

VERMONT SUPERIOR COURT  
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CIVIL DIVISION  
Case No. 97-5-17 Lecv

DeLeon vs. Stowe Motel, LLC d/b/a

## DECISION ON MOTION

Defendant's Motion in Limine filed November 20, 2020

Opposition filed January 11, 2021

Reply filed February 12, 2021

The Motion is granted for the reasons described below.

Plaintiff was a guest at the Stowedrift Motel in 2014 and while there used a bicycle that was provided as an amenity for guests. She fell to the ground and sustained injury. In this suit, she claims that the fall was caused by a mechanical failure of the bicycle that was provided by the motel. Defendant disputes the cause of her fall. Plaintiff has disclosed an expert witness on the issue of mechanical failures resulting from poor bicycle maintenance. The witness has been deposed and Defendant moves in limine to exclude his testimony.

Plaintiff's proposed expert, Richard Thomas, never saw the bicycle or any pictures of it. Plaintiff had been asked early on, when she first asserted a claim, to preserve all evidence, but the bicycle disappeared. In a prior decision, Judge Pearson has ruled that due to the Plaintiff's spoliation of the bicycle, the jury will be instructed that "the bicycle in question was generally in poor, or substandard condition on June 7, 2014, due to outside storage and exposure to the elements." Decision and Order, October 18, 2019; Reconsideration denied November 26, 2019. Mr. Thomas's information came from reviewing documents in the case: the complaint, depositions, some motions, discovery responses, and photos of where the motel generally stored bicycles.

Mr. Thomas was a bicycle racer and coach and has worked as a bicycle mechanic for 24 years, first as a mechanic in a bicycle shop and for the last 12 years as owner of his own bicycle shop. He testified that if someone comes to his shop and describes a mechanical problem that occurred while riding a bicycle, he tries to discern what the problem might be. In this case, there is no bicycle to be studied and there are conflicting accounts of what occurred at the time of Plaintiff's fall, some of which are suggestive of mechanical failure of the bicycle and at least one that suggests that the reason for the fall was unrelated to the bicycle itself but that she has a weak ankle and fell while trying to dismount. Mr. Thomas was asked to review materials and comment on the possibilities of mechanical failure.

Plaintiff identified in her Opposition to the Motion in limine that Mr. Thomas would give expert opinion testimony on the following:

- (1) the maintenance and care necessary to make bicycles offered to the public reasonably safe
- (2) the consequences, in terms of mechanical operation, of a bicycle in poor condition that does not receive regular maintenance
- (3) the specific defects that are more likely than not to occur in the absence of regular maintenance
- (4) whether it is more likely than not that such defect(s) occurred at the time Ms. Deleon crashed
- (5) whether such defects contributed to the crash.

Opposition, page 8.

On the basis of his extensive experience, Mr. Thomas has the knowledge and experience to testify as to the first three items: the maintenance and care needed to make bicycles offered to the public reasonably safe, the mechanical consequences of lack of maintenance on operation, and the specific defects that are more likely than not to occur in the absence of regular maintenance. He is an expert in the field of the maintenance and repair of bicycles. That does not automatically mean that he is qualified to give opinion testimony on any question presented to him in relation to an incident involving a bicycle.

Mr. Thomas testified credibly at deposition that he was asked to review certain materials and “comment on possible causes of a bicycle crash on June 7, 2014.” Motion, Exhibit B, Statement of Richard Thomas, page 1. He acknowledged that he was focused only on possible mechanical issues, and that “at best” he could testify as to “possible mechanical issues which could have caused or contributed to Ms. Deleon’s fall.” Motion, Exhibit C, Deposition of Richard Thomas, page 95.

He described some of the mechanical things that can result from poor storage and maintenance. He testified that rollers inside the chain can rust and seize and cause the chain to come off; a corroded shift cable can cause a half shift, and back pedaling after a half shift can cause the chain to jam; a stiff link can skip off the sprocket and cause the chain to come off; and a drive chain can be worn. He does not know whether or not the chain came off in Ms. Deleon’s case.

In the materials he reviewed, he read that Ms. Deleon said that the pedal stopped. He testified that “this is not inconsistent with a jam from a half shift,” and also that it “is consistent with a stiff-link.” Exhibit B, page 3. He also noted a statement from Ms. Deleon’s friend, riding near her, in which she wrote “I heard a noise and then I quickly saw my friend fall onto the ground.” Although there is no description beyond the word “noise,” he considered that that “would describe a mechanical issue” although he also conceded that an undefined noise “could be something else.” He also noted someone’s inability to “roll the bike” after the fall.

