

**IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF SAINT CROIX AT KINGSHILL**

DOLORES K. BRAITHWAITE,

Plaintiff,

vs.

K-MART CORPORATION,

Defendant.

)
) **CIVIL NO. 628/1998**
) **ACTION FOR DAMAGES**
)

)
) **JURY TRIAL DEMANDED**
)

) **NOT FOR PUBLICATION**
)

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Cabret, Presiding Judge

MEMORANDUM OPINION

(March 6, 2000)

This matter is before the Court on two motions in limine filed by Defendant. In one motion, Defendant seeks to exclude expert testimony of Plaintiff's future damages because "the current picture of Plaintiff's medical condition is not a reliable indication of her future."¹ In the second motion in limine, Defendant seeks to exclude the opinion of Plaintiff's proffered safety

¹ Defendants Motion in Limine to Exclude Evidence of Future Damages at 3.

expert, Rosie Mackay, on the grounds that the opinion is unreliable, usurps the function of the jury and is unfairly prejudicial. For reasons which follow, the Court will deny Defendant's motion to exclude expert testimony on future damages² but will grant Defendant's motion to exclude Mackay's opinion.

I. FACTUAL BACKGROUND

The facts relevant to the instant motions will be recited with the Court's discussion on the motions at issue. To put the motions into context, however, the Court will discuss the factual allegations underlying Plaintiff's claims. Plaintiff alleges that at the time of the accident she was shopping at Defendant's retail store for hardware to hang picture frames. According to Plaintiff, the aisle which contained the hardware was being reorganized and there were boxes and other things on the floor. Plaintiff contends that as she was turning away from an item she was looking at, she slipped on a loose screw on the floor and fell. Plaintiff alleges that as a result of her fall, she has suffered injuries to her back which entitle her to past and future damages from Defendant.

II. DISCUSSION

A. Expert Opinions on Future Damages

In support of her claim for future damages, Plaintiff seeks to introduce the opinions of a medical expert, vocational specialist and an economist. Plaintiff's medical expert, Dr. George J.

² In an Order issued February 24, 2000, the Court ordered a bifurcated trial for separate consideration of liability and damages. Accordingly, although the Court concludes in this opinion that the testimony of Plaintiff's future damages experts is admissible, this testimony will only be permitted if the jury first finds Defendant liable for Plaintiff's injuries.

Straschnov, diagnosed Plaintiff as suffering from a severe degree of lumbo-sacral spondylolisthesis and found that "if the severity of the condition as reported by the radiologist is correct, the prognosis remains guarded."³ Dr. Straschnov further opined:

It would now be difficult to imagine that [Plaintiff] would ever be free of pain and in fact she may get worse in the sense that she may develop minor or even major degrees of neurological complications. If that be the case, major surgical intervention may become a necessity. . . . [S]he should be treated by supportive exercises, appropriate medication and local heat. In order to prevent further deterioration of the condition, a solid back brace should be fitted and worn at all times, except in bed. She should be kept under routine orthopedic care.⁴

Based on this prognosis, Dr. Straschnov concluded in his report that "[i]t would be detrimental, in my opinion, for Mrs. Braithwaite to return to her employment. I believe she would be well advised to consider permanent retirement."⁵

In his deposition, Dr. Straschnov elaborated on the opinions contained in his report. Regarding his opinion on the potential for surgical intervention, Dr. Straschnov testified that he does not currently consider Plaintiff a candidate for surgery because he does not think "she's had a sufficient degree of treatment. One of the reasons for giving her the brace is to see whether stabilization by means of the brace will alleviate or improve her symptoms."⁶ Dr. Straschnov also stated the reasons why he thought it would be detrimental for Plaintiff to continue working: "I don't think she is able to sit for any length of time. She's unable to walk distances. She's

³ Medical Report of Dr. George J. Straschnov at 3.

⁴ Id.

⁵ Id. (paragraph indention omitted).

⁶ Deposition of Dr. George J. Straschnov at 36.

unable to bend, and she's unable to do any heavy lifting."⁷ When asked whether Plaintiff could continue to work if her employer made accommodations, Dr. Straschnov testified:

I consulted her about that , and she said that in her category of employment, this would not be possible. . . . As far as I know, she is at work, but she is tolerating it with considerable discomfort and pain. . . . I don't know anything about her work. To that extent, I don't know whether it could be modified or it could not be modified. I don't know that. . . . [S]he has not had a sufficient trial of treatment. I think if she wears her brace for three to six months and she remains relatively asymptomatic, I think there's a possibility that one could do that. But at the present time, I don't think so, that it's unlikely."⁸

Dr. Straschnov stated on cross-examination in his deposition that the conclusions reached in his report remain unchanged. During a hearing on the admissibility of his opinion, Dr. Straschnov stated that, as is standard practice among physicians, in forming his opinion he relied on the medical history provided by the Plaintiff, his physical examination of the Plaintiff and a radiologist's report.

