

I. Background¹

On February 8, 1999, Charles E. Bethea was fatally shot in a robbery while he was entering the Divas International Gentlemen’s Club (“Divas”), an adult entertainment establishment located at 6201 Bristol Pike, Levittown, Bucks County, Pennsylvania. This property is owned by defendant Larken Hotel, who leased to defendant Bristol Lodge the restaurant space in which the club is located. Defendant Kenneth Stein is a limited partner and executive in the general partner of Larken Hotel, as well as the president and fifty percent stockholder of Bristol Lodge. Bristol Lodge in turn entered into a restaurant-management agreement (“Management Agreement”) with the Divas Defendants for them to operate and manage Divas. Divas is a restaurant and bar that provides adult entertainment in the form of topless dancing. Plaintiffs allege that defendants collectively failed to provide lighting and security sufficient to maintain a reasonable and safe premises, and that decedent Charles E. Bethea suffered and died as a result of this negligence. They have brought this wrongful death and survivors action pursuant to 20 Pa.C.S. § 3373, 42 Pa.C.S. §§ 8301-02, and Pa.R.C.P. 2201(A).

The following uncontested facts regarding Mr. Bethea’s murder were taken from the deposition of Detective Raymond Buzek. (Divas Def. Mot., Exh. E). Dewayne Housely was arrested in July 1999, and upon trial was convicted for the killing of Mr. Bethea. Mr. Housely was 22 at the time of his arrest, and had a history of criminal offenses. He had been released from prison several months prior to the Mr. Bethea’s murder, after a seven-year imprisonment for a number of car-jackings. There was no evidence that Mr. Bethea knew Mr. Housely, but the facts show that Mr. Housely clearly targeted Mr. Bethea. According to the police investigation, Mr. Housely first intended to rob Mr. Bethea on February 6, 1999. With a friend, Mr. Housely followed Mr. Bethea from a gambling establishment in Trenton, New Jersey that Mr. Bethea

¹ All facts are reviewed in the light most favorable to the non-moving party, as required on a motion for summary judgment. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348 (1986) (quoting United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993 (1962)).

frequented. Upon entering Pennsylvania, however, Mr. Housely's car ran out of gas, and he was forced to postpone his plans.

On the following evening, February 7, 1999, Mr. Housely again attempted to rob Mr. Bethea. Mr. Housely was accompanied by Courtney Boone, who later pleaded guilty to his role in the events. At 11:30 p.m., Mr. Housely and Mr. Boone followed Mr. Bethea from the gambling establishment to an Eckerd drug store and later to a diner, all located in Trenton, New Jersey. They subsequently followed Mr. Bethea into Pennsylvania to Divas. Mr. Bethea parked in the parking lot outside, where Mr. Housely similarly parked. As Mr. Bethea headed toward the first set of doors, Mr. Housely got out of his car and grabbed Mr. Bethea's arm. Mr. Bethea swatted Mr. Housely away and ran to enter the building. Mr. Housely followed. The two apparently had a very brief altercation between the first and second set of double doors of the entrance. According to eyewitnesses seated inside the Divas Club, Mr. Bethea flew backwards through the second set of doors into the room, with his hands raised in front of his face and his back facing the club. At that moment, shortly after midnight on February 8, 1999, Mr. Housely shot and killed Mr. Bethea who was then inside Divas as described. Mr. Housely then rifled through Mr. Bethea's pockets and escaped with some amount of cash. From the time Mr. Bethea entered the first set of double doors to the time he was shot, approximately ten seconds or less had elapsed.

II. Motion to Exclude Expert Testimony

The Divas Defendants have moved under Federal Rule of Evidence 702 to exclude the testimony of plaintiff's proffered expert, Robert Peloquin.

Legal Standard

Federal Rule of Evidence 702, as amended December 1, 2000, states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the

facts of the case.

Under Rule 702, when “[f]aced with a proffer of expert scientific testimony . . . the trial judge must determine at the outset, pursuant to Rule 104(a) whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.” Daubert v. Merrell Dow Pharms., 509 U.S. 579, 592, 113 S. Ct. 2786, 2796, 125 L. Ed. 2d 469 (1993) (footnotes omitted). This gatekeeping function extends beyond scientific testimony to “testimony based on . . . ‘technical’ and ‘other specialized’ knowledge.” Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141, 119 S. Ct. 1167, 1171, 143 L. Ed. 2d 238 (1999).

The Court of Appeals for the Third Circuit has established that Federal Rule of Evidence 702 as interpreted by Daubert and its progeny embodies “three distinct substantive restrictions on the admission of expert testimony: qualifications, reliability, and fit.” United States v. Mathis, 264 F.3d 321, 335 (3d Cir. 2001), cert. denied, 152 L. Ed. 2d 148, 122 S. Ct. 1211 (2002) (quoting Elcock v. Kmart Corp., 233 F.3d 734, 741 (3d Cir. 2000)). The proponent of the expert testimony bears the burden of establishing its admissibility by a preponderance of the evidence. See Oddi v. Ford Motor Co., 234 F.3d 136, 144 (3d Cir. 2000), cert. denied, 121 S. Ct. 1537 (2001).

The Third Circuit Court of Appeals has set the following standard to qualify as an expert:

Rule 702 requires the witness to have “specialized knowledge” regarding the area of testimony. The basis of this specialized knowledge “can be practical experience as well as academic training and credentials.” We have interpreted the specialized knowledge requirement liberally, and have stated that this policy of liberal admissibility of expert testimony “extends to the substantive as well as the formal qualification of experts.” However, “at a minimum, a proffered expert witness . . . must possess skill or knowledge greater than the average layman. . . .”

Elcock, 233 F.3d at 741 (quoting Waldorf v. Shuta, 142 F.3d 601, 625 (3d Cir. 1998)).

The factors which govern reliability are as follows:

(1) whether a method consists of a testable hypothesis; (2) whether the method has been subject to peer review; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; (5) whether the method is generally accepted; (6) the relationship of the technique to methods which have been established to be reliable; (7) the qualifications of the expert witness testifying based on the methodology; and (8) the non-judicial uses

to which the method has been put.

