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

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

**SURRICK, J.** **FEBRUARY 27, 2006**

**MEMORANDUM & ORDER**

Presently before the Court are Defendants Developers Diversified Realty Corp., K-Mart Corp., and K-Mart of PA, L.P.'s Motion In Limine To Preclude Plaintiff's Liability Expert From Testifying At Trial (Doc. No. 22). For the following reasons, Defendants' Motion will be granted in part and denied in part.

## 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.

Defendants filed the instant Motion seeking to preclude the testimony of Plaintiff's liability expert at trial.

## II. LEGAL ANALYSIS

Defendants argue that the expert testimony of James E. Peserik, Plaintiff's liability expert, should be excluded for several reasons. First, Defendants contend that Peserik's opinions are based upon inaccurate facts. (Doc. No. 22 ¶¶ 4-6.) Specifically, Defendants contend that Peserik's opinions rely on the assumption that Wood tripped and fell over a wheel stop, when in fact Wood stated that he slipped off the wheel stop. (*Id*.) Next, Defendants contend that Peserik's testimony that the subject wheel stop was cracked and broken is not relevant and should be precluded pursuant to Rule 702. (Doc. No. 22 at 3.) Finally, Defendants contend that Peserik's opinions regarding how and when the wheel stop was moved and his testimony regarding the conduct of Defendants' employers as it relates to notice are sheer speculation and have no basis in fact. (*Id.*)

Rule 702 governs the admissibility of expert testimony, and it provides:

> 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.

Fed. R. Evid. 702. Rule 702 "embodies a trilogy of restrictions on expert testimony: qualification, reliability, and fit." *Schneider v. Fried*, 320 F.3d 396, 404 (3d Cir. 2003).

With regard to Defendants' argument that the opinions of the expert are based upon inaccurate facts, it would appear that there is a difference between the facts as related by Wood and the facts related by Peserik. For some reason, Peserik states that the accident happened when Wood "tripped and fell over the wheel stop which was not in its proper location." (Doc. No. 22 at

Ex. 1, p. 2.) There is nothing in the record to support this statement. Wood testified that he stepped onto the top of the wheel stop and his foot slipped off. Significantly, Wood was the only witness in a position to testify as to how this accident actually happened. Nevertheless, the difference between Peserik's version that Wood tripped over the wheel stop and fell, and Wood's version that he slipped off the wheel stop and fell does not compel the conclusion that Peserik's testimony should be excluded. Whether Wood tripped over or slipped off of the wheel stop is of little consequence to Peserik's opinion regarding the condition and the movement of the wheel stop. Moreover, the jury will have the opportunity to hear both of those witnesses testify and will be able to assess the credibility of each. The jury will also be instructed that the opinion of an expert has value only when you accept the facts upon which the opinion is based.

We also reject Defendants' argument that Peserik should be precluded from testifying about the condition of the wheel stop because "there is no relevance to the cracked/broken condition of the subject wheel stop." (Doc. No. 22 at 3.) The cracked condition of the wheel stop may be relevant here. (Pl.'s Mem., Doc. No. 31 at 5; *see also* Fed. R. Evid. 402.) One of the central issues of this case is whether the location of the wheel stop caused Wood's accident and subsequent injuries. The fact that the wheel stop was in a cracked/broken condition may have a tendency to make a fact that is of consequence more probable or less probable than it might otherwise be. Fed. R. Evid. 401. Defendants' motion to exclude Peserik's testimony on these grounds will be denied.

Defendants also claim that Peserik's report "is lacking in an explanation as to the methodology he used to determine the cause of the wheel stop being pushed off the rebar anchor or how long it had been off the anchor." (Defs.' Mem., Doc. No. 22 at 3.) Defendants object to

the portions of Peserik's report in which he makes statements regarding when the wheel stop was pushed off its rebar anchor, and to his conclusion that "it is reasonable to assume that the defendants either knew or should have known of the defective condition prior to Mr. Wood's accident." (Doc. No. 22 ¶¶ 8, 10; Doc. No. 22 at Ex. 1, p. 7.) In his report, Peserik discusses the nature of wheel stops and how automobiles cannot move wheel stops. He then explains that the condition of the metal rebar that was used to anchor the wheel stop "clearly shows that the wheel stop was struck with sufficient force to not only move the wheel stop but to cause, by forcing the wheel stop over the rebar, to bend the rebar." (Doc. No. 22 at Ex. 1, p. 5.) He offers the opinion that only heavy equipment such as a forklift, snowplow, or a wheel loader, could move a wheel stop. (*Id.*) Peserik bases these statements on his engineering background, knowledge of wheel stops, photographs of the parking lot, and his own examination of the parking lot.

