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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Burt Feuerstein and Janet Shalwitz,)
Plaintiffs,)
vs.)
The Home Depot, U.S.A., Inc.,)
Gorilla Ladder Company, Tricam)
Industries, Inc., Trex Company, Inc.,)
and A.B.C. Corp.,)
Defendants.)

**2:12-cv-01062 JWS
ORDER AND OPINION**

**[Re: Motions at Dockets 84, 86
124, and 126]**

I. MOTIONS PRESENTED

At docket 84, Defendants The Home Depot, U.S.A., Inc. (“Home Depot”) and Tricam Industries, Inc. (“Tricam”; collectively “Ladder Defendants”) filed a motion *in limine* seeking to exclude the testimony of Herbert Weller (“Weller”), expert witness for Plaintiffs Burt Feuerstein (“Feuerstein”) and Janet Shalwitz (collectively “Plaintiffs”). The memorandum and documents in support are at docket 85. Ladder Defendants filed a second motion *in limine* at docket 86 seeking to exclude the testimony of Plaintiffs’ second expert witness, Jay Preston (“Preston”). The memorandum in support and supporting documents are at docket 87. Plaintiffs’ filed oppositions at dockets 95

1 and 96. Ladder Defendants filed replies at dockets 106 and 107. Oral argument was
2 requested, but would not be of additional assistance to the court.

3 At docket 124, Defendant Trex Company, Inc. (“Trex”) filed a motion in *limine* to
4 exclude the testimony of Preston, challenging Preston’s opinions about the Trex
5 decking. Plaintiffs’ response is at docket 129.¹ No reply was filed. At docket 126, Trex
6 filed a motion *in limine* to exclude Weller’s testimony, challenging his opinions related to
7 Trex decking. Plaintiffs’ response is at docket 128. No reply was filed.

8 II. BACKGROUND

9 Plaintiffs filed suit against Ladder Defendants, Trex, and other entities on
10 May 21, 2012. Jurisdiction is based on 28 U.S.C. § 1332. Feuerstein was injured on
11 May 8, 2011, when his ladder, a Tricam AL-22-2 (“AL-22”), slipped out underneath him.
12 The AL-22 is an articulating ladder manufactured by Tricam and sold by Home Depot.
13 An articulating ladder is a three-part ladder, with an inner assembly and two flared outer
14 assemblies. The inner assembly is hinged to permit the ladder to be used as an A-
15 frame or a straight ladder. The outer assemblies can be positioned on various rungs of
16 the inner assembly to make the ladder longer or shorter, or they can be removed to
17 form part of a scaffold. Feuerstein was using the ladder in its straight configuration on
18 the day of the accident. He had the ladder set up on his deck so that he could reach
19 the overhanging roof. Feuerstein’s decking is manufactured by Trex, which was also
20 sold by Home Depot.

21 Plaintiffs plead claims under Arizona law for strict liability, breach of an implied
22 warranty, negligence, failure to warn, punitive damages, and Janet Shalwitz’s loss of
23 consortium, as well as a claim for violation of the Magnuson-Moss Warranty Act.
24 According to Plaintiffs, Feuerstein was using the AL-22 in accordance with applicable
25 instructions at the time of his accident. The gravamen of all Plaintiffs’ claims are that

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27 ¹The caption in docket 129 indicates that it relates to Trex’s motion to exclude Weller’s
28 testimony, but upon review of the document it is clear that docket 129 addresses Preston’s
testimony. Thus, the court presumes the caption was an error.

1 the ladder slipped out underneath him due to a defective design of the ladder's feet and
2 a defective design of the surface of the Trex decking. Plaintiffs retained Preston and
3 Weller to investigate the accident. Preston considered the AL-22's set up on the day of
4 the accident and performed tests related to Trex decking. Weller considered the AL-
5 22's set up on the day of the accident and performed tests related to the ladder's ability
6 to slip on the Trex decking.

