

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CHRISTIE FILANOWSKI and)
ROBERT FILANOWSKI)
)
Plaintiffs)
)
v.) Civil No. 99-147-B-H
)
WAL-MART STORES, INC.)
d/b/a SAM'S CLUB)
)
Defendant)

**ORDER ON MOTION IN LIMINE AND RECOMMENDED DECISION
ON CROSS-MOTIONS FOR SUMMARY JUDGMENT**

This matter is before the Court on the parties' cross-motions for summary judgment (Docket No. 29 and 55) and on the Defendant's Motion in Limine (Docket No. 33), seeking to exclude the testimony of Plaintiffs' expert under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). Plaintiffs, Christie and Robert Filanowski, filed a four count complaint in this Court on June 8, 1999, alleging negligence, loss of consortium, punitive damages, and spoliation of evidence against the Defendant, Wal-Mart Stores, Inc. d/b/a Sam's Club.

I. Motion in Limine

Plaintiffs retained a physicist, Thomas A. Boster, to present expert opinion regarding the circumstances of the accident. Boster would offer an opinion regarding the following: (1) the amount of force involved when an object weighing five pounds falls a distance of five feet; (2) the lack of negligence on the part of Christie Filanowski; (3) the impropriety of the stacking method used by Sam's Club; (4) the fact that failing to preserve the shelving, records or notes, and the videos from the store amounts to spoliation of evidence; (5) the nature of the retailing

concept of stores like Sam's Club; (6) the likelihood of Sam's Club changing its merchandising technique; and (7) the need of Sam's Club to post warnings regarding the probability of falling merchandise. *Boster Affidavit*

Sam's Club moves to exclude Boster's testimony because it does not meet the requirements for the admissibility of expert testimony under Rule 702 of the Federal Rules of Evidence under *Daubert* and *Kumho Tire Co. v. Carmichael* 526 U.S. 137 (1999). Under Rule 702, only expert testimony that is "predicated on facts legally sufficient to provide a basis for the expert's opinion" is admissible. *Schubert v. Nissan Motor Corp. in U.S.A.*, 148 F.3d 25, 31 (1st Cir. 1998) (citation omitted). The *Daubert* regime requires the trial judge to determine "whether the reasoning and methodology underlying [proffered expert] testimony is scientifically valid and . . . whether that reasoning or methodology properly can be applied to the facts at issue." *Daubert*, 509 U.S. at 592-93. The same "gatekeeper" functions come into play when the expert testimony is based on "technical" or "other specialized knowledge" gained by "skill, experience, training, or education" covered by Rule 702. *Kumho Tire*, 526 U.S. at 141.

In the present case Boster presents himself not only as a physicist qualified to testify as to certain scientific principles, but also as a "nationally recognized expert in safety engineering, human factors engineering, and retail merchandising human factors." *Boster Aff.* ¶ 2. Defendant concedes for purposes of this motion that Boster is qualified as an expert physicist and could testify to the application of the laws of physics. However, Defendant asserts that there are factual issues as to Boster's qualifications as an expert in certain areas outside physics. *Def.'s Reply to Plaintiffs' Opposition to Defendant's Motion to Exclude Expert Testimony*. For

purposes of this motion, I will assume that he has the necessary qualifications, training, and experience to testify in these other areas as well.

In paragraph four of his affidavit, Boster discusses the pounds of force which would be generated upon impact if objects weighing varying amounts fell from a distance of five feet. *Boster's Aff.* ¶ 4. While the scientific principles behind these various calculations do not appear to be in dispute, there is a real issue regarding the “fit” between this testimony and the facts of this case. There is no reliable evidence that an object weighing five pounds fell on Ms. Filanowski's foot. However, there is some evidence in the record that the object which fell weighed one pound and Boster has also calculated the force involved with such a fall. Assuming the factual predicate that an object weighing one pound struck Ms. Filanowski's foot is developed at trial, such testimony would be admissible.

Boster next states that based on a reasonable probability, Ms. Filanowski had no responsibility in causing the object to fall. *Boster's Aff.* ¶ 5. Boster does not state upon what information he bases this conclusory opinion. Absent some evidence identifying the object itself, or where it fell from, I cannot see how Boster could arrive at such a conclusion.

Boster also opines that “the object fell because of improper stacking of the product.” *Boster Aff.* ¶6. Boster bases his opinion primarily on photographs of the accident site taken by Arthur Unobskey, Defendant's employee, the day of the incident. Boster then states that he agrees with David Long, Sam's Club's present manager, that Defendant's actions constitute negligence and proximately caused Mrs. Filanowski's injury. *Id.*

Initially, the Court notes that Boster mischaracterizes Mr. Long's testimony. Mr. Long never testified that Sam's Club's action constituted negligence that proximately caused Mrs.