Elcock, 233 F.3d at 745-46 (quoting In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 742 n.8 (3d Cir. 1994)). It has been noted that Daubert:

makes certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. . . . The trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable. That is to say, a trial court should consider the specific factors identified in Daubert where they are reasonable measures of the reliability of expert testimony.

Elcock, 233 F.3d at 746 (quoting Kumho Tire, 526 U.S. at 152, 119 S. Ct. at 1176). Thus, the factors outlined above are not exhaustive and the inquiry remains flexible. See Elcock, 233 F.3d at 746. Where the testimony is not scientific in nature, “relevant reliability concerns may focus upon personal knowledge or experience,” as opposed to “scientific foundations.” Kumho Tire, 526 U.S. at 150, 119 S. Ct. at 1175.

The fit requirement stems from the textual provision that “scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.” Mathis, 264 F.3d at 335 (quoting F.R.E. 702). Admissibility under this factor turns on “the proffered connection between the scientific research or test result to be presented and particular disputed factual issues in the case.” Oddi, 234 F.3d at 145. This measure is “not intended to be a high one.” Id. Its standard is not dissimilar to the general liberal standard of relevance under the Rules. See Mathis, 264 F.3d at 335.

Analysis

A. Robert Peloquin

According to his deposition testimony, Mr. Peloquin received an undergraduate degree in history and government from Georgetown University in 1951 and a law degree from Georgetown University Law Center in 1956. (Divas Mot., Exh D, Pl. Resp. to Divas, Exh. 5, Peloquin Dep. at 6.) Peloquin served in the United States Navy from 1951 to 1955, and became an intelligence specialist for the Navy Reserves. (Id. at 6-7.) From 1957 to 1967, he worked as an attorney for

the Department of Justice in matters of internal national security and organized crime matters from 1962 to 1967. (Id. at 9-10.) Mr. Peloquin then served as special counsel to the Federal Communications Commission in trials to revoke the licenses for radio and television stations, and as associate house counsel in the Office of the Commission of the Professional Football League. (Id. at 10-11.) From 1968 to 1970, he was a partner in the law firm of Hubley & Peloquin in Washington, D.C. specializing in trial litigation. (Id. at 12-13.)

For purposes of this motion, Mr. Peloquin's more pertinent work experience came after 1970. From 1970 to 1985, he served as president of an organization called INTERTEL, which provided security services to corporate clients. (Id. at 13.) Their first client was Resorts International, a company that owned casinos in the Bahamas. (Id. at 14.) Resorts International funded the formation of INTERTEL and kept the security company on a retainer. (Id. at 14.) As an example of its services for Resorts International, INTERTEL screened the company's personnel, established rules as to how the casino would be run, and set rules governing the physical security of the hotel and casino operations, including restaurants and bars. (Id. at 16.) Other accounts included running seven casinos for another corporation in Nevada, and designing a security program for the protection of students in George Washington University in D.C. (Id. at 17-18.)

Although Mr. Peloquin was employed in various positions within Resorts International after 1985, including serving as the executive vice president from 1985 to 1990 and chairman of the board of Resorts International Bahamas from 1987 to 1989, he continued to be chairman of INTERTEL. (Id. at 18-20.) While he was president and later chairman of INTERTEL, Mr. Peloquin was a member of the American Society of Industrial Security. (Id. at 22.) As such, he received the organization's literature and attended some of its conferences. (Id. at 28-29.) He continues to review various articles of interest to him, although he no longer has a formal subscription to the organization's literature. (Id. at 22.) He further testified that he was in the business of training security guards on casino properties, and that he had reviewed studies done

prior to the passage of laws in Nevada and New Jersey with regard to the effects of surveillance cameras in casino security. (Id. at 29, 24.)

Under the applicable standard, the specialized knowledge of the expert may be derived from practical experience. In light of the practical experience and background in providing corporate security services, Mr. Peloquin has satisfied the Court that he possesses specialized knowledge beyond the ken of the average layman in the area of security for commercial properties. Although the Divas Defendants attempt to distinguish security required for a casino from that of a public restaurant and adult entertainment nightclub, they have provided no grounds to maintain such a narrow distinction. I therefore conclude that Mr. Peloquin is preliminarily and generally qualified to testify at trial as an expert witness on the subject of what security measures would make the activities of patrons at bars, restaurants, nightclubs and casinos safe during their intended visit.

Mr. Peloquin's expert report cites the following deficiencies in the defendants' security as contributing factors to defendants' failure to deter the Bethea murder: (1) failure to position a security host at the security desk in the entrance of the club; (2) provision of insufficient lighting in the parking area; and (3) failure to have sufficient security in the parking lot, either by retaining open surveillance camera coverage, circulating security guards to survey the parking area or providing valet service. Mr. Peloquin opines in his report that nightclubs such as Divas attracts the type of clientele that is more prone to violence. He notes that security hosts accompanied dancers out into the parking lot at the end of the night, revealing the awareness of management of security risks, but that no such measures were taken with regard to patrons.

His expert report and deposition testimony reveals that Mr. Peloquin reached his opinion by reviewing deposition testimony of various witnesses, the police investigation report, and photographs of the Divas club and surrounding parking area. When asked whether he was aware of any studies testing the effectiveness of surveillance equipment in preventing violent crimes, Mr. Peloquin cited studies done prior to the passage of laws on casino security in Nevada and

New Jersey as supportive of his position. (Id. at 24-25.) He stated that he had reviewed these studies about fifteen years ago. (Id.) He admitted, however, that he had done no studies regarding the adequacy or necessity of security cameras or lighting or any other type of security device for restaurants other than a casino restaurant that was subject to statutory security requirements. (Id. at 27.) When asked about the existence of studies testing the effectiveness of security guards' presence in preventing violent crimes, he replied that he didn't know of any studies in that particular area, but that from practical experience he was aware of what a security guard could do. (Id. at 40.) When asked whether he had "seen any scientifically validated study that concludes that a well-lighted parking lot prevents crime," he replied, "No, just common sense." (Id. at 49.) He testified that he had not done "a survey of other similar establishments, either in Pennsylvania, New Jersey, or throughout the country to see if valet service is a standard method of providing security in gentlemen's clubs." (Id. at 55.) He further testified that he was not aware of "any scientific study that indicates that a valet service would reduce the crime that might occur in such establishments," but asserted that such conclusion was "common sense." (Id.) Mr. Peloquin later stated his opinion that "good light is a deterrent to crime" was "based on common sense and experience." (Id. at 98.) He further relied upon "common sense" to support his position that valet service at Divas club might have deterred the crime. (Id. at 55.) When asked whether he had seen "any validated scientific studies which would indicate that the likelihood of crime would be decreased if there was better lighting or a scanning camera," Mr. Peloquin answered, "No, but I'm sure there are some." (Id. at 90.) Finally, Mr. Peloquin was asked, "And there's no way of testing, if I understand correctly, of testing whether a security camera inside the premises or out in the parking lot, what the percentage would be of that preventing a crime?" (Id. at 130.) Mr. Peloquin replied, "No. I think you've on numerous occasions said scientifically based things. No, I don't think there is any. But I do think that the more you have, the better protection you have. That's the whole thing." (Id.)

