

56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party.’” *Navarro v. Pfizer Corp.*, 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Nicolo v. Philip Morris, Inc.*, 201 F.3d 29, 33 (1st Cir. 2000). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must “produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue.” *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). “As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party.” *In re Spiegel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

II. Factual Background

The parties dispute almost every factual statement included in their opponents’ statements of material facts submitted pursuant to this court’s Local Rule 56. The following facts provide the necessary setting for the resolution of the pending motion and do not appear to be in dispute.

The defendant, a Delaware corporation with a principal place of business in Indiana, manufactured a truck trailer on which plaintiff James A. Libbey was working on January 26, 2001 in

Biddeford, Maine when he slipped and fell. Complaint (Docket No. 1) ¶¶ 2, 6, 9-10; Answer (Docket No. 2) ¶¶ 2, 6, 9-10.² There were two painted metal strips in the bed of the trailer which were the longitudinal structural members of the chassis and the support for the wood decking that constituted the remainder of the truck bed; the wood decking was positioned so that the top flanges of the metal I-beams would be flush with the deck surface. Plaintiffs' Statement of Additional Facts ("Plaintiffs' SMF"), included in Plaintiffs, [sic] James A. Libbey and Ann Libbey's Response to Defendant's Statement of Facts and Additional Facts, etc. ("Plaintiffs' Responsive SMF") (Docket No. 18) at 5-17, ¶ 54; Defendant Wabash National Corporation's Response to Plaintiffs' Statement of Additional Facts ("Defendant's Responsive SMF") (Docket No. 23) ¶ 54.

The plaintiffs have designated William English as their sole expert witness. Motion at 2; Objection at 1; Defendant Wabash National Corporation's Statement of Undisputed Facts in Support of its Motion in Limine, etc. ("Defendant's SMF") (Docket No. 11) ¶ 16; Plaintiffs' Responsive SMF ¶ 16. The complaint alleges that the truck trailer bed was defective and unreasonably dangerous due to a design defect, Complaint ¶ 8, and that the defendant failed to warn users appropriately, *id.* ¶¶ 14, 18.

III. Discussion

A. Motion to Exclude Testimony

The defendant seeks to exclude English's proposed testimony under *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), contending that it is unreliable and irrelevant. Motion at 4-6. The parties apparently assume

² The defendant denies the allegations in paragraph 10 of the complaint and responds that it has insufficient information "to form a belief as to the allegations made" in paragraph 9 of the complaint. However, neither party provides this essential basic information in its statement of material facts. There does not appear to be a serious dispute about the facts alleged in these paragraphs of the complaint and stated here. *See* Motion at 1 (plaintiff fell on January 26, 2001 while working on trailer); Plaintiffs, [sic] James A. Libbey and Ann Libbey's Objection to Defendant Wabash National Corporation's Motion to Exclude Expert Testimony, etc. ("Objection") (Docket No. 17) at 1 (plaintiff slipped and fell on January 26, 2001 while unloading trailer).

that English will testify in accordance with his written report.³ Specifically, the defendant contends that English “is far exceeding the bounds of his qualifications in attempting to offer opinions with respect to the proper design of a flatbed trailer, having; [sic] (a) never worked on such a trailer, (b) never previously inspected such a trailer, (c) no qualifications with respect to the design or manufacture of such a trailer, and (d) no background or experience to allow him to testify as to the efficacy of alternative designs in the context of a flatbed trailer.” Reply at 2.

English apparently will testify that the painted metal surfaces of the I-beam flanges in the trailer bed would have been slippery when wet, that wetness of the trailer bed would have been a normally expected condition of operation of the truck and that the presence of these surfaces contributed significantly to the plaintiff’s injuries. Letter dated January 3, 2002 from William English to W. Wright Danenbarger (“Report”), Exh. A to Motion, at 2-4. He will also testify that installation of an available slip-resistant surface on the smooth surfaces of the Ibeam flanges would have prevented the accident. *Id.* at 4-5.

Federal Rule of Evidence 702 imposes an important gatekeeper function on judges by requiring them to ensure that three requirements are met before admitting expert testimony: (1) the expert is qualified to testify by knowledge, skill, experience, training, or education; (2) the testimony concerns scientific, technical, or other specialized knowledge; and (3) the testimony is such that it will assist the trier of fact in understanding or determining a fact in issue.

Correa v. Cruisers, 298 F.3d 13, 24 (1st Cir. 2002) (citing *Daubert* and *Kumho*). Here, the defendant contends that English’s proposed testimony does not meet the first and third requirements.

³ In its reply memorandum, the defendant asserts that “it is critical to point out that Mr. English’s slipometer [sic] readings and supplemental report have not been provided to defense counsel, despite the fact that the testing has [sic] completed on June 10, 2002.” Defendant Wabash National Corporation’s Reply Memorandum, etc. (“Reply”) (Docket No. 22) at 4. This statement apparently refers to testing that took place after the date of the only report of English that appears in the record. Exh. A to Motion, dated January 3, 2002. In the absence of any such report, the court can only evaluate English’s possible testimony in the light of the earlier report. In any event, the alleged failure of counsel for the plaintiff to comply with discovery requests is not among the factors to be considered in assessing the admissibility of expert testimony under *Daubert* and *Kumho*.

