IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

BRUCE GUY and CONNIE GUY,	:	
	:	C.A. No: K07C-04-028 (RBY)
Plaintiffs,	:	
	:	
v.	:	
	:	
ANDREAS STIHL AG & CO. KG, STIHL, INC., and TRI-SUPPLY & EQUIPMENT, INC.,	:	
	:	
Defendants.	:	

Submitted: November 19, 2010
Decided: January 19, 2011

Upon Consideration of Defendant
Andreas Stihl AG & Co. KG's
Motion to Exclude Plaintiff's Expert Witness
GRANTED
and
Motion for Summary Judgment
DEFERRED

OPINION AND ORDER

R. Stokes Nolte, Esq., Reilly, Janiczek & McDevitt, PC, Wilmington, Delaware for Plaintiffs.

Onofrio de Gennaro, Esq., Maron, Marvel, Bradley & Anderson, P.A., Wilmington, Delaware for Defendant Andreas Stihl AG & Co. KG.

Roger D. Landon, Esq., Murphy & Landon, Wilmington, Delaware for Defendant Tri-Supply & Equipment, Inc.

Young, J.

Guy v. Andreas Stihl AG & Co., KG, et al.
C.A. No: 07C-04-028 (RBY)
January 19, 2011

SUMMARY

In early 2007, Bruce and Connie Guy ("The Guys") filed a complaint against Andreas Stihl AG & Co., KG ("Andreas Stihl"). The Guys' complaint finds its genesis in a 2005 work accident, where Bruce Guy was injured while operating one of Andreas Stihl's cutting machines, the TS-400. The Guys' complaint alleges that the TS-400 was negligently manufactured, that Andreas Stihl breached both express and implied warranties with respect to the TS-400, and also includes a claim for loss of consortium.

Andreas Stihl has filed two motions in response to the Guys' claim: a Motion to Exclude the testimony of an expert retained by the Guys, and a Motion for Summary Judgment. The Motion for Summary Judgment argues that since the Guys' expert is not qualified to render an expert opinion, and because an expert opinion is required in this case,[1] a ruling in Andreas Stihl's favor on the Motion to Exclude would be case dispositive.

The Guys do not agree with this analysis. The Guys contend that they have already proven that the TS-400 is defective, because Andreas Stihl's manual admits that death or severe injury can result when cutting with the upper front quadrant of the machine's cutting attachment. That is not an acceptable leap. The liability at issue requires product expertise. It is not within the common knowledge of laymen. Hence, it is necessary for the plaintiff to introduce expert testimony in order to

[1] *See, e.g., Reybold Group, Inc. v. Chemprobe Technologies, Inc.*, 721 A.2d 1267, 1270 (Del. 1998); *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991); *Nacci v. Volkswagon of Am., Inc.*, 325 A.2d 617, 619 (Del. Super. Sept. 11, 1974).

establish a prima facie case,[2] given the complex regulations and design specifications surrounding the TS-400.

Thus, without admissible expert testimony, the Guys' claim that the TS-400 is defective cannot be supported. The Court first engages in an analysis of the adequacy of the Guys' expert's qualifications and the reliability of his testimony. Only if the Court finds the expert is not qualified to testify is a summary judgment analysis appropriate. After a thorough review of the record, the Court finds that the Guys' expert is not qualified to testify under D.R.E. 702. Andreas Stihl's Motion to Exclude is therefore **GRANTED.** Andreas Stihl's Motion for Summary Judgment is **DEFERRED**, subject to the Plaintiff's filing, if desired, a motion requesting additional time to acquire qualified supporting expertise. Any such motion must be filed within ten days of the date of this Order or Summary Judgment will be granted.

FACTS

On April 13, 2005, Plaintiff Bruce Guy ("Guy") was working as a laborer on a pipe crew for Asset Builders LLC at the Quail's Nest residential subdivision in Dover, Delaware. Guy's crew was installing storm drain pipe and catch basins in the ground throughout the new development. The work consisted of digging a trench with an excavator, laying pipe in the trench, placing the catch basins in the trench at predetermined intervals, and, finally, connecting the pipe to the catch basins.