All in all, he forthrightly concedes that given the limited facts available to him, he could only identify “possible” causes of mechanical failure or, in other words, things that can happen as a result of poor maintenance that are “consistent” with mechanical failure. Despite the attorney’s language in paragraph 4 above, he is not able to say that the bicycle Ms. Deleon rode the day of her fall actually had any of the possible defects he described or even that it was “more likely than not” that any of the

possible defects existed. He could only say that such defects would be “consistent with” what occurred.

Expert opinion testimony may not be based on mere speculation. *Turgeon v. Schneider*, 150 Vt 268 (1988). In this case, Mr. Thomas is not speculating about “possible” mechanical failures. Rather, he is using his expertise appropriately to define possible mechanical failures. They are mere possibilities, however. He, to his credit, acknowledges that he cannot do more than identify possible scenarios. Since the bicycle was unavailable for examination, he could not determine whether any of the possibilities actually existed. He cannot give the opinions that Plaintiff seeks, specifically that it was more likely than not that any of the defects occurred (4 above) or that such defects contributed to the crash (5 above). Thus, he is precluded from giving opinions about whether any mechanical defects actually existed and whether they contributed to the crash.

An additional reason that he cannot testify as to the cause of the crash is that while he is an expert in bicycle repair and maintenance, he is not an expert in accident reconstruction. Plaintiff seeks to rely on *Sherwood v. BNSF Ry. Co.*, 2019 WL 943467 (U.S. District Court Idaho) in support of allowing Mr. Thomas to testify about mechanical defects. In that case, the proposed expert was a bicycle expert and although not allowed to testify as an accident reconstructionist, he was allowed to testify about the condition of the bicycle and the nature of the damage he observed on the bicycle after the accident. In this case, Mr. Thomas never saw the bicycle. He observed that if he had, he would have been able to determine more about whether or not there was a mechanical defect, but because he could not do so, his opinion was limited to identifying possibilities.

This leaves the question about whether Mr. Thomas can give the opinion testimony he is qualified to give: that the defects he described “possibly” existed on the day of the crash. If he were to do so, the jury would have nothing but possibilities, and the jurors would have to speculate. The giving of “possibility” testimony by an expert would be almost an invitation to the jurors to speculate, or would at least appear to be giving them permission to do so.

This falls short of the standard for expert opinion testimony under V.R.E. 702:

The testimony would not meet “the legal standard of reasonable probability required of expert opinions.” *Campbell v. Heinrich Savelberg, Inc.*, 139 Vt. 31 (1980). “In considering the competency of [expert opinion] testimony, reasonable probability is the standard, rather than conjecture or mere possibility.” *State v. Bishop*, 128 Vt 221 (1969).

“[I]ndefinite” expert opinions, or those “expressed in terms of mere possibilities,” are not admissible. For example, we have held that an expert’s offering a “reasonable hypothesis” was insufficient, explaining that “[e]xpert testimony should be made of sterner stuff.” *Parvin v. State*, 113 So. 3d 1243, 1247 (Miss. 2013)(citations omitted).

“[E]xperts cannot simply hazard guesses, however educated, based on their credentials. Instead, expert testimony must be sufficiently definite and certain to be admissible, for neither the Courts nor the juries are justified in inferring from mere possibilities the existence of facts, and they cannot make mere conjecture or speculation the foundation of their verdicts.” *Porter Hayden Co. v. Wyche*, 738 A. 2d 326, 330 (Md. App. 1999).

See also *Schulz v. Celotex Corp.*, 942 F. 2d 204, 208 (3d Cir. 1991), *Viener v. Jacobs*, 834 A. 2d 546, 558 (Pa. Super. 2003).

Based on the foregoing analysis, the court concludes that while Mr. Thomas is an expert in his field, Plaintiff is precluded from calling him as an expert witness to give the opinion testimony identified in both his disclosure Statement and in the Opposition to the motion. Specifically, he is precluded from testifying that it is more likely than not that mechanical defect(s) were present on the bicycle at the time of Ms. DeLeon's fall because he can only identify possibilities. He is precluded from testifying that mechanical defects contributed to the crash because he is not an accident reconstructionist and because he can only opine that it is a possibility that there were defects and a possibility that defects contributed to the crash. Moreover, he is precluded from testifying about the possibility that defects may have resulted from the bicycle being in poor condition due to outside storage and exposure to the elements because such testimony would only identify possibilities and thus does not meet the required standard of reasonable probability that any defect actually existed.

It appears that the case is ready for trial. Unless the attorneys submit a stipulation to continued pretrial activities and deadlines, it will be scheduled for a pretrial status conference when the court is able to resume civil jury trials. If, in the meantime, there is an agreement to a reduced number of jurors or to a court trial, the attorneys are requested to notify the court.

Electronically signed pursuant to V.R.E.F. 9(d) on February 16, 2021 at 5:25 PM.



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Mary Miles Teachout  
Superior Court Judge