The Supreme Court has recognized that the same standards that govern the admissibility of scientific knowledge also apply to technical or other specialized knowledge. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 148 (1999). The *Kumho* Court held that a trial court has broad latitude in its determination of an expert's reliability. *Id.* at 152. Peserik's Curriculum Vitae indicates that he completed graduate studies in engineering at several universities, and also attended various seminars presented by engineering clubs and associations. (Doc. No. 31 at Ex. A.) His Curriculum Vitae also shows that he has been a professional consultant on various engineering projects—including reconstruction of industrial and vehicle accidents, and machinery and equipment failures—for over thirty years. Finally, his Curriculum Vitae lists several teaching engagements and membership in numerous professional societies. We are satisfied that Peserik's testimony regarding wheel stops "has a reliable basis in the knowledge and experience of"

engineering. *See Kumho Tire*, 526 U.S. at 149 (quoting *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 592 (1993)). He is therefore qualified to testify regarding the nature of wheel stops, the anchoring of wheel stops, and their movement. *See id.* at 148 ("Disciplines such as engineering rest upon scientific knowledge."); *Schneider*, 320 F.3d at 404 ("Qualification refers to the requirement that the witness possess specialized expertise. We have interpreted this requirement liberally, holding that a broad range of knowledge, skills, and training qualify an expert." (internal citations omitted)).

Nevertheless, we will not permit Peserik to offer speculation as to the wheel stop being moved sometime in the winter prior to Wood's accident. Peserik states that "the damage is consistent with the wheel stop having been struck by a snowplow or other snow removal equipment." (Doc. No. 22 at Ex. 1, p. 7.) Such testimony falls within the scope of Peserik's expertise and will be permitted. However, Peserik then appears to use this testimony to conclude that "it is probable that the damage at the wheel stop occurred during the winter prior to Mr. Wood's accident." (*Id.*) As Defendants point out, Peserik does not provide any explanation for his conclusion that the damage to the wheel stop occurred during the winter prior to Wood's accident. His statement that the damage is consistent with damage done by a snowplow does not necessarily lead to this conclusion. Peserik indicates that the damage is also consistent with the wheel stop being struck by forklift, a wheel loader, or other heavy equipment. (*Id.* at 5.) He provides no explanation for his speculation that the damage is more likely due to a snow plow than this other equipment. Under the circumstances, his opinion that the damage was likely caused by a snow plow is "not based on sufficient facts or data" nor will it "assist the trier of fact." Moreover, his opinion that the "misalignment of the wheel stop" caused the fall has nothing

to do with his expertise and encroaches on the domain of the jury. *See* Fed. R. Evid. 702; s*ee also* *Schneider*, 320 F.3d at 404 ("The [expert] testimony must be reliable; it must be based on the methods and procedures of science rather than on subjective belief or unsupported speculation; the expert must have good grounds for his or her belief.").

Similarly, Peserik cannot testify that Defendants should have known about the defective condition. While an expert opinion is not objectionable "because it embraces an ultimate issue to be decided by the trier of fact," the expert opinion must still meet the requirements of admissibility. Fed. R. Evid. 704(a). It appears that Peserik bases his opinion regarding Defendants' alleged negligence on his speculative conclusion that the damage to the wheel stop occurred in the winter prior to the Wood incident, and the supposed activities or lack thereof of Kmart's personnel related to the parking lot. (Doc. No. 22 at Ex. 1, p. 7.) As discussed above, Peserik will not be permitted to testify as to when the wheel stop damage occurred. Furthermore, Peserik's opinion that "Kmart's personnel should be examining the parking lot during [their] excursions to note and report to their manager any damage to the parking lot" is also not based on any discernible facts. Peserik's report does not provide any basis upon which to consider Peserik an expert on the obligations of Kmart employees. His opinions concerning the duties of Kmart employees and the time when the subject wheel stop was moved or damaged are sheer speculation and would be of little assistance to the trier of fact. *See* Advisory Committee Notes, Fed. R. Evid. 704 ("Under Rules 701 and 702, opinions must be helpful to the trier of fact . . . . These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach. . . ."). Accordingly, Peserik's expert testimony will be limited to those opinions that are based on actual facts and his expertise, and that are helpful to the trier of fact.

Therefore, Peserik is precluded from testifying that Defendants knew or should have known about the wheel stop's condition prior to Wood's accident, that the wheel stop was likely damaged in the winter prior to Wood's accident, and that the wheel stop caused Plaintiff's injury.

An appropriate Order follows.

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**ORDER**

AND NOW, this 27th day of February, 2006, upon consideration of Defendants' Motion In Limine To Preclude Plaintiff's Liability Expert From Testifying At Trial (Doc. No. 22), and all papers submitted in support thereof and in opposition thereto, it is ORDERED that Defendants' Motion is GRANTED in part and DENIED in part, consistent with the attached Memorandum.

IT IS SO ORDERED.

BY THE COURT:

S/R. Barclay Surrick

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R. Barclay Surrick, Judge