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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 Docket 117, 119]

I. MOTIONS PRESENTED

At docket 117, Plaintiffs Burt Feuerstein ("Feuerstein") and Janet Shalwitz (collectively "Plaintiffs") filed a motion *in limine* seeking to exclude the testimony of Robert Tichy ("Tichy"), expert witness for defendant Trex Company, Inc. ("Trex"). The memorandum and documents in support are at docket 118. Trex responds at docket 131. Plaintiffs reply at docket 132. At docket 119, Plaintiffs filed a motion *in limine* seeking to exclude the testimony of Robert Duncan ("Duncan"), Trex's other expert witness. The memorandum and documents in support are at docket 120. Trex responds at docket 130. Plaintiffs reply at docket 133. Oral argument was requested for both motions, but would not be of additional assistance to the court.

II. BACKGROUND

The parties are familiar with the background of the accident in this case and the claims made by Plaintiffs against Trex and the other defendants. A full recitation of the facts and claims is located in the court's order at docket 140.

Trex listed both Tichy and Duncan as expert witnesses. Tichy is the expert hired to provide his expert opinion regarding the quality and slip resistance of Feuerstein's Trex decking. Tichy, in turn, hired Duncan, who works as the laboratory manager for the Composite Material and Engineering Center, to conduct the slip resistance testing on Feuerstein's Trex decking. Duncan conducted slip-resistance tests and prepared a report describing his methodology and results. A copy of that report is at docket 120-1. Tichey reviewed and interpreted Duncan's results and based his opinions regarding the deck's slip resistance on those results. Tichy's expert rebuttal report, which discusses and interprets the results of Duncan's slip resistance tests, is at docket 118-2, and his expert report is in the record at docket 118-1.

Plaintiffs seek to exclude Duncan's testimony and any testimony derived from Duncan's tests results, including Tichy's testimony. They argue that Duncan is not qualified to conduct slip resistance testing nor is he qualified to testify about the safety of Trex decking. They also argue that his methodology was flawed, causing his data and any opinions derived from that data to be unreliable. They also argue Tichy is not qualified to analyze the data from any slip-resistance test or give his opinion about the deck's slip-resistance. In addition, they argue Tichy is not qualified to give his opinion about the lack of design or manufacturing defects in Feuerstein's Trex decking because he has no experience in Trex's manufacturing or design process and that he is not qualified to provide an opinion about Feuerstein's ladder set up on the day of the accident.

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III. DISCUSSION

The court has broad discretion when ruling on motions *in limine*.¹ Rule 702 permits opinion testimony by an expert as long as the witness is qualified and the witness's opinion is relevant and reliable.² "[A] district court's inquiry into admissibility is a flexible one." The purpose of the district court's inquiry is "to screen the jury from unreliable nonsense opinions" and not to "exclude opinions merely because they are impeachable." The district court functions as a "gatekeeper, not a fact finder." ⁵

Under Rule 702, a witness is "qualified as an expert by knowledge, skill, experience, training, or education." "Expert opinion testimony is relevant if the knowledge underlying it has a valid connection to the pertinent inquiry. And it is reliable if the knowledge underlying it has a reliable basis in the knowledge and experience of the relevant discipline." The district court's task in screening a scientific opinion for reliability was addressed in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*8 and its progeny. "The court must assess the expert's reasoning or methodology, using as appropriate criteria such as testability, publication in peer-reviewed literature, known or

¹See Jenkins v. Chrysler Motors Corp., 316 F.3d 663, 664 (7th Cir. 2002); see also Campbell Indus. v. M/V Gemini, 619 F.2d 24, 27 (9th Cir. 1980) ("A district court is vested with broad discretion to make . . . evidentiary rulings conducive to the conduct of a fair and orderly trial.").

²Fed. R. Evid. 702.

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

⁴Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc., 738 F.3d 960, 969 (9th Cir. 2013).

⁵Primiano v. Cook, 598 F.3d 558, 565 (9th Cir. 2010) (internal quotations omitted).

⁶Fed. R. Evid. 702.

⁷Primiano, 598 F.3d at 565 (internal quotations omitted).

