Michael M. Pollak (SBN 90327)
Barry P. Goldberg, Esq. (SBN 115667)
POLLAK, VIDA & FISHER
11150 W. Olympic Blvd, Suite 980
Los Angeles, CA 90064-1839
Telephone: (310) 551-3400
Facsimile: (310) 551-1036

Attorneys for Defendant Paso Oil Co., Inc., dba Action 76; and Luis E. Peralta dba Acton Unocal Tire and Service Center

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES – NORTHERN DISTRICT (LANCASTER)

CAROL JEAN POSNER, an individual, MARC PRIORE, an individual,

Plaintiffs,

vs.

PASO OIL CO., INC., a corporation, d/b/a ACTION 76; LUIS E. PERALTA, an individual, d/b/a/ ACTON UNOCAL TIRE AND SERVICE CENTER; and Does 1 through 25, Inclusive,

Defendant.

Case No.: MC022228
[*Assigned to the Hon. Brian C. Yep, Dept. A10*]

Action Filed: January 7, 2011

DEFENDANT'S MOTION IN LIMINE NO. 7 TO EXCLUDE EXPERT TESTIMONY OF BRAD AVRIT, P.E.
[*Evidence Code* §§ 350, 352, 801(b)]

Trial Date: June 15, 2012
Time: 8:30 a.m.
Dept: A10

FSC: June 4, 2012

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that Defendant PASO OIL CO., INC., et al., by and through their attorneys of record, hereby move the Court, in limine for an Order excluding any and all evidence, references to evidence, testimony, or argument in any manner whatsoever, either directly or indirectly, relating to the expert testimony of Brad Avrit, P.E., to the extent that his testimony is speculative and not supported by evidence.

The Court is further requested to order counsel for all parties to inform each of their witnesses of this Order and of these instructions, to redact any mention of such matters from

each writing or document in the case, and to direct all witnesses not to make any reference to this subject matter in any fashion.

This Motion is made upon the following grounds:

1. The matters of fact or alleged facts refer to or deal with matters that are not relevant to the litigation and are otherwise objectionable under *Evidence Code §§ 350, 352*, and 801(b) or other provision of law;

2. If any of the facts referred to in this Motion are brought before or made known to the jury, either directly or indirectly, such facts will be prejudicial to Defendant even though the Court sustains an objection and instructs the jury to disregard such matters; and

3. If the jury is made aware of such facts, either directly or indirectly, it will result in a mistrial of the case and extraordinary delay, expense and inconvenience caused by a retrial, to the Court, the public, and the litigants.

Defendant has met and conferred with Plaintiffs prior to filing this motion as required by the local rules.

WHEREFORE, Defendant prays that the Court enter its Order as requested.

DATED: October 22, 2012

POLLAK, VIDA & FISHER

BY: _____
BARRY P. GOLDBERG, Attorney for Defendant PASO OIL CO., INC., etc., et al.

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MEMORANDUM OF POINTS AND AUTHORITIES

1. PRELIMINARY STATEMENT

This is a premises liability action to recover for damages arising from an alleged slip and fall accident which occurred at Defendant's service station in which 56-year old Plaintiff Carol Jean Posner sustained bodily injuries on January 22, 2010. Although it was wet and rainy on that date, Plaintiff admits that the moisture and wetness was "open and obvious." Moreover, the walking surface was objectively safe even when wet. In an attempt to establish liability, plaintiff contends that she "***believes*** that a petroleum product spill and the wet surface caused her (cane) to slip." (Emphasis Added.) *No witness will offer testimony that they saw any foreign substance or evidence of a foreign substance in or around where plaintiff fell*.

Defendant contends that it did not breach a duty of care owed to Plaintiff because it had no notice, whether actual or constructive, that an alleged unknown "mystery" substance was on the ground where Plaintiff fell. Furthermore, Defendant contends that Plaintiff's physical health at the time of the incident was so poor, that her own underlying medical conditions contributed to her slip and fall, and not an unknown spilled substance.

To date, no witness, including Brad Avrit, P.E., has identified any particular substance which arguably caused or contributed to plaintiff's fall. Rather, plaintiff relies on the so-called expert opinions of Brad Avrit, P.E., that 1) because plaintiff fell, there must have been some unknown and unidentified dangerous substance present; 2) Plaintiff's cane must have slipped on "oil or some other contaminant," and 3) that had defendant had other inspection procedures in place, it would have discovered the unknown and unidentified substance.

Such pure speculation and conjecture, not based upon admissible facts that there even was some dangerous substance present, is insufficient to support an expert opinion. It is prejudicial and must be excluded.

2. THIS COURT MAY EXCLUDE PREJUDICIAL EVIDENCE IN ADVANCE OF TRIAL BY WAY OF AN IN LIMINE MOTION.

The court has the inherent power to grant a motion in limine to exclude "any kind of evidence which could be objected to at trial, either as irrelevant or subject to discretionary exclusion as unduly prejudicial". (*Clemens v. American Warranty Corp.* (1987) 193 Cal.App.3d 444; *Peat, Marwick, Mitchell & Co. v. Superior Court* (1988) 200 Cal.App.3d 272, 288).

