

[REDACTED]

Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT, STATE OF UTAH
[REDACTED] COUNTY

<p>[REDACTED]</p> <p>Plaintiffs,</p> <p>v</p> <p>[REDACTED]</p> <p>Defendants.</p>	<p>PLAINTIFF'S MOTION IN LIMINE TO EXCLUDE DEFENDANT'S EXPERT, [REDACTED], ALONG WITH HIS REPORT AND EXPERT TESTIMONY</p> <p>Case No.: [REDACTED]</p> <p>Hon. Judge: [REDACTED]</p> <p>ORAL ARGUMENT REQUESTED</p>
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Defendant's Expert, [REDACTED], along with his report and expert testimony

Pursuant to Rule 702 of the Utah Rules of Evidence, Plaintiff, [REDACTED], (hereinafter [REDACTED]) by and through their counsel, [REDACTED] hereby move the Court to exclude Defendant's Expert, [REDACTED], report and expert testimony.

TABLE OF CONTENTS

I. RELIEF SOUGHT AND GROUNDS FOR THE MOTION.....3

II. FACTUAL BACKGROUND4

III. LEGAL STANDARD.....6

IV. ARGUMENT.....7

A. [REDACTED] does not qualify as an expert witness because he does not have the knowledge, skill, experience, training, or education in residential construction. This lack of expertise will hinder the fact finders.7

B. [REDACTED] report is unreliable because it is not based on sufficient facts or data and has not been readily applied to the facts.9

C. The threshold required by Rule 702(b) has not been satisfied because it is unclear if the underlying principles or methods [REDACTED] relies on have been generally accepted by the relevant expert community.10

V. CONCLUSION.....10

TABLE OF AUTHORITIES

Cases

Balderas v. Starks, 138 P.3d 75, 552 Utah Adv. Rep. 64, 2006 UT App 2187
California College Inc. v. UCN Inc., 2019, 440 P.3d 825, 2019 UT App 399
Evans ex rel. Evans v. Langston, 2007, 166 P.3d 621, 2007 UT App 240, certiorari denied
182P.3d 9107
Taylor v. University of Utah, 438 P.3d, 2019 UT App 14, 882 Utah Adv. 76.....7

Rules

Rule 702 of the Utah Rules of Evidence3, 6

I. RELIEF SOUGHT AND GROUNDS FOR THE MOTION

This motion is brought according to Rule 702 of the Utah Rules of Evidence. It is [REDACTED] position that [REDACTED] (hereinafter [REDACTED]) is unqualified to act as an expert because (1) he does not have the knowledge, skill, experience, training, or education in residential construction. This lack of expertise will hinder the fact finders, (2) [REDACTED] report is unreliable because it is not based on sufficient facts or data and has not been readily applied to the facts, and (3) The threshold required by Rule 702(b) has not been satisfied because it is unclear if the underlying principles or methods [REDACTED] relies on have been generally accepted by the relevant expert community.

II. FACTUAL BACKGROUND

1. [REDACTED] (hereinafter [REDACTED]) contracted [REDACTED] to build a home for him in [REDACTED]. The parties did sign a formal contract, and construction began on [REDACTED] home (the "House") shortly after that.

2. [REDACTED] originally agreed that the payment for the home construction would be cost plus a builder's profit of 12% and that this 12% profit would apply to amounts paid to sub-contractors which [REDACTED] found and paid himself, meaning that even if [REDACTED] decided to pick out and produce his sub-contractors for certain parts of the construction, he would owe to [REDACTED] 12% of the final invoice for those contractors. Additionally, [REDACTED] has desired to pay for the cost of the home in cash payments.

3. At or about the end of [REDACTED], [REDACTED] decided that he would no longer pay for the construction in cash. Instead, [REDACTED] applied for and obtained a construction loan to finish the home at [REDACTED] Bank. For the first several months after the loan was obtained, [REDACTED] would take draws from the loan account at [REDACTED] Bank as expenses were incurred, and [REDACTED] was good about signing off on those draws (as any withdrawal requires both [REDACTED] signature and a signature from a [REDACTED] representative).

