

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT WOOD :
 :
 : CIVIL ACTION
 v. :
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 DEVELOPERS DIVERSIFIED : NO. 04-CV-5563
 REALTY CORP., ET AL. :

SURRICK, J.

FEBRUARY 23, 2006

MEMORANDUM & ORDER

Presently before the Court are Defendants' Developers Diversified Realty Corp., K-Mart Corp., and K-Mart of PA, L.P. Motion In Limine To Preclude Plaintiff From Introducing Evidence of Subsequent Remedial Measures (Doc. No. 20) and Motion In Limine To Preclude Plaintiff From Introducing Evidence Of the Opinions Of Kmart Employee Wayne Black (Doc. No. 21). For the following reasons, Defendants' Motions will be granted.

I. BACKGROUND

On May 25, 2004, Plaintiff Robert Wood and a friend, Sharon Lee, had been shopping at a Kmart store located in East Norriton, Pennsylvania. Upon returning to Lee's vehicle, which was parked in the handicapped area of Kmart's parking lot, Plaintiff stepped onto a wheel stop behind Lee's vehicle and then fell. Plaintiff alleges that his fall was the result of the defective condition of the wheel stop. Specifically, Plaintiff claims that the wheel stop was not properly anchored to the ground because the rebar anchor that was supposed to secure the wheel stop was bent. Plaintiff contends that the defective wheel stop was not parallel to the wheel stop immediately behind it. When Plaintiff's foot slipped off the wheel stop, Plaintiff fell to the ground and sustained injuries.

On November 5, 2004, Plaintiff brought this personal injury action in the Court of Common Pleas of Philadelphia County. Defendants removed the case to this Court based on diversity jurisdiction. Defendants filed the instant Motions seeking to preclude certain testimony and evidence at trial.

II. LEGAL ANALYSIS

A. Subsequent Remedial Measures

According to Defendants, sometime during the summer or fall of 2005, the wheel stops and portions of the handicapped parking stalls were painted blue. The rebar anchor may have also been repaired or removed at that time. In addition, the wheel stops were ultimately removed from the parking lot by Defendant Developers Diversified. (Doc. No. 20 ¶¶ 3, 4.) Defendants contend that testimony regarding the measures that they took following the Wood incident, which included the painting and repairing of the wheel stop, and the removal of the wheel stop, is not admissible at trial. (Defs.' Mem., Doc. No. 20 at 1.)

The admissibility of evidence of subsequent remedial measures is governed by Federal Rule of Evidence 407, which provides:

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Fed. R. Evid. 407. According to Defendants, the subsequent painting, repair, and removal of the wheel stop fall within the scope of Rule 407 because these measures may have made Plaintiff's

injury less likely to occur. Defendants do not deny that it was feasible for them to take these measures before the Wood incident. (Defs.' Mot., Doc. No. 20 at ¶ 8-10.) They contend that none of the exceptions listed in Rule 407 are applicable here. (*Id.* at ¶ 13.)

Plaintiff contends that Defendants have admitted that the remedial actions “would not have made any difference in the instant matter,” and that this admission has put into controversy whether the measures were feasible, thereby invoking Rule 407’s exception. (Pl.’s Mem., Doc. No. 27 at 2-3.) The Third Circuit has observed that, in order for the feasibility exception to be invoked, “Rule 407 requires that the feasibility of precautionary measures be controverted.” *Knight v. Otis Elevator Co.*, 596 F.2d 84, 91 (3d Cir. 1979). Defendants here do not argue that the remedial measures in question would not have made any difference. Rather, Defendants question whether such measures would have in fact prevented this particular incident from occurring considering how the incident occurred. (Doc. No. 30 at 1.) Defendants do not controvert the feasibility of the remedial measures taken. Moreover, Plaintiff provides no other basis for admitting the evidence. Accordingly, Defendants’ Motion to exclude evidence regarding the subsequent painting, repair, and removal of the wheel stop and handicapped area will be granted. *See Alvarez v. Gulf Oil Corp.*, Civ. A. No. 84-325, 1985 WL 6282, *1-2 (D. Del. Aug. 19, 1985) (in personal injury case, remedial measure by defendant was excluded because defendant “never contested the feasibility of repainting the steps” that plaintiff had fallen down; defendant only maintained “that the steps were in a safe condition at the time of the accident”).

