejudice or confuse or mislead the jury.⁶

Defendant Davis makes three arguments for excluding the specific statements he mentioned in his motion: (1) Mr. Blum has no reliable factual basis for his statements; (2) Mr. Blum's conclusions invade the province of the Court and the jury; and (3) Mr. Davis had no legal duty to ensure that the grading of the house was not "defective." Defendant RHIS contends that the data upon which he relies is not available and, therefore, not subject to peer review, and there are no standards that Mr. Blum followed during his inspection.

Plaintiffs state that Mr. Blum had a number of other sources for his opinions other than Ms. Atwell's statements to him. They also assert that Defendant Davis' failure to reveal water leakage was a violation of the Buyer Property Protection Act. Lastly, Plaintiffs argue that Mr. Blum's testimony regarding grading is not being offered to show that Defendant Davis owed a duty, but rather to demonstrate Defendant Davis' state of mind.

I agree with Defendant Davis to the extent that Mr. Blum is not permitted to testify regarding any conclusions that are not supported by a reliable factual basis; specifically, whether Defendant Davis knew or should have known that the house had moisture problems when he sold it to Ms. Atwell. Additionally, Mr. Blum's testimony is limited in that he may not opine as to Defendant Davis' breach of a legal

⁶*Id.* at 430.

duty.

These conclusions are based on my analysis of the five factors mentioned above, which I will now address. First, I find that Mr. Blum is an expert. Defendant Davis did not question Mr. Blum's qualifications, but Defendant RHIS did. Mr. Blum did concede that a case concerning this subject matter has never gone to trial before, but said that he has had a number of other cases of this type. Also, in his deposition, Mr. Blum stated that he has testified in court over 190 times and he has never been excluded as an expert.

In *State v. McMullen*,⁷ the Court observed:

The "proponent of the proffered testimony bears the burden of establishing the relevance [and] reliability . . . by a preponderance of the evidence." The proponent's focus in establishing the scientific validity of expert testimony should be on the methodology applied by the expert rather than the conclusions he generates. "Proponents do not need to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of the evidence that their opinions are reliable." When assessing whether the proponent has met its burden, the trial court does not choose between competing scientific theories, nor is it empowered to determine which theory is stronger. *Daubert* requires only that the trial court determine whether the proponent of the evidence has demonstrated that scientific conclusions have been generated using sound and reliable approaches.

Based on the above-mentioned burden of proof and considerations of this Court, I find the evidence to be relevant and reliable. As the court in *McMullen*

⁷900 A.2d 103, 114 (Del. Super. 2006) (citations omitted).

Atwell v. RHIS, et al.
C.A. No. 02C-12-003 WLW
September 11, 2006

points out, the conclusions generated by the expert are not this Court's concern. Rather, I must consider whether his methodology is sound and I find that it is. Mr. Blum received information from Ms. Atwell and inspected the house. Based on information garnered from Ms. Atwell and his inspection, he formed his opinion. It is the opinion of this Court that experts, such as Mr. Blum, often rely on information relayed to them by the homeowner; thus, Mr. Blum's methodology is appropriate and the third factor is met as well. Thus, I find that he is qualified to testify in this matter.

I also find that Mr. Blum's testimony will assist the jury to determine a fact in issue, namely, an alleged cause of Plaintiffs' injuries. I further conclude that Mr. Blum's testimony will not mislead or confuse the jury. Consequently, Mr. Blum may testify subject to the limitations I have already mentioned.

Based on the foregoing, Defendant Davis' motion in limine to limit Mr. Blum's testimony and Defendant RHIS' motion in limine to exclude all of Mr. Blum's testimony are *granted* in part and *denied* in part.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.

R.J.

WLW/dmh

oc: Prothonotary

xc: Order Distribution