Because the proffered testimony is not scientific in nature, the methodology need not be

subjected to rigorous testing for scientific foundation or peer review. Nevertheless, the expert must still provide a methodology that can be proven to be reliable. I find that plaintiffs have failed to establish any reliable methodology utilized by Mr. Peloquin. Although plaintiffs argue that Mr. Peloquin's reliance upon the discovery material is the industry standard in forming an expert opinion, this argument misconstrues the concept of methodology.² The expert must explain the means by which he reached his conclusions, and such means must satisfy at least one of the Daubert factors of reliability. In light of Mr. Peloquin's responses and statements, his analysis appears to be no more than his instinctive reaction to the materials provided. He cites to no industry standard for his opinions on the requisite necessities for adequate security, nor does he provide any explanation that could be tested or subjected to peer review as to how he has reached these opinions. "An 'expert's opinion must be based on the methods and procedures of science rather than on subjective belief or unsupported speculation.'" Oddi v. Ford Motor Co., 234 F.3d 136, 158 (3d Cir. 2000) (quoting In re Paoli R.R. Yard PCB Litig., 35 F.3d at 742). Mr. Peloquin's conclusion that the more security measures one takes, the better, rises to nothing more than "ipse dixit [that] does not withstand Daubert's scrutiny." Id. Indeed, in light of Mr. Peloquin's statements that such conclusions were "common sense," the Court determines that the proffered opinion poses no benefit in assisting "the trier of fact to understand or determine a fact in issue" as required under Rule 104(a) and Daubert.³ The jury here can use its own common sense as juries do daily in deciding whether defendants were negligent.

The Court further determines that, in light of these findings, there appears to be no need to call sua sponte for an in limine hearing. See Oddi, 234 F.3d at 153-54 (record sufficient to exclude expert testimony without hearing) (no need for a district court to "provide a plaintiff with

² Methodology is defined as a "body of methods, rules and postulates employed by a discipline: a particular procedure [or] set of procedures." Oddi v. Ford Motor Co., 234 F.3d 136, 157 n. 20 (3d Cir. 2000) (quoting WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 747 (1990)).

³ Additionally, where matters may be elucidated without specialized knowledge through "probing cross-examination and arguments pitched to the common sense of the jury," the probative value of a proffered opinion may be outweighed by considerations of "undue delay, waste of time, or needless presentation of cumulative evidence" and may therefore be excluded under Rule 403. United States v. Stevens, 935 F.2d 1380, 1399-1400 (3d Cir. 1991)

an open-ended and never-ending opportunity to meet a Daubert challenge until plaintiff ‘gets it right’”) (quoting In re TMI Litig., 199 F.3d 158, 159 (3d Cir. 2000), cert. denied sub. nom. General Pub. Utils. Corp. v. Abrams, 530 U.S. 1225, 147 L. Ed. 2d 266, 120 S. Ct. 2238 (2000)). Consequently, I conclude that Mr. Peloquin’s testimony is inadmissible as expert testimony under Rule 702.⁴

B. Frederick Bornhofen

Plaintiffs have requested that in the event the Court grants defendants’ motion to exclude Mr. Peloquin’s testimony, the Court similarly exclude the testimony of Divas Defendants’ expert, Frederick Bornhofen, on the same grounds.⁵ Mr. Bornhofen worked for five years as a Naval Intelligence special agent, three years as a security manager for the Magnavox Company, 5 years as a loss prevention manager for Zenith Radio Corporation, 2 years as the director of security and safety of the National Tea Company, and 12 years as the director of security for the Sun Company. (Pl. Resp. to Divas, Exh. 8, Bornhofen Resumé; Pl. Resp. to Divas, Exh. 7, Divas Repl., Exh. B, Bornhofen Dep. at 14, 1924, 28, 31.) He was later vice president and general manager of Cap Index, Inc., which utilized a mathematical model that took census information, and with a proprietary algorithm, calculated the likelihood of where violent crime would occur. (Pl. Resp. to Divas, Exh. 7, Divas Repl., Exh. B, Bornhofen Dep. at 35.) Since 1990, Mr. Bornhofen has been the principal in Bornhofen and Associates, an independent security consultant group. (Id. at 36; Pl. Resp. to Divas, Exh. 8, Bornhofen Resumé.) Mr. Bornhofen has previously testified as an expert in security matters in state court on five or six occasions in the past ten years. (Pl. Resp. to Divas, Exh. 7, Divas Repl., Exh. B, Bornhofen Dep. at 39.) I find that Mr. Bornhofen’s work experience is sufficient to qualify him as an expert in the public

⁴ This Court is not in the dark as to what methodology Mr. Peloquin used; it is clear from his testimony that he used no methodology to analyze the security risks to patrons at Divas, but rather he relied on his own instincts and common sense.

⁵ The Divas Defendants contend that plaintiffs failed to comply with the Federal or Local Rules of Civil Procedure in filing their Daubert motion with their response. Although the Court notes that the combined filing was confusing, it appears to comply with the procedural requirements. Consequently, the motion will not be dismissed on that ground.

establishment security issues in this instance.

