

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

TERESA JAVOIS

Plaintiff)

CASE NO. SX-03-CV-0000513

Vs.)

ACTION FOR: DAMAGES - CIVIL

COST-U-LESS)

Defendant)

**NOTICE OF ENTRY OF
MEMORANDUM OPINION
AND ORDER**

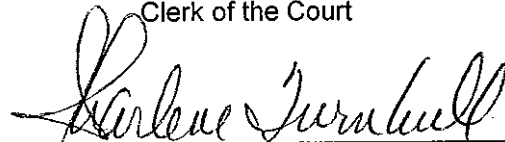
TO: JUDGES OF THE SUPERIOR COURT
LEE J. ROHN, ESQ.
CHARLES S. RUSSELL, ESQ.
KEVIN L. KELLER, ESQ.

LIBRARIAN
~~AT~~
ORDER BOOK

Please take notice that on July 31, 2009 a(n) MEMORANDUM OPINION
AND ORDER dated July 30, 2009 was entered by the Clerk in the above-entitled
matter.

Dated: July 31, 2009

Venetia H. Velazquez, Esq.
Clerk of the Court



SHARLENE TURNBULL
COURT CLERK SUPERVISOR

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

TERESA JAVOIS and MICHAEL JAVOIS,
Plaintiffs,
v.
CULUSVI, INC. d/b/a COST-U-LESS,
Defendant.

SX-03-CV-513
ACTION FOR DAMAGES

ORDER

In accordance with the memorandum opinion of even date, it is hereby

ORDERED that Plaintiff's Motion to limit Dr. Robert Lessne's testimony in regards to the safety conditions of Cost-U-Less is **GRANTED**; and further

ORDERED that Plaintiff's Motion to Limit Dr. Robert Lessne's testimony in regards to liability apportionment is **DENIED**, and further

ORDERED Plaintiff's Motion to limit Lessne's definition of earning capacity is **GRANTED**; and further

ORDERED that Plaintiff's Motion to exclude Dr. Robert Lessne's testimony in regards to full vocational testing with Plaintiff is **DENIED**; and further

ORDERED that Defendant's Motion to exclude testimony of Plaintiff's expert witnesses is **DENIED**; and it is finally

ORDERED that Defendant's Motion to exclude Plaintiff's loss of earning capacity claim is **DENIED** as moot.

DONE and so **ORDERED** this 30th day of July, 2009.

ATTEST:

Venetia Harvey-Velazquez
Clerk of the Court

By: Karlene Gurabault
Court Clerk Supervisor

Dated: 7/30/09

Edgar D. Ross
EDGAR D. ROSS
Senior Sitting Judge
CERTIFIED TO BE A TRUE COPY
This 30th day of July, 2009
VENETIA H. VELAZQUEZ, ESQ.
CLERK OF THE COURT
By: Karlene Gurabault Court Clerk

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

TERESA JAVOIS and MICHAEL JAVOIS,

Plaintiffs,

v.

CULUSVI, INC. d/b/a COST-U-LESS,

Defendant.

SX-03-CV-513

ACTION FOR DAMAGES

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Plaintiffs' Motion In Limine to limit the Testimony of Robert Lessne and Defendant's Opposition. Defendant simultaneously a filed Motion to Excluded (sic) Plaintiff's Loss Earning Capacity (sic) claim and the expert testimonies of Gary Fannin and Alan Bronstein, and Plaintiffs filed a reply thereto. For the reasons set forth herein, Plaintiff's motion will be granted in part and denied in part, and Defendant's motions will be denied.

FACTS

On September 2, 2003, Plaintiff Teresa Javois ("Plaintiff") was shopping at Cost-U-Less. While in the frozen foods aisle, Plaintiff allegedly slipped on what appeared to be a piece of frozen lobster. Plaintiff claims that the piece of lobster had thawed, and a puddle of water had formed around it. It is the Plaintiffs assert the Defendant Culusvi, Inc. d/b/a Cost-U-Less ("Defendant") knew or should have known of the unsafe conditions at the store location and did not inform its licensees and/or invitees of this dangerous condition. As a result, Plaintiff claims that she was injured and suffered great pain of the body and mind, which caused her to incur medical and related expenses and prevented her from performing her marital duties.

