IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

AMANDA HARTZOG, individually, and as next friend of JAHMIL PEREZ, a minor	
Plaintiffs,	**SX-04-CV-095**
v.	**ACTION FOR: DAMAGES**
UNITED CORPORATION, d.b.a. PLAZA EXTRA,	
Defendants.	

MEMORANDUM OPINION

This Case was initially filed on February 29, 2004. On July 1, 2005, Defendant served Plaintiff with the First Demand for Production of Documents, which included requests for experts' curriculum vitae and expert reports. On December 7, 2009, Defendant filed Motion and Brief *In Limine* to Exclude Plaintiff from Naming Expert Witnesses. On December 16, 2009, Plaintiff served Defendant with Notice of Expert Retention of Robert J. Anders as Retail Expert. On December 21, 2009, Plaintiff served Defendant with Notice of Lay Expert, Olasee Davis.

On January 25, 2010, Defendant filed a Motion and Brief to Strike Plaintiff's "Lay Expert." On February 25, 2010, Plaintiff filed a Memorandum in Opposition to Defendant's Motion to Strike "Lay Expert." On March 9, 2010, Defendant filed a Reply Brief Re: Motion to Strike Plaintiff's "Lay Expert." On March 16, 2010, a Court Order rescheduled a Calendar Call for October 18, 2010, and set jury selection and trial beginning on November 1, 2010, through November 26, 2010.

Defendant argues against Plaintiff's "Lay Expert" on two alternate grounds. First, Defendant argues that Plaintiff's failure to timely disclose, and non-compliance with the reporting requirements under Rule 26(a)(2)(C)(i) and Rule 37(c)(1) of the Federal Rules of Civil Procedure regarding expert witnesses. This argument is subject to the same analysis and conclusion that this Court offered in response to Defendant's Motion and Brief *In Limine* to Exclude Plaintiff from Naming Expert Witnesses.

Defendant's second argument is that Dr. Davis, as a lay witness, should not be allowed to testify regarding matters of scientific, technical, or other specialized knowledge. Defendant relies on a reading of V.I. Code Ann. Tit. 5, 911(1-2), which makes an analogy to the corresponding Federal Rule of Evidence 701.

This Court, finds that consistent with Defendant's second argument, Plaintiff's witness could be admitted, but that any testimony offered must be limited in scope to lay testimony. Specifically, this Court finds that Dr. Davis should not be able to testify on the toxicity of *Diffenbachia* because this would involve expert testimony from a lay witness.

Limitations on what may be offered as Lay Testimony

Defendant cites the relevant statute governing the admission of Lay Witness testimony as *V.I. Code Ann. Tit. 5, 911(1).* As Defendant's brief points out, the language of *V.I. Code Ann. Tit. 5, 911(1)* is almost identical to *FRE 701* provisions governing allowable testimony by Lay Witnesses. Thus *911(1)* states:

> (1) If the witness is not testifying as an expert his testimony in the form of opinions or inferences is limited to such opinions or inferences as the judge finds (a) may be rationally based on the perception of the

> witness and (b) are helpful to a clear understanding of his testimony or to the determination of the fact in issue.

Significantly, *911(1)* is not identical to *FRE 701*. The Federal Rule explicitly precludes lay witnesses from offering testimony "based on scientific, technical, or other specialized knowledge…" *FRE 701(c)*. Said preclusion is not articulated in *911(1)*.

Likewise, the language of *V.I. Code Ann. Tit. 5, 911(2)* is almost identical to *FRE 702* provisions defining allowable Testimony by Experts. Thus *911(2)* states:

> (2) If the witness is testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to such opinions as the judge finds are (a) based on facts or data perceived by or personally known or made known to the witness at the hearing and (b) within the scope of the special knowledge, skill, experience or training possessed by the witness.

Whereas *FRE 702*, "permits expert opinion testimony from a 'witness qualified as an expert by knowledge, skill, experience, training, or education' when such specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." (Defendant's Reply Brief)

Defendant avers that the Court should find that Lay Witness testimony, as governed by *Rule 911(1),* may not be based on scientific, technical, or other specialized knowledge just as it may not under *FRE 701(c)*. Although section *911(1)* does not explicitly include this restriction, Defendant points to the decision in *Mulley v. People of the Virgin Islands*, 2009 V.I. Supreme Lexis 34, in which the Court recognized that "section 911(2)…indirectly incorporates the same standard for determining when testimony is expert…. Thus, consideration under either rule would

reach the same result." As a result, *Mulley* recognizes the same limitation under the V.I rule as specifically included in *FRE 701(c)*.

