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A Coming of Age: The Routine Admissibility of Retail Safety Expert Opinions in Federal Civil Cases

Theodore E. Karatinos & Shaheen Nouri

Stetson University College of Law

Gulfport

Florida

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Theodore E. Karatinos & Shaheen Nouri¹

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I. Introduction

193. Given sufficient data, the well-reasoned opinions of retail safety experts should be admitted in federal civil trials. In recent years, the field of retail safety has significantly matured.² Given the recent developments in the field, barring the admissibility of safety opinions under Federal Rule of Evidence 702 should only occur in extraordinary circumstances. To avoid the exclusion of their forensic opinions, retail safety experts must present their opinions within the proper court-related context.

194. Retail safety experts can run the gauntlet of the federal rules of evidence by familiarizing themselves with the requirements. They must frame their qualifications in terms of “knowledge, skill, experience, training, [and] education.”³ They

1 Theodore “Ted” E. Karatinos, Esq. has taught litigation-related classes at the Stetson University College of Law since 2002. He practices personal injury law at the Holliday Karatinos Law Firm and may be contacted at tedkaratinos@helpinginjuredpeople.com. Shaheen Nouri is a currently a Juris Doctor Candidate at the Stetson University College of Law and serves as a teaching fellow for pre-trial litigation courses.

2 The authors define “retail safety” as loss prevention, risk management, facility management, and commercial maintenance practices.

3 FED. R. EVID. 702.

should organize their forensic reports within the procedural framework of Federal Rule of Civil Procedure 26(a)(2), while drafting the content of their reports within the framework of Federal Rule of Evidence 702. Their reports must educate the federal judiciary on the widely-accepted standards used in risk management, facility management, loss prevention, and commercial maintenance. “Evidence of custom within a particular industry, group, or organization is admissible as bearing on the standard of care in determining negligence.”⁴ Stated another way, “a business owner breaches the duty of care owed to its customers when it allows a dangerous condition or defect to exist on the premises if that condition or defect was created by the owner, operator or his agent; or, if the condition is created by someone else, when the business owner had actual or constructive notice that the dangerous condition or defect existed prior to the injury.”⁵ By incorporating the requirements of the federal rules into their reports, retail safety experts will secure the admissibility of their opinions in federal court.

II. The Matured Field of Retail Safety

195. Within the past ten years, groups, associations, and governmental entities have developed accepted retail safety standards. These developments reflect a push toward uniformity in securing a safe retail environment for vendors, customers, and employees. For example, the International Sanitary Supply Association [ISSA] published a set of cleaning industry management standards in 2006.⁶ In that publication, the ISSA outlines the minimum accepted standards for the following, with references to all pertinent OSHA standard subsections:

- Managerial Training;
- Site-specific Orientation;
- Environmental Management Systems; and
- Regulatory Compliance

196. These standards provide a comprehensive guide to safe retail cleaning practices. Historically, a retail outlet’s failure to implement systematic cleaning of the premises has led to considerable litigation. Such litigation runs the gamut from slip-and-falls to falling merchandise cases. Going forward, the ISSA standards may form a baseline for accepted cleaning practices across all retail settings, as the ISSA’s

4 *Silverpop Sys. v. Leading Mkt. Techs., Inc.*, 641 F. App’x 849 (11th Cir. 2016) (citing *Muncie Aviation Corp. v. Party Doll Fleet, Inc.*, 519 F.2d 1178 (5th Cir. 1975)).

5 *Morris v. Wal-Mart Stores, Inc.*, 330 F.3d 854, 858 (6th Cir. 2003).

6 *Cleaning Industry Management Standard*, ISSA (2006).

cleaning industry management standards reflect a broader trend towards providing uniform measures for safe practices in retail environments.

197. Beyond standardized cleaning practices, various organizations and retail safety industry leaders have waded into the ocean of retail safety. The American National Standards Institute [ANSI] has issued standards for the safe matting of commercial entrances.⁷ The Standard Guide for Commercial Entrance Matting in Reducing Slips, Trips, and Falls, published by the National Floor Safety Institute [NFSI] provides information on all aspects of safety mats, their placements, their maintenance, required patterns, and more. The ANSI standard is designed both to prevent and to reduce the incidents of falls in retail safety establishments. By following the guidelines prescribed therein, a landowner would strive to provide safer walking surfaces at a reasonable cost. Through the implementation and enforcement of internal policies, a higher degree of floor safety may be achieved. Industrial giants, such as Cintas, have provided their own comprehensive guides to preventing falls in areas of high pedestrian traffic.⁸ Retail safety experts now recognize the utility of an integrated cleaning and matting safety plan. Most importantly, both the National Safety Council and the federal government have blazed a uniform trail towards a safer retail experience by publishing standards. The widely-referenced National Safety Council's Accident Prevention Manual lays out what is known as the "safety hierarchy" or "hazard control hierarchy" for the prevention of accidents. This hierarchy prescribes a prioritized scheme to address hazards before they occur. First, it states that a retail environment should endeavor to eliminate hazards. This is inclusive of an array of hazards, which include hazardous chemicals, perilous designs, and dangerous product placements when safer alternatives can be achieved. Second, the hierarchy states that a retail environment should venture to guard against the possibility of someone coming into contact with the hazard. The means of guarding against the contact with hazards ranges from proper placement of safety cones around wet floors or sealing off a supermarket aisle when heavy machinery is in use, to the requirement of rubber gloves for employees using chemicals in the retail space. Third, the hierarchy prescribes that retail environments strive to warn all individuals of hazards as a last line of defense. Put another way, it is important for the retail environment to warn of hazards with the use of signs, tape, and safety cone (among other safety warning systems). This hierarchy will help the retail environment to focus on the most effective means of dealing with hazardous conditions and ensure safety.

