Torres v. Cintas Corporation et al Doc. 398

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

AMALIA DIAZ TORRES, surviving spouse of ELEAZOR TORRES GOMEZ,	)	
Plaintiff,	)	
v.	)	**Case No. 08-CV-0185-CVE-TLW**
CINTAS CORPORATION and LAVATECH, INC.,	)	
Defendants.	)	

OPINION AND ORDER

Now before the Court are Plaintiff's Amended Motion in Limine to Exclude Testimony from Dr. Alfred Bowles (Dkt. ## 292, 293) and Plaintiff's Amended Motion in Limine to Exclude Testimony from William Howard and Edward Kwasnick (Dkt. ## 294, 295).[1] Plaintiff asks the Court exclude the testimony of defendant Cintas Corporation's (Cintas) medical causation expert, Alfred Bowles, M.D., because he is not qualified to testify in the specialized area of traumatic injuries caused by industrial accidents and he did not follow reliable methodology to reach his opinions. Plaintiff also asks the Court to exclude the testimony of William Howard, Ph.D., and Edward Kwasnick, P.E., due to their alleged lack of qualification to offer expert testimony in the area of industrial safety.

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[1] Plaintiff's original motions to exclude expert witnesses (Dkt. ## 257, 259, 261, 263) are moot based on the filing of the amended motions in limine. For clarity, the Court references the sealed and unsealed versions of both the original and amended motions, although the Court notes that the Court Clerk has docketed the unsealed versions only as pending motions.

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I.

On March 6, 2007, Eleazar Torres Gomez (decedent) died when he climbed onto an energized conveyor and fell into a dryer at Cintas' Tulsa plant. On July 16, 2007, plaintiff filed this case in Tulsa County District Court alleging, inter alia, an intentional tort under Parret v. UNICCO Services Co., 127 P.3d 572 (Okla. 2005), against Cintas. Plaintiff claims that Cintas acted with "knowledge of the substantial certainty that [its] conduct would cause serious injury or death to persons like Eleazor Torres Gomez." Dkt. # 7, at 28. In preparation for trial, Cintas retained the expert services of Dr. Howard and Kwasnick, and a co-defendant, Lavatech, Inc. (Lavatech), retained Dr. Bowles as a medical causation expert. All three experts prepared expert reports and were deposed by plaintiff.

Dr. Howard holds a masters degree and Ph.D. in mechanical engineering from the University of Pennsylvania and he is a licensed professional engineer in Georgia, New Jersey, and Alabama. He is currently the president of a consulting company called Stability Technology, Inc. (Stability Technology), and he states that Stability Technology:

> specializ[es] in Manufacturing, including the design and development of new industrial machinery. Stability Technology is a company that provides specialized design and engineering services to Manufacturing companies in the area of manufacturing, machinery, industrial equipment, packaging equipment, and industrial automation. In particular, this includes the Mechanical and Electrical design of machinery, Manufacturing economic analysis, Manufacturing consulting, Manufacturing productivity and efficiency analysis and improvement, [and] legal services (Tort and Intellectual Property) related to the design of machinery . . . .

Dkt. # 370, Ex. A, at 19. He opines that Cintas provided sufficient training to the decedent to prevent this accident and that the decedent showed "reckless disregard for his own safety" and for Cintas' safety policies by climbing onto an energized conveyor. Id. at 18. He also states that Cintas' safety policies were adequate to prevent injury to its employees, and the management of

Cintas' Tulsa plant was unaware that employees were mounting energized conveyors after these safety policies were adopted. Id.

Kwasnick is a licensed professional engineer in Alabama, Florida, Louisiana, Mississippi, South Carolina, and Virginia, and currently serves as the president of a consulting company called Turn-Key Industrial Engineering Services, Inc. (Turn-Key). Turn-Key provides "laundry facility design and process improvement services for customers in the uniform . . . market[]." Dkt. # 370, Ex. B, at 13. Before operating a consulting company, Kwasnick worked as a plant manager for a laundry facility in Lakeland, Florida and as a project manager or engineer for several employers, including at least one laundry facility. Id. at 14-15. Kwasnick prepared an expert report concerning the adequacy of Cintas' safety polices, as compared to other industrial laundry facilities, and compliance with OSHA regulations. Id. at 11. He also opined that it was not unreasonable for Cintas to staff the automated wash with only one employee and that there was no evidence that management was aware of any violations of Cintas' safety policies.