In addition to Dr. Straschnov's report, Plaintiff is also relying on the report of James A. Watson, a vocational specialist. In his report, Watson states that he spoke with Plaintiff's work supervisor regarding her current condition. According to the report, the supervisor noticed "that Ms. Braithwaite displays some pain behavior on the job but does not does not like to make an issue of it."⁹ Watson concluded that

If Ms. Braithwaite loses her employment as a result of pain or because her treating physician advises her to retire from work she will be unemployable and will have

⁷ Id. at 59.

⁸ Id. at 59-60 (paragraph indentions omitted).

⁹ Report of James A. Watson at 5.

lost all her capacity to earn. I do not have vocational services to offer this lady because she is employed in a job with sedentary requirements."¹⁰

Based on the reports of Dr. Straschnov and Watson, Plaintiff's economist reported that, as a result of her injuries, Plaintiff will suffer a loss of future income in the amount of \$637,654.

Defendant contends that Dr. Straschnov's conclusion, that Plaintiff should retire, is unreliable because his deposition testimony shows that treatment is ongoing and that she has not yet attained "maximum medical improvement."¹¹ Accordingly, Defendant asserts that Dr. Straschnov's opinion should be excluded at trial, and because the reports of Plaintiff's vocational specialist and economist are based on Straschnov's opinion, their opinions should also be excluded. The Court disagrees.

Admission of expert testimony is governed by Rule 702 of the Federal Rules of Evidence.

Rule 702 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.

This rule invokes three basic requirements: (1) that a witness proffered to testify to specialized knowledge must be an expert, (2) that the expert's methods of arriving at his or her conclusion are reliable and (3) that the testimony must "fit" the factual dispute at issue so that it will assist the jury, i.e. the expert's opinion testimony is relevant to facts of the case. See In Re Paoli R.R.

¹⁰ Id. at 6.

¹¹ Defendants Motion in Limine to Exclude Evidence of Future Damages at 2.

Yard PCB Litig., 35 F.3d 717, 741-43 (3d Cir. 1994). Regarding the reliability factor, which is at issue here, the Paoli court ruled:

a judge should find an expert opinion reliable under Rule 702 if it is based on 'good grounds,' i.e., if it is based on the methods and procedures of science. A judge will often think that an expert has good grounds to hold the opinion that he or she does even though the judge thinks that the opinion is incorrect. As [Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)] indicates, '[t]he focus . . . must be solely on principles and methodology, not on the conclusions that they generate.' Daubert, --- U.S. at - --, 113 S.Ct. at 2797. The grounds for the expert's opinion merely have to be good, they do not have to be perfect. The judge might think that there are good grounds for an expert's conclusion even if the judge thinks that there are better grounds for some alternative conclusion, and even if the judge thinks that a scientist's methodology has some flaws such that if they had been corrected, the scientist would have reached a different result.

Paoli, 35 F.3d at 744.

In this case, the thrust of Defendant's objection to Dr. Straschnov's opinion is that the conclusion is flawed because Plaintiff has not completed treatment. Dr. Strashnov's opinion, however, shows that it is difficult to accurately forecast the ultimate extent and duration of Plaintiff's future damages because of the uncertainty associated with her treatment. The Restatement's comment on damages for future harm contemplates such circumstances. The Restatement (Second) of Torts provides:

When an injured person seeks to recover for harms that may result in the future, he is entitled to damages based upon the probability that harm of one sort or another will ensue and upon its probable seriousness if it should ensue. When a person has suffered physical harm that is more or less permanent in nature, as stated in § 910, he is entitled to recover damages not only for harm already suffered, but also for that which probably will result in the future. At the time of trial, while some form of harm may be anticipated, its nature, extent and duration ordinarily cannot be foretold with accuracy. . . . This is true with reference to anticipated harm to feelings and to earning capacity. This fact does not, however,

prevent recovery for money damages, even though in the great majority of cases the amount will not correspond even approximately to the harm that will be suffered, since the amount is arrived at by considering probabilities, both favorable and unfavorable, that seldom forecast what will happen to a single individual.

