

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

OWEN JOHNSON,

Plaintiff,

VS.

GRENADA DEL MAR
CONDOMINIUM ASSOCIATION,

Defendant.

CIVIL NO.: SX-02-CV-752

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

MEMORANDUM OPINION

THIS MATTER is before the Court on Defendant's Motion to Exclude Plaintiff's Liability Expert, Daniel Coughlin, P.E., or in the Alternative, for Leave to File Expert Report in Response filed on June 1, 2007. For the following reasons, Defendant's motion will be granted in part and denied in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff is a licensed master electrician and president and sole owner of Owen Johnson Electric, Inc. ("Owen Johnson Electric"). On November 26, 2002, Plaintiff filed his Complaint for damages against Defendant based on a negligence theory of liability. Plaintiff alleges that on October 30, 2002, he was injured when he fell from a ladder while working on a light post located on Defendant's premises. Plaintiff claims he was a business invitee of Defendant and Defendant was negligent in failing to construct or maintain the post in a reasonably safe condition and in failing to warn Plaintiff of the dangerous condition of the post.

Plaintiff presented Roger Currier IV, a licensed civil engineer, as an expert witness to determine the cause of the failure of the light post. Currier submitted an expert witness report dated January 25, 2003. To prepare the report, Currier interviewed Plaintiff and examined the premises where Plaintiff was injured. Currier examined the design and construction of the light

post, including the method used to connect the metal post to its concrete base. Carrier concluded that the metal light post was improperly and inadequately fastened to the concrete base, focusing particularly on the three-inch lag bolts used to connect the post to the base. Carrier also concluded that the design of the structure was inherently flawed and was insufficient to support a lateral load applied near the top of the pole. Carrier further concluded that Plaintiff would not have been able to discover the inadequacy of the structure since its weaknesses were hidden from direct view. Finally, Carrier recommended that any replacement light fixture be designed in accordance with applicable building codes.

Defendant deposed Carrier in September 2004. Plaintiff took a video trial deposition of Carrier on October 5, 2004 after learning that Carrier had been diagnosed with stomach cancer. On November 9, 2006, Defendant filed a *Daubert* Motion to Exclude Expert Opinions of Roger Carrier. Plaintiff filed a Motion for Leave to File a Substitute Expert Report on Issue of Liability on January 9, 2007 stating that Carrier moved to Florida for treatment and is not available to defend his conclusions at a *Daubert* hearing and requested leave to file a substitute expert report on the issue of liability. The Court issued an Order granting Plaintiff's Motion for Leave to File a Substitute Expert Report on Issue of Liability on April 23, 2007.

Plaintiff filed an expert report dated April 12, 2007 prepared by Daniel Coughlin, a licensed structural engineer. Coughlin's report included multiple photographs of the injury site and the light post itself. Coughlin's report analyzed the structure of the light post and included structural calculations to evaluate the structural integrity of the light post. Coughlin's report concluded that the three-inch lag bolts used to construct the structure were insufficient to anchor the metal light post to the concrete base and the use of the insufficient lag bolts violated the 1964 Virgin Islands Building Code.

On June 1, 2007, Defendant filed a Motion to Exclude Plaintiff's Liability Expert, Daniel Coughlin, P.E., or in the Alternative, for Leave to File Expert Report in Response with an accompanying memorandum. In support of the motion, Defendant claims that Plaintiff took advantage of the relief granted by the Court in the April 23, 2007 Order by filing entirely new expert opinions through Coughlin's report. Defendant claims this amounts to unfair prejudice if Defendant is not given an opportunity to respond to the new expert opinions before trial. Defendant asks the Court to exclude the Coughlin report, or, in the alternative, allow Defendant to disclose new expert opinions in response. On June 21, 2007, Plaintiff filed an Opposition to Defendant's motion to exclude Coughlin's expert opinions. Plaintiff claims that it followed the Court's Order granting Plaintiff leave to file a substitute expert report on the issue of liability and states that Plaintiff "has no objection to Grenada Del Mar serving a rebuttal report that addresses Coughlin's report." Pl.'s Opp'n 2. Defendant filed a Reply Memorandum in response to Plaintiff's Opposition on June 27, 2007.