7 III. DISCUSSION

8 The court has broad discretion when ruling on motions *in limine*.² Ladder
9 Defendants and Trex request that the court exclude Plaintiffs' two experts pursuant to
10 Rule 702 of the Federal Rules of Evidence. Rule 702 permits opinion testimony by an
11 expert as long as the witness is qualified and the witness's opinion is relevant and
12 reliable.³ "[A] district court's inquiry into admissibility is a flexible one."⁴ The purpose of
13 the district court's inquiry is "to screen the jury from unreliable nonsense opinions" and
14 not to "exclude opinions merely because they are impeachable."⁵ The district court
15 functions as a "gatekeeper, not a fact finder."⁶

16 Under Rule 702, a witness may be "qualified as an expert by knowledge, skill,
17 experience, training, or education."⁷ "Expert opinion testimony is relevant if the
18 knowledge underlying it has a valid connection to the pertinent inquiry. And it is reliable
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20 ²See *Jenkins v. Chrysler Motors Corp.*, 316 F.3d 663, 664 (7th Cir. 2002); see also
21 *Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 27 (9th Cir. 1980) ("A district court is vested with
22 broad discretion to make . . . evidentiary rulings conducive to the conduct of a fair and orderly
trial.").

23 ³Fed. R. Evid. 702.

24 ⁴*City of Pomona v. SQM N. Am. Corp.*, Nos. 12-55147, 12-55193, 2014 WL 1724505, at
25 *3 (9th Cir. May 2, 2014).

26 ⁵*Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 969 (9th Cir. 2013).

27 ⁶*Primiano v. Cook*, 598 F.3d 558, 565 (9th Cir. 2010) (internal quotations omitted).

28 ⁷Fed. R. Evid. 702.

1 if the knowledge underlying it has a reliable basis in the knowledge and experience of
2 the relevant discipline.”⁸ The district court’s task in screening a scientific opinion for
3 reliability was addressed in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁹ and its
4 progeny. “The court must assess the expert’s reasoning or methodology, using
5 appropriate criteria such as testability, publication in peer-reviewed literature, known or
6 potential error rate, and general acceptance.”¹⁰ However, these factors are “not
7 definitive, and the trial court has discretion to decide how to test an expert’s reliability as
8 well as whether the testimony is reliable, based on the particular circumstances of the
9 particular case.”¹¹ When non-scientific testimony is at issue, the “*Daubert* factors (peer
10 review, publication, potential error rate, etc.) simply are not applicable”¹² The
11 reliability of such non-scientific testimony depends more “on *the knowledge and*
12 *experience* of the expert, rather than the methodology or theory behind it.”¹³

13 “It is the proponent of the expert who has the burden of proving admissibility.”¹⁴
14 Admissibility must be established by preponderance of the evidence.¹⁵ The party
15 presenting the expert has the burden to show that the expert’s findings are based on
16 “sound science” and that the expert’s methodology is capable of independent
17 validation.¹⁶

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19 ⁸*Primiano*, 598 F.3d at 565 (internal quotations omitted).

20 ⁹509 U.S. 579 (1993).

21 ¹⁰*Pomona*, 2014 WL 1724505, at *3.

22 ¹¹*Primiano*, 598 F.3d at 564 (internal quotations omitted).

23 ¹²*Hangerter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1017 (9th Cir. 2004)
24 (quoting *United States v. Hankey*, 203 F.3d 1160, 1169 (9th Cir. 2005)).

25 ¹³*Id.* (quoting *Hankey*, 299 F.3d at 1069) (emphasis in original).

26 ¹⁴*Lust v. Merrell Dow Pharm., Inc.*, 89 F.3d 594, 598 (9th Cir. 1996).

27 ¹⁵*Daubert*, 509 U.S. at 592 n. 10.

28 ¹⁶*Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1316 (9th Cir. 1995).

1 **A. Expert testimony of Herbert Weller**

2 Ladder Defendants assert that Plaintiffs’ expert, Herbert Weller, is not qualified
3 to give expert opinions about Feuerstein’s accident. They argue that Weller does not
4 have the necessary experience, training, knowledge, or education in ladder design,
5 particularly articulating ladder design, or ladder accident reconstruction. They argue
6 that Weller’s qualifications are based only on self study and nominal safety certifications
7 and memberships.

8 Upon review of Weller’s affidavit and curriculum vitae, the court concludes that
9 Weller is qualified to testify about ladder safety in general. In addition to his experience
10 using ladders in his prior profession as a professional painter, Weller has taken an
11 Occupational Safety and Health Administration (“OSHA”) stairways and ladder safety
12 course and a self-study correspondence course through the American Society of Safety
13 Engineers. He has been certified as a safety specialist through the World Safety
14 Organization. He has been asked to provide input in a few ladder safety studies and
15 has participated in at least one workshop involving ladder safety standards. Based on
16 these qualifications, the court concludes that he possesses more knowledge in ladder
17 safety than a layperson and can testify as an expert in general ladder safety.