Filanowski's injury. Mr. Long merely reviewed the photographs and based on assumptions that Plaintiffs' counsel asked him to make stated that he would not encourage the stacking depicted in the photographs.

Boster's opinion that the object fell because of improper stacking is inadmissible. His opinion is based on his review of two photographs which depict boxes of laser labels. There is an incident report which states that the plaintiff was struck by a box of laser labels. If that incident report is admitted at trial, and the factfinder determines from disputed facts that the photo depicts how the scene appeared at the time of the accident, then Boster's opinion would be relevant. However, even if the Court assumed that the photographs did depict the scene at the time the accident occurred, Boster fails to explain how, using his expertise, he determined that the stacking depicted in the photographs leads to his conclusion that improper stacking caused Ms. Filanowski's injury.

Plaintiffs also offer Boster's testimony that Sam's Club's actions after the accident, namely its failure to preserve evidence of the accident, amounted to spoliation of evidence. *Boster Aff.* ¶ 7. Boster states that based on Sam's Club's knowledge of Ms. Filanowski's injury "Sam's Club should have known and did know that this information would be needed in the future for litigation purposes." *Id.* I am satisfied that what Sam's Club should have known or did know about future litigation is a question of fact that is not the subject of expert testimony.

Plaintiffs also offers Boster's testimony to establish the retailing concept of Sam's Club, the financial benefits of the concept and Defendant's unwillingness to change the practice. *Boster Aff.* ¶¶ 8-9. Boster is an expert in safety and human factors engineering. However, I do

not see how this testimony is relevant or helpful to the issues which the Court would pose to the jury.

For reasons stated above, Defendant's Motion in Limine is GRANTED in part, but is DENIED as to that portion of Boster's opinion which pertains to the weight of falling objects, subject to a relevancy determination based upon actual trial evidence.

Summary Judgment Standard

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court views the record on summary judgment in the light most favorable to the nonmovant. *Levy v. FDIC*, 7 F.3d 1054, 1056 (1st Cir. 1993). "A trialworthy issue exists if the evidence is such that there is a factual controversy pertaining to an issue that may affect the outcome of the litigation under the governing law, and the evidence is 'sufficiently open-ended to permit a rational factfinder to resolve the issue in favor of either side.'" *De-Jesus-Adorno v. Browning Ferris Ind. Of Puerto Rico*, 160 F.3d 839, 841-42 (1st Cir. 1998) (quoting *National Amusements v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995)).

Factual Background

The Court will first address Defendant's motion and therefore recites the following facts in a light most favorable to Plaintiffs.

While shopping at Sam's Club in Bangor, Maine on August 18, 1995, Christie Filanowski was injured. Ms. Filanowski reached up to a shelf for a package of computer labels and while she was reading the notations on the box something fell and struck her right foot. Ms.

Filanowski does not remember where the object came from that struck her foot, and she does not know why it fell. *Def.'s Statement of Undisputed Material Facts*, ¶ 8, not objected to by *Plaintiffs*. There is no evidence that any individuals other than Ms. Filanowski and her associates were in the area at the time of the accident and there is no evidence to suggest that any of them did anything to cause the object to fall. Ms. Filanowski reported the incident to an employee at the cash register and to a manager, and her daughter went back with the manager to show where the incident occurred.

Ms. Filanowski returned to Sam's Club with two private investigators in the winter of 1995-96 and during that visit the investigators took photographs of the shelving. Upon that return visit, Ms. Filanowski observed that the shelves "looked like someone took a hacksaw and cut the shelving off." *C. Filanowski Dep. at 29, 44, 46*. The shelving at the time of this accident was at least six feet off the floor according to one source. *Bryant Aff. ¶ 4*. Sam's Club currently uses the same type of steel shelving unit that was involved in the incident. *Declaration of David Long ¶ 2, and attached Exhibits*. Other than the photos taken on the day of the accident, (*Incident Report*), there is no contemporaneous evidence regarding the height of the shelves. However, it is admitted that the shelves were lowered a couple of years later for merchandising purposes totally unrelated to the accident. *Miller Dep. at 26-27*.

Discussion

Defendant moves for summary judgment on all counts asserted by Plaintiffs. Plaintiffs also move for summary judgment on the issue of Defendant's negligence. I recommend that the Court DENY both the Plaintiffs' Motion and Defendant's Motion for Summary Judgment as it pertains to Count I, negligence, and Count II, Loss of Consortium and GRANT Defendant's

Motion for Summary Judgment as it pertains to Count III, punitive damages and Count IV, spoliation of evidence.