3. THIS COURT MAY PRECLUDE EVIDENCE WHERE THE PROBATIVE VALUE IS SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNDUE PREJUDICE

Evidence Code Section 352 states that the court may exclude evidence if its probative value is substantially outweighed by the probability that its admission will "create substantial danger of undue prejudice." *See People v. Cardenas,* (1982) 31 Cal. 3d 897, 904; *Mozzetti v. City of Brisbane*, (1977) 67 Cal. App. 3d 565, 578.

In the present case, expert opinion testimony relating to or suggesting what "mystery" substance caused or contributed to plaintiff's fall would be purely speculative, as is discussed in more detail below. Allowing such evidence, and an opinion that defendant should have discovered it, would create unfair and significant prejudice to the plaintiff, and therefore should be excluded.

4. THE COURT MAY EXCLUDE AN EXPERT'S OPINION WHERE BASED UPON SPECULATION OR CONJECTURE (Evidence Code §801(b))

*Evidence Code §*801(b) states that an expert's opinion must be based on matters "perceived by or personally known to the witness or made known to him at or before the

hearing." ***An expert may not base his or her opinion speculation or conjecture.*** (*Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App. 3d 325; *Long v. California-Western States Life Ins. Co.* (1955) 43 Cal.2d 871); See also Law Revision Commission Comment on Evidence Code Section 801 (speculative matters are not a proper basis for an expert's opinion).

Where an expert must work backward to reconstruct an accident, his opinion may be inadmissible if based upon too many variables. *Solis v. Southern Cal. Rapid Transit Dist*. (1980) 105 Cal. App. 3d 382, 389–90; see also, *Francis v. Sauve* (1963) 222 Cal. App. 2d 102, 114–15 (traffic reconstruction opinion testimony disallowed where too many variables).

An expert's opinion may also be excluded if it is not shown to be reliable. *People v. Price* (1991) 1 Cal. 4th 324, 419–20); *People v. Carter* (1957) 48 Cal. 2d 737, 752).

In the present case, the defendant's expert is hindered by the same type of problems that rendered the testimony in *Solis* and *Francis* inadmissible. The defense expert will attempt to determine what alleged "mystery" substance may have been present, even though no one ever saw any such substance, and there is no evidence that any foreign substance was even ever present. There is not even any secondary evidence normally seen in slip cases, like skid marks or residue on the plaintiff's clothing.

Too much critical evidence is missing to allow this expert to render a reliable opinion, as follows:

1. There were no witnesses to the accident or the events leading up to the accident. Plaintiff neither looked to see if some foreign substance was present after she fell, nor instructed anyone else to look to see if some substance was present.

2. Immediately after her fall, witness after witness arrived and neither saw neither a foreign substance nor the remnants of a substance in the form of skid marks or other indicator that something dangerous was present. The defendant inspected the area immediately after plaintiff left the location and never saw or cleaned up a spill. The defendant has testified that he tested the walking surface with his toe and found nothing slippery and no evidence of any slide marks.

3. The plaintiff's expert's tests and analysis of the area occurred in May 2012 more than two years after the alleged fall. Since no substance was ever found or identified, the expert is guessing that "oil or some other contaminant" must have been present. This is totally speculative.

4. The plaintiff's expert's conclusion that defendant knew or should have known of a substance which has never been identified is pure conjecture.

As a result, Mr. Avrit's's opinions and conclusions are mere speculation. (*Lockheed Litigation Cases, supra*, 115 Cal.App.4th at p. 564 [the matter relied on by an expert must provide a reasonable basis for his opinion, and opinions based on speculation or conjecture are not admissible]; *Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, [an expert cannot base his opinions on assumptions that are not supported by the record, or upon information that is not reasonably relied upon by other experts]; *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 487 [a possible cause of an injury only becomes probable when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action]; *Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1118 [a theoretical possibility of causation cannot support an expert's conclusion that the act in question was the cause of the injury].)

Based upon the foregoing, it is unclear how the defense expert can render an opinion on this crucial evidence based upon anything other than conjecture, speculation and simple guesswork. As such, it is again requested that the Court exclude any testimony of defendant's expert relating to whether an unknown "mystery" substance was present and somehow caused or contributed to plaintiff's fall.

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5. CONTROLLING CASE LAW PROHIBITS THE PRECISE SPECULATION OFFERED BY PLAINTIFF'S EXPERT IN THIS CASE.

Plaintiff's expert opinion is based upon the premise that ***from the alleged slip and fall alone*** it can be inferred that it was more probable than not that a slippery substance was present on and otherwise safe walking surface. In essence, plaintiff's expert is attempting to apply the doctrine of res ipsa loquitur to this case when the California Supreme Court has held that res ipsa loquitur does not apply to slip and fall cases. (*Brown v. Poway Unified School Dist.* (1993) 4 Cal. 4th 820, 826-28, "*Brown*".)