Dr. Bowles was originally retained by Lavatech to provide expert testimony on the medical cause of decedent's death, but he has since been designated as an expert witness by Cintas as well. Dr. Bowles has a bachelors degree in mechanical engineering from Purdue University, and a medical degree from Indiana University. He states that he is employed by Biodynamic Research Corporation as a consultant and provides expert services in the areas of "biomechanics, occupant kinematics, injury causation, mechanism of injury and vehicle crashworthiness." Dkt. # 372, Ex. B, at 1. He also practices as a general and emergency physician and serves as a general surgeon in the United States Air Force Reserve. Id. Dr. Bowles visited a Cintas facility in San Antonio, Texas and observed the operation of an automated wash alley. Id. at 3. On May 11, 2009, Dr. Bowles

conducted an "exemplar/surrogate demonstration" using a Lavatech dryer using the following method:

> A human-form surrogate was placed in a recumbent, foot-leading position, on the shuttle conveyor at the end of 276 pairs of previously laundered blue jeans. The shuttle conveyor was activated to allow loading of the Lavatec dryer. The surrogate entered through the front of the dryer near the tail-end of the garment load. After entering feet-first up to about the waist level, the remainder of the surrogate was quickly pulled through the dryer entry opening. The orange-colored garment on the human form re-appeared in the entry door opening about every 1-2 seconds for several revolutions. The human form disappeared from view as the dryer doors closed. As garments entered the rotating dryer, the load began to move toward the open exit side. Pairs of blue jeans gradually moved out to the rear conveyor. The surrogate device made several tumbles and interior contacts before being ejected onto the rear conveyor. The human-form surrogate was recovered and a second run was made loading only the surrogate into the operating dryer. The surrogate made several tumbles and contacts in the dryer drum before being ejected out of the exit side of the machine.

Id. at 5 (emphasis added). Dr. Bowles concluded that the dryer movement would have caused the decedent to suffer a concussion within seconds and "[i]t is likely that [decedent] was unconscious and fatally injured by mechanical head trauma before he was impaired by any mechanism associated with the thermal energy introduced by the dryer." Id. at 6.

II.

In Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), the Supreme Court held that district courts must initially assess the admissibility of "scientific" expert testimony under Fed. R. Evid. 702. The Supreme Court extended the gatekeeper role of federal district courts to all expert testimony in Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999). In Bitler v. A.O. Smith Corp., 400 F.3d 1227 (10th Cir. 2005), the Tenth Circuit discussed the role of district courts when considering a Daubert challenge to the admissibility of expert testimony. First, the court should make a preliminary finding that the expert is qualified to testify. Id. at 1232-33. Next, the

proponent of expert testimony must establish that the expert used reliable methods to reach his conclusion and that the expert's opinion is based on a reliable factual basis. Id. at 1233. The Tenth Circuit cited four factors that district courts should apply to make a reliability determination:

> (1) whether a theory has been or can be tested or falsified; (2) whether the theory or technique has been subject to peer review and publication; (3) whether there are known or potential rates of error with regard to specific techniques; and (4) whether the theory or approach has "general acceptance."

Id. at 1233 (citing Daubert, 509 U.S. at 593-94). The Tenth Circuit was clear that "a trial court's focus generally should not be upon the precise conclusions reached by the expert, but on the methodology employed in reaching those conclusions." Id. In other cases, the Tenth Circuit has emphasized that any analytical gap in an expert's methodology can be a sufficient basis to exclude expert testimony under Daubert. Trucks Ins. Exchange v. MagneTek, Inc., 360 F.3d 1206, 1212-13 (10th Cir. 2004); Goebel v. Denver & Rio Grande Western R. Co., 346 F.3d 987, 992 (10th Cir. 2003). Under Daubert, "'any step that renders the analysis unreliable . . . renders the expert's testimony inadmissable. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology.'" Mitchell v. Gencorp Inc., 165 F.3d 778, 783 (10th Cir. 1999) (citing In re Paoli R.R. Yard PCB Litigation, 35 F.3d 717, 745 (3d Cir. 1994)).

III.

Plaintiff asks the Court to exclude the expert testimony of Dr. Bowles because he lacks any qualifications to offer an opinion on medical causation in the specific area of industrial accidents, and she claims that Dr. Bowles applied unreliable methodology to reach his opinions. Plaintiff also asks the Court to exclude the testimony of Dr. Howard and Kwasnick based on their alleged lack of qualifications. Plaintiff did not attach a copy of any expert report to her motions and, after

prompting by the Court,[2] did file amended motions in limine citing deposition testimony supporting her arguments. No other evidence was submitted with plaintiff's motions to exclude expert testimony.