III. DISCUSSION

Although no law is cited in Defendant's motion to exclude Coughlin's expert testimony, Defendant essentially asks the Court to exercise its discretion to exclude unfairly prejudicial evidence under Federal Rule of Evidence 403. Federal Rule 403 authorizes the Court to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. Fed. R. Evid. 403. When determining whether to exclude evidence under Rule 403, the Court is required to engage in a balancing test to weigh the genuine need for the challenged evidence against the risk of prejudice to the defendant. *U.S. v. Blyden*, 964 F.2d 1375, 1378 (3rd Cir. 1992) (citation omitted). "In addition, practical considerations play a role in determining whether a trial court should exclude evidence on non-constitutional grounds." *Mulley v. People*, 51 V.I. 404, 413 (V.I. 2009) (citation omitted).

Plaintiff's Complaint alleges that Defendant was negligent in failing to construct or maintain a light post in a reasonably safe condition and in failing to warn Plaintiff of the dangerous condition of the post. The Coughlin report directly addresses the issue of liability. The Coughlin report contains an evaluation of the design and construction of the light post. The Coughlin report contains structural calculations and concludes that the light post was structurally insufficient due to the use of lag bolts that were too short to support the structural load applied when Plaintiff climbed the ladder. The Coughlin report could be helpful to the jury in determining whether Defendant was negligent in maintaining the allegedly structurally deficient light post on the premises or in failing to warn Plaintiff of the light post's condition. The Court finds that the Coughlin report is highly probative to the negligence action for the purposes of proving Defendant's liability.

Defendant's arguments that the Coughlin report is highly prejudicial are based primarily on practical considerations. The Court agrees that the Coughlin report is more comprehensive and more technical than the Currier report. However, the Court granted Plaintiff leave to file a substitute expert on the issue of liability, and that is exactly what Plaintiff did. The Court's Order dated April 23, 2007 did not restrict Plaintiff to locating an expert who would adopt Currier's conclusions as his own, and the Court cannot fault Plaintiff for obtaining a substitute expert who reached essentially the same conclusions by utilizing a different methodology. Although Coughlin chose to perform a more detailed analysis than Currier, both experts concluded that the design and the structure of the light post were deficient based primarily on the inadequate three-inch lag bolts used to attach the metal light post to the concrete base. Both experts referenced the applicable building codes in reaching their conclusions. The Court finds that the probative value of the Coughlin report outweighs the danger of undue prejudice to Defendant under Rule 403 and will deny Defendant's motion to exclude Coughlin's testimony.

However, given that Plaintiff has no objections to Defendant serving a rebuttal report addressing Coughlin's testimony, the Court will allow Defendant to submit an expert report addressing Coughlin's report on the issue of liability within twenty (20) days of the date of this Order. Defendant's rebuttal report is strictly limited to the issues raised in the Coughlin report. Defendant's motion for leave to file an expert report in response to Coughlin's report will be granted.

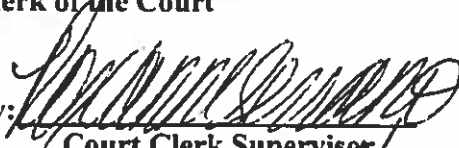
IV. CONCLUSION

The Court finds that the probative value of the Coughlin report outweighs the danger of unfair prejudice under Federal Rule of Evidence 403 and the Coughlin report shall remain in evidence. However, since Defendant has not had an opportunity to address the issues raised in the Coughlin report and Plaintiff has no objections to allowing Defendant to file a rebuttal report in response to the Coughlin report, the Court shall allow Defendant to do so within twenty (20) days of the date of the accompanying Order. Accordingly, for the reasons stated above, Defendant's Motion to Exclude Plaintiff's Liability Expert, Daniel Coughlin, P.E., or in the Alternative, for Leave to File Expert Report in Response shall be granted in part and denied in part.

Dated: April 24th, 2012


DARRYL DEAN DONOHUE, SR.
PRESIDING JUDGE

ATTEST:
VENETIA H. VELAZQUEZ, Esq.
Clerk of the Court

By: 
Court Clerk Supervisor

4/25/12