At a Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Broome County Courthouse, in the City of Binghamton, New York on the 22nd day of January 2019.

PRESENT: HONORABLE JEFFREY A. TAIT
JUSTICE PRESIDING

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

DANIEL WELLINGTON and SHERRY WELLINGTON,

Plaintiffs,

vs.

CHRISTA CONSTRUCTION LLC and TOWER ROOFING,

Defendants.

DECISION AND ORDER

Index No. 2012-2972
RJI No. 2013-0770-C

APPEARANCES:

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HON. JEFFREY A. TAIT, J.S.C.

This matter is before the Court on the motion in limine of the defendant Tower Roofing Co., Inc. seeking to preclude the defendant Christa Construction LLC's expert from testifying at the trial of this action. Christa Construction opposes the motion.

Background

The plaintiffs commenced this action on December 24, 2012 by filing a summons with verified complaint with the Broome County Clerk's Office. The complaint seeks damages for personal injuries the plaintiffs allege Mr. Wellington sustained on October 18, 2012 when a tire rim fell from the roof of a building and struck his head while he was working on a construction project. [1] The complaint asserts five causes of action against Christa Construction and Tower Roofing[2] based on allegations of negligence, statutory violations of Labor Law §§ 240, 241, and 200, failure to comply with Rule 23 of the Industrial Code, and loss of consortium stemming from a workplace injury.

This matter was previously before the Court on several motions filed by the parties, including: the plaintiffs' motion for partial summary judgment on the issue of liability

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1 At the time, Mr. Wellington was working at ground level on the west side of the building.

2 Christa Construction was the Project's general contractor and Tower Roofing was a subcontractor. The plaintiffs allege they retained Mr. Wellington's employer, KC Masonry Inc., to perform work, labor, and services at the project.

pursuant to New York Labor Law § 240(1); Christa Construction's motion for summary judgment on its claims for contractual defense and indemnification against Tower Roofing; Tower Roofing's motion for summary judgment dismissing the plaintiffs' complaint, or in the alternative dismissing their Labor Law §§ 240(1) and 241(6) claims; and Tower Roofing's motion for summary judgment dismissing the cross claims of Christa Construction.

By Decision and Order dated December 5, 2016 (Decision),[3] this Court: denied the plaintiffs' motion for partial summary judgment on the issue of liability pursuant to New York Labor Law § 240(1); granted Tower Roofing's cross motion for summary judgment dismissing the plaintiffs' Labor Law § 241(6) claim, but denied it in all other respects; denied Christa Construction's motion for summary judgment on its claims for contractual defense and indemnification against Tower Roofing; and denied Tower Roofing's cross motion for summary judgment dismissing the cross claims of Christa Construction. The parties appealed the Decision. By Memorandum and Order dated May 3, 2018, the Appellate Division, Third Department modified the Decision "by reversing so much thereof as denied plaintiffs' motion for partial summary judgment on the issue of liability pursuant to Labor Law § 240(1)" and affirmed it in all other respects (*see Wellington v. Christa Constr. LLC*, 161 AD3d 1278, 1283 [3d Dept 2018]).

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3 The factual background, applicable law, and contentions of the parties are set forth at length in the Decision and thus will not be repeated here.

Arguments of the Parties

On this motion, Tower Roofing seeks to preclude Christa Construction's expert Ernest J. Gailor, P.E. from testifying at the trial of this matter, which is scheduled to begin on April 29, 2019.

On the prior motion, Christa Construction submitted the affidavit of Mr. Gailor, who opined that the tire rim fell due to "the wind and its interaction with the stored Tower's equipment and materials including the ISO [roofing] insulation," which he contended "can act like a large sail and can exert forces ... capable of lifting and/or pushing a tire rim along a smooth rubber surface and off the roof" (*see* Gailor affidavit dated August 26, 2016 at ¶¶ 22, 25).[4] He concluded that Christa Construction was not at fault for the accident and "the cause of the tire rim falling from the roof on October 18, 2012 was based solely on the failure to reasonably and properly secure the rim and ISO," which he attributed to Tower Roofing (*id.* at ¶¶ 30, 34).