18 The court recognizes that Ladder Defendants have raised legitimate questions
19 as to the depth and quality of Weller’s experience in ladder safety standards and ladder
20 testing. Indeed, while Weller’s affidavit states that he has “determined the causation of
21 hundreds of injuries sustained by members of the public,”¹⁷ he does not inform the court
22 as to how many of these investigations involved ladder accidents. He purports to be
23 fully versed on the applicable ladder standards—the American National Standards
24 Institute (“ANSI”) safety standards for ladders—but does not specify the number of
25 safety tests he has conducted. Moreover, he does not cite to a single case where he
26 was allowed to testify at trial as an expert in ladder accident reconstruction and safety

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28 ¹⁷Doc. 95-3 at ¶ 9.

1 standards. While these deficiencies have given the court pause, they reflect more on
2 the weight a fact-finder should give his testimony, rather than admissibility. Thus, at
3 this juncture, the court concludes that Weller is at least minimally qualified to discuss
4 the ladder accident at issue here.

5 However, the court concludes that Weller is not qualified to offer opinions about
6 the deficiencies in the labels and warnings related to the products in this case.

7 Plaintiffs, who have the burden to prove admissibility, provide no evidence that Weller
8 has had any training or education related to ladder warnings or instructions. Weller's
9 declaration, however, suggests that he has *experience* in designing ladder warnings
10 and labels. Specifically, he states that he designed a ladder safety manual that is used
11 by Wal-Mart, and in support he refers to an exhibit that he attached to his declaration.
12 The exhibit, however, is only a questionnaire that Wal-Mart returned to Weller after he
13 mailed it to Wal-Mart regarding his "proposed feasibility study on the issue of ladder
14 safety." He does not provide the manual or any other evidence to demonstrate that he
15 was involved in writing a ladder safety manual that Wal-Mart uses. Weller also claims
16 that he designed a ladder label, referred to as "Marking #5," which is the label that
17 describes an acceptable method for approximating a safe ladder angle. Ladder
18 Defendants' expert rebuts this claim:

19 [Weller] claims that he designed the label describing the procedure for
20 setting the ladder at the proper angle. This is incorrect. The label was first
21 published in the 1990 version of ANSI A14.2, long before [Weller] had any
22 involvement with ANSI A14. The label is based upon the "fireman's rule,"
which is the method by which firemen have set their ladders. This rule goes
back at least 50 years. . . . At no time has [Weller] had any input into the
[ANSI A14] Labeling Task Force.¹⁸

23 Plaintiffs do not refute the defense expert's statement and do not provide evidence to
24 show that Weller has been involved in the creation of any ladder warnings. Based on
25 Plaintiffs' failure to meet their burden regarding Weller's experience with product labels
26 and warnings, the court concludes that Weller is not qualified to provide expert

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28 ¹⁸Doc. 85-7 at p. 9.

1 testimony regarding effective ladder warnings or the deficiencies of the warnings related
2 to the products at issue in this case.

3 Ladder Defendants also argues that even if Weller is qualified to testify regarding
4 general ladder safety and ladder accidents, his opinions regarding the cause of
5 Feuerstein's accident should be excluded because they are not reliable. Weller's report
6 offers a variety of opinions related to Feuerstein's ladder accident, such as the
7 appropriateness of the height, angle, and set up of the ladder at the time of the
8 accident. These opinions are in the realm of his general ladder knowledge and
9 expertise and are based on Feuerstein's testimony about how he set up the ladder on
10 the day of the accident.¹⁹

11 Weller's report also discusses tests he designed and ran to ascertain whether
12 the ladder improperly slipped out underneath Feuerstein. Ladder Defendants assert
13 that Weller's technique to test his theory and the results derived therefrom are not
14 reliable, and any opinion derived from such tests should be excluded. Weller's slip
15 tests are scientific in nature in that they were conducted to determine the amount of
16 force required to cause the accident ladder to slip on Trex decking. The court therefore
17 will consider the applicable *Daubert* factors. The applicable factors include whether the
18 technique Weller used is generally accepted as the proper method for measuring a
19 ladder's resistance to slippage and whether the techniques he applied can be recreated
20 and retested.