Nevertheless, for the reasons that follow, the Court has determined that it must also exclude Mr. Bornhofen's testimony. A review of his expert report reveals that its purpose is to counter the opinion of Mr. Peloquin by pointing to the weaknesses in Mr. Peloquin's report and deposition testimony. (Pl. Resp. to Divas, Exh. 8, Bornhofen Report). Mr. Bornhofen takes the security deficiencies listed by Mr. Peloquin and argues that there is no scientifically supported data on the deterrent effects of any of the measures. He cites a major study in 1979 that was conducted to determine the effectiveness of lighting as a crime deterrent, and reports that the official conclusion was "inconclusive." (Id. at 4.) Mr. Bornhofen cites the Protection of Assets Manual, which he describes as the "Bible" of the security industry, for the following quotation: "Although lighting is an important aspect of any security program, its effect in reducing crime may be overrated." (Id.) He further cites the Manual as stating that there is no statistical data to support the belief that light reduced crime. (Id.) Mr. Bornhofen also commented that he knew of much anecdotal evidence revealing that lighting does not deter crime. (Id.) He commented similarly on the inconclusive deterrent effects of surveillance cameras, citing Rosemary Erickson's ARMED ROBBERS AND THEIR CRIMES. (Id. at 5.) Further, he dismisses Mr. Peloquin's emphasis on the security hosts and their absence at the front door area by noting, "It is widely recognized by security professionals that a potential victim or Security Officer should never confront or resist an armed man." (Id. at 6). Additionally, Mr. Bornhofen testified at his deposition that the "rule of thumb" for parking lot lighting is that if "you can avoid stumbling and falling" and "can see and read and recognize," the lighting is adequate. (Pl. Resp. to Divas, Exh. 7, Divas Rep., Exh. B, Bornhofen Dep. at 39.) He also stated that valet service was not a "recognized security technique." (Id. at 82.)

Consequently, Mr. Bornhofen does not proffer an opinion so much as he debunks Mr. Peloquin's. Further, Mr. Bornhofen's counter-opinion to Mr. Peloquin's relied upon studies

whose results regarding the deterrent effects of the cited security measures were inconclusive,⁶ as well as anecdotal evidence that he fails to describe outside of noting that violent crimes can occur in broad daylight and that bank robberies have risen despite camera surveillance in banks. Such knowledge is common to any layperson, and similarly to Mr. Peloquin's offered testimony "offers only 'generalized common sense' that 'does not rise to the level of expert opinion solely because it is offered by someone with an academic pedigree.'" ID Sec. Sys. Canada, Inc. v. Checkpoint Sys., 198 F. Supp. 2d 598, 611 (E.D. Pa. 2002) (quoting Fedor v. Freightliner, Inc., 193 F. Supp. 2d 820, 832 (E.D. Pa. 2002)). As the United States Supreme Court has stated:

[T]he general rule is . . . that expert testimony not only is unnecessary but indeed may properly be excluded in the discretion of the trial judge "if all the primary facts can be accurately and intelligibly described to the jury, and if they, as men of common understanding, are as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training, experience, or observation in respect of the subject under investigation"

Salem v. United States Lines Co., 370 U.S. 31, 35, 8 L. Ed. 2d 313, 82 S. Ct. 1119 (1962) (quoting United States Smelting Co. v. Parry, 166 F. 407, 415 (8th Cir. 1909)) (cited with approval in Wilburn v. Maritrans GP Inc., 139 F.3d 350, 359 (3d Cir. 1998)). In light of the decision of the Court to exclude Mr. Peloquin's testimony and the finding that the basis for his rebuttal is not beyond the grasp of the ordinary juror, I conclude that the admission of Mr. Bornhofen's opinion would not assist "the trier of fact to understand or determine a fact in issue" as required under Rule 104(a) and Daubert.⁷

Mr. Bornhofen does render an opinion that Divas "was not negligent or unreasonable in their operation of their business on the day in question." (Id. at 8.) Nevertheless, Mr. Bornhofen provides no basis for this conclusion, other than a conclusory statement citing to his career, training, readings seminar attendance and experience. (Id.) Despite his statement that "the

⁶ I further observe that nowhere in Mr. Bornhofen's deposition testimony or expert report did he discuss any factors that might demonstrate the cited studies' independent reliability, such as the studies' sponsors, the time-frame in which they were done, or the variables that were studied.

⁷ Thus, Mr. Bornhofen's opinion may similarly be excluded under Rule 403. Stevens, 935 F.2d at 1399-1400.

security efforts [of Divas] were consistent with the perceived threats and the type of business that was operated,” Mr. Bornhofen does not explain what would constitute sufficient security measures for Divas given the nature of its business and history, nor does he describe what measures taken by Divas upon which he based his analysis and how they were sufficient. (Id.) He thus does not indicate and support an argument of what would constitute reasonable and sufficient security measures for Divas. In the absence of a reliable methodology, Mr. Bornhofen’s attempt to disprove Mr. Peloquin’s opinion, by arguing that there is no evidence to support it, does not provide a reliable methodology for an independent opinion that defendants were not negligent. I find that Mr. Bornhofen’s conclusions, like Mr. Peloquin’s, pose inadmissible “ipse dixit.” In light of the Court’s findings, the Divas Defendants would not gain any advantage from an in limine hearing. I conclude that Mr. Bornhofen’s proffered expert opinion is inadmissible under Rule 702.

Conclusion

Upon a full review of the expert reports and deposition testimonies for both Mr. Peloquin and Mr. Bornhofen, I find the submissions wholly inadequate to determine even the existence of a reliable methodology of evaluating security measures in a public restaurant and nightclub, whether scientifically accepted or practically applied. It appears from the deposition testimony that there is no scientifically accepted methodology. Mr. Peloquin testified that he was not aware of any studies that were done on the effectiveness of camera surveillance or lighting. (Divas Mot., Exh D, Pl. Resp. to Divas, Exh. 5, Peloquin Dep. at 98.) When asked whether he was “aware of any standards that have been promulgated anywhere in this country which specified the type of lighting, patrolling or surveillance in a parking lot of a retail establishment such as Divas,” he responded, “No, I think it’s up to the management to determine what they should do to properly protect their people.” (Id.) Similarly, Mr. Bornhofen testified that he wasn’t familiar with any particular studies on the prevention of violent crime at restaurants or nightclub establishments, and that he did not know “of any studies specifically designed to study violence

in restaurants or those kind of institutions.” (Pl. Resp. to Divas, Exh. 7, Divas Repl., Exh. B, Bornhofen Dep. at 43.) Not surprisingly, neither expert offered nor was asked in his deposition whether he used a practically applied methodology or whether one existed in the industry because it is clear that neither expert knew of or used any analytical methodology in reaching their conclusions, and I will not infer the existence of one absent any evidence of it in the record.