A. Negligence and Loss of Consortium

Defendant moves for summary judgment on the ground that there is no evidence in the record that a dangerous condition existed and that even if a dangerous condition did exist there is no evidence in the record that Sam's Club knew or should have know that a dangerous condition existed. Plaintiffs counter by arguing that the facts in the record establish Defendant's negligence as a matter of law.

In a negligence action a plaintiff must establish "a duty on the part of the defendant toward the plaintiff, a breach of that duty, and an injury suffered by the plaintiff as a result of that breach." *Gayer v. Bath Iron Works Corp.*, 687 A.2d 617 621 (Me. 1998). A store owes the plaintiff the duty to use "ordinary care to ensure that the premises were reasonably safe . . . guarding [the plaintiff] against all reasonably foreseeable dangers, in light of the totality of the circumstances." *Hanson v. Madison Paper Co.*, 564 A.2d 1178 (Me. 1989) (quoting *Baker v. Mid Maine Medical Center*, 499 A.2d 464, 467 (Me. 1985)). This duty does not require the defendant to guarantee that the premises be completely free of all risks of harm. *Id.*

Defendant contends that Plaintiffs have not presented evidence that a dangerous condition existed on the day of the incident. The record contains no testimony from any witness describing what item struck Ms. Filanowski. The only evidence in the record that a dangerous condition may have existed are the incident report prepared the day of the accident and the photographs, which were taken by Mr. Unobskey *after* the accident occurred. How long after is disputed, but what is clear is that Unobskey took the photograph after Ms. Filanowski left the area, waited in

line, checked out and spoke to the manager, Mr. Caton. The earliest possible time Mr. Unobskey took the photographs was when Mr. Caton went back with Ms. Filanowski's daughter to the place where the accident occurred. Assuming that Unobskey took the photographs at the earliest possible time, the photographs may accurately depict how Defendant stacked the merchandise at the time of the accident. A factfinder might infer that this "improper" stacking somehow created a dangerous situation. It is further possible to conclude, if one relies upon the incident report, that the box of laser labels was the mechanism which caused Ms. Filanowski's injury.

However Defendant further contends that even if a dangerous condition did exist at the time of the accident Plaintiffs have not presented any evidence that Defendant had knowledge that such condition existed. *Milliken v. City of Lewiston*, 580 A.2d 151,152 (Me. 1990). Plaintiffs argue that Defendant had constructive knowledge that a dangerous condition existed because Ms. Filanowski's injury resulted from a recurring condition at Defendant's stores, namely, falling merchandise. Plaintiffs point out that in a less than four year period, over twenty-five thousand fallen merchandise cases occurred at Wal-Mart and Sam's Club stores throughout the country. Plaintiffs maintain that Wal-Mart/Sam's Club utilizes a merchandising technique, namely stacking goods at a high level, that causes the products to fall and injure customers. To allow evidence of similar accident or occurrences as proof of constructive notice, a plaintiff must demonstrate substantial similarity of operative circumstances between the incident at issue and previous incidents. *Moody v. Haymarket Assoc.*, 723 A.2d 744, 745 (Me. 1999); *Dumont v. Shaw's Supermarkets*, 664 A.2d 846 (Me. 1995). Here, Plaintiffs have not offered any reliable evidence of how this particular incident compares to other falling merchandise situations. Absent this evidence it is impossible to determine whether the incident here shared a substantial

similarity of circumstances with previous fallen merchandise cases at other Wal-Mart/Sam's Club stores.

While this Court is not satisfied that the Defendant had constructive notice of the "dangerous condition" merely because of the existence of twenty-five thousand falling merchandise cases over a four year period throughout the United States, it is fair to argue from the evidence that Defendant had notice that improperly stacked merchandise was a condition which could be dangerous to those on the premises. Defendant admits that it engages in periodic safety sweeps to look for items which are improperly or dangerously stacked. Mr. Long admitted that the stacking at issue in the photographs was not done the correct way. Therefore the jury might conclude that Defendant had sufficient notice of the allegedly dangerous stacking of merchandise at issue in this case.

Plaintiffs also argue that Defendant is liable under the *res ipsa loquitur* doctrine. Under the doctrine the factfinder can infer that the defendant caused the harm suffered by the plaintiff when:

- (a) the event is of a kind which ordinarily does not occur in the absence of negligence;
- (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and
- (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.

Poulin v. Aquaboggan Waterslide, 567 A.2d 925, 926 (Me. 1989) (adopting the definition of *res ipsa loquitur* found in the Restatement (Second) of Torts § 328D (1965)). In this case Plaintiffs cannot eliminate other responsible causes for the item that fell and hit Ms. Filanowski's foot. For

example, the item may have fallen not because of any negligence on the part of Defendant, but because a customer recently rearranged how the items were stacked. If a factfinder is to find the Defendant negligent it must be based upon a finding that the store breached its duty of reasonable care in maintaining its stacked shelves in the proper manner.