⁸⁵⁰⁹ U.S. 579 (1993).

potential error rate, and general acceptance." However, these factors are "not definitive, and the trial court has discretion to decide how to test an expert's reliability as well as whether the testimony is reliable, based on the particular circumstances of the particular case." If an expert does not "conduct his or her own research, independent of the litigation, on the subject of the testimony, the district court must determine whether there exists any 'objective, verifiable evidence that the testimony is based on scientifically valid principles." When non-scientific testimony is at issue, the "Daubert factors (peer review, publication, potential error rate, etc.) simply are not applicable" The reliability of such non-scientific testimony depends more "on *the knowledge and experience* of the expert, rather than the methodology or theory behind it." 13

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

⁹Pomona, 2014 WL 1724505, at *3.

¹⁰Primiano, 598 F.3d at 564 (internal quotations omitted).

¹¹Domingo ex rel. Domingo v. T.K., 289 F.3d 600, 605 (9th Cir. 2002) (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1317–18 (9th Cir.1995)).

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

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

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

¹⁵Daubert, 509 U.S. at 592 n.10.

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

A. Duncan's testimony

Contrary to Plaintiffs' argument, Duncan is qualified to conduct slip-resistance testing. Plaintiffs stress that unlike their expert, Jay Preston ("Preston"), Duncan does not possess certification to use the English XL Variable Incidence Tribometer ("VIT"), which is an instrument used to measure the slip-resistance of a material. While such information may assist the jury in assigning weight to his testimony, it does not require exclusion of the testimony. The record demonstrates that Duncan is a laboratory manager for a center that specializes in composite materials, such as Trex decking. His laboratory is accredited to use the VIT by the International Code Council Accreditation Services. More importantly, he has over twelve years' experience in conducting slip resistence testing and has conducted thousands of such tests over his career. Thus, Duncan is qualified to conduct slip-resistance testing with the VIT and may testify about the testing he conducted on Feuerstein's decking. That is, he may explain his methodology and his results to the jury.

Plaintiffs also argue that Duncan is not qualified to offer an opinion about the safety of Trex decking. Plaintiffs' argument is moot, as Duncan is not slated to do so. Trex's disclosure statement indicates that Duncan will testify regarding the testing he conducted. Indeed, Duncan concedes that he is not an expert in what constitutes a safe deck in terms of slip resistance and concedes he does not conduct qualitative analysis related to his test results.¹⁸ He did not come to any subjective opinions about the data obtained from his testing of Feuerstein's deck.¹⁹

¹⁷Trex indicates that Duncan will testify about the slip resistance testing he conducted on September 19, 2013. Doc. 118-1 at p. 5; Doc. 120-1 at p. 5. Trex does not plan to have Duncan testify about what those results mean or to have him provide an opinion on the safety of Feuerstein's decking.

¹⁸Doc. 130-1 at p. 39 (Duncan depo. at p. 38, II. 19-24).

¹⁹Doc. 130-1 at p. 10 (Duncan depo. at p. 9, II. 13-15).

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²⁰Doc. 130-1 at pp. 31 (Duncan depo. at pp. 30, II. 10-11, 16-20).

inapplicable or unreliable. Plaintiffs also argue that Duncan could not establish an

acceptable standard deviation for his testing. However, Duncan testified that the

standard deviation is plus or minus .03 to .05 and that the results of his testing fell

within this range.²⁵ Duncan's testimony is sufficient to persuade the court that his

methodology is reliable. Any issue Plaintiffs may have with his methodology or his

Plaintiffs also seek to exclude Duncan's testing and any testimony related to

²¹Doc. 120-1 at pp. 14-15.

²²Doc. 130-1 at p. 17 (Duncan depo. at p. 16, II. 8-18).

²³ASTM F1679-04 is the standard test method for using a VIT. Doc. 130-1 at p. 20 (Duncan depo. at p. 19, II. 2-11).

²⁴Doc. 130-1 at p. 16 (Duncan dep. at p. 15, II. 23-25).

²⁵Doc. 130-1 at p. 57 (Duncan depo. at p. 56, II. 5-13).

calculation of the standard deviation goes to weight and can be addressed during cross examination.