For the foregoing reasons, the opinions and testimony of both Mr. Peloquin and Mr. Bornhofen will be excluded. Nevertheless, I find that the expert opinions are not necessary to determine whether the defendants were negligent, and that lay persons may determine any negligence based upon their own common sense and experience. I will therefore consider the motions for summary judgment without any reliance upon the excluded opinions.

III. Motions for Summary Judgment

Legal Standard

Federal Rule of Civil Procedure 56 (c) states that summary judgment may be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” For a dispute to be “genuine,” the evidence must be such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). If the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party to “do more than simply show that there is some metaphysical doubt as to the material facts.” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The non-moving party may not rely merely upon bare assertions, conclusory allegations, or suspicions. See Fireman's Ins. Co. v. Du Fresne, 676 F.2d 965, 969 (3d Cir. 1982).

Analysis

A. Divas Defendants

I note at the outset that the parties agree that Pennsylvania law applies in this diversity action, and this Court will therefore not engage in a conflicts of law analysis. It is well settled that when sitting in diversity, this Court is bound to accept the decisions of the state's highest court as the "ultimate authority of state law." Estate of Meriano v. Commissioner, 142 F.3d 651, 659 (3d Cir. 1998). If the Pennsylvania Supreme Court has not decided an issue, this Court is to consider the decisions of lower state courts, as well as federal appeals and district court cases interpreting state law. See State Farm Mut. Auto. Ins. Co. v. Coviello, 233 F.3d 710, 713 (3d Cir. 2000).

To establish liability for negligence, plaintiff must establish the following four elements: (1) a duty or obligation recognized by the law, requiring the actor to conform to a certain standard of conduct; (2) a failure to conform to the standard required; (3) a causal connection between the conduct and the resulting injury and (4) actual loss or damage resulting to the interests of another. See Morena v. South Hills Health System, 501 Pa. 634, 642 n. 4 (1983). Pennsylvania has adopted the standard of care set forth in Section 344 of the Restatement (Second) of Torts, for liability involving business premises upon to the public resulting from the accidental, negligent or intentional acts of third persons towards other persons on the property. See Kenny v. Southeastern Pennsylvania Transp. Auth., 581 F.2d 351, 354 (3d Cir. 1978), cert. denied, 439 U.S. 1073, 59 L. Ed. 2d 39, 99 S. Ct. 845 (1979) (citing Moran v. Valley Forge Drive-In Theater, Inc., 431 Pa. 432, 246 A.2d 875 (1968)). The Restatement (Second of Torts) provides:

A possessor of land who holds it out to the public for entry for his business purposes is subject to liability to members of the public while upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

Restatement (Second) of Torts § 344. The Pennsylvania Supreme Court has cited with approval comment f to Section 344, which provides in relevant part:

Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.

In the seven years prior to Mr. Bethea's murder, there had been one other fatal shooting in the Divas parking lot. According to deposition testimony of Detective Buzek and Walter Trout, a former manager of Divas, the previous incident occurred in 1997 and involved a personal dispute between a Divas security employee and an acquaintance. (Pl. Resp. to Divas, Exh. 12, Trout Dep. at 48-50; Pl. Resp. to Divas, Exh. 10, Divas Def. Mot., Exh. E, Buzek Dep. at 61-68.) The shooting was deemed a justifiable homicide, and no criminal charges were filed. (Id.) Mr. Trout further testified at his deposition that on occasion there had been fights or unruly patrons within Divas that required the club to call the police. (Pl. Resp. to Divas, Exh. 12, Trout Dep. at 41.) Plaintiff has submitted 49 incident reports, a number of which were filed with the Bristol Township Police and the rest filed with Divas management by the staff between 1996 and 1999. (Pl. Resp. to Divas, Exh. 11.) As the expert for defendants Bristol Lodge, Larken Hotel and Stein has noted, a number of the reports describe the same event, and are therefore duplicative. (Rep. Br. for Larken Hotel, Bristol Lodge, and Stein, Exh. 7 at 3.) Further, a small number of the reported incidents encompassed non-violent occurrences of slip-and-falls and plumbing problems. (Id.) Nevertheless, although I have not yet determined whether they will be admitted into evidence at trial, the reports and previous shooting incident make clear that there had been incidents at Divas of disorderly conduct with potential for resulting in violent conduct. I therefore find that based on the plaintiffs' submissions and the character of the business

conducted by Divas (a nightclub providing topless dancing and liquor), a jury may reasonably conclude the defendants should have reasonably anticipated careless or criminal conduct on the part of third persons, and was thus obliged to provide a reasonably sufficient number of servants to afford reasonable protection. I find from the available record that Mr. Bethea was a business invitee of the defendants and as such was owed a duty of reasonable care. The issues relevant to the Court's inquiry therefore revolve around whether defendants breached their duty, and if so, whether such breach caused injury to plaintiffs.

Plaintiffs allege that defendants were negligent by failing to provide sufficient lighting or security in the Divas parking lot and within the club, and thus failing to deter Mr. Bethea's murder. On the night of the shooting, Divas had only one "security host" on duty. When Mr. Bethea and Mr. Housely entered the club, the security host was inside a private room within the club, assisting a dancer and customer. Therefore there was no security at the security desk area at the entrance of the club when Mr. Bethea was shot. There were no security guards, surveillance cameras, nor valet parking in or around the parking lot area. The parking lot had four light stanchions, each with two light globes, situated toward the end of the parking lot, further away from the club entrance. Plaintiffs contend these arrangements were insufficient and was a significant factor contributing to Mr. Bethea's death.

The Divas Defendants contend that there was no action they could have been taken that would have deterred a criminal like Mr. Housely, who was determined to rob Mr. Bethea at gunpoint. It appears clear from the record that Mr. Housely did not intend to use the premises as a business invitee, and his attack upon Mr. Bethea did not arise out of the activities of the defendant. Yet, "the intentional torts or crimes of a third party are not always a superseding cause which break the chain of proximate causation and relieve the defendant of liability" Douglas W. Randall, Inc. v. AFA Protective Sys., 516 F. Supp. 1122, 1125 (E.D. Pa. 1981), aff'd without opinion, 688 F.2d 820 (3d Cir. 1982)..

