

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

SUSSEX COUNTY COURTHOUSE
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GEORGETOWN, DE 19947
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December 17, 2013

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RE: *Audrey E. Sweiger v. Delaware Park, L.L.C. & Delaware Racing
Association d/b/a Delaware Park,*
C.A. No. S11C-10-020 RFS

Date submitted: October 8, 2013

Dear Counsel:

Before the Court is Plaintiff Audrey E. Sweiger's ("Plaintiff's") Motion *in Limine* to Exclude or Limit the Testimony of Todd T. Breck ("Breck"), expert for Defendants Delaware Park, L.L.C. and Delaware Racing Association d/b/a Delaware Park ("Defendants"). Plaintiff's Motion is **DENIED**.

Facts

This Motion stems from an incident which occurred on the evening of January 13, 2010. On that date, Plaintiff, an eighty-one-year-old woman, visited Defendants' establishment, and was present in Defendants' casino at about 6:20 p.m. Plaintiff

claims that she left the casino area and entered an adjacent glass-enclosed alcove, which Plaintiff believed to be a smoking room. Plaintiff then attempted to re-enter the casino through a different entrance and in doing so, walked into an unmarked glass window and fell to the floor. She suffered bodily injuries as a result. Other glass windows within the wall contained decals, but the one causing Plaintiff's injury did not.

Analysis

Plaintiff contends that Breck's conclusions do not meet the rigors required of expert opinions because they are nothing more than disguised lay opinions which embrace, without any expert basis or support, the ultimate issue that Plaintiff was not paying attention when she walked into the glass window. Plaintiff provides various excerpts from Breck's deposition in which he opines as such and states that his conclusions came from common knowledge and his "entire persona and the way [he] move[d] through the planet."¹ Furthermore, because Plaintiff does not allege negligence *per se*, she chastises Breck's insinuation that because Defendants violated no code or ordinance, no negligence occurred.

Defendants counter that Breck's conclusions do meet the standards required of expert opinions. According to them, Plaintiff asserts that Breck's opinions are

¹ Tr. of Todd T. Breck at 90: 19–20.

based on nothing more than common knowledge by pointing to excerpts from his deposition which are taken out of context. In actuality, Defendants contend, Breck's deposition testimony demonstrates his use of a reliable basis in forming his conclusions. To the extent common knowledge factored into his opinions, Defendants argue that Breck merely and permissibly applied that knowledge to technical architectural design. Additionally, Defendants note that under the Delaware Rules of Evidence, an expert may testify regarding an ultimate issue.²

In its decision on Defendants' Motion *in Limine* to Exclude Testimony of Plaintiff's Expert Witness Julius Pereira,³ the Court laid out the rules regarding expert testimony. The basic necessities of an expert opinion are relevance and reliability.⁴ This Court concludes that Breck's opinions are both. They are relevant because they could be helpful to the trier of fact, and reliable because they discuss matters beyond common knowledge, such as an analysis of the site of the injury. At one point in his deposition, Breck opines on the triable issue of the visibility of the glass window:

² *E.g.*, D.R.E. 704 ("Testimony in the form of an opinion or inference otherwise admissible is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact.").

³ *Sweiger v. Delaware Park, L.L.C.*, C.A. No. S11C-10-020 RFS, at 7–13 (Del. Super. Dec. 9, 2013).

⁴ *See Ward v. Shoney's, Inc.*, 817 A.2d 799, 802 (Del. 2002) (citing *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)).

As stated in my report, the reason I wanted to measure the light was to make sure that we met the requirements of the code and it exceeded those requirements, and, therefore, people were not fumbling around in the dark not being able to see where they were going. There is sufficient light for people who were paying attention to the direction that they were traveling to make sure they were not going to walk into something.⁵

The Court also notes that Defendants are correct that an expert may opine that architects and engineers incorporate common sense conclusions into their designs.⁶

Breck's opinion establishes that he did this:

It's my knowledge specifically as an expert because I pay attention to these things, that's what I do. And as one is walking to an entrance she should be looking down because there is a piece of aluminum at the bottom that if she didn't see and it was open, she would have tripped over. So, to me she should be looking more than just straight ahead and I don't know what she was looking at, but, it's my opinion that she wasn't paying attention to where she was headed.⁷

⁵ Tr. of Todd T. Breck at 122: 5–14.

⁶ See *Ward*, 817 A.2d at 803 (“Properly viewed, [the] expert[’s] opinion relates only to the fact that designers should take into account pedestrian walking habits; and that, given people’s tendency to cut corners, the landscape edging should have been low enough to avoid being a tripping hazard for those who took the short cut.”).

⁷ Tr. of Todd T. Breck at 91: 2–12.

Based on the above, Plaintiff's Motion is **DENIED**.

IT IS SO ORDERED.

Very truly yours,

/s/ Richard F. Stokes

Richard F. Stokes

Cc: Prothonotary
Judicial Case Manager