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24 ¹⁹Feuerstein stated in his deposition that he believes the ladder was about two or three
25 rungs above the roofline at the time of the accident and that he used the appropriate method for
26 setting the ladder angle on the day of the accident. Doc. 85-4 at pp. 8, 9 (Feuerstein's
27 deposition pp. 18, 23-24). Ladder Defendants argue that these are disputed facts and Weller
28 cannot base his opinions on Feuerstein's testimony. They rely primarily on photographs that
Feuerstein had taken after the accident. Feuerstein disputes the significance of these photos,
asserting that they were not meant to represent the exact placement and angle of the ladder at
the time of the accident but were merely meant to be an approximation of where the ladder was
set up at the time of the accident. Doc. 85-4 at p. 8 (Feuerstein's deposition pp. 18-20).

1 Weller admits that he modified the generally accepted slip test set forth in the
2 applicable safety standard—ANSI A 14.2—when he tested how the ladder performs on
3 Trex decking. Modification of the generally accepted test is not necessarily problematic
4 given that the generally accepted test requires tests on plywood, not Trex decking, but
5 Weller does not set forth sufficient evidence to show that all of his modifications and his
6 specific test design are standard in ladder accident investigation. While Weller states
7 that his investigative methods are generally approved and peer reviewed by the
8 Consumer Product Safety Commission (“CPSC”) and OSHA, Ladder Defendants’
9 expert states that his “review of the CPSC and OSHA investigative manuals does not
10 indicate that they are peer reviewed . . . [and] [t]he investigation done by [Weller] is not
11 found in either of these guides.”²⁰ Plaintiffs, who have the burden to demonstrate
12 admissibility, do not provide evidence in support of Weller’s contention that his
13 investigative methods and his test modifications are generally acceptable and in
14 accordance with the accident investigation protocol set forth by CPSC and OSHA.

15 More importantly, while Weller recorded his investigation and methodology so
16 that it could be subjected to review, his results cannot be independently verified given
17 significant errors that call into question the soundness of his methodology.²¹ Ladder
18 Defendants’ expert points out that Weller failed to measure the exact angle at which the
19 ladder was placed during his tests; did not have the scale vertical when he weighed the
20 test weights; did not hang the scale by its hook as designed but rather held the scale by
21 its body; held the gauge incorrectly during his force measurements; and improperly
22 applied the pullout force at the bottom of the ladder by pulling not just horizontally as
23 required by the accepted testing standard but also upward. These errors mean that the
24 weight on the ladder during Weller’s tests and the force he applied are actually

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26 ²⁰Doc. 85-7 at p. 9.

27 ²¹Weller recorded his investigation and the video was submitted into the record as
28 Exhibit C-16 to Plaintiffs’ opposition (doc. 95-3, doc. 98). It is also submitted into the record at
doc. 100-4 at p. 58 (Weller’s declaration, Exhibit 16).

1 unknown, and therefore, the results are not accurate and cannot be verified through
2 retesting.

3 Plaintiffs fail to put forth any evidence to counter Ladder Defendants' expert or
4 otherwise argue why these errors do not fundamentally affect the results. Plaintiffs
5 argue instead that these issues should go to weight and not admissibility. Indeed, an
6 imperfect execution of a otherwise solid and accepted methodology is sufficient to pass
7 muster under *Daubert*.²² That is, minor errors in reasoning or execution should not
8 render an expert's testimony inadmissible.²³ But here, the court concludes that Weller's
9 methodology has not been proven to be generally accepted, and the errors are
10 significant enough to make his entire analysis unreliable. Therefore, the court
11 concludes that any opinions Weller formed on the basis of his tests are inadmissible.

12 Trex also asks the court to exclude Weller's testimony as it relates to Trex
13 decking. Although Weller was not designated as an expert in slip resistance, Trex
14 notes that Weller's report contains one opinion regarding Trex decking. In his report,
15 Weller concludes that Trex decking has a manufacturing defect because it has no
16 warning labels regarding the use of a ladder on its surface. Given that the court has
17 concluded Weller is not qualified to testify regarding labels and warnings, his testimony
18 about the type of warning that should come with Trex decking is therefore inadmissible.
19 Furthermore, the court has already determined, in relation to the Ladder Defendants'
20 motion, that any opinion Weller formed based on his slip tests is inadmissible given the
21 reliability problems noted above.