The Supreme Court of Pennsylvania has held that the jury must determine whether the defendant, at the time of his negligent conduct, realized or should

have realized the likelihood that his negligent conduct created a situation which afforded an opportunity to a third person to commit a crime, and that a third person might avail himself of the opportunity to commit a crime.

Id. (quoting Anderson v. Bushong Pontiac Co., 404 Pa. 382, 171 A.2d 771 (1961)). “Legal causation is found when a defendant’s negligent conduct is a ‘substantial factor’ in bringing about the specific harm incurred.” Rabutino v. Freedom State Realty Co., Inc., 2002 Pa. Super. LEXIS 2891, at *17 (Pa. Super. Oct. 15, 2002) (quoting Trude v. Martin, 442 Pa. Super. 614, 660 A.2d 626 (Pa. Super. 1995)). The question of legal causation is reserved for the jury, and may only be removed from the jury’s consideration when it is clear that reasonable minds cannot differ on the issue. Id. (quoting Gravlin v. Fredavid Builders & Developers, 450 Pa. Super. 655, 677 A.2d 1235, 1238 (Pa. Super. 1996)). Certainly, defendants have provided persuasive evidence to support their contention, including Mr. Housely’s extensive criminal record, his psychological profile and the factual background surrounding the events leading up to the shooting. Nevertheless, I find that plaintiffs have set forth sufficient evidence to pose a genuine issue of material fact. Whether or not adequate security measures were taken, and whether any deficiency in the security measures was a substantial factor in Mr. Bethea’s death, are questions of fact that should be resolved by the jury. See Kenny, 581 F.2d at 355 (woman raped in Philadelphia transit system station) (jury question as to whether Septa had properly maintained lighting or security measures); Moran, 431 Pa. at 437-38 (plaintiff lost hearing when teenagers set off firecracker in theater restroom) (jury question as to whether theater had taken reasonable measures to control conduct of patrons); Rabutino, 2002 Pa. Super. LEXIS 2891, at ** 17-21 (plaintiff shot in hotel party of 200 underage attendants when unrelated party-goer shot handgun into crowd to resolve racial stand-off between Hispanic and Italian-American youths) (court could not state that racial standoff and resultant harm to bystander was unforeseeable event superceding hotel’s negligence as a matter of law).⁸ Thus, the motion of the Divas Defendants

⁸ Glynn v. Reynolds, 17 Phila. 501, 513 (Pa. Comm. Pl. 1988), upon which defendants rely, is not to the contrary. In addition to concluding that the record clearly showed that any lack of security measures by the defendant was not a proximate cause of the plaintiff’s injuries, the Common Pleas court further determined that the plaintiff had failed

for summary judgment will be denied.

B. Larken Hotel

Larken Hotel moves for summary judgment based on the argument that it did not possess and control the space used by Divas. Under Section 344 of the Restatement, the duty to protect business invitees against the criminal act of third parties is premised on whether or not the business was a “possessor” of the land. Restatement (Second) of Torts § 344; Leichter v. Eastern Realty Co., 358 Pa. Super. 189, 192, 516 A.2d 1247, 1249 (Pa. Super. 1986). To be a “possessor,” the business must do one of the following:

it must be in occupation of the land with the intent to control it, it must have been in occupation of the land with intent to control it if no other party has done so subsequently, or it is entitled to immediate occupation if neither of the other alternatives apply.

Blackman v. Federal Realty Inv. Trust, 444 Pa. Super. 411, 416, 664 A.2d 139 (Pa. Super. 1995).

Yet, this argument ignores the clear and undisputed fact that the altercation between Mr. Bethea and Mr. Housely began in the parking lot, a portion of the property over which Larken Hotel did appear to have possession and control. The Management Agreement between Bristol Lodge and Larken Hotel provided that Divas and the hotel would use the parking lot in common. (Larken Mot., Exh. 4 at 6.) Additionally, in his deposition testimony, Kenneth Stein, a limited partner and owner of the general partner of Larken Hotel, conceded that Larken Hotel was responsible for the lighting in the parking lot. (Larken Mot., Exh. 2 at 26.) The lighting in the parking lot is one of the security deficiencies cited by plaintiffs as the cause of Mr. Bethea’s death.

Consequently, summary judgment is not warranted on this ground.

Larken Hotel further moves for summary judgment based on a lack of duty of care to Mr. Bethea, as it had no notice of probable criminal acts by third parties. Because a landowner is not an insurer of a visitor’s safety, he does not have a duty of care “until he knows or has reason to

to allege he was on the defendant’s property, that the record did not support any argument that the plaintiff was an invitee, and that residential landlords did not have a general duty to protect against criminal intrusion. Thus, there were numerous reasons to grant summary judgment in favor of the defendant landowners in Glynn; such is not the case in this instance.

know that the acts of the third person are occurring, or are about to occur.” Morgan v. Bucks Assoc., 428 F. Supp. 546, 549 (E.D. Pa. 1977). As with the Divas Defendants, Larken Hotel was on notice from a number of police reports regarding criminal incidents that took place on the premises. Defendants’ contention that the incidents within the Club do not constitute notice of crimes in the parking lot is unwarranted; “if the jury should find the occurrence of crimes anywhere on the [] property which might pose a danger to others, it could impose a duty upon [the landowner] to take appropriate precautions throughout all of the premises.” Murphy v. Penn Fruit Co., 274 Pa. Super. 427, 433, 418 A.2d 480 (Pa. Super. 1980). Additionally, as with the Divas Defendants, the character of the establishment was sufficient to put Larken Hotel on notice of their duty of care. Comment f to section 344 notes that the nature of a business may be such that careless or criminal conduct of third parties was reasonably foreseeable. It is reasonable to conclude that where an establishment provides alcohol and adult entertainment, there is an increased potential for reckless or violent behavior. Larken Hotel was aware that Divas would be used for adult entertainment. (Larken Br., Exh. 2 at 14.) It is within the ambit of their obligation as landowners to take necessary precautions for the safety of the parking lot or any property used in common with Divas. Consequently, plaintiffs have shown sufficient notice by Larken Hotel for the potential for careless or criminal acts by third parties to trigger a duty of care.