4. Throughout [REDACTED], some delays were outside of [REDACTED] control. Firstly, at or about the end of [REDACTED], [REDACTED] moved backed on the property during mid-construction. It is well-known in the construction industry that when an occupant lives in the structure, the progress slows significantly. [REDACTED], the world was hit by the COVID-19 pandemic. With the pandemic raging, and the constant changes in regulations,

lock-downs, quarantine, and other rules, it became difficult to keep enough workers on the site to stay on time with the construction progress on the house, this in addition to [REDACTED] living on the property. As such, there were some reasonable and expected delays. However, even with that, construction on the house continued to progress.

5. On or about [REDACTED], the county gave final occupancy for [REDACTED] to occupy the home.

6. As is usually the case with construction projects, there was a short list, a 'punch list,' (the "Punch List") of items that needed to be touched up or worked on before the project was considered final and complete. After the construction, [REDACTED] was unsatisfied with how some elements turned out. In reasonable faith, [REDACTED] tried and offered to fix, repair, or adjust these elements. Still, [REDACTED] refused to accept most of the repairs and concluded that he would withhold further payments to [REDACTED], which was in clear breach of contract.

7. [REDACTED] still owes [REDACTED] to [REDACTED] for the work done on the house. Additionally, [REDACTED] has been making bad faith attempts to withdraw the remaining [REDACTED] without [REDACTED]'s knowledge, consent, or receiving any payment.

8. Even though the topic of this lawsuit is dealing with construction, the facts are simple [REDACTED] and [REDACTED] had a contract to build [REDACTED] a home in exchange for payment. [REDACTED] satisfied its end of the bargain on or about [REDACTED], when the county gave final occupancy to [REDACTED] to occupy his newly constructed home. [REDACTED] has got to satisfy his end of the bargain because he still owes [REDACTED] [REDACTED]. Therefore, this case is a breach of contract case.

9. [REDACTED] has retained [REDACTED] as their expert to discuss the best

practice in the industry for construction projects, including build quality, installation practices, finishing, and repair costs for bringing the work performed by [REDACTED], to industry standards. [REDACTED] opinion is based on a walkthrough, his observation of construction defects in the house, and his field experience with construction. While not explicitly stated in Defendant's Disclosure of Retained Expert, [REDACTED] opinion was also based on conversations he had with Defendant, [REDACTED], and his wife. [REDACTED] failed to reach out to Plaintiff so that he could obtain the whole picture and render a complete and unbiased opinion.

10. As will be described in greater detail below, [REDACTED] CV reflects his inexperience with residential construction, which makes his bare-boned report unreliable.

11. On [REDACTED], [REDACTED] issued a report after visiting the home and speaking with [REDACTED]. However, for the reasons elaborated below, this report is unreliable and should not be given the weight of an expert report.

III. LEGAL STANDARD

Pursuant to Rule 702 of the Utah Rules of Evidence,

(a) Subject to the limitations in paragraph (b), a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

(b) Scientific, technical, or other specialized knowledge may serve as the basis for expert testimony only if there is a threshold showing that the principles or methods that are underlying in the testimony

- (1) are reliable,
- (2) are based upon sufficient facts or data, and
- (3) have been reliably applied to the facts.

(c) The threshold showing required by paragraph (b) is satisfied if the underlying principles or methods, including the sufficiency of facts or data and the manner of their application to the facts of the case, are generally accepted by the relevant expert community.

The ultimate question that must be answered before expert testimony can be admitted is whether, on balance, the evidence will be helpful to the finder of fact. Such testimony is helpful when the subject is not within the knowledge or experience of the average individual. *See Balderas v. Starks*, 138 P.3d 75, 552 Utah Adv. Rep. 64, 2006 UT App 218. District courts have wide discretion to determine whether expert testimony is admissible. *See Taylor v. University of Utah*, 438 P.3d, 2019 UT App 14, 882 Utah Adv. 76. The critical factor in determining the competency of an expert is whether that expert has knowledge that can assist the trier of fact in resolving the issues before it. *See Evans ex rel. Evans v. Langston*, 2007, 166 P.3d 621, 2007 UT App 240, certiorari denied 182P.3d 910.