For the reasons explained above, I recommend that the Court DENY both parties' motions on Plaintiffs' claims alleging negligence and loss of consortium.

B. Punitive Damages

Plaintiffs are also seeking punitive damages in the amount of \$100,000,000. It is firmly established under Maine law that a plaintiff can only recover such damages "if he can prove by clear and convincing evidence that the defendant acted with malice." *Tuttle v. Raymond*, 494 A.2d 1353, 1363 (Me. 1985). "[R]eckless conduct alone cannot satisfy the element of malice necessary[.]" *Id.* At 1364. The Plaintiffs have offered no evidence of any reckless, let alone, malicious conduct which would entitle them to an award of punitive damages. *See Hayes v. Larsen's Manufacturing Co., Inc.*, 871 F. Supp. 56, 60 (D. Me. 1994).

C. Spoliation of Evidence

Plaintiffs also allege that they are entitled to damages because Defendant "willfully, wantonly, deliberately and intentionally destroyed and spoiled the shelving rack knowing full well it was evidence in a potential liability case against them and to wit: cut the shelving in half and destroyed the portion from which the object fell and struck the Plaintiff Christie Filanowski." Complaint at ¶ 16. Plaintiffs also argue that Defendant improperly destroyed videotapes and safety team meeting notes that Defendant should have preserved after Defendant became aware of the possibility of litigation.

Plaintiffs have offered no case to support the proposition that Maine has recognized spoliation of evidence as a cause of action. In fact, in their Response Plaintiffs do not cite a case from any jurisdiction to support this cause of action. Instead, Plaintiffs argue that they are entitled to a “spoliation inference” because of Defendant’s failure to preserve evidence.¹ Accordingly, I recommend that the Court enter summary judgment on this claim.

Conclusion

For the reasons stated above Defendant’s motion in limine is GRANTED in part. Further, I recommend that the Court DENY Defendant’s Motion for Summary Judgment as to the negligence and loss of consortium counts (Counts I and II) and DENY Plaintiff’s Motion For Summary Judgment. On the two remaining counts (Count III and IV), alleging punitive damages

¹ The spoliation inference permits the trier of fact to “infer from a party’s obliteration of a document relevant to a litigated issue that the contents of the document were unfavorable to that party.” *Testa v. Wal-Mart Stores, Inc.* 144 F.3d 173, 177 (1st Cir. 1998). The party asserting the inference must produce evidence that the other party “knew of (a) the claim (that is, the litigation or the potential for litigation), and (b) the document’s potential relevance to that claim.” *Id.* Here, Plaintiffs’ have not offered any evidence that the video tapes or the safety team meeting notes contained evidence that was even potentially relevant to this claim. Further, the evidence is clear that Defendant’s custom was to erase the tapes weekly and to discard the safety team meeting notes yearly. No negative inference can be drawn from Defendant following a normal business practice when the incident report and the photographs pertaining to this particular incident were not themselves destroyed.

Plaintiffs also allege Defendant improperly destroyed the shelving from which the item fell. Plaintiffs based this assertion on Ms. Filanowski’s statement that when she returned to the site several months later with private investigators it looked like someone cut the shelving with a hacksaw. I am satisfied that even if the Court accepted Ms. Filanowski’s statement as true no spoliation of evidence occurred. First, Sam’s Club is under no duty to preserve the shelving for several months in anticipation of the lawsuit. Second, as Defendant points out, there is no nexus between the alleged destruction and Plaintiffs’ ability to prove this suit. The height of the shelving can be reconstructed based on the photographs and Plaintiffs’ memory.

and spoliation of evidence, I recommend that the Court GRANT the Defendant's Motion for Summary Judgment.

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) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum 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.

Margaret J. Kravchuk
United States Magistrate Judge

Dated on April 6, 2000.

TRLIST STNDRD

U.S. District Court
District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 99-CV-147

FILANOWSKI, et al v. WAL-MART STORES INC
Assigned to: JUDGE D. BROCK HORNBY
Demand: \$0,000
Lead Docket: None
Dkt# in other court: None

Filed: 06/08/99
Jury demand: Plaintiff
Nature of Suit: 360
Jurisdiction: Diversity

Cause: 28:1332 Diversity-Personal Injury

CHRISTIE FILANOWSKI

N. LAURENCE WILLEY, JR.

plaintiff

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plaintiff

N. LAURENCE WILLEY, JR.
(See above)
[COR LD NTC]

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