Finally, Larken also moves for summary judgment based on a lack of breach of their duties and plaintiffs’ failure to prove causation. The question of legal causation is reserved for the jury, and may only be removed from the jury’s consideration when it is clear that reasonable minds cannot differ on the issue. Rabutino, 2002 Pa. Super. LEXIS 2891, at *17. For substantially the same reasons provided above, see Kenny, 581 F.2d at 355; Moran, 431 Pa. at 437-38; Rabutino, 2002 Pa. Super. LEXIS 2891, at ** 17-21, I find that plaintiffs have sufficiently shown that a genuine issue of material facts exist as to the questions of breach and causation, and will deny the motion of summary judgment on these grounds.

C. Bristol Lodge

Bristol Lodge similarly moves for summary judgment based on its lack of possession of the property. “The possessor of land occupies the land with the intent to control it.” Estate of Zimmerman v. SEPTA, 168 F.3d 680, 684 (3d Cir. 1999). As described briefly in the factual background, Bristol Lodge leased the restaurant portion of the Econolodge from the owner Larken Hotel, and then entered into the Management Agreement with the Divas Defendants appointing the Divas Defendants as its “exclusive representative to supervise, direct and control the management and operation of the food, beverage, and entertainment operations, including the sale of alcoholic beverages, in the Premises . . . all on behalf of Bristol.” (Bristol Mot., Exh. 4 at ¶1.01.) Thus, Bristol poses that the club itself was controlled by the Divas Defendants, while the remaining property was controlled by the landowner Larken Hotel.

“[T]itle ownership is not determinative of whether a defendant is a possessor of land under Restatement (Second) of Torts § 328E.” Kirschbaum v. WRGSB Assocs., 97-CV-5532, 1999 U.S. Dist. LEXIS 19480, at * 38 (E.D. Pa. Dec. 14, 1999), aff’d 243 F.3d 145 (3d Cir. 2001) (citing Kostar v. Pepsi-Cola Metro. Bottling Co., 96-CV-7130, 1998 U.S. Dist. LEXIS 16828, at *3 (E.D. Pa. Oct. 22, 1998)). “Where a property is leased, the tenants generally have control or possession of the interior spaces of a building which they rent.” Id. at ** 38-39 (citing Jackson v. Topa Equities (V.I.) Ltd., 1998 U.S. Dist. LEXIS 22348, at *3 (D.V.I. Aug. 4, 1998)). Bristol Lodge did not lease the property, however, but hired a corporation to manage and provide the restaurant services within the property. The Management Agreement between Bristol Lodge and the Divas Defendants preserves certain rights and places obligations on Bristol Lodge as lease-holder. (Bristol Mot., Exh. 4.) For example, Bristol retained the right “to establish, modify and enforce reasonable rules and regulations with respect to all driveway and parking areas. . . .” (Id. at ¶ 3.05.) Further, Divas agreed to “comply with reasonable rules and regulations as set forth in Exhibit “E”. . . or subsequently promulgated by Bristol for the safety, care, cleanliness

and use of the Premises.” (Id. at ¶ 3.06.)⁹ Finally, Bristol agreed that it “shall, at Bristol’s expense, repair and maintain . . . all parking lots” (Id. at ¶ 3.11(d).) Consequently, the Court cannot say that Bristol did not control the Divas club or surrounding property as a matter of law. The question of whether Bristol was a possessor of the land should be resolved by the jury. See Leichter, 358 Pa. Super. at 195.

Similarly, the remaining issues raised by Bristol Lodge concerning whether plaintiff has proven a breach of duty or causation should also be submitted to the jury. See Kenny, 581 F.2d at 355; Moran, 431 Pa. at 437-38; Rabutino, 2002 Pa. Super. LEXIS 2891, at ** 17-21. For the same reasons provided to deny the motions of summary judgment for the Divas Defendants and Larken Hotel, I find that plaintiffs have sufficiently shown that a genuine issue of material facts exist, and will deny the motion of Bristol Lodge for summary judgment.

D. Kenneth Stein

Defendant Kenneth Stein has moved for summary judgment on the counts against him personally. Mr. Stein was a forty-nine percent limited partner in Larken Hotel, as well as the owner and executive of Stein Hotel Corporation, the management company that is the general partner in Larken Hotel. (Stein Mot., Exh. 3 at 6.) Further, Mr. Stein is a fifty percent shareholder and president of Bristol Lodge. (Id. at 9; Stein Am. Ans. at ¶ 5.) Mr. Stein argues that his status in neither of the corporate entities is sufficient to hold him personally liable for plaintiffs’ claims.

With regard to his status in Larken Hotel, Mr. Stein notes that as a limited partner he is not subject to liability for the obligations of the partnership. The Limited Partnership Act provides as follows:

A limited partner is not liable, solely by reason of being a limited partner, under an order of a court or in any other manner, for a debt, obligation or liability of the limited partnership of any kind or for the acts of any partner, agent or employee of the limited partnership.

⁹ Exhibit E to the Management Agreement was not submitted to the Court.

15 Pa.C.S. § 8523.¹⁰ The statute was amended in June of 2001, effective August 2001, to render any liability of limited partners subject to the same test for individual liability as officers of corporations and other forms of associations under 15 Pa.C.S. § 110. See 15 Pa.C.S. § 8523, Amended Committee Comment (2001). Defendant Stein is thus not subject to liability solely based upon his status of limited partner. Plaintiffs must show that other grounds exist to hold him personally liable as corporate officer or shareholder of any of the relevant corporate entities.

There are two theories under which a corporate officer or shareholder may be held individually liable for the obligations of the corporation: the “participation theory” and “piercing the corporate veil.” The Pennsylvania Supreme Court examined the differences between the participation theory and the doctrine of piercing the corporate veil in Wicks v. Milzoco Builders, Inc., 503 Pa. 614, 470 A.2d 86 (1983).

There is a distinction between liability for individual participation in a wrongful act and an individual’s responsibility for any liability-creating act performed behind the veil of a sham corporation. Where the court pierces the corporate veil, the owner is liable because the corporation is not a bona fide independent entity; therefore its acts are truly his. Under the participation theory, the court imposes liability on the individual as an actor rather than as an owner. Such liability is not predicated on a finding that the corporation is a sham and a mere alter ego of the individual corporate officer. Instead, liability attaches where the record establishes the individual’s participation in the tortious activity.