B. Tichy's testimony

Trex's disclosure statement indicates that Tichy "will opine on the condition of the decking in question at the time of [Feuerstein's] fall, the design and manufacturing of the materials used in the decking, and any modifications of the decking material made after the material was purchased and installed at the residence of [Feuerstein]."²⁶ It also indicates that he will testify as to the slip resistance of the decking based on Duncan's test. Trex's rebuttal expert disclosure also indicates that Tichy will be a rebuttal expert. His rebuttal expert report critiques Preston's methodology and the results Preston obtained.

Tichy is clearly qualified as an expert in Trex decking. He has spent thirty years studying and practicing in the areas of material science, wood science and technology, and building products. He can testify regarding the condition of Feuerstein's decking and about the properties of Trex decking. Plaintiffs argue that Tichy is not qualified to discuss the design and manufacturing of Trex decking because he has not been directly involved in its design or manufacture. While these issue certainly go to the weight of his testimony, he clearly has sufficient experience in testing and evaluating Trex decking for code compliance. He can provide testimony in line with this experience.

Plaintiffs object to any testimony Tichy plans to give about the slip resistance of Feuerstein's Trex decking. They stress that Tichy did not perform his own testing and therefore cannot be qualified to discuss the results of such tests. However, the record demonstrates that it is Tichy's practice to rely on and interpret data that technicians gather in order to determine if a building product complies with the applicable codes. Tichy is an engineer and knows how to interpret the coefficient of friction data obtained

²⁶Doc. 118-1 at p. 5.

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during a slip resistance test.²⁷ He also knows what is a typical coefficient of friction for decking based on industry standards.²⁸ That is to say, he is an expert in interpreting data related to slip-resistance testing and can form opinions about the safety of a product based on that data. His education and experience qualifies him to derive opinions from the results of Duncan's testing, as well as Preston's testing.²⁹

As noted by the Plaintiffs, however, Tichy is not an expert in the testing procedures. He does not actually perform slip-resistance testing, design slip-resistance testing methods, or know how to use a VIT.³⁰ He admits that Duncan is the expert on operating the VIT and conducting the actual tests.³¹ So while he can discuss Preston's results and provide his opinion about whether they are typical and whether he gathered enough data, he cannot directly critique Preston's use of the VIT or whether he followed the standard testing method for that instrument.

Plaintiffs also object to any testimony Tichy plans to provide about Feuerstein's ladder and its set up on the day of the fall. The court agrees that Tichy has not been designated or established as an expert in ladder safety or ladder accident reconstruction.³² Any opinions he has about the cause of Feuerstein's accident being related to the ladder placement is deemed inadmissible.

²⁷Doc. 131-1 at pp. 93-94 (Tichy depo. at p. 92, II. 23-25; p. 93, II. 1-12); Doc. 131-1 at pp. 47-48 (Tichy depo. at p. 46, II. 1-3; p. 47, II. 5-16).

²⁸Doc. 131-1 at p. 59 (Tichy depo. at p. 48, II. 5-25); doc. 131-1 at p. 97 (Tichy depo. at p. 96, II. 16-19).

²⁹Doc. 131-1 at p. 94 (Tichy depo. at p. 93, II. 8-12).

³⁰Doc. 131-1 at p. 29 (Tichy depo. at p. 28, II. 7-8, 18); Doc. 131-1 at p. 30 (Tichy depo. at p. 29, II. 16-18); doc. 131-1 at p. 93 (Tichy depo. at p. 92, II. 17-18).

³¹Doc. 131-1 at p. 69 (Tichy depo. at p. 68, l. 17).

³²Tichy admits that he is not an expert on ladders. Doc. 131-1 at p. 37 (Tichy depo. at p. 36, II. 5-6).

IV. CONCLUSION

Based on the foregoing discussion, Plaintiffs' motions in limine at dockets 117 and 119 are **DENIED IN PART AND GRANTED IN PART** in accordance with the court's discussion above.

DATED this 12th day of June 2014.

/s/ JOHN W. SEDWICK SENIOR UNITED STATES DISTRICT JUDGE