The third element addresses the relevance of the proposed testimony. The defendant argues that English's proposed testimony is irrelevant because he did not provide evidence of studies, tests or statistics to support his conclusion that the metal strips in the trailer bed are unreasonably slippery; he acknowledged that there are no standards addressing the degree of slip resistance required for components of trailer beds; he did not inspect the trailer at issue or any similar trailers; he did no research concerning his proposed design alternatives; he had no data concerning falls under similar circumstances; and he does not know "the specifics as to how it is that James Libbey fell." Motion at 8-11. Most of these points go to the weight of English's testimony rather than its relevance. The defendant relies on this court's opinion in *Reali v. Mazda Motor of Am., Inc.*, 106 F.Supp.2d 75 (D. Me. 2000), to support its argument, but in that case the proffered expert's testimony was based on assumptions that clearly differed from the circumstances present at the time of the accident, or on assumptions that were not independently verifiable, *id.* at 77-79. The defendant has made no showing that similar differences exist in this case. To disallow expert testimony because there are no industry standards applicable to the precise mechanism of injury in a given case would prevent expert testimony in any case involving an injury that had not been anticipated or otherwise addressed by the industry involved. Such an irrational outcome is not contemplated by *Daubert* or *Kumho*. English's proposed testimony is not irrelevant under Rule 702.

With respect to the first requirement set forth in *Correa*, the defendant's view of the qualifications required for an expert is, in general, unduly restrictive. English's admitted lack of familiarity with the use, design and manufacture of flatbed trailers does not automatically disqualify him from expressing an expert opinion about the slip resistance of a portion of the surface of the defendant's flatbed trailer design. *See generally Wheeler v. John Deere Co.*, 935 F.2d 1090, 1100-01 (10th Cir. 1991) (expert witness in products liability action not strictly confined to area of practice

but may testify concerning related applications; mechanical engineer with expertise in safe design of farm equipment may testify concerning consumer expectations for farm combine); *Bassett Furniture Indus. of N. Carolina, Inc. v. NVF Co.*, 576 F.2d 1084, 1090-91 (5th Cir. 1978) (expert allowed to testify regarding sanding procedures used in furniture manufacturing although he was not familiar with furniture industry); *Colegrove v. Cameron Mach. Co.*, 172 F.Supp.2d 611, 635-36 (W.D. Pa. 2001) (expert in mechanical engineering with no experience in designing mechanism at issue or with machine on which mechanism operated allowed to testify that condition of mechanism was defective); *Traharne v. Wayne Scott Fetzer Co.*, 156 F.Supp.2d 717, 724 (N.D. Ill. 2001) (failure of expert personally to examine machine at issue goes to weight, not admissibility, of testimony). In this case, English's background in slip resistance of metal surfaces is sufficient to qualify him to testify.

Finally, the defendant attacks English's methodology, contending that his use of a slipmeter of his own design and the lack of a relevant standard for slipperiness renders his opinions inadmissible. Motion at 11-15. The only report from English that is present in the record does not mention the use of a slipmeter or a degree of slipperiness that is unacceptable. The defendant's statement of material facts includes some references to such testimony during English's deposition. Defendant's SMF ¶¶ 20-24. The defendant relies solely on an unreported recommended decision in the Southern District of Alabama issued in 1995 to support its argument. Motion at 11-14; *Waters v. Wal-Mart Stores, Inc.*, 1995 U.S. Dist. LEXIS 13359 (S.D. Ala. June 16, 1995). The defendant has provided no indication that the recommended decision was adopted by that court. It is not the practice of this court to rely on such opinions as persuasive authority; even if the practice were otherwise, the facts surrounding the opinion proffered in that case are readily distinguishable from the circumstances present here. In any event, the plaintiff has submitted sufficient evidence concerning the use of the English slipmeter, published studies concerning its use and the existence of standards of the American National Standards

Institute and OSHA that refers to the English slipmeter to allow English to testify concerning any measurements made with this device. Plaintiffs' SMF ¶¶ 29-31, 35, 41, 43-44, 48-49, 63-66, 70, 87, 89, 104; Exhs. 11, 15, 20 to Plaintiffs' SMF. Again, the defendant's objections go to the weight of English's testimony rather than to its admissibility.

For the foregoing reasons, the defendant's motion to exclude English's testimony is denied.

B. Motion for Summary Judgment

The defendant's motion for summary judgment is based solely on the absence of expert testimony for the plaintiffs. Motion at 15-17. In light of my ruling above, the asserted basis for the motion for summary judgment does not exist. Accordingly, that motion should be denied as well.

IV. Conclusion

For the foregoing reasons, I **DENY** the defendant's motion to exclude the testimony of William English and recommend that its related motion for summary judgment be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this ___th day of October, 2002.

David M. Cohen
United States Magistrate Judge

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