B. Wayne Black

Wayne Black was employed by Defendant Kmart as an Asset Protection Manager at the time of the Wood incident. The day after the Wood incident, Sharon Lee approached Black and told him that she had been with Wood at the time of the incident, and that she wanted to report the incident to Kmart. With Lee's assistance, Black subsequently filled out an incident report. (Defs.' Mot., Doc. No. 21, Ex 1.) Although this report purportedly relates the facts as told by Lee to Black, during his deposition Black offered his own theory as to how the incident occurred. Black theorized in his deposition that Wood "was knocked to the ground when the rear tailgate of Ms. Lee's van rose automatically and struck him." Black also opined that Sharon Lee was not being truthful about the incident. (Defs.' Mot., Doc. No. 21 ¶ 4-7). Relying on Federal Rules of Evidence 401 and 403,¹ Defendants argue that Black's opinions about how the incident happened are irrelevant as are his opinions regarding Lee's truthfulness. Defendants further contend that such testimony is unfairly prejudicial. (Defs.' Mem., Doc. No. 21 at 1-2.) Plaintiff responds that pursuant to Rule 701, Black may testify as to his lay opinions. (Pl.'s Mem., Doc. No. 26 at 2.)

Rule 701 provides that a witness not testifying as an expert may offer testimony in the form of opinions. However, those opinions must be "(a) rationally based on the perception of the

¹ Rule 403 provides, in pertinent part:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. R. Evid. 403. Rule 401 explains that "relevant evidence" means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401.

witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701. *See also Blakey v. Continental Airlines, Inc.*, No. 93-2194, 1997 WL 1524797, at *5 (D.N.J. Sept. 9, 1997) ("The core definitional terms of Rule 701 include: (1) that the opinion must be based upon personal knowledge; (2) that the opinion is rationally based thereon and (3) that the opinion is helpful to the trier of fact."). Federal Rule of Evidence 602 provides: "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Fed. R. Evid. 602; *see also Randolph v. Collectramatic, Inc.*, 590 F.2d 844, 847-48 (10th Cir. 1979) ("There is uniformity among the courts that the testimony of witnesses . . . is admissible if predicated upon concrete facts within their own observation and recollection that is facts perceived from their own senses, as distinguished from their opinions or conclusions drawn from such facts."). At his deposition, Black indicated that he did not witness the accident happen. (Doc. No. 26, Ex. A at 22.) He learned of the incident the day after it had occurred, when one of the store managers told him about it. (*Id.*) On that same day, Sharon Lee approached him and requested that a claims report be completed regarding Wood's accident. (*Id.* at 33-34.) Since Black was not an eyewitness to the accident, and had no personal knowledge about how the accident occurred, his opinions on that topic are mere speculation and would be of no assistance to the trier of fact. His testimony therefore fails to meet the requirements of Rules 602 and 701. Accordingly, we will exclude Black's testimony regarding his opinions as to how the Wood incident occurred.

Similarly, Black may not testify as to his opinion regarding Lee's truthfulness concerning

Wood's accident. At his deposition, Black stated that he believed Lee was lying about how the accident occurred, and based this conclusion "on [his] experience" with accidents involving other customers. (Doc. No. 21, Ex. 2 at 73-74.) Black's opinion regarding Lee's truthfulness is not "rationally based," as is required by Rule 701. *See Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1193 (3d Cir. 1995) (Rule 701 "was primarily designed to allow lay individuals to express opinions that are in reality only a shorthand statement of fact"); *see also* Fed. R. Evid. 701 advisory committee's notes (Rule 701(a) has "the familiar requirement of first-hand knowledge or observation"). The only foundation for Black's opinion is his experience evaluating other customer-related incidents, none of which involved Lee. There is no indication that Black had ever had any contact with Lee prior to her approaching him on May 26, 2004. Such speculative testimony regarding Lee's truthfulness will not help the trier of fact in deciding the issues in this case. Moreover, the probative value of such testimony is far outweighed by its potentially prejudicial effect on the jury. *See* Fed. R. Evid. 403. Black's testimony regarding Lee's truthfulness does not meet the requisite standards under the Federal Rules of Evidence, we will exclude Black's opinion testimony regarding Lee's truthfulness.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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	:	
v.	:	
	:	NO. 04-CV-5563
DEVELOPERS DIVERSIFIED	:	
REALTY CORP., ET AL.	:	

ORDER

AND NOW, this 23rd day of February, 2006, upon consideration of Defendants' Motion In Limine To Preclude Plaintiff From Introducing Evidence of Subsequent Remedial Measures (Doc. No. 20), and Motion In Limine To Preclude Plaintiff From Introducing Evidence Of the Opinions Of Kmart Employee Wayne Black (Doc. No. 21), and all papers submitted in support thereof and in opposition thereto, it is ORDERED that Defendants' Motions are GRANTED.

IT IS SO ORDERED.

BY THE COURT:

S/R.Barclay Surrick

R. Barclay Surrick, Judge