Defendant also cites the authority of the Utah Appeals court, which held that when a witness' testimony is based on "scientific, technical, or specialized knowledge, that witness must be qualified as an expert under rule 702...." *State v. Rothlisberger*, 95 P.3d 1193, 1198-99 (Utah 2004). The Utah Appeals court decision is instructive because Utah has identical evidentiary provisions as the Virgin Islands regarding lay and expert testimony.

This Court finds Defendants' arguments persuasive. In the Plaintiff's Notice of Lay Expert, Olasee Davis, Plaintiff states that she will call Dr. Davis as a Lay Expert and notes that due to his type of work and education, he "understands and teaches about the toxicity of *Diffenbachia*." This Court finds that to be able to testify about the toxicity of Diffenbachia would require the witness to have "scientific, technical and specialized knowledge." Furthermore, to testify about the Diffenbachia's "grave danger to children, and the need to warn of the plant's toxic nature to customers who can easily touch the plant as they walk by in the store" would also require specialized knowledge. In the *Rothlisberger* decision, the Utah Court held that "[it's] clear that when a witness seeks to testify regarding matters that are necessarily based on that witness's "scientific, technical, or specialized knowledge," that witness must be qualified as an expert under rule 702 of the Utah Rules of Evidence, and all reliability, reporting, or otherwise applicable statutory commands must then be followed with respect to that testimony."

This Court also finds support for the argument that the *FRE 701(c)* limitation is indirectly incorporated into *Rule 911(1)* based on the fact that the Legislature of the Virgin Islands has since repealed Title 5, Virgin Islands Code, Chapter 67, Admissibility of Evidence, Uniform Rules of Evidence, and replaced it with the Federal Rules of Evidence on March 23, 2010, which the Governor approved on April 7, 2010. The Legislature took this action "to reflect…revisions or to address the current trends in the law," so by doing so, "the legal community and the Territory would greatly benefit from adopting the Federal Rules of Evidence which will alleviate the current ambiguity and discrepancies in the application of the law." Furthermore, given that *Mulley* had already recognized that the FRE 701(c) would apply albeit "indirectly," this Court finds that the Legislative repeal of URE and replacement with the FRE strikes with a strong policy argument against the argument that 701(c) should not apply.

Plaintiff cites many pre-2000 cases. In light of the 2000 amendment to Rule 701, *Mulley,* and that the Legislature of the Virgin Islands has since repealed the V.I. evidence statutes and replaced them with the Federal Rules of Evidence, the Court finds it is not necessary to delve into these prior cases.

"Lay Expert": must not conflate expert and lay opinion testimony

The Defendant directs this Court to a citation from *Donlin v. Philips Lighting North America Corp.*, 581 F.3d 73 (3d. Cir. 2009), of the FED.R.EVID. 701 advisory committee's notes for the 2000 amendments, which states: "[s]ubsection (c) was added in 2000 to 'eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay

witness clothing...[and] to prevent a party from conflating expert and lay opinion testimony thereby conferring an aura of expertise on a witness without satisfying the reliability standard for expert testimony set forth in Rule 702."

In the present case, the Plaintiff filed on December 21, 2009 a Notice of "Lay Expert" shortly after the Defendant filed on December 7, 2009 a Motion and Brief *In Limine* to Exclude Plaintiff from Naming Expert Witnesses. The close sequential timing of these motions evidences that Plaintiff's filing came in response to the Defendant's Motion, and that Plaintiff's intent was to name an expert witness in the event that this Court ruled against Defendant's motion. Furthermore, as noted in the Defendant's Reply Brief Re: Motion to Strike Plaintiff's "Lay Expert," "If Plaintiff intended only to call Dr. Davis to testify regarding his factual observations in this case, there would have been no need to file any type of notice." The Court agrees that there would be no requirement to file such notice.

Certainly, the Court finds ambiguous the Plaintiff's term "Lay Expert" as it seems to conflate the very ideas the lay person and the expert. The Plaintiff's combination of the adjective "lay," which means non-expert, to the noun "expert" is illuminating and troubling. It is difficult to conceive of another situation or set of circumstances that on its face falls squarely into path of the advisory committee's goal to prevent the admission of "an expert in lay witness clothing."