Restatement (Second) of Torts § 912 cmt. e (1979). More concisely stated, "the law cannot wait for future scientific investigation and research. We must resolve cases in our courts on the basis of scientific knowledge that is currently available." Moore v. Ashland Chemical, Inc., 151 F.3d 269, 276 (5th Cir. 1998).

In this case, Dr. Straschnov's opinion is based on his current knowledge of Plaintiff's physical condition. Defendant has not disputed his qualifications or the relevance of his opinion. Though it is likely that in five years Plaintiff's physicians will better be able to predict her medical future, Defendant has not cited any authority which allows for continuances until a Plaintiff reaches the maximum level of improvement. Indeed, the Court's review of the law reveals that such issues much be resolved based on the "scientific knowledge that is currently available." Id. Defendant's evidence that Plaintiff's condition may improve can be raised on cross-examination of Dr. Straschnov and is more a matter of weight than admissibility. Accordingly, Defendant's motion to exclude Dr. Straschnov's opinion will be denied. Furthermore, because Defendant's motion to exclude the testimony of Plaintiff's vocational specialist and economist is based solely the alleged deficiencies with Dr. Straschnov's opinion, the Court will also deny this part of Defendant's motion.

B. Opinion of Safety Expert

Plaintiff has proffered the opinion of a safety specialist, Rosie Mackay, to prove her claim that Kmart was negligent. In her report, Mackay generally concludes that "K-Mart was negligent

and irresponsible by allowing debris to remain in the traffic aisles where customers could encounter it."¹² Defendant objects to Mackay's report on several grounds. Specifically, Defendant contends that Mackay's opinion is not based on the evidence, that she does not offer any specialized knowledge that could assist the jury, that her conclusions are based on the wrong standard of liability, that the probative value of her opinion is substantially outweighed by the danger of unfair prejudice and that she relied on safety regulations that are inapplicable in this case. Despite Plaintiff's response that Defendant merely misconstrues the nature of her negligence claim, the Court finds merit in all of Defendant's objections.

Before addressing the merits of Defendant's motion, however, it is necessary to resolve Plaintiff's assertion regarding the nature of her negligence claim. In her complaint against Defendant, Plaintiff alleges that "[o]n May 25, 1998, plaintiff slipped and fell on a foreign object that was on the floor at defendant's store located in St. Croix. The accident was caused by defendant's negligence in failing to inspect and maintain the premises in a safe condition for its customers."¹³ In response to interrogatories, Plaintiff described the accident as follows:

I was walking in Kmart. . . . The Kmart employees were rearranging the store. Many boxes and things were on the floor. I stopped by a shelf and turned around to walk. I felt something under my shoe, but it was too late, I fell to the ground. [A person who helped me] showed me the screw in the front of my foot."¹⁴

¹² Report of Rosie Mackay at 4.

¹³ Complaint at paragraphs 2-3 (paragraph numbering and indentions omitted).

¹⁴ Plaintiff's Response to Defendant's First Interrogatories, number 17.

Plaintiff explained that her negligence claim is based on her contention that "[w]hen rearranging the store, the company should do so in the night when there isn't anyone in the store. Kmart should keep aisles free and safe and not cluttered with boxes and merchandise and debris."¹⁵ In Plaintiff's portion of a proposed joint pretrial order, Plaintiff further explains her factual contentions:

plaintiff was shopping for hardware used to hang picture frames. She went to that area within the hardware department. . . . [T]his was one of those areas being reorganized, with boxes in the aisle between the merchandise racks which not only provided a tripping hazard for customers, but also impeded the customers' view of the floor. There were no Kmart employees in the immediate vicinity. . . . As Mrs. Braithwaite was examining the available merchandise, she stepped back onto a screw that was lying on the floor. The screw rolled under her foot causing her to lose her balance and fall.¹⁶

When Defendant objected to the Mackay's opinion on the ground that there is no evidence that it had actual or constructive notice of the screw on the floor, Plaintiff responded:

Kmart has failed to appreciate the fact that liability is not based upon actual or constructive prior notice of the fact that that specific screw was on the floor, but because Kmart knowingly exposed its customers, including Mrs. Braithwaite, to the known danger of the condition of the aisle with boxes obstructing customer's views of the floor and of the increased danger of miscellaneous articles falling to the floor due to the fact that the merchandise was being rearranged at the time. This is the true import of the testimony that Kmart seeks to exclude.¹⁷

In her report, Mackay essentially recounted the facts as they are presented above. Mackay stated that during her shopping trip

¹⁵ Id. at number 22.