22 **B. Expert testimony of Jay Preston**

23 Ladder Defendants assert that Plaintiffs' other expert, Jay Preston, is not
24 qualified to give expert testimony about Feuerstein's ladder accident. They argue that
25 he does not have the necessary experience, skill, training, knowledge, or education in

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27 ²²*Pomona*, 2014 WL 1724505, at * 7.

28 ²³*Id.*

1 ladder design, particularly articulating ladder design, to opine about the ladder's defects
2 or the causation of Feuerstein's ladder fall. The court disagrees. Preston's declaration
3 and curriculum vitae demonstrate that he is a qualified ladder safety specialist with
4 experience in ladder accident reconstruction. He has a degree in safety from the
5 University of Southern California, and his course work involved an emphasis on
6 products liability analysis and prevention. He has investigated hundreds of ladder
7 accidents. He is licenced by the state of California as a Registered Professional Safety
8 Engineer and teaches courses in safety engineering and ladder safety at the University
9 of Southern California. Given this education and experience, Preston is qualified to
10 give expert testimony regarding the safe and proper use of ladders. He may testify as
11 to the proper set up of a ladder and any problems he observed with Feuerstein's AL-22.
12 He can testify as to what he observed when he set up Feuerstein's ladder and discuss
13 how a ladder accident can occur when a ladder "walks" due to the fact that all of the
14 ladder's feet are not solidly on the ground. Such an opinion is based on Preston's
15 knowledge and expertise in ladder safety.

16 Trex does not dispute Preston's qualifications to provide expert testimony on the
17 relevant issues. Trex instead argues that Preston's expert opinions about the safety
18 and slip resistance of Trex decking are based on unreliable data. To gather his data
19 about the slip resistance of Feuerstein's Trex decking, Preston used an English XL
20 Variable Incidence Tribometer ("VIT"). The VIT "measures . . . Slip Resistance factor
21 when the test surface is lubricated and static coefficient of friction . . . when the surface
22 is dry."²⁴ Trex does not dispute that the VIT is generally used to test slip resistance of a
23 material. Trex does not set forth evidence to show that Preston's use of the VIT was
24 improper or deviated from the accepted protocols. Indeed, Trex does not dispute that
25 Preston is a certified VIT operator and that he was trained to use the device by its
26 inventor. Trex generally questions why Preston used a paper towel to wipe the surface

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28 ²⁴Doc. 124-1 at p. 7.

1 of the deck before testing, stating that it is not part of the testing method and that it
2 could have contaminated the surface of the decking, but it does not cite to any expert
3 evidence or testing manuals to support this claim. In response, Plaintiffs filed a copy of
4 the VIT's user guide which instructs a user to wipe the VIT's test foot with a paper
5 towel, which suggests paper towels will not affect the results.

6 Plaintiffs have met their burden to prove the admissibility of Preston's testimony
7 regarding Trex decking. The VIT Preston used to form his opinions about the slip
8 resistance of Trex decking is generally accepted as the proper device to use for slip
9 resistance testing. Trex does not provide any evidence to show that Preston made
10 significant errors or modifications that call into question the soundness of Preston's
11 methodology. Moreover, given that Preston has the requisite training and knowledge
12 regarding how to use the VIT, the court has no reason to question his methodology.
13 Any concern about the variability of Preston's results and how Preston interpreted those
14 results is a question of weight and not admissibility.²⁵

15 IV. CONCLUSION

16 Based on the foregoing discussion, Ladder Defendants' motions *in limine* at
17 dockets 84 and 86 are **DENIED IN PART AND GRANTED IN PART** as follows:

18 1) Weller is qualified as an expert in general ladder safety and his testimony
19 regarding Feuerstein's use of the AL-22 on the day of the accident and any safety
20 problems he observed about the AL-22 is admissible. However, testimony about his
21 slip tests and the opinions derived from such tests are inadmissible.

22 2) Weller is not qualified as an expert in ladder labels and warnings. His
23 opinions regarding the labels and warnings associated with the products in this case
24 are inadmissible.

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²⁵See *Primiano*, 598 F.3d at 564-65 (the focus of a Daubert examination "is not the correctness of the expert's conclusions but the soundness of his methodology").