Personal Knowledge Exception

Plaintiff relies on *Int'l Rental & Leasing Corp. v. McClean*, 303 F.Supp.2d 573 (D.V.I. 2004) to support its contention that Dr. Davis should be allowed to testify on the toxicity of the *Diffenbachia* plant. In the Plaintiff's Memorandum in Opposition to

Defendant's Motion to Exclude Lay Expert, she states that Dr. Davis' testimony regarding his "lay opinion on the toxicity of the *Diffenbachia* plant, its dangerous effect if the sap gets on humans, specifically on children, and the need for retailers such as Plaza Extra to have warning signs on the plant identifying it as extremely dangerous for small children" should be permitted based on her reading of *Donlin,* which states:

> "When a lay witness has particularized knowledge by virtue of his experience, he may testify – even if the subject matter is specialized or technical – because the testimony is based upon the layperson's personal knowledge rather than the specialized knowledge with the scope of Rule 702." *Donlin* at 81.

Plaintiff argues that Dr. Davis should be permitted to give his lay opinion because he has particular knowledge of horticulture and the toxicity of the *Diffenbachia* plant. However, the Plaintiff has misinterpreted "particularized knowledge" and "personal knowledge."

In *Donlin*, the Plaintiff was only a temporary employee and "did not develop an in-depth knowledge of the company's salary structure, advancement opportunities, pay raises, or employment patterns." *Id* at 82. The Plaintiff's testimony consequently failed to meet the personalized knowledge exception. The court held that the Plaintiff had "crossed the line into subject areas that demand expert testimony." *Id* at 83. See also *Lightning Lube, Inc. Witco Corp.*, 4 F.3d 1153, 1175 (3d Cir. 1993) (company founder allowed to testify regarding future business performance because of his in-depth experience with the business' contracts, operating costs and competition); *In re Merritt Logan, Inc.*, 901 F.2d 349, 360 (3d Cir. 1980) (principal shareholder of business properly testified concerning business

projections where he was intimately involved with the investments and management of the business); *Teen-Ed, Inc. v. Kimball Int'l, Inc.*, 620 F.2d 399, 403 (3d Cir. 1980) (company's licensed public accountant was allowed to testify regarding lost profits based on his personal knowledge of company's balance sheet).

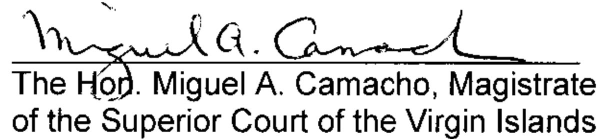
Further, these cases address fact patterns in which the lay witnesses were involved employees, managers or a principal shareholder of the businesses. Personal knowledge was based on their knowledge of these businesses with which they were involved. In the present case, Dr. Davis does possess specialized knowledge about plants such as the *Diffenbachia*. However, nowhere does it say that Dr. Davis was involved with the placement of warning signs of plants in Plaza Extra stores, that he physically inspected the alleged *Diffenbachia* plant, or that he examined the Plaintiff's son.

In *Int'l Rental*, "the general manager of a business that regularly makes decisions on the costs of repairing vehicles, <u>and personally viewed</u> the damaged vehicle," was permitted to testify that "he has sufficient expertise and knowledge to give estimates on the cost of repairing his company's vehicle." The key to personal knowledge in *Int'l Rental* is that the general manager had physically inspected the damage vehicle. Although the Plaintiff cites this case to support her position, the case cuts against her argument and supports the Defendant's argument because, as noted above, Dr. Davis did not personally view the plant or examine the Plaintiff's son.

To conclude, in the present case, the Court finds that it shall limit testimony to factual observations and descriptions of why Dr. Davis suggested the plant was

the *Diffenbachia*. However, Dr. Davis should not be able to testify about toxicity of plant, about the danger the plant poses to children, or whether retailers should have signs in the window. To testify on these matters the Plaintiff should have had Dr. Davis qualified as an expert witness. An appropriate Order of even date follows.

DATED this 3 day of July, 2010.



The Hon. Miguel A. Camacho, Magistrate
of the Superior Court of the Virgin Islands

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

By:
Court Clerk Supervisor

Dated: 8/2/10