After the pipe had been laid at the site, the crew discovered that the elevation

[2] *Id.* at 1270.

of the pipe in the trench was higher than the pre-cut holes in the basins. To fit the pipe into the pre-cut holes, the crew decided to cut the section of the catch basin above the pre-cut holes so that the pipe could be fit into the basin. To accomplish this task, Guy stood inside each of the catch basins while operating a STIHL TS-400 cut-off machine equipped with an unauthorized 14-inch diamond wheel.[3]

The details surrounding Guy's accident are murky at best. Guy remembers that he had nearly finished cutting through the concrete on one of the catch basins when the blade of the TS-400 pinched unexpectedly and threw the blade back in his face. Guy sustained permanent injury, and has filed a complaint against Andreas Stihl for negligence and breach of warranty.

At this point in the proceedings, both sides have hired experts to support their competing interpretations of the role that the TS-400 played in the accident. Guy has retained an expert, Philip O'Keefe ("O'Keefe"), who has opined that, among other things, the TS-400 is unreasonably dangerous, because an adjustable guard allows the user to expose the upper quadrant of the machine's cutting wheel.[4] Andreas Stihl

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[3] The Stihl TS-400 is a hand-held, gasoline-powered tool that uses either an abrasive composite or diamond wheel to grind through certain types of materials, including asphalt, concrete, masonry and various metals. Stihl-branded cut-off machines are nearly ubiquitous on construction sites worldwide.

[4] O'Keefe also found that the warnings in the TS-400's manual are confusing, and that a concrete-cutting chain saw would have been better suited to accomplishing Guy's task. Andreas Stihl properly asserts that it is not responsible for Guy's choice of tools. It is undisputed that Guy never read the TS-400 manual. Therefore, Andreas Stihl's primary challenge to O'Keefe's report centers on his finding concerning the dangerousness of the TS-400 as currently marketed and sold.

now moves to exclude O'Keefe's testimony by raising concerns about O'Keefe's qualifications and the reliability of his report, and, if successful, requests that the Court enter summary judgment in its favor.

STANDARD OF REVIEW

Delaware Rule of Evidence 702 governs the admission of expert testimony. That rule provides:

> [i]f 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.

D.R.E. 702 is substantially similar to Federal Rule of Evidence 702, which the United States Supreme Court interpreted in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[5] *Daubert* specifically addressed the admissibility of scientific testimony under F.R.E. 702. In *Kumho Tire Co., Ltd. v. Carmichael*, the Court extended the *Daubert* holdings to apply to all expert testimony concerning "scientific, technical or other specialized" matters.[6] Though the United States Supreme Court's interpretations of F.R.E. 702 in *Daubert* and *Kumho* are only binding upon federal

[5] 509 U.S. 579 (1993) ("*Daubert*").

[6] 526 U.S. 137 (1999) ("*Kumho*").

courts, the Delaware Supreme Court has expressly adopted their holdings as correct interpretations of D.R.E. 702.[7]

Accordingly, D.R.E. 702 "imposes a special obligation upon a trial judge to 'ensure that any and all scientific testimony... is not only relevant, but reliable.'"[8] The trial judge acts as the "gatekeeper" in deciding whether an expert's testimony "has a reliable basis in the knowledge and experience of [the relevant] discipline."[9] The foci of a *Daubert* analysis are the "principles and methodology" used in formulating an expert's testimony, not on the expert's resultant conclusions.[10]

To help determine whether an expert's "principles and methodology" are rooted in science and derived from the scientific method,[11] the *Daubert* Court identified several factors that may be useful to a trial judge acting as the "gatekeeper": (1) whether a theory or technique has been tested; (2) whether it has been subjected to peer review and publication; (3) whether a technique had a high known or potential rate of error and whether there are standards controlling its operation; and (4) whether the theory or technique enjoys general acceptance within

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[7] *Bowen v. E.I. DuPont de Nemours & Co., Inc.*, 906 A.2d 787, 794 (Del. 2006); *see also M.G. Bancorporation v. Le Beau*, 737 A.2d 513, 521 (Del. 1999) ("[s]ince Delaware Rule of Evidence 702 is identical to its federal counterpart, we rely on the United States Supreme Court's most recent authoritative interpretation of Federal Rule of Evidence 702.").

[8] *M.G. Bancorporation*, 737 A.2d at 521.

[9] *Id.* at 523 (quoting *Daubert*, 509 U.S. at 589).