¹⁶ Proposed Joint Pre-Trial Order, Factual Contentions of Plaintiff.

¹⁷ Plaintiff's Opposition to Motion in Limine to Exclude the Testimony of Plaintiff's Liability Expert at 3. (Emphasis in original).

Brathwaite (sic) was specifically looking for picture hooks. As Ms. Brathwaite (sic) turned away from the shelf which she was observing the display, she stepped on something, and slipped and fell, sustaining bodily injuries.

Subsequent to the fall, while on the floor, Ms. Brathwaite (sic) would learn that the item she stepped on was screw. K-Mart at the time was in the process of reorganizing the store, and in addition there were many boxes and several other items on the floor in the particular aisle in which Ms. Brathwaite (sic) fell.¹⁸

After reviewing several occupational safety statutes and treatises, including Kmart's own safety manual, Mackay concluded that "K-Mart was negligent and irresponsible by allowing debris to remain in the traffic aisles where customers could encounter it."¹⁹ Mackay added:

Ms. Brathwaite (sic) was the unsuspecting victim of this unsafe physical condition of poor housekeeping which K-Mart on paper abhors, recommends against, and requires different action.

....

K-Mart failed to:

1. provide an establishment free from recognized hazards,
2. keep floors free from debris,
3. warn of impending danger,
4. utilize its written policy of searching and correcting, on a regular basis, the conditions that produce dirt, debris, foreign substances and disorder.

It is my opinion, and I have come to the conclusion, that K-Mart failed to use good, logical, prudent safety precautions, failed to follow their own establishment's rules, and failed to control unsafe physical conditions and employee practices, which unsafe conditions and employee practices caused Ms. Brathwaite (sic) to fall. The actions of Ms. Brathwaite were reasonable and consistent with human factors engineering, and Ms. Brathwaite (sic) in no way contributes (sic) to this fall.²⁰

During Mackay's deposition, Defense counsel questioned her extensively concerning her knowledge of the facts underlying her opinion. Mackay testified that Plaintiff knew there were

¹⁸ Mackay Report at 1.

¹⁹ Id. at 4.

²⁰ Id.

boxes on the floor and that Plaintiff "watched out for the boxes."²¹ Mackay acknowledged that she, Mackay, knows nothing about the screw which allegedly caused Plaintiff's fall: she does not know the size or color of the screw, where it came from or how long it was on the floor. Mackay further acknowledged that she never saw the location in the store where that accident occurred and does not "know where the exact location was[.]"²² but that she is "familiar with Kmart, so [she is] sure that [she] must have traversed that location on previous occasions."²³ Despite this lack of knowledge, Mackay testified that "Kmart should have known the screw was there and should have picked it up."²⁴ To clarify this statement, defense counsel asked: "[y]our testimony is regardless of however long the screw was on the floor, Kmart is responsible, even if it had just been dropped by another customer just before she slipped?"²⁵ Mackay responded: "[a]gain, because of the circumstances, yes."²⁶

The standards for admitting expert testimony are presented above and need not be restated here. Defendant has not challenged Mackay's qualifications as an expert, and for the purpose of ruling on the instant motion the Court will assume that she has the requisite degree of knowledge to give expert testimony as a safety engineer. There is no factual basis in the record,

²¹ Deposition of Rosie Mackay at 27.

²² Id. at 38.

²³ Id. at 36.

²⁴ Id. at 30.

²⁵ Id. at 31.

²⁶ Id.

however, supporting any of Mackay's conclusions. It is clear that the boxes left in the aisle did not cause Plaintiff to fall, and Plaintiff has pointed to no evidence that anything other than the screw actually caused the accident. Furthermore, Mackay candidly acknowledged that she had no evidence that Kmart had any knowledge, actual or constructive that the screw was on the floor. Accepting Mackay's bold conclusion under these circumstances "would impose on defendant the erroneous legal standard of strict liability, namely, that 'Kmart was negligent in that there was a [screw], and it was not [picked] up.'" Saldana v. Kmart Corp., No. 1995-90M, slip op. at 9 (D.V.I. Dec. 20, 1999) (court excluded Mackay's proffered opinion because it erroneously imposed strict liability on Kmart).

In reaching her conclusions, Mackay relied in part on federal regulations of the Occupational Safety and Health Act, 29 U.S.C. §§ 651-78 ("OSHA") and its Virgin Islands counterpart, title 24, sections 31 through 51 of the Virgin Islands Code. In Saldana, the District Court of the Virgin Islands ruled that these safety regulations protect only employees. Saldana, slip op. at 10. Since the plaintiff in the instant case, like Saldana, "obviously was not an employee of Kmart at the time of the accident, neither OSHA nor VI OSHA would assist the jury in determining whether Kmart was negligent." Id. at 11.