In rejecting a presumption of negligence, the court explained:

"Experience teaches that slip and falls are not so likely to be the result of negligence as to justify a presumption to that effect. As Prosser and Keeton explain, '*there are many accidents which, as a matter of common knowledge, occur frequently enough without anyone's fault . . . . [A] n ordinary slip and fall . . . will not in [itself] justify the conclusion that negligence is the most likely explanation; and to such events res ipsa loquitur does not apply*.' (Prosser & Keeton, Torts (5th Ed. 1984) § 39. P. 246.) This is true even when the fall is associated with a slippery object, because objects too often appear on floors without sufficient explanation. For this reason, 'something slippery on the floor affords no res ipsa case against the owner of the premises, unless it is shown to have been there long enough so that he should have discovered it and removed it." (Id., at pp. 255-56.)" (*Brown, supra* 4. Cal.App.4th at pp. 826; emphasis added.)

Indeed, it is a basic fact of life that people are often injured in the absence of negligence. [N]ot every accident that occurs gives rise to a cause of action upon which the party injured may recover damages from someone. Thousands of accidents occur every day for which no one is liable in damages, and often no one is to blame, not even the ones who are injured. (*Holcombe v. Burns* (1960) 183 Cal.App.2d 811, 815 (Citations omitted.)) Inasmuch as there is no evidence of a slippery substance on the brushed concrete where plaintiff fell, and no evidence that the premises was in a "dangerous condition," plaintiff should not be permitted to accomplish an

inference of negligence by expert testimony. Allowing such testimony would, in essence, overrule the California Supreme Court.

6. <u>CONTROLLING AUTHORITY FROM THIS DISTRICT ESTABLISHES THAT CONJECTURE THAT THE GROUND WAS TOO SLIPPERY IS MERE SPECULATION AND LEGALLY INSUFFICIENT TO BASE AN EXPERT'S OPINION.</u>

The case of *Buehler v. Alpha Beta Co.* (1990) 224 Cal.App.3d 729 from this district should control the outcome of this motion. The plaintiff in *Buehler* alleged that her slip and fall in the defendant's store was caused by an inappropriately slippery floor, due to either an unknown substance on the floor or improper waxing of the floor. (*Id.* at 733.) As in our case, Plaintiff did not see anything on the floor to cause her to slip and did not know the cause. (*Id*. at 734.) The *Buehler* court affirmed a summary judgment in favor of the defendant on the ground that the defendant had established a prima facie defense of no liability based on the lack of evidence of any slippery or otherwise defective condition. (*Id.* at 731-32.) The court held that ***"[c]onjecture that the floor might have been too slippery at the location where appellant happened to fall is mere speculation which is legally insufficient*** . . . ." (*Id*. at 734; emphasis added.))

Moreover, the *Buehler* court was mainly concerned that there was a lack of evidence that the floor was "too slippery" where plaintiff fell, that is, that a dangerous condition even existed. Although the plaintiff contended that there must have been some substance, either too much wax or some unknown substance, the court found no substantial evidence of wax or any other substance creating a dangerous condition. (*Buehler v. Alpha Beta Co., supra*, 224 Cal.App.3d 729, 734.)

Vaughn v. Montgomery Ward & Co. (1950) 95 Cal.App.2d 553, came to the same conclusion. There, the only evidence the *Vaughn* plaintiff presented was that she slipped and fell

in defendant's store injuring her. As in the present case, plaintiff claimed that her fall was caused by an oily, slippery, liquid substance which the defendant had negligently allowed to remain on the floor. (*Id*. at 553-54.) The court explained that in most reported slip and fall cases, the plaintiff had offered evidence proving the existence of a dangerous condition created by the business owner or proof of some foreign substance on the floor. (*Id*. at 556.)

The *Vaughn* plaintiff's statement that his foot felt an oily and slippery substance did not constitute substantial evidence of a dangerous condition essential to maintaining an action for negligence or premises liability. (*Id*. at 557.)

In this case, the plaintiff merely speculates that something must have been on the ground, contributing to her fall. "Conjecture that the floor might have been too slippery at the location where appellant happened to fall is mere speculation which is legally insufficient. . . ." (*Buehler v. Alpha Beta Co., supra*, 224 Cal.App.3d 729, 734 (emphasis added).)

Under both *Buehler* and *Vaughn*, plaintiff's expert's contention that she must have stepped on something can be no more than conjecture that the ground may have been "too slippery," that is, that an unreasonably dangerous condition existed.

7. <u>CONCLUSION.</u>

Based on the foregoing, the Defendant respectfully request that this Court exclude any and all evidence, or mention of evidence referring to the testimony of Brad Avrit, P.E. which infers that "oil or some other contaminant" was present, and that defendant knew or should have known of such "mystery" substance.

Since there can be no probative value to such evidence, especially when weighed in comparison to the serious, obvious prejudice and confusion such evidence will create if known to jurors, it must be excluded.

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DATED: October 22, 2012

Respectfully Submitted,

POLLAK, VIDA & FISHER

BY: _____
BARRY P. GOLDBERG, Attorney for Defendant PASO OIL CO., INC., etc., et al.