[10] *Id.*

[11] *Daubert*, 509 U.S. at 590.

a relevant scientific community.[12]

The *Daubert* factors are not a "definitive checklist or test."[13] Rather, the "inquiry must be 'tied to the facts' of a particular case,"[14] because "the factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony."[15]

Consistent with *Daubert,* Delaware courts apply a five-step test to determine the admissibility of scientific or technical expert testimony. The trial judge must determine whether: (1) the witness is qualified as an expert by knowledge, skill experience, training or education; (2) the evidence is relevant; (3) the expert's opinion is based upon information reasonably relied upon by experts in the particular field; (4) the expert testimony will assist the trier of fact to understand the evidence or to determine a fact in issue; and (5) the expert testimony will not create unfair prejudice or confuse or mislead the jury.[16] The party seeking to introduce the expert testimony bears the burden of establishing its admissibility by a preponderance of the

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[12] *Id.* at 590-94.

[13] *See Kumho*, 526 U.S. at 150 (quoting *Daubert*, 509 U.S. at 593).

[14] *See Id.* (quoting *Daubert*, 509 U.S. at 591).

[15] *See Id.*

[16] *Bowen*, 906 A.2d 787, 794-95 (Del. 2006). *See also Tolson v. State*, 900 A.2d 639, 645 (Del. 2006); *Eskin v. Carden*, 842 A.2d 1222, 1227 (Del. 2004).

evidence.[17]

To summarize: if an expert opinion is challenged, as it is here, the trial judge must decide whether the expert is qualified to render the opinion and whether the testimony has a reliable basis in the relevant subject matter.[18] The *Daubert* test is not finite, but must be viewed as a guideline for determining whether any particular opinion of a qualified expert is based on valid reasoning and methodology.[19] The ultimate question for the Court is "whether the expert's technique or principle [is] sufficiently reliable so that it will aid the jury in reaching accurate results."[20]

DISCUSSION

A. *O'Keefe's Qualifications*

Mr. O'Keefe is a licensed engineer in Illinois with a BS in Mechanical Engineering from the Illinois Institute of Technology. He has a wide variety of engineering work experience that spans several decades, including experience designing and testing outdoor power equipment, and he has participated in the design

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[17] *Minner v. Am. Mortgage & Guar. Co.*, 791 A.2d 826, 843 (Del. Super. Apr. 17, 2000) (citing *Nat'l Bank of Commerce v. Dow Chem. Co.*, 965 F. Supp. 1490, 1497 (D. Ark. 1996), aff'd 133 F. 3d 1132 (8th Cir. 1998)); *see also Daubert*, 509 U.S. 579, 592, n. 10 (1993); *Marmo v. Tyson Fresh Meats*, 457 F. 3d 748, 757-58 (8th Cir. 2006); *Oddi v. Ford Motor Co.*, 234 F. 3d 136, 145 (3d Cir. 2000); *Nelson v. Tennessee Gas Pipeline Co.*, 243 F. 3d 244, 251 (6th Cir. 2001);*Cook v. Sheriff of Monroe County*, 402 F.3d 1092, 1107 (11th Cir. 2005).

[18] *M.G. Bancorporation,* 737 A.2d at 523.

[19] *Livesay v. Heagy*, 2004 WL 3928262 (Del. Super. 2004).

[20] *Id.* (citation omitted).

of various hand-held power tools. In addition, O'Keefe has performed testing with cut-off machines and managed field testing for cut-off machines.

Because of his extensive engineering background, the Guys submit that Mr. O'Keefe possesses the requisite knowledge, skill, experience and training to be qualified as an engineering expert. The Guys rely upon two principal cases to buttress this argument: *State v. Jones*[21] and *Grace v. Morgan.*[22] In *Jones*, the court held that a handwriting identification specialist possessed sufficient specialized knowledge such that she could testify as an expert in the field of document analysis.[23] In *Grace*, the court held that because of an overlap in knowledge between architects and engineers in the area of parking lot planning, an architect could be qualified as an expert regarding a breach of the standard of care for an engineer.[24]

The Guys' analysis of these cases misidentifies the critical issue raised by Andreas Stihl's Motion to Exclude. While both decisions do address the standards for establishing an expert's general qualifications, the Guys neglect to mention that those opinions also require the moving party to link the expert's general qualifications to the specific facts at issue in the case. In *Jones*, the court's decision focused on the handwriting specialist's qualifications, not only in a general sense, but also with respect to her "specialized knowledge [that would] assist the jurors in

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[21] 2003 WL 21519842 (Del. Super. June 11, 2003).

[22] 2006 WL 2065172 (Del. Super. July 25, 2006).