IV. ARGUMENT

A. [REDACTED] **does not qualify as an expert witness because he does not have the knowledge, skill, experience, training, or education in residential construction. This lack of expertise will hinder the fact finders.**

[REDACTED] disclosures state that he has not authored any publications or testified as an expert at trial or deposition in the last four years. It has not been disclosed to the contrary, and

upon information and belief, [REDACTED] has never testified or authored publications on construction or residential construction.

As evident in [REDACTED] CV, [REDACTED] is not an expert in residential construction, the topic at hand. Only since 2021 has [REDACTED] been providing general contracting services for custom residential and class A office spaces (it is unclear how many projects are specifically residential). According to [REDACTED] CV, he "was part of several management teams before coming to [REDACTED] completed commercial projects ranging from \$10-20M." This would potentially qualify [REDACTED] as an expert in the field of commercial construction and not residential construction. Plaintiff has more residential construction expertise than Mr. Marsala.

As explained in greater detail in [REDACTED]'s Certification, being an expert in commercial construction does not mean that makes a person an expert in residential construction, as the two are vastly different in almost every way from the building materials to the codes and permits needed, to the difference in costs, required equipment, and project deadlines. Therefore, the industry standard that [REDACTED] should have been comparing in his report is the industry standard for residential construction and not just construction in general.

[REDACTED] report not only failed to cite the appropriate residential construction industry standard, but he also failed to cite *any* industry standard. The only thing that [REDACTED] said in his report was, "we have observed the following items at the stated property that are defective, built or installed incorrectly and below industry standards and the 2015 IRC building. It is our expert opinion and to our knowledge that the following observations stated below do not meet the industry standards and the 2015 IRC." However, there is no elaboration as to what the industry standard is, or even what 2015 IRC is, and how it is relevant to this case. Instead, [REDACTED]

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report was more of a "Punch list" than an expert report. This apparent lack of knowledge will further confuse fact finders and will be a hindrance in this case.

B. [REDACTED] report is unreliable because it is not based on sufficient facts or data and has not been readily applied to the facts.

[REDACTED] lack of expertise in residential construction is a hindrance and will not help the trier of fact in resolving the issues in this case. Especially with regards to Defendant's negligence claims. The fact finders need an expert who understands the industry standards of residential construction and can explain if Plaintiff's actions were reasonable given the facts in this case: Defendant's specification changes and how that impacts the project's timeline, construction progression when the owner lives on premises versus when the owner does not, how COVID-19 effected in the residential construction industry during Spring 2020, and overall quality of Plaintiff's work. [REDACTED] report fails to analyze these relevant and material facts.

[REDACTED] report was created from (1) the opinions of [REDACTED], who has little to no residential construction experience, and (2) the opinions of [REDACTED], who, upon information and belief, have no residential construction experience and have a clear bias. District courts act as gatekeepers to screen out unreliable expert testimony. *See California College Inc. v. UCN Inc.*, 2019, 440 P.3d 825, 2019 UT App 39. [REDACTED] forming his expert testimony from his lack of personal expertise and biased conversations with Defendant without citing a credible source and applying it to the facts, in this case, makes his expert testimony unreliable.

C. The threshold required by Rule 702(b) has not been satisfied because it is unclear if the underlying principles or methods [REDACTED] relies on have been generally accepted by the relevant expert community.

On [REDACTED], [REDACTED] stated that it was his professional opinion that “the potential cost for the repairs and corrections stated in [the] [REDACTED] report ... could be between \$175,000.00 and \$227,000.00.” The methodology for the potential repair costs was not based on what has been generally accepted by the relevant expert community. Instead, [REDACTED] admits in his letter to [REDACTED] that the source of the potential repair costs “is based on our current assembly costs and unit costs applied to quantities.” [REDACTED] fails to consider how his quote for the cost of potential repairs considers the expert community. We respectfully request that the Court not consider [REDACTED] expert opinion that reflects the residential construction expert community.

V. CONCLUSION

In light of the above, Plaintiff’s Motion in Limine to exclude Defendant’s Expert, [REDACTED], along with his report and expert testimony, should be granted in its entirety.

DATED this [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

Attorney for Plaintiff