



SUPERIOR COURTS
EIGHTH JUDICIAL ADMINISTRATIVE DISTRICT
OCONEE JUDICIAL CIRCUIT
Bleckley, Dodge, Montgomery, Pulaski, Telfair & Wheeler Counties

PHILLIP R. WEST, CHIEF JUDGE
DODGE COUNTY COURTHOUSE
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October 5, 2005

Via Hand Delivery

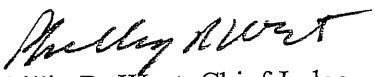
Honorable Rhett Walker
Post Office Box 4276
Eastman, Georgia 31023

Re: Essie Mae Thornton, et al vs. Three Rivers Construction, Inc., vs. Leandro Flores
Dodge County Superior Court
Civil Action No.: 04V-1714

Dear Rhett:

Enclosed for filing, you will find an Order in the above referenced case. A copy of the order has been forwarded to Mr. Don Johnson, Mr. Michael St. Amand, and Mr. Mark Oldenburg.

Sincerely,


Phillip R. West, Chief Judge
Dodge County Superior Court

PRW/amm

Enclosure

Cc: Mr. Don Johnson
Mr. Michael St. Amand
Mr. Mark Oldenburg

OCT - 6 2005

knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. Id. at 592. This requires the judge to make a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue. Id. at 592-593. The Court in Daubert provided some general observations to assist trial judges in the task of determining whether a theory or technique is scientific knowledge that will assist the trier of fact. These include (1) whether the theory or technique can be and has been tested; (2) whether it has been subjected to peer review and publication; (3) the known or potential rate of error and the existence and maintenance of standards controlling the technique's operation; (4) the general acceptance of the technique or theory within the scientific community. Id. at 593-594.

Daubert applies to Georgia courts through O.C.G.A. § 24-9-67.1, which allows Georgia courts to draw from the Daubert and other U.S. Supreme Court opinions in applying standards of expert evidence. O.C.G.A. § 24-9-67.1(f). The Code section's provisions for the admissibility of expert testimony include:

If scientific, technical, or other specialized knowledge will assist the trier of fact in any cause of action to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if: (1) the testimony is based upon sufficient facts or data which are or will be admitted into evidence at the hearing or trial; (2) the testimony is the product of reliable principles and methods; and (3) the witness has applied the principles and methods reliably to the facts of the case.

O.C.G.A. § 24-9-67.1(b).

In Kumho Tire Company, Ltd, et al, v. Carmichael, et al, 526 U.S. 137 (1999), the Court recognized that a trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is

reliable. Kumho Tire Co., Ltd, et al, v. Carmichael, et al, 526 U.S. 137, 152 (1999). A trial court should consider the factors Daubert specified where they are reasonable measures of the reliability of expert testimony. Id. “The trial court must have the same kind of latitude in deciding *how* to test an expert’s reliability...as it enjoys when it decides *whether or not* that expert’s relevant testimony is reliable.” Id.

In the present case, this Court is called upon to decide the relevancy and reliability of testimony from the plaintiff’s expert Mr. Christopher Shiver. Mr. Shiver’s proposed testimony, based on scientific knowledge, is offered to establish the general causation of the accident that is the subject of this lawsuit. Thus, its admissibility is a proper question before this Court.

Mr. Shiver’s qualifications include his holding a Bachelor of Mechanical Engineering degree from the Georgia Institute of Technology and his previous presentations to various organizations and prior testimony as an expert in cases in both federal and state courts. (Exhibits 1 & 2 to Shiver Depo) However, Mr. Shiver admits that he does not recall any of the prior cases he testified in dealing specifically with a guardrail or safety rail issue. (Shiver Depo p.33)

The Plaintiff provided Mr. Shiver with a certain set of facts upon retaining him as an expert for this case; Mr. Shiver used those facts to prepare to render his opinion as to the cause of the accident. Rather than independently verifying the accuracy of those facts, Mr. Shiver relied solely on those facts as given to him by the Plaintiff and the OSHA report issued from OSHA’s investigation of this accident to render his opinion. (Shiver Depo p.50-52) In fact, Mr. Shiver admits that his opinion is based solely on the description of the system contained within the OSHA report and his review of the OSHA

expert's calculations. (Shiver Depo p.53-54, 91) Shiver's work basically consisted of replicating calculations another engineer made for this case, but Shiver only performed the calculations for those numbers that he disagreed with. (Shiver Depo p.80)

Furthermore, Shiver admits that he did not perform any real world testing specific to the opinions and conclusions that he reached in this case. (Shiver Depo p.98) Shiver did not examine any alternative safety rail designs, despite knowing that the OSHA expert's calculations were based on a different design than the type employed for the Walden Trace Project, and despite admitting that he had the capability of performing such tests. (Shiver Depo p. 92-97) Nor did Shiver visit the Walden Trace Project site to perform any investigation or visual inspection of the site. Although Shiver was employed years after the subject accident and construction had been concluded, he admits that if he had been asked to, he could have disassembled building materials and made observations about nail holes and the condition of the materials. (Shiver Depo p.85-86)


This Court has considered the Daubert factors in measuring the reliability of Mr. Shiver's testimony and examined the principles and methods used by Mr. Shiver and how those principles and methods may be reliably applied to the facts in this case as required by O.C.G.A. §24-9-67.1(b). The Court finds that Mr. Shiver's opinion is unreliable as it relates to the facts in this case. The Court has the duty to admit only evidence which it finds both relevant and reliable to the facts in the case that would aid the jury.

Here, Mr. Shiver has presented no reports, sketches, or designs to aid the Court in understanding his methodology in reaching his conclusions. There has been no indication of the potential rate of error for his calculations, nor any indication that his method of simply recalculating another engineer's calculations is an acceptable method

for rendering an expert opinion. In fact, Mr. Shiver testified that he had not discussed his opinions or conclusions with any other engineers. (Shiver Depo p.156) Mr. Shiver's reliance on facts and data from an unknown engineer without conducting his own independent investigations and testing to reach his causation opinion make the expert opinion unreliable.

Therefore, the Defendant's Motion to Exclude the Testimony of Christopher Shiver is GRANTED.

SO ORDERED, this 5th day of October, 2005.



Hon. Phillip R. West, Chief Judge
Dodge Superior Court