[23] *Jones*, 2003 WL 21519842 at *3.

[24] *Grace,* 2006 WL 2065172 at *4.

deciding the *particular* issues of the instant case.[25] Similarly, *Grace* does *not* say that all architects are qualified to testify in any matter that concerns engineers. What *Grace* does say is that an architect "may testify regarding the applicable standard of care for an engineer *regarding parking lot design and planning issues* and whether it was breached, because [the architect] was properly qualified to testify on the subject matter through training and experience."[26]

Even if the Court were to agree that O'Keefe is qualified to testify as an expert in the field of engineering, that finding would not end this inquiry because Andreas Stihl is not seriously contesting O'Keefe's general qualifications as an engineer. Rather, Andreas Stihl is arguing that O'Keefe does not have sufficient *specialized* knowledge to assist the jurors in deciding the particular issues in the instant case.[27] Specifically, Andreas Stihl disputes whether O'Keefe is qualified to testify with respect to a design defect inherent in the TS-400 cut-off machine.

It is unsurprising that Andreas Stihl would raise this question. The Delaware Supreme Court has commanded trial judges to inquire as to whether the proffered expert and the purported "field of expertise" itself can produce an opinion that is sufficiently informed, testable and, in fact, verifiable on an issue to be determined at trial.[28] In performing this inquiry, the Delaware Supreme Court has cautioned that

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[25] *Jones*, 2003 WL 21519842 at *3 (emphasis added).

[26] *Grace,* 2006 WL 2065172 at *6 (emphasis added).

[27] *See Kumho Tire Co.,* 526 U.S. at 156.

[28] *Goodridge v. Hyster Co.,* 845 A.2d 498, 503 (Del. 2004) (emphasis in original).

"[e]ven though an expert may be qualified to opine within a recognized "field," that fact alone does not automatically guarantee reliable, and therefore admissible, testimony. It is critical that a trial judge be satisfied that any *generalized* conclusions are applicable to the *particular* facts of the case."[29] Regarding that inquiry, the Court now turns to the record.

The Guys argue that O'Keefe has experience with the design and testing of outdoor power equipment, and has participated in the design of various hand-held power tools, both gasoline powered and electric. The Guys further argue that O'Keefe's prior work experience involved managing field testing for cut-off machines, and that O'Keefe personally tested cut-off machines.

The Guys' reference to O'Keefe's background in testing cut-off machines is misleading. O'Keefe's testing background, with respect to cut-off machines, is limited to one isolated incident over a decade ago in which he imprecisely recalls operating a cut-off machine for a few minutes. O'Keefe does not remember what he was cutting, or the model of the machine he was using.

O'Keefe has never been recognized or qualified in any court as an expert in the design, manufacture, use, or safety of any hand-held gasoline powered tool. O'Keefe holds no patents of any type related to a gasoline-powered hand-held tool.

Perhaps more significantly, he does not recall ever disassembling a cut-off machine. He has done no testing of any kind with any cut-off machine, nor can he recall observing any testing beyond his vague recollection of one incident that took

[29] *Id.* at 503.

place several years ago. O'Keefe has never lectured on the design, use or safety of cut-off machines or any other hand-held gasoline-powered equipment, and cannot recall ever publishing any article on the design, use or safety of any hand-held gasoline-powered equipment.

Similarly, O'Keefe has no "hands-on" experience in the design, manufacture or use of cut-off machines or other similar tools. O'Keefe has never examined test data reflecting dynamics that occur during kickback with a cut-off machine, and does not know how often kickback occurs with cut-off machines, chains saws, or other power tools. Further, he has never performed or reviewed a risk analysis for a cut-off machine, or investigated a cut-off machine accident. He is unfamiliar with injury statistics for cut-off machines, and does not know how the injury rate of cut-off machines compares to other similar machines.

While Mr. O'Keefe's experience with cut-off machines appears marginal, the scope of his knowledge with respect to the product at the center of this case, the Stihl TS-400, is almost nonexistent. O'Keefe has never started a TS-400, been present while one was started, mounted a cutting attachment, used one or tested one. In fact, O'Keefe's first encounter with the TS-400 took place a few minutes the night before his deposition, and his subsequent inspection of the TS-400 lasted only two minutes. In his report, Mr. O'Keefe's attempts to explain the engineering principles underlying Guy's contention that the TS-400 should not be offered for sale, if one of its intended uses is making cuts similar to the one that caused injury in this case.