Plaintiff further alleges Defendant's conduct to be grossly negligent, reckless, willful, wanton and outrageous and was the proximate cause of her injuries. In preparation for trial,

Plaintiffs hired Gary Fannin, Vocational Evaluation Specialist, and Alan Bronstein, Economist, as their expert witnesses. Defendant retained Robert Lessne, PhD., Vocational Rehabilitation Expert, *inter alia*, and Orlando Fernandez, M.D., as their expert witnesses. Plaintiffs and defendant now seek to have expert witness testimony excluded.

STANDARD OF REVIEW

The admissibility of expert testimony under Federal Rules of Evidence Rule 702 has three major requirements: (1) witness must be an expert; (2) procedures and methods used must be reliable; and (3) testimony must fit factual dispute at issue so that it will assist jury. FED. R. EVID. 702; Saldana v. Kmart Corp., 84 F. Supp. 2d 629 (D. Virgin Islands, 1999). A broad range of knowledge, skills, and training qualify an expert as such, and the Third Circuit has eschewed imposing overly rigorous requirements of expertise. United States v. Velasquez, 64 F.3d 844 (3d Cir. 1995); Carmelita Elcock v. Kmart Corp., 233 F.3d 734 (3d Cir. 2000); *See also* Hammond v. International Harvester Co., 691 F.2d 646, 653 (3d Cir.1982) (permitting engineer with sales experience in automotive and agricultural equipment, who also taught high school automobile repair, to testify in products liability action involving tractors).

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." FED. R. EVID. 702; *see also* Aloe Coal Co. v. Clark Equipment Co., 816 F.2d 110 (3d Cir. 1987). The requirement of the evidentiary rule addressing expert testimony, that expert's testimony must assist trier of fact, is to ensure that evidence is relevant or "fits" under facts of case; there must be valid connection between expertise in question and inquiry to be made in case. FED. R. EVID. 702; *see also* United States v. Velasquez, 64 F.3d 844 (3d Cir. 1995) (District court properly admitted expert testimony of handwriting analyst; analyst

had more than 14 years of experience as forensic document analyst for United States Postal Inspection Service, her testimony concerned “scientific, technical or other specialized knowledge” and was sufficiently reliable to be admissible, and her testimony, comparing handwriting of defendant's accomplices with handwriting on mailing labels used to ship drugs, was of assistance to jury in determining whether accomplices had written labels, which was fact at issue in prosecution for engaging in continuing criminal enterprise involving at least five people.)

Unless expert testimony is rendered by a qualified expert, it must be excluded; to render expert opinions, a witness must be sufficiently qualified as an expert by knowledge, skill, experience, training, or education. Wade-Greaux v. Whitehall Laboratories, Inc., 874 F. Supp. 1441 (D. Virgin Islands, 1994). Even if evidence offered by the expert witness satisfies the rule governing admissibility of expert testimony and is relevant, it may still be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury. FED. R. EVID. 403.

DISCUSSION

The thrust of Plaintiff's Motion is that Federal Rule of Evidence 702 precludes certain testimony of Dr. Lessne as an expert witness. The Court will address whether to limit each of the following: 1) Dr Lessne's testimony on safety conditions at Cost-U-Less; 2) Dr. Lessne's testimony regarding liability apportionment; 3) Dr. Lessne's definition of earning capacity; 4) Dr. Lessne's failure to mention Defendant's medical expert report in his report; and 5) Dr. Lessne's testimony regarding the vocational testing of plaintiff.

First, Plaintiffs argue that it is improper for Dr. Lessne to proffer opinions on the safety of Cost-U-Less and the circumstances of the accident because Dr. Lessne is not a safety expert. Defendant counters that Lessne is an expert in Ergonomics and as such his testimony is relevant.

While his Curriculum Vitae does list Ergonomics as one of his areas of specialization, Dr. Lessne was retained and is testifying as a vocational rehabilitation expert, not as a safety expert. Ergonomics is defined as “a process, [that] refers to the design of machines, machine systems, work methods, and environments to take into account the safety, comfort, and productiveness of human users and operators.” Human-Factor Engineering, Encyclopedia Britannica Online. Dr. Lessne cannot be qualified as a safety expert because he does not have the prerequisite knowledge, skill, experience, training, or education. As such, Dr. Lessne cannot give his opinion regarding the safety conditions of Cost-U-Less that resulted in Plaintiff’s alleged injuries.

