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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 REPLY TO PLAINTIFF'S OPPOSITION TO 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

Defendant PASO OIL CO., INC., et al., (hereafter "Acton 76") provides the following Reply Brief in support of its motion 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.

MEMORANDUM OF POINTS AND AUTHORITIES

1. SUMMARY OF REPLY ARGUMENT

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.

Plaintiff's opposition is plain wrong. First, an expert may not opine that an unspecified "contaminant" was present without some supporting evidence of its existence. Second, an expert cannot use photos taken ***one year after the incident*** which apparently shows gasoline stains nowhere near the area where plaintiff fell, and conclude some "other" substance caused plaintiff's fall. In fact, Mr. Avrit never opined that the plaintiff slipped on gasoline. Rather, he repeatedly speculated that plaintiff fell on "oil or some other contaminant."

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.

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2. 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).

3. 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.

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.)

4. <u>AN EXPERT CANNOT OPINE ON WHETHER OR NOT A DANGEROUS CONDITION EXISTED, BASED UPON "PROBABILITY" OR "POSSIBILITY" AS PLAINTIFF SUGGESTS.</u>

Plaintiff takes the cited case law out of context. In *Hinckley v. La Mesa R.V. Center, Inc.* (1984) 159 Cal.App.3d 630, upon which primarily relies, does not allow opinions absent any evidence to support the opinion. In that case, ***there was evidence of two causes of a fire***. In that circumstance, a court permitted an expert to opine on the most likely cause of the fire to defeat a nonsuit motion. In that case, res ipsa loquitur and strict liability were involved.

Plaintiff also cites several medical malpractice cases for the proposition that somewhat speculative opinions are permitted as part of each and every "medical opinion" rendered. These cases have no application here. An expert cannot opine that some substance was present without identifying it and without there being some factual support that the particular substance was actually found. As the court held in *People v. Johnson* (1993) 19 Cal.App.4th 778, 790:

> "A witness cut loose from time-tested rules of evidence to engage in purely personal, idiosyncratic speculation offends legal tradition quite as much as the tradition of science. Unleashing such an expert in court is not just unfair; it is inimical to the pursuit of truth.

The expert whose testimony is not firmly anchored in some broader body of objective learning is just another lawyer, masquerading as a pundit."

In fact, courts have properly found no foundation for Brad Avrit's opinions in the past. that noncompliance with certain building codes and standards made the crack dangerous. (See, *Caloroso v. Hathaway* (2004) 122 Cal.App.4th 922, 928-929. [The court properly excluded Avrit's opinion that defendant's noncompliance with certain building codes and standards created a triable issue whether the condition was dangerous.]

Similarly, when an expert's opinion is purely conclusory because unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion, that opinion has no evidentiary value because an "expert opinion is worth no more than the reasons upon which it rests." (*Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 523-525.)

5. <u>IT IS IMPROPER TO EVEN ALLOW AN EXPERT TO OPINE THAT A CONDITION IS "UNSAFE"OR DANGEROUS</u>

In *Wilkerson v. City of El Monte* (1937) 17 Cal.App.2d 615, the plaintiff's expert was allowed to testify, over objections, that the construction and condition of the road was "unsafe", that it was "dangerous" and that it was "defective" and "wrong". The court of appeal held that the objections to these questions should have been sustained. These opinions went to the ultimate question of fact for the jury to determine. Similarly, in *Blinkinsop v. Weber* (1948) 85 Cal.App.2d 276, 282-283, a fall on stairs by the plaintiff; judgment for defendant and plaintiff appeals; affirmed] It was not error, to refuse to allow an expert to opine that stairs were "unsafe": "Usually an expert cannot be asked whether a structure is a safe one, but all of the facts may be elicited from the witness from which the conclusion follows...". In *Martindale v. City of Mountain View* (1962) 208 Cal.App.2d 109, 124, the court held that it was improper to ask an

expert if the condition at a railroad crossing was "hazardous". The court in *Martindale*, held that these were matters to be determined by the jury. (See, also, *Baccus v. Kroger* (1953) 120 Cal.App.2d 802, 803-804.

6. CONCLUSION.

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.

DATED: October 22, 2012

Respectfully Submitted,

POLLAK, VIDA & FISHER

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