A.

Plaintiff asks the Court to exclude the testimony of defendant's medical causation expert, Dr. Bowles, because he is unqualified and his testing methods were unreliable.[3] Plaintiff relies solely on the opinion of her attorney to show that Dr. Bowles is unqualified and that Dr. Bowles' testing methods render his expert opinions unreliable. Defendant responds that Dr. Bowles is qualified to testify in the general areas of biomechanics and traumatic injury, and he applied reliable methodology to reach his opinions. Defendant also argues that plaintiff's motion is inadequate to

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[2] Cintas filed a motion to clarify (Dkt. # 290) asking the Court to deny plaintiff's motions to exclude expert testimony without requiring Cintas to respond or to require plaintiff to supplement her motions with evidence supporting her requests to exclude expert testimony. The Court granted Cintas' motion and plaintiff filed amended motions in limine citing to deposition testimony by each expert.

[3] Plaintiff also argues that Dr. Bowles was designated as an expert for Lavatech, and Cintas did not make timely disclosure that it would also be offering Dr. Bowles's testimony. However, plaintiff cites no authority in support of its argument that Dr. Bowles' testimony should be excluded on this basis. The Federal Rules of Civil Procedure require an expert witness to prepare a report "containing a complete statement of all opinions to be expressed." Fed. R. Civ. P. 26(a)(2)(B). A party's failure to timely disclose the identity of an expert witness or provide an expert report requires the court to automatically exclude expert testimony unless the violation of Rule 26(a)(2) was justified or was harmless under the circumstances. Fed. R. Civ. P. 37(c)(1); Woodworker's Supply, Inc., v. Principal Mut. Life Ins. Co., 170 F.3d 985, 992-93 (10th Cir. 1999). In this case, any untimely expert designation by Cintas is harmless, because Lavatech designated Dr. Bowles as an expert witness and plaintiff had an opportunity to depose Dr. Bowles. The fact that Dr. Bowles is called by Cintas, instead of Lavatech, does not prejudice plaintiff.

justify the pretrial exclusion of expert testimony, because the motion is supported solely by the bare assertions of plaintiff's counsel.[4]

While defendant has the burden to show that Dr. Bowles's expert testimony is sufficiently reliable for admission at trial, plaintiff must offer more than the opinion of her attorney to demonstrate that Dr. Bowles' testimony should be excluded by a pretrial ruling on a motion in limine. Plaintiff relies solely on a one-sided assessment of Dr. Bowles' qualifications, without reference to his expert report, in an attempt to show that he is not qualified to testify. See Dkt. # 292, at 11. Plaintiff has not cited any expert testimony or peer-reviewed article questioning the reliability of Dr. Bowles' methods, as compared to the methods employed by other experts in the same field. The issue before the Court is whether Dr. Bowles is qualified to testify and applied methodology accepted by other experts in the same field to reach his opinions, not whether his opinions are absolutely correct. See Dodge v. Cotter, 328 F.3d 1212, 1222 (10th Cir. 2003) ("While expert opinions 'must be based on facts which enable [the expert] to express a reasonably accurate conclusion as opposed to conjecture or speculation, . . . absolute certainty is not required."). Thus, the Court must review the record to determine if defendant has shown that Dr. Bowles is preliminarily qualified to testify and if he applied reliable methodology, and mere argument from plaintiff's counsel questioning these issues will not prevent Dr. Bowles from testifying.

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[4] Plaintiff replies that any challenge to the admissibility of expert testimony requires the proponent to establish that expert testimony is admissible. Dkt. # 393, at 1-3. Of course, the Court may not abdicate its gatekeeper function, and must find that an expert is qualified and applied reliable methodology before permitting expert testimony at trial. See Goebel v. Denver and Rio Grande Western R.R. Co., 215 F.3d 1083, 1087 (10th Cir. 2000). This does not mean that a court must exclude expert testimony before trial based on an inadequate Daubert motion, because the Court has discretion to determine how to exercise its gatekeeper role. Id.

