

VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 20-CV-00308

Laurie Agri v. Windsor Southeast Supervisory Union

ENTRY REGARDING MOTION

Title: Motion in Limine to Preclude PLF's Weather Expert Stephen Maleski (Motion: 3)
Filer: Bonnie J. Badgewick
Filed Date: December 08, 2022

The motion is GRANTED IN PART and DENIED IN PART.

In this case, Plaintiff claims negligence on the part of the Defendant school district in allowing a slippery icy condition near a school entrance to be present during a school function, causing her to slip and fall and sustain injuries as she sought to enter the building. In this motion, Defendant seeks to preclude Plaintiff's weather expert, Stephen Maleski, from testifying at all. The issue generally is whether the school principal was negligent in failing to pay attention to weather conditions that would affect the weather during an evening school dance and failing to act to prevent the dangerous condition on the school premises where Plaintiff fell, either by cancelling the event or requiring the laying down of material such as sand over the ice to prevent slipperiness.

The expert disclosure stated that Mr. Maleski would testify about:

- The weather forecasts for February 16, 2018 that were readily available
- The actual weather that took place in the area around the time of the incident
- The conclusions "that the people who were supposed to be taking action with respect to both the predictions, and paying attention to the actual weather, should have drawn from this information."

He was deposed, and Defendant's counsel has moved to preclude his testimony as an expert witness under V.R.C.P. Rule 702 and *Daubert v. Merrill Do. Pharm., Inc.*, 509 U.S. 579 (1993). The defense does not challenge his qualifications as an experienced meteorologist, but argues that allowing his testimony would mislead the jury by allowing him as an expert to enjoy greater credence than his qualifications support because, Defendant argues, under the circumstances, the subject matter of his testimony does not require specialized knowledge or training over and above that of persons familiar with weather in Vermont.

As the legal claim is one for negligence, Plaintiff's burden includes proving a duty the school district had to persons coming and going to and from the school for a school event, and breach of that duty. Both the forecasts available prior to the incident and the actual weather conditions at the time are pertinent to the case.

Readily available forecasts. As an experienced meteorologist in Vermont, Mr. Maleski has knowledge of what forecast information was readily publicly available in the area. When asked at his deposition, he testified that "someone off the street could have done this research, yeah," as it was "stuff that's readily available to the general public if they know where to look. And the National – the National Weather Services is an easily-available public resource; they make it a point to make all of this stuff publicly available and in formats that are easily understandable to the general public." (Motion Exhibit B, pages 55-56). He acknowledges that knowledge of access to readily available forecast information does not require expert skill.

However, that does not mean that the information is not relevant to the case, or that he cannot give testimony as to publicly available forecasts, and he apparently has factual knowledge of forecasts available to the public. It just means that he cannot be identified as having an *expert* opinion about the availability of public forecasts. To identify him as an expert on this issue would give him more credence in the minds of jurors than is warranted, as the subject does not call for expert testimony. He may, however, be a fact witness on public availability of forecast information.

Actual weather in the area preceding, during, and after the incident. Mr. Maleski testified at his deposition that specialized knowledge is not required for residents of Vermont to know that when the temperature drops from a high of 40 to a low of 10, surfaces freeze and become slippery and dangerous. *Id.* at 43-44. He also testified that "the forecast was very plainly presented that a hard freeze and a fairly sudden freeze was, in fact, imminent that evening." *Id.* Because neither of these facts requires him to use any specialized knowledge or skill in responding, Mr. Maleski may not be presented to the jury as an expert when asked questions eliciting any such answers.

However, his skill, experience, and knowledge, may qualify him to use available records of a technical nature available to meteorologists to have an opinion as to what the weather conditions were at the school before and during the incident. Thus, he may be asked opinion questions as to what the actual weather was at those times, to the extent he can answer such questions in the exercise of his expertise as a meteorologist, given that he was not present. The cases cited by Plaintiff's counsel on pages 15-18 of Plaintiff's Opposition support expert testimony of this type.

The conclusions that responsible people should have reached from forecasts and weather conditions. Plaintiff's memorandum in opposition to the motion makes clear that counsel wishes to present Mr. Maleski as an expert to give an opinion on not only what conclusions school personnel should have reached but what sources of information they should have consulted as well. Opposition, pages 11-13. The court has ruled above that he may provide information as a fact witness about publicly available forecast information. However, the opinion evidence

Plaintiff wishes to have him give amounts to an expert opinion on the standard of care that school personnel should have exercised on the evening of February 13, 2018.

Experts are routinely called to testify to give expert testimony on the relevant standard of care a defendant is required to meet in a case involving a claim of negligence. For example, doctors as experts give expert testimony about the required standard of care for medical treatment under the circumstances presented by a patient/plaintiff. However, the expert must be qualified as an expert in the particular role involving the application of that standard of care. A research doctor who tracks statistical data about outcomes of different modes of heart condition treatment would not be qualified as an expert on the standard of care a treating physician should use in the care of a specific patient presenting symptoms of a possible heart condition. The expert must have the specialized knowledge, skill, and experience that qualifies him or her to answer the specific opinion question asked.

Here the issue is what standard of care should have been exercised by the school principal on the day and evening of the school dance. The proper expert to give such testimony is a school principal or other school decision maker charged with the responsibility of following weather conditions and forecasts as pertaining to scheduled school events and making decisions about school operations. A school administrator with knowledge, experience, and training could be qualified to give an expert opinion on the standard of care on that issue, and the record indicates that Plaintiff plans to call such an expert.

However, a meteorologist is not charged with decision making with respect to school events, even though he or she may have information that would be helpful to such decisionmakers. Mr. Maleski, while an expert on weather conditions and forecasting, has not been shown to have specialized training, skill, or expertise in knowing the appropriate standards applicable to school administrators in their role as decisionmakers about scheduled school events: specifically, what specific sources to consult, when to consult them, and what decisions to make about holding school functions under specified circumstances. While he may have information that could be helpful to school administrators in exercising their role, that does not make him an expert in the decision making they have to engage in as a function of their role as school administrators. Thus, he is not qualified to give an expert opinion on the standard of care, or breach thereof, to be exercised by school administrators in following weather conditions as they pertain to scheduled school events and or taking or not taking action based on weather factors.

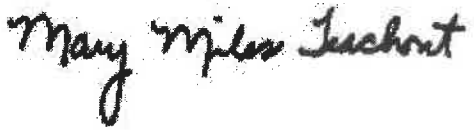
Summary

In sum, the motion is granted to preclude Mr. Maleski from giving an expert opinion on what sources the principal *should* have consulted about the weather on February 16, 2018, what conclusions she should have drawn from doing so, and whether or not she breached the duty of a school official under the circumstances. It is also granted to preclude him from being identified as giving an *expert* opinion on what forecast information was publicly available on that date, although he may testify as a fact witness on that subject.

The motion is denied with respect to Mr. Maleski giving fact testimony about publicly available forecast information, and denied with respect to giving expert testimony about what the weather conditions were at the school before and during the school dance.

Based on this ruling, Plaintiff's counsel is advised that the court will not allow Mr. Maleski to be represented to the jury as an expert as to all his testimony. As to the specific questions for which he is qualified to give expert opinion testimony as set forth in this ruling, he may be identified as giving expert opinion testimony.

Electronically signed February 22, 2023 pursuant to V.R.E.F. 9 (d).



Mary Miles Teachout
Superior Judge (Ret.), Specially Assigned

Vermont Superior Court
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