

## Evidence - Expert - Fire

By: Tom Egan December 17, 2014

Where an insurance company has brought a subrogation action against a defendant house painter who allegedly caused a fire to an insured home, a motion by the defendant to exclude the testimony of the plaintiff's designated expert witness must be denied because the record contains evidentiary support for the expert's opinion regarding causation.

"... By his motion, [defendant Giovan C.] Dalla Pola is requesting an order excluding the opinion of Chubb's expert witness, Thomas Klem ('Klem'), regarding the origin and cause of the fire, and granting him judgment as a matter of law on both of the plaintiff's claims against him. Dalla Pola contends that Klem's testimony attributing the cause of the fire to the plaintiff's painting company is inadmissible because it is based on factual assumptions that have no support in the evidentiary record. He further argues that there is no evidence, other than Klem's inadmissible opinion, to show that he or any of his workers were responsible for the fire. Accordingly, Dalla Pola contends that summary judgment is warranted in his favor. ...

"In the instant case, Dalla Pola does not challenge Klem's qualifications as an expert in the area of fire investigation. Nor does he dispute that Klem's testimony regarding the cause and origin of the fire is relevant to the matters at issue in the litigation. Moreover, Dalla Pola does not contend that Klem employed an improper methodology for investigating the source of the fire. Rather, the defendant argues that there is no reliable factual support for Klem's theories that the painters spilled stain in the garage, or that they left a bag of sawdust or contaminated sawdust there. ... Accordingly, he asserts that the plaintiff's expert testimony is speculative and is therefore inadmissible under Rule 702 of the Federal Rules of Evidence. ...

"The record presented to this court contains factual support for Klem's proposed scenarios regarding the cause of the ignition in the [policyholders]' garage. For example, but without limitation, Klem's theory that the painters spilled stain in the garage is supported by evidence showing that [Marcus] Pereira had been performing sanding and staining work on the day preceding the fire, by the conclusion of the local fire and State Police officials that the fire originated in the area near the metal shelving unit where the painters had stored paint and stain, and by the discovery of staining material on the floor mat located near the metal unit. ... It is also consistent with Lieutenant [Frank] Gray's assessment that the fire was probably caused by the spontaneous combustion of staining materials that had been left in the garage by the painters, as well as with the results of the laboratory analysis, which detected the presence of a substance 'with a moderate tendency to self heat' both on the floor mat and in one of the paint cans recovered from the garage, and identified that substance as a possible source of the material on the floor mat. ... With respect to Klem's opinion that the fire may have been caused by contaminated sawdust, that theory is supported by Trooper [Peter] Bramante's conclusion that the fire originated in the precise location where Pereira reportedly left a large bag of sawdust. ... Furthermore, it is entirely consistent with Trooper Bramante's opinion that 'the most probable cause of this fire was spontaneous combustion involving the cloth bag of sawdust and other possible materials.' ... Accordingly, the defendant's assertion that Klem's opinion rests on a speculative and unreliable factual foundation is belied by evidence in the record.

"The fact that Klem's opinion is based on circumstantial rather than direct evidence does not render his testimony unreliable. 'By the very nature of a fire, its cause must often be proven through a combination of common sense, circumstantial evidence and expert testimony.' ... Moreover, Klem's inability to identify the precise source of the fire does not defeat the admissibility of his expert opinion in this case. Under either of Klem's proposed scenarios, the cause of the fire would be attributable to Dalla Pola. ... Therefore, his testimony promises to 'help the trier of fact to understand the evidence' regarding the source of the fire. ...

"... Even assuming, *arguendo*, that this court were to conclude that 'the factual underpinning of [the] expert's opinion [was] weak,' the challenges by the defendant at most affect 'the weight and credibility of the testimony — a question to be resolved by the jury.' ...

“The defendant’s assertion that Klem ignored evidence of alternative sources for the fire is similarly unpersuasive. ... To the extent Dalla Pola wishes to expose any alleged flaws in Klem’s expert analysis, he will have an ample opportunity to do so through cross-examination and the presentation of evidence at trial. ...”

*Pacific Indemnity Company v. Dalla Pola (Lawyers Weekly No. 02-612-14) (18 pages) (Dein, U.S.M.J.) (Civil Action No. 12-11638-JGD) (Dec. 15, 2014).*

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