

Mildred Ciricillo and Robert,  
Ciricillo,

Plaintiffs,

-vs-

United States of America and City  
Of Newark

Defendants

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

Hon. Dickinson R. Debevoise

Civil Action #:03-3039(DRD)

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**BRIEF IN OPPOSITION TO  
DEFENDANTS' MOTIONS TO EXCLUDE  
THE TESTIMONY OF MICHAEL NATOLI**

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Dated: September 12, 2005

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**RESPONSES TO STATEMENT OF UNDISPUTED MATERIAL FACTS**

1. Admitted.

2. Admitted.

3. Admitted.

4. Admitted.

5. Plaintiffs admit that Brian Tate testified that inspection of the macadam area was the responsibility of the City.

It is a disputed fact as to whether the United States had a concurrent obligation to perform inspections based upon the lease, their obligations assumed thereunder and their duties to pedestrians utilizing the area in question. See Gallagher 8/26/05 Declaration Exhibit C at 11-12.

6. Plaintiffs admit that James Grant testified that the City maintains the entire macadam surface. It is a disputed fact as to whether the United States had a concurrent obligation to perform maintenance based upon the lease, their obligations assumed thereunder and their duties to pedestrians utilizing the area in question. See Gallagher 8/26/05 Declaration Exhibit C at 11-12.

7. Admitted as to location of the fall. It is a disputed fact as to whether the United States had a concurrent obligation to perform maintenance based upon the lease, their obligations

assumed thereunder and their duties to pedestrians utilizing the area in question. See Gallagher 8/26/05 Declaration Exhibit C at 11-12.

## LEGAL ARGUMENT

**I. WHERE THE EXPERT WITNESS IS QUALIFIED TO TESTIFY AND HIS TESTIMONY WILL ASSIST THE TRIER OF FACT, THE MOTION TO EXCLUDE THE TESTIMONY OF MICHAEL NATOLI SHOULD BE DENIED.**

Defendants contend that the testimony of Michael Natoli is inadmissible. However, the rejection of expert testimony is the exception rather than the rule. Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311 (9<sup>th</sup> Cir. 1995) did not work a "seachange over federal evidence law," and "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi, 80 F.3d 1074, 1078 (5<sup>th</sup> Cir. 1996)(noting that the trial judge has the discretion "to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted."

In the case at bar the testimony of Michael Natoli, P.E. should be admitted because helpfulness to the trier is the essential condition of admissibility. In deciding whether proffered expert testimony will "assist the trier of fact to understand the evidence or to determine a fact in issue," the trial court assesses three issues: (1) whether scientific, technical, or other specialized knowledge will be of assistance

to the trier of fact, (2) whether the proffered expert witness is qualified to provide the assistance the trier will find useful, and (3) whether the information the expert witness has to give the fact finder is reliable, or trustworthy, in an evidentiary sense. Federal Rule of Civil Procedure 702.5.

The witness' specialized knowledge as an engineer will of assist the trier of fact to understand or determine facts in issue. Federal Rule of Civil Procedure 104(a). On pages 3-4 of his supplemental report dated December 21, 2004 Mr. Natoli opines that "based on reasonable engineering probability, long term exposure to the elements and live load impacts created by active motor vehicle traffic (i.e., construction equipment traveling over the asphalt pavement areas) results in a breakdown of the asphalt pavement. Initially, asphalt pavement cracking evolves from the surface depression stage until the crack widths widen to the point of pavement spalling. Therefore, as the asphalt pavement sections spall away, potholes formed expose a vertical pavement edge condition which creates a distinct walking surface hazard." Exhibit A.

Testimony at trial by Mr. Natoli will therefore assist the jury in reaching a verdict on issues of negligence as they pertain to Defendant United States of America and dangerous condition and palpable unreasonableness as they apply to

Defendant City of Newark.

Mr. Natoli, an engineer, is qualified to provide the assistance the trier will find useful. A number of Daubert factors and the general policy of the federal rules generally favor the admission of expert testimony. In re Paoli R.R. Yard PCB Litigation, 35 F.3d 717, 778 (3d Cir. 1994). Furthermore, the requirement "that the proposed witness be an expert has been liberally construed in this circuit." Schneck v. IBM, 1996 WL 885789\*8 (citing United States v. Velasquez, 64 F.3d 844, 849 (3d Cir. 1995)).

The information Mr. Natoli has to give the fact finder is reliable, or trustworthy, in an evidentiary sense. As the court stated in In re Paoli R.R. Yard PCB Litigation, 35 F.3d 717, 744 (3d Cir. 1994), proponents "do not have 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 evidence that their opinions are reliable. . . . The evidentiary requirement of reliability is lower than the merits standard of correctness." See also Daubert, at 1318.

Rule 702 simply requires that: (1) the expert be qualified; (2) the testimony address a subject matter on which the factfinder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony "fit" the facts of the case.



Moore's Federal Rules Pamphlet 2005, p. 526. Because Mr. Natoli's testimony will satisfy the requirements of the aforesaid federal rules and case law, his testimony should be admitted at trial.

Accordingly, the motion should be denied.

**CONCLUSION**

For the foregoing reasons, the motions to exclude the testimony of Michael Natoli should be denied.

Respectfully submitted,

DATED: September 12, 2005

By:           /s/ Steven I. Greene            
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