In addition, many of Mackay's conclusions are inadmissible because she states a legal conclusion. Although experts are generally permitted to offer opinions that embraces an ultimate issue to be decided by the trier of fact, *see* Fed. R. Evid. 704 (a), they are not permitted to draw legal conclusions that a defendant was negligent. *See, e.g., Andrews v. Metro North Commuter R.R. Co.*, 882 F.2d 705, 708 (2d Cir. 1989) (engineer's testimony that railroad was negligent

improperly drew legal conclusion); Owen v. Kerr-McGee Corp., 698 F.2d 236, 240 (5th Cir. 1983) (question properly excluded which in effect asked expert to opine that plaintiff was contributorily negligent).

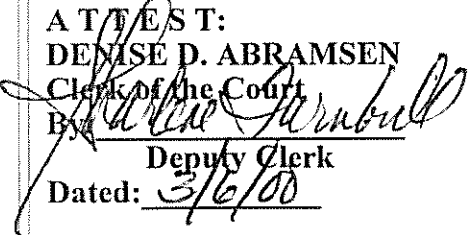
Finally, the Court finds that Mackay's "expert" opinion would not be helpful to the jury. Although the Third Circuit has indicated "that it will interpret possible helpfulness to the trier of fact broadly and will favor admissibility in doubtful cases[.]" Linkstrom v. Golden T. Farms, 883 F.2d 269, 270 (3d Cir. 1989), this is not a doubtful case. Mackay merely opines that Kmart was irresponsible for allowing debris to exist on the floor. Such an opinion not only applies a standard of strict liability as discussed above, but under the circumstances, "the normal life experiences and qualifications of the jury would permit it to draw its own conclusions concerning the safety of the floor, based upon the lay testimony of eyewitnesses." Getter v. Wal-Mart Stores, Inc., 66 F.3d 1119, 1124 (10th Cir. 1995). Certainly, the jurors have had considerable experience traversing floors and shopping in stores. Cf. Linkstrom, 883 F.2d at 271 (finding that farm safety expert could assist urban jurors, who were unfamiliar with farming, understand the conditions on a farm, the dangers encountered by farm workers, safe farming practices and how the accident occurred).

Under the above circumstances, the Court further concludes that Mackay's opinions would merely confuse and mislead the jury. See Fed. R. Evid. 403. Cloaked with the status of expert, she has offered opinions which are not based on any evidence. Thus the opinions would be of no probative value. By proffering Mackay's opinion, Plaintiff is attempting to instruct the jury that Defendant is negligent because she fell on a screw in a part of the store that was being

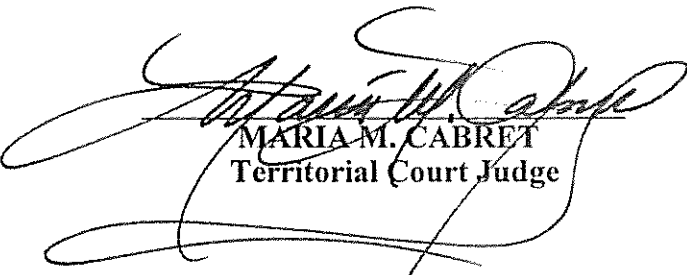
reorganized. Although such testimony would be of no assistance to the jurors, it is possible that they would give it considerable weight because of Mackay's expert status. Accordingly, even if the opinion could be considered relevant, any probative value is substantially outweighed by the unfair prejudice and confusion that would result from its admission. *See Id.*

III. CONCLUSION

For the reasons stated above, the Court concludes that Defendant's Motion in Limine to exclude Plaintiff's future damages experts must be denied and that Defendant's Motion in Limine to exclude Plaintiff's liability expert must be granted. Plaintiff's medical expert properly based his prognosis on currently available data, and there is no requirement that a plaintiff must complete treatment before such an opinion can be offered. Plaintiff's liability expert, however, based her opinion on facts not in evidence, applied an erroneous standard of care on Defendant and relied on irrelevant authority. Accordingly, her testimony is inadmissible and will be excluded at trial.

ATTEST:
DENISE D. ABRAMSEN
Clerk of the Court
By 
Deputy Clerk

Dated: 3/6/00


MARIA M. CABRET
Territorial Court Judge