Tower Roofing's key points on this motion seeking to preclude Mr. Gailor's testimony are that his opinions: (1) are largely speculative and based on impermissible factual conclusions regarding its alleged negligence; and (2) are not based on any foundational facts or technical information sufficient to constitute an expert opinion or from which those opinions can be evaluated (such as sound engineering principles, calculations, or data). It asserts that Mr. Gailor seeks to offer an opinion that ISO was stored on the roof that day – despite

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4 Which is based in part on surveillance video which he asserts shows the weather conditions at the time of the incident and "the tire rim falling from the roof and immediately thereafter a piece of ISO roofing insulation floats to the ground" (*id.* at ¶¶ 20, 21).

contradictory testimony on that issue – and was capable of lifting and/or pushing the tire rim in such a manner that it caused Mr. Wellington's injuries, without providing any scientific or technical basis for his conclusions in that regard. In addition, Tower Roofing argues that Mr. Gailor cannot offer an opinion regarding whether it had or breached a legal duty or whether that breach of duty was a substantial factor in causing Mr. Wellington's injuries (citing *Rodriquez v. New York City Hous. Auth.*, 209 AD2d 260 [1st Dept 1994] [it is reversible error to permit party to attempt to prove negligence by expert testimony regarding the meaning and applicability of a statute imposing a standard of care]).

In opposition, Christa Construction's position is that Mr. Gailor is appropriately qualified to give his opinion, the opinion is based on facts that will be established at trial, and any question regarding the validity of that opinion goes to the weight to be accorded to it rather than its admissibility. It attaches a further supplemental response to the demand for expert witness wherein Mr. Gailor outlines specific engineering calculations based on evidence in the record to support his opinions in this matter. Its counsel asserts these calculations, along with Mr. Gailor's references to sections of the New York State Industrial Code, are not common knowledge and require professional or technical knowledge beyond that of the average juror (*see* affidavit of Sean A. Tomko at ¶¶ 13-14).

Mr. Tomko states that Mr. Gailor will testify regarding wind sp eeds and calculations pertaining to forces exerted by wind, including with respect to the ISO and the tire rim, at the time of the incident. He asserts that the cumulative evidence, including a video attached as Exhibit Y, suggests that Tower Roofing was storing ISO on the roof and that "it was reasonable for Mr. Gailor to conclude, based on the totality of evidence in the record, that the ISO was

being stored on the roof as Mr. Shenk testified" (*see id.* at ¶ 5). He argues that experts are permitted to base their opinions on circumstantial evidence in the record (citing *Adamy v. Ziriakus*, 231 AD2d 80, 84-85 [4th Dept 1997]).[5] He also argues that Mr. Gailor can testify that Tower Roofing was required to secure materials as the roofing contractor pursuant to 12 NYCRR 23-2.1[6] and that its failure to do so violated worksite safety standards and caused the accident, asserting that such duties are acknowledged by the testimony of the parties.

In his reply affirmation, Tower Roofing's counsel asserts that Mr. Gailor "has intentionally disregarded any testimony that does not support his preferred narrative, fails to even address the possibility of any independent factors not related to Tower Roofing that could have contributed to or affected the way in which the tire rim became dislodged and ultimately fell off the roof, and blatantly cherry-picks and adopts without scrutiny only the testimony he deems favorable to Christa's position" (*see* reply affirmation of Brady J. O'Malley at ¶ 5).

Law

The admission of expert testimony is a matter that rests within the discretion of the trial court (*see Dufel v. Green*, 84 NY2d 795, 797 [1995]). "Before admitting expert testimony, a

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It is worth noting that in *Adamy*, the Court's discussion regarding permitting testimony based on circumstantial evidence was limited to cases involving Dram Shop causes of action. That Court referenced with approval another case where it reinstated a Dram Shop claim based on "competent eyewitness and expert opinion testimony tending to establish, *circumstantially*, that [the individual] was intoxicated at the time he was sold alcoholic beverages" (*id.*, citing *Nesbitt v. Jackson*, 178 AD2d 931 [4th Dept 1991]).

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12 NYCRR 23-2.1 provides, in pertinent part "(a) Storage of material or equipment. (1) All building materials shall be stored in a safe and orderly manner . . . (2) . . . Material and equipment shall not be placed or stored so close to any edge of a floor, platform or scaffold as to endanger any person beneath such edge."

court must determine whether a proposed expert 'possess[es] the requisite skill, training, education, knowledge and/or experience to qualify as [an] expert[] on the [particular matter at issue] ... in light of prevailing professional standards'" (*Matter of Apr. WW.*, 133 AD3d 1113, 1115 [3d Dept 2015], quoting *Hurrell–Harring v. State of New York,* 119 AD3d 1052, 1053 [3d Dept 2014]). The test to be applied is whether the opinion involves a matter not within the knowledge or experience of a typical juror (*see Dufel* at 798; *see also Mariano v. Schuylerville Cent. School Dist.*, 309 AD2d 1116, 1118 [3d Dept 2003]). Expert testimony, even on ultimate questions, may be admissible and is "appropriate to clarify a wide range of issues calling for the application of accepted professional standards" (*Hurrell-Harring*, 119 AD3d at 1053, quoting *Selkowitz v. County of Nassau*, 45 NY2d 97, 102 [1978]; *see also Kettles v. City of Rochester*, 21 AD3d 1424, 1426 [4th Dept 2005]; *Sanders v. Otis El. Co.*, 232 AD2d 327, 328 [1st Dept 1996]).