Plaintiffs also argue that Dr. Lessne should not be allowed to testify regarding liability apportionment, which Dr. Lessne defines as “the causation of disability is based past (sic) disabilities and the secondary disabilities are based on a percentage of disability caused by the secondary injury”. Plaintiffs assert that Dr. Lessne should not opine on liability apportionment because it would go into medical causation, an area outside of his expertise. Additionally, Plaintiffs claims that Dr. Lessne’s explanation of liability apportionment ignores the law of the Restatement of Torts on causation that the accident does not have to be sole cause of the injury but only a producing cause. Restatement (Second) of Torts § 431, 433A. Defendant claims that Lessne does not attempt to apportion causation, and does not give a medical causation opinion. Lessne himself admits that such apportionment is properly left to a medical doctor. Because Lessne does not plan to testify to apportionment, Plaintiff’s objection is premature and will be denied.

Plaintiffs also take issue with Dr. Lessne’s definition of “earning capacity” because it contradicts the definition of “loss of earning capacity” in the Restatement of Torts. Defendants argue that the definition is not incongruent with the Restatements and that Lessne will testify

within the vocational rehabilitation context. The Court notes that Lessne's definition is relevant in a vocational rehabilitation context. Therefore, as a Vocational Rehabilitation Expert, Dr. Lessne is qualified to testify to the concept of "earning capacity" in the context of vocational rehabilitation. However, this Court finds that while Lessne's definition for earning capacity may be relevant, it could also serve to confuse the jury and would not aid the trier of fact in determining loss of earning capacity within the confines of the applicable law. See FED. R. EVID. 403.

Additionally, plaintiffs argue that Lessne's report is incomplete because he failed to consider and review Dr. Fernandez's, Defendant's medical expert, report. Lessne is qualified to offer his opinion based on his interview with Plaintiff, so long as Lessne is testifying within his field of expertise. As reflected by Dr. Lessne's Curriculum Vitae, he has a Master of Arts for Rehabilitation of the Blind and Visually Impaired, a Master of Science for Economics of Disability, Ergonomics and Work Adjustment with Special Research in Behavioral Cybernetics, and a Doctor of Philosophy with extensive course work in compensation economics.

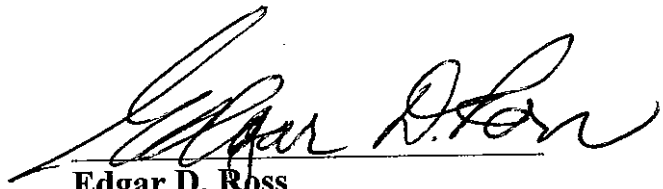
Dr. Lessne's extensive educational background and professional experience makes him qualified to testify as an expert. Dr. Fernandez or other medical experts can also testify at trial, if necessary, regarding medical causation or evidence of Plaintiff's pre-existing injuries. The jury can appropriately determine how much weight to give Lessne's testimony in light of this fact. In this instance, the Court does not find Dr. Lessne's expert testimony's probative value to be substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading to the jury. Therefore, Lessne's testimony regarding vocational testing will not be excluded.

Finally, Plaintiffs argue that Lessne's testimony should be excluded because he was unable to perform the full vocational testing with Plaintiff. Lessne concedes that he unable to complete the full vocational testing with Plaintiff Teresa Javois, but it was because Plaintiff

Teresa Javois "showed up late, was combative, left early and refused to return." (Defendant's Opp'n to Plaintiffs' Mot. In Limine as to the Test. of Robert Lessne, page 1). Dr. Lessne based his evaluation on Plaintiff's "own reported physical difficulties and the results of some vocational testing, along with her age, work and education history and vocational education, training, as well as experience possessed by Dr. Lessne." (Defendant's Opp'n to Plaintiffs' Mot. in Limine as to the Test. of Robert Lessne, page 2). As a vocational rehabilitation expert, Dr. Lessne is qualified to testify to his evaluation of Plaintiff based on their interaction.

Defendant moved to have the testimony of plaintiff's expert witnesses excluded on the grounds that if their witness is excluded so should the plaintiffs'. Defendant further moves that without the testimony of vocational experts, plaintiff's claim for loss of earning capacity should be excluded from trial. In support of its motion, Defendant claims that in the absence of vocational rehabilitation testimony, Plaintiffs' claim for loss of earning capacity is speculative and should be excluded. Based on the foregoing, the Court will deny both motions. An appropriate order will issue.

Dated: July 30, 2009



Edgar D. Ross
Senior Sitting Judge of the Superior Court

CERTIFIED TO BE A TRUE COPY
This 31st day of July, 2009

VENETIA H. VELAZQUEZ, ESQ.
CLERK OF THE COURT

By [Signature] Court Clerk