Plaintiff claims that Dr. Bowles lacks the qualifications to offer any opinion outside of his limited field of expertise - injuries caused by automobile crashes - and he should not be permitted to testify about decedent's death in an industrial accident. Dr. Bowles is a licensed physician and a board certified surgeon. Dkt. # 292, Ex. A, at 2. He also has a bachelors degree in mechanical engineering. Dkt. # 372, Ex. A, at 1. He has published several peer-reviewed articles on the biomechanics of injuries in automobile accidents, but none of these articles applied to accidents in industrial settings. Dkt. # 292, Ex. A, at 3. However, the mere fact that Dr. Bowles has no specific training in industrial accidents does not render him unqualified to discuss decedent's injury. Daubert and Kumho do not require that an expert possess specialization in the precise issue before the Court, as long as the expert stays "within the reasonable confines of his subject area." Ralston v. Smith & Nephew Richards, Inc., 275 F.3d 965, 970 (10th Cir. 2001). While Dr. Bowles' expert report reflects that he has specialized in injuries caused by automobile accidents, it is clear that he possesses a general expertise in the area of the biomechanics of traumatic injuries, such as the incident causing decedent's death, and defendant has shown that Dr. Bowles is preliminarily qualified to offer an opinion about the cause of decedent's death and decedent's pain and suffering.

Plaintiff also challenges Dr. Bowles' methodology, and claims that his testimony should be excluded as unreliable for three reasons: (1) Dr. Bowles dropped an unconscious test dummy into the dryer, but this did not accurately replicate how a conscious person would respond in the same conditions; (2) Dr. Bowles removed instrumentation from the test dummies and did not measure the actual force inside the dryer; (3) Dr. Bowles conducted testing using an empty dryer, while there were clothes in the dryer when decedent died. Dkt. # 292, at 9. These arguments go the substance of Dr. Bowles testimony, and plaintiff has offered no evidence that experts in the field would not

use similar methods. This is clear from plaintiff's reliance on Michael Cody's testimony concerning his fall into a dryer. Cody fell into a dryer at Cintas' plant in Painesville, Ohio, but another employee observed Cody fall into the dryer and turned off the dryer within several seconds of the fall. Cody was not killed, but he did suffer some personal injuries. Plaintiff claims that Dr. Bowles's opinions are refuted by Cody's actual experience, because Cody was fully conscious for the entire duration of his time inside the dryer. Cody's experience may be used to question Dr. Bowles' ultimate conclusions, but it does not show that his methods were unreliable. Plaintiff argues that a conscious person would respond differently than a mannequin inside the dryer, but she offers no evidence that there was a safe way to perform such testing. Next, plaintiff claims that Dr. Bowles used an uninstrumented mannequin for testing, but fails to note that Dr. Bowles testified in his deposition that the instrumentation would not survive in the environment within an industrial dryer. Dkt. # 372, Ex. A, at 12-13. Dr. Bowles has offered a reasonable explanation for using an uninstrumented mannequin to conduct testing, and this is not a basis to exclude his testimony. Finally, plaintiff claims that Dr. Bowles's testing was unreliable, because there were no clothes in the dryer when he conducted his testing. This statement is inaccurate. Dr. Bowles' expert report states that he placed the test dummy behind a load of blue jeans, and the test dummy slipped into the dryer after the clothes. Dkt. # 372, Ex. B, at 5. He also ran a separate test without clothes in the dryer. Id. Plaintiff may challenge Dr. Bowles' conclusions through cross-examination, but she has not shown Dr. Bowles' testimony should be excluded due to the unreliability of his methodology. Plaintiff's motion to exclude Dr. Bowles' testimony (Dkt. # 293) should be denied.

B.

Plaintiff claims that neither Dr. Howard nor Kwasnick is qualified to testify about safety standards in an industrial laundry facility, because neither witness has experience or training in this specialized area. However, plaintiff fails to attach a copy of either Howard's or Kwasnick's expert reports, and asks the Court to consider plaintiff's one-sided summary of the experts' qualifications as a basis to exclude their testimony. Defendant has produced both Dr. Howard's and Kwasnick's expert reports, and their reports contain a description of their qualifications. Based on defendant's disclosures, there is a sufficient record to consider plaintiff's argument that Dr. Howard and Kwasnick are unqualified to testify, and the Court can preliminarily assess Dr. Howard's and Kwasnick's qualifications to offer expert testimony at trial.