Id. at 621 (footnote omitted).

“Participation theory, in simple terms, is a theory which imposes personal liability on corporate officers or shareholders where they have personally taken part in the actions of the corporation.” First Realvest, Inc. v. Avery Builders, Inc. 410 Pa. Super. 572, 577, 600 A.2d 601 (Pa. Super. 1991). Under the participation theory, “a corporate officer can be held liable for

¹⁰ Prior to the amendment, the Limited Partnership Act provided as follows:

A limited partner is not liable for the obligations of a limited partnership unless he is also a general partner or in addition to the exercise of his rights and powers as a limited partner, he participates in the control of the business. However, if the limited partner participates in the control of the business, he is liable only to persons who transact business with the limited partnership reasonably believing, based upon the conduct of the limited partner, that the limited partner is a general partner.

15 Pa.C.S. § 8523 (a) (1995) (amended 2001). Thus, even under the prior statute, there is no basis for liability of defendant Stein to plaintiffs based upon his limited partner status, as plaintiffs did not transact business with Mr. Stein reasonably believing him to be the general partner.

‘misfeasance,’ *i.e.*, the improper performance of an act, but not for ‘mere nonfeasance,’ *i.e.*, the omission of an act which a person ought to do.” Brindley v. Woodland Village Restaurant, 438 Pa. Super. 385, 391, 652 A.2d 865 (Pa. Super. 1995). In Brindley, the Pennsylvania Superior Court determined that the negligence of the defendant restaurant owners in keeping the restroom clean, which led to the plaintiff’s injury, was “more analogous to negligence consisting of nonfeasance” Id. at 394. Similarly, the Bethea plaintiffs have alleged negligence by the defendants more akin to nonfeasance, and have failed to show that the alleged security deficiencies were the result of the “active, knowing participation” of Mr. Stein. Id. at 394. Although plaintiffs argue that Mr. Stein was an active participant in the operations of the various corporate entities, and allege his personal involvement in improper actions such as the transfer of a non-transferable liquor license, the promotion of a swingers club, and the use of the Divas lounge as an illegal off-track betting parlor, these activities do not constitute a deliberate determination to keep the premises insufficiently secure. Consequently, I conclude that plaintiffs have not proven that Mr. Stein can be held liable under the participation theory.

Similarly, plaintiffs have failed to show facts that support the rare application of the doctrine to pierce the corporate veil. “In deciding whether to pierce the corporate veil, courts are basically concerned with determining if equity requires that the shareholders’ traditional insulation from personal liability be disregarded and with ascertaining if the corporate form is a sham, constituting a facade for the operations of the dominant shareholder.” Village at Camelback Property Owners Ass’n v. Carr, 371 Pa. Super. 452, 461, 538 A.2d 528 (Pa. Super. 1988), aff’d, 524 Pa. 330, 572 A.2d 1 (1990) (citing Carpenters Health & Welfare Fund v. Kenneth R. Ambrose, Inc., 727 F.2d 279 (3d Cir. 1983)). “Thus, we inquire, *inter alia*, whether corporate formalities have been observed and corporate records kept, whether officers and directors other than the dominant shareholder himself actually function, and whether the dominant shareholder has used the assets of the corporation as if they were his own.” Id. (citing Ambrose, 727 F.2d at 284; Ashley v. Ashley, 482 Pa. 228, 237, 393 A.2d 637 (1978)). Plaintiffs

have provided no evidence with regard to any of these factors or otherwise shown that any of the corporate entities involved are sham operations. Although they argue that Mr. Stein engaged in legally questionable activity in his capacity as officer, partner or shareholder, this by itself does not constitute grounds to ignore the corporate form of the entities for which he was working. Absent a showing of “such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist,” 1 FLETCHER CYC CORP §41.30 (Perm Ed), the corporate veil will not be pierced.

I conclude that plaintiffs have not shown that a genuine issue of material fact exists as to Mr. Stein’s individual liability under either a participation theory or by piercing the corporate veil. Consequently, the motion of Mr. Stein for summary judgment will be granted.

IV. Conclusion

This Court concludes that neither the expert for the plaintiffs, Robert Peloquin, nor the expert for the Divas Defendants, Frederick Bornhofen, have set forth a reliable methodology to support their respective theories regarding the sufficiency of the security at the Divas club. Consequently, the motion of the Divas Defendants to exclude the testimony and reports of Robert Peloquin and the motion of plaintiffs to exclude the testimony and reports of Frederick Bornhofen will both be granted.

Further, without reliance upon any of the reports or deposition testimony of the excluded experts, the Court concludes that pursuant to Federal Rule of Civil Procedure 56(c), plaintiffs have succeeded in showing that a genuine issue of material fact exists as to the negligence claim against the Divas Defendants, Larken Hotel and Bristol Lodge. Consequently, the motions of the Divas Defendants, Larken Hotel and Bristol Lodge for summary judgment will be denied. Nevertheless, the Court concludes that no genuine issue of material fact exists as to Mr. Stein’s lack of individual liability, and will therefore grant his motion for summary judgment.

An appropriate Order follows.

1. The motion of the Divas Defendants (Doc. No. 25) is **GRANTED IN PART AND DENIED IN PART**. The motion of the Divas Defendants to exclude the testimony of plaintiffs' expert is **GRANTED**. The motion of the Divas Defendants for summary judgment is **DENIED**.
2. The motion of plaintiffs (Doc. No. 34) to exclude the Divas Defendants' expert testimony is **GRANTED**.
3. The motions of defendants Bristol Lodge and Larken Hotel for summary judgment (Doc. Nos. 26 and 28) is **DENIED**.
4. The motion of defendant Kenneth Stein for summary judgment (Doc. No. 27) is **GRANTED**.

It is **FURTHER ORDERED** that **JUDGMENT** is entered in favor of defendant Kenneth Stein and against plaintiffs Rathesha Bethea, Administratrix of the Estate of Charles E. Bethea, decedent, and Karimah Bethea and Rathesha Bethea in their own right.

LOWELL A. REED, JR., S.J.