Andreas Stihl contends that O'Keefe's ultimate conclusion, that the TS-400 is unreasonably dangerous, is not supported by recognized principles or methodologies.

O'Keefe's report lacks proper explanation as to how he reached this determination. For example, none, of O'Keefe's conclusions is supported by any objective standard, because O'Keefe did not visit the accident site, attempt an accident reconstruction, or take into account the potential negligence of Guy or Guy's employer. Accepting O'Keefe's opinion would render every cut-off machine on the market defective, a conclusion unsupported by background or logic.

These facts are merely a sampling of the absence of O'Keefe's product knowledge, and lack of anything countervailing in the evidence contained in the record. That Mr. O'Keefe may be qualified to testify as an engineering expert in many areas is not our issue. Whether he may be qualified to testify as an expert in cut-off machines is. Mr. O'Keefe is unqualified to testify as an expert in this case.

B. ***Summary Judgment Appropriate***

In a motion for summary judgment, the moving party bears the burden of proving "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[30] Summary judgment is appropriate only when, after viewing all the evidence in a light most favorable to the nonmoving party, the Court finds no genuine issue of material fact.[31] A genuine issue of material fact arises when "any rational trier of fact could infer that plaintiffs have proven the elements

[30] SUP. CT. CIV. R. 56(e); *see also Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

[31] *Gill v. Nationwide Mut. Ins. Co.*, 1994 WL 150902, at *2 (Del. Super. Feb. 22, 1994).

of prima facie case by clear and convincing evidence."[32] If a defendant, as the moving party, can establish that there is no genuine issue of material fact, and the defendant is entitled to judgment as a matter of law, the burden will shift to the plaintiff to show the existence of specific facts to support the plaintiff's claim.[33]

Here, there is no genuine issue of material fact. Both parties agree that Guy was injured while using the TS-400, and do not dispute the factual conditions extant. The Court is, however, left to decide whether expert testimony is necessary, as a matter of law, to prove the existence of a defect in the TS-400. To do so, the Court must determine whether the existence of a defect in the TS-400 in question is within the knowledge of the average juror, thus eliminating the need for an expert opinion as to whether the TS-400 was defectively designed.

The Court finds that summary judgment is appropriate in this case, because the Guys cannot establish the existence of a product defect without producing the testimony of a qualified, reliable expert. The Guys argue that summary judgment is inappropriate, because an expert is not required to establish a design defect. The Court disagrees.[34] The workings and operation of the TS-400, a mechanical cutting tool created with a sophisticated design and controlled by industry standards, are not

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[32] *Cerebus Intl. LTD. v. Apollo Mgmt., L.P.,* 794 A.2d 1141, 1149 (Del. 2002) (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 254 (1986)).

[33] *Anderson*, 477 U.S. at 248.

[34] The Stihl TS-400 is not, for example, a common household mop. *See Brown v. Dollar Tree Stores, Inc.*, 2009 WL 5177162 (Del. Super. Dec. 9, 2009).

within the average juror's scope of knowledge.[35]

CONCLUSION

Daubert is designed to be a flexible test, but it does have its limits. After reviewing the record in its entirety, the Court finds that Mr. O'Keefe's generalized conclusions are not applicable to the particular facts in this case. As such, Mr. O'Keefe is not qualified to testify in this case. Further, the Court finds that expert testimony is necessary to establish the existence of a defect in the TS-400. Therefore, Andreas Stihl's Motion to Exclude is hereby **GRANTED**. Andreas Stihl's Motion for Summary Judgment, filed contemporaneously herewith, is **DEFERRED** subject to Plaintiff's filing, if desired, a motion requesting additional time to acquire qualified supporting expertise, which must be filed within ten days of the date of this Order or Summary Judgment will be granted.

SO ORDERED this 19th day of January, 2011.

/s/ Robert B. Young
J.

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[35] The Court acknowledges that there is a narrow category of cases where expert testimony is not required to prove a product defect. *See Reybold Group, Inc. v. Chemprobe Tech.,* 721 A.2d 1267 (Del. 1998). That category of cases, however, requires the plaintiff to present circumstantial evidence to the jury that tends to negate other reasonable causes of the injury, in the absence of abnormal use and reasonable secondary causes. *Id.* at 1270. To the extent that the plaintiff raised this argument, the Court finds insufficient circumstantial evidence in the record to support applying this exception to the instant matter.