Dr. Howard has a Masters degree and Ph.D. from the University of Pennsylvania in mechanical engineering. He is a licensed professional engineer. He is currently the president of Stability Technology, a consulting firm specializing in "design and engineering services to Manufacturing companies in the area of manufacturing, machinery, industrial equipment, packaging equipment, and industrial automation." Dkt. # 370, Ex. A, at 19. He states that most of his work involves machinery design and automation, but he provides consultation on "machinery safety work and OSHA compliance for machinery." Id. at 2. His proposed expert testimony concerns the adequacy of defendant's safety procedures. Plaintiff objects to Dr. Howard on the basis that he has no specialized knowledge concerning safety standards for laundry machinery. As with Dr. Bowles, it is not necessary that Dr. Howard have specialized training in or knowledge of the precise issue before the Court, as long as he is qualified as an expert in the general field of machinery safety. See Ralston, 275 F.3d at 970. Plaintiff makes no argument that Dr. Howard lacks the expertise to testify

as an expert witness in the general field of machinery safety, and the Court finds that defendant has preliminarily established that Dr. Howard is qualified to offer the expert opinions stated in his report.

Kwasnick is a professional engineer and is the president of Turn-Key, a consulting company providing "laundry facility design and process improvement services" for a wide range of companies. Dkt. # 370, Ex. B, at13. Plaintiff claims that Kwasnick's sole experience in the laundry industry is his brief experience as a plant manager for a laundry facility in Lakeland, Florida. However, Kwasnick also has other work experience in the laundry industry and he has published articles concerning the management and operation of industrial laundry facilities.[5] Plaintiff claims that Kwasnick may have expertise on the "mechanical and operational aspects of the laundry industry," but he has no experience or training in the area of plant safety. Dkt. # 396, at 2. However, plaintiff downplays Kwasnick's prior work experience, including his tenure as the plant manager of an industrial laundry facility, and under-represents Kwasnick's experience in the laundry industry. There is no apparent reason to question Kwasnick's expertise in the specialized field of the management and operation of laundry facilities, and he is preliminarily qualified to offer expert testimony on safety standards applicable to an industrial laundry facility.

Plaintiff also claims that Dr. Howard and Kwasnick may attempt to offer testimony concerning what Cintas' Tulsa managers actually knew, and this testimony would constitute inadmissible hearsay and is not based on the expert's personal knowledge. Dkt. # 295, at 7. It is unclear why an expert would ever rely on "personal knowledge" because the experts are generally

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[5] Kwasnick's expert report provides no indication if any of his articles were published in peer-reviewed journals, and the Court makes no finding on this issue.

called upon to provide after-the-fact opinions based on their experience and training, not testimony concerning their firsthand knowledge of the relevant facts. Under Fed. R. Evid. 703, an expert may base his opinions on inadmissible evidence, but the expert may not disclose the inadmissible evidence to the jury unless the Court finds that the probative value in assisting the jury consider the expert's testimony outweighs the prejudicial effect of the evidence. See Structural Polymer Group, Ltd. v. Zoltek Corp., 543 F.3d 987, 997 (8th Cir. 2008). Plaintiff's claim that expert testimony should be excluded because the experts relied, in part, on inadmissible hearsay is meritless. However, neither Dr. Howard nor Kwasnick may attempt to inject inadmissible evidence into the trial through their testimony.[6] Plaintiff's motion to exclude the testimony of Howard and Kwasnick should be denied with the caveat that defendant may not elicit inadmissible hearsay from its expert witnesses at trial.

IT IS THEREFORE ORDERED that Plaintiff's Amended Motion in Limine to Exclude Testimony from Dr. Alfred Bowles (Dkt. ## 292, 293) and Plaintiff's Amended Motion in Limine to Exclude Testimony from William Howard and Edward Kwasnick (Dkt. ## 294, 295) are **denied**.

IT IS FURTHER ORDERED that Plaintiff's Motion in Limine to Exclude Testimony from Dr. Alfred Bowles (Dkt. ## 257, 261) and Plaintiff's Motion in Limine to Exclude Testimony from William Howard and Edward Kwasnick (Dkt. ## 259, 263) are **moot**.

DATED this 31st day of March, 2010.

Claire V. Eagan

CLAIRE V. EAGAN, CHIEF JUDGE
UNITED STATES DISTRICT COURT

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[6] Plaintiff may elicit inadmissible evidence on cross-examination of defendant's experts, and the bar on an expert's testimony concerning inadmissible evidence applies only to the party offering the expert testimony. Pineda v. Ford Motor Co., 520 F.3d 237, 247 n.14 (3d Cir. 2008).