Analysis

Both Tower Roofing and Christa Construction raise valid and legitimate points in connection with this motion. A party should not have to face an opposing expert who under the guise of superior training and knowledge offers speculation and opinions that lack a factual basis (*see Stewart v. Avasso,* 301 AD2d 643 [2d Dept 2003]). On the other hand, disagreements regarding the validity of an expert's opinion go to its weight and probative value and are to be tested through a contrary expert opinion or cross examination (*see People v. Cronin*, 60 NY2d 430, 432 [1983]).

According to Mr. Gailor's affidavit and Curriculum Vitae, he is a licensed professional engineer with over 40 years of experience, has served as an OSHA safety officer for the US

DOT, and has acted as a Senior Forensic Engineer since 1991, which has involved providing forensic consulting services in a variety of circumstances including industrial and construction accidents and claims related to construction safety. Based on this, he is qualified to testify and offer his opinions regarding work site safety and the field of engineering as they relate and pertain to this case. However, because there is conflicting testimony regarding certain potentially pivotal issues, such as the storage and presence of ISO on the roof on the date in question, the issue becomes whether and, if so, to what extent, Mr. Gailor can offer expert opinions which are based on credibility or factual determinations.

In this regard, section 1:90 of the New York Pattern Jury Instructions is instructive.[7] It provides, in relevant part, as follows:

> "When a case involves a matter of science or art or requires special knowledge or skill not ordinarily possessed by the average person, an expert is permitted to state his or her opinion for the information of the court and jury. The opinions stated by each expert who testified before you were based on particular facts, as the expert obtained knowledge of them and testified to them before you, or as the attorneys who questioned the expert asked the expert to assume. You may reject the expert's opinion if you find the facts to be different from those which formed the basis for the opinion. You may also reject the opinion if, after careful consideration of all the evidence in the case, expert and other, you disagree with the opinion. In other words, you are not required to accept an expert's opinion to the exclusion of the facts and circumstances disclosed by other testimony. Such an opinion is subject to the same rules concerning reliability as the testimony of any other witness. It is given to assist you in reaching a proper conclusion; it is entitled to such weight as you find the expert's qualifications in the field warrant and must be considered by you, but is not controlling upon your judgment."

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7 This charge has recently been modified by the Committee on Pattern Jury Instructions, but this is the version this Court typically gives in any trial in which expert testimony is presented.

Therefore, counsel may ask Mr. Gailor to assume particular facts are true, such as that ISO was or was not stored on the roof on the date in question, and then state an opinion based on those assumed facts. Mr. Gailor can also testify regarding his calculations of the wind speed to wind pressure and offer his opinion based on those calculations that the wind was or was not sufficient to dislodge the tire rim (whether alone or in combination with ISO) and cause it to fall off the roof. However, Mr. Gailor is not permitted to make credibility or ultimate factual determinations when offering his opinions. In other words, he will not, absent some unusual circumstances that "open the door" to admissibility of such testimony, be permitted to opine on which version of events is more credible. Yet, he would be allowed to testify that a particular scenario is impossible if that is based on engineering principles.

It is important to note that any decision on a motion in limine which determines the admissibility of evidence in advance of trial "constitutes, at best, an advisory opinion" (*Brindle v. Soni*, 41 AD3d 938, 939 [3d Dept 2007], quoting *Ferrara v. Kearney,* 285 AD2d 890 [3d Dept 2001] [citations and internal quotation marks omitted]). There are many grey areas here which can only be definitively sorted out and resolved based on and following the testimony at trial. It is simply impossible to address all possible permutations regarding what testimony will and will not ultimately be admissible. This is why such decisions are not appealable until the conclusion of trial, so that "the relevance of the proffered evidence, and the effect of Supreme Court's ruling with respect thereto, can be assessed in the context of the record as a whole" (*id.*, quoting *Brennan v. Mabey's Moving & Stor.,* 226 AD2d 938, 938 [3d Dept 1996]).

Conclusion

For the foregoing reasons, Tower Roofing's motion to preclude Christa Construction's expert from testifying at the trial of this action is denied.

This Decision shall also constitute the Order of the Court pursuant to rule 202.8(g) of the Uniform Rules for the New York State Trial Courts and it is deemed entered as of the date below. To commence the statutory time period for appeals as of right (CPLR 5513[a]), a copy of this Decision and Order, together with notice of entry, must be served upon all parties.

Dated: April 8, 2019
Binghamton, New York

HON. JEFFREY A. TAIT
Supreme Court Justice

FILED
APR 09 2019
BROOME COUNTY CLERK