⁷ *ANSI/NFSI Standard B101.6 for Commercial Entrance Matting in Reducing Slips, Trips, and Falls*, AMERICAN NATIONAL STANDARDS INSTITUTE (2012).

⁸ *Floor Mats: A Key Component of Your Slip and Fall Prevention Strategy*, CINTAS CORPORATION (2014).

198. The federal government has promulgated safety regulations. By and through the Occupational Safety and Health Administration, the matured field of retail safety has been furnished with regulations that encompass a broad range of retail safety matters. OSHA's regulations encompass measures for the protection of both employees and patrons, and outlines measures that the retail environment must adhere to for the protection of such individuals. These regulations span the breadth of walking-working surface conditions, the repair and safeguarding of hazardous conditions, the use of qualified professionals for repair and correction, and other relevant instances of ensuring safety in a retail environment.

199. Within the field of retail safety, an extensive amount of regulations and peer-reviewed literature is available for the use of any retail safety expert in forming their opinions. The formation of admissible testimony in this field requires the amalgamation of regulations, policies, and peer-reviewed studies, among other elements mentioned in the attached template. This process should make use of all pertinent resources to form a protective wrapping around the expert's opinion. When done properly, this patchwork of cleaning, matting, and managerial safety standards now forms a quilt that the qualified retail safety expert may rely upon to cover forensic opinions.

III. Drafting the Rule 26(a)(2) Report

200. Retail safety experts should consider using the template linked to this article to comply with Federal Rule of Civil Procedure 26(a)(2).⁹ In the first section of the report, the opinions should be numbered. Each opinion must be supported with underlying data and analyzed through the filter of one or more industry standards. The second section of the report should disclose a detailed numerical list of the facts and data relied upon by the expert. The third section of the report will contain charts, graphs, and diagrams. The fourth section will showcase the expert's qualifications. The fifth section will contain a list of cases in which the expert has thus far testified in the past four years. The final section will disclose how much the expert has been paid for the services rendered in the case. Following the template will streamline judicial scrutiny of the expert's analysis under Federal Rule of Evidence 702.

⁹ FED. R. CIV. P. [26\(a\)\(2\)](#).

IV. Peer-Reviewed Retail Safety Expert Research

201. After the Supreme Court's seminal 1993 ruling in *Daubert v. Merrell Dow Pharmaceuticals*,¹⁰ the gatekeeping requirements for admissible expert opinion were codified in Federal Rule of Evidence 702.¹¹ Admissible opinions draw strength from peer-reviewed research. Retail safety experts would be wise to cite copiously to articles within the subspecialty applicable in each case. These articles should be listed in section II of the expert's forensic report for ease of access and organizational purposes. A representative sample of such peer-reviewed research on retail safety practices is attached for further reading.

V. Current Federal Civil Cases Favoring Admissibility of Retail Safety Expert Opinions

202. Federal precedent provides a foundation that favors the admissibility of expert opinions in the field of retail safety. Federal courts have admitted the opinion of a retail safety expert where it provides the court with the industry standards of the particular retail environment at bar.¹² A trial court must be "flexible" in evaluating the admissibility of the expert's opinions.¹³ As one federal court noted, "trial courts routinely allow experts to testify on industry standards, ordinances, and policies."¹⁴ In 2000, the Advisory Committee for the Federal Rules of Evidence observed "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system."¹⁵ Put another way, the Committee clarified that the trial courts should not endeavor to take away from the jury or fact-finder the authority and responsibility of viewing the facts and determining a result through the lens of expert testimony when it is helpful. Precedent regarding the requisite use of scientific principles and replicable experiments in the qualification of expert opinion, with regard to retail safety, directs that an expert's experience alone may be sufficient in establishing their reliability, making the scientific principles no longer requisite factors. In *Peterson v. Scotia Prince Cruises, Ltd.*, a federal court found that peer-review, publication, and potential error rate are not applicable factors when the reliability of expert testimony depends heavily on their knowledge and experience, rather

¹⁰ *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 594 (1993).

¹¹ FED. R. EVID. 702.

¹² *State Farm Fire & Cas. Co. v. Bell*, F. Supp. 3d 1085, 1098 (D. Kan. 2014); *Bass v. Hardee's Food Sys.*, 982 F. Supp. 1041, 1043 (D. Md. 1997).

¹³ *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 594 (1993).

¹⁴ *Garrity v. Wal-Mart Stores East, L.P.*, 288 F.R.D. 395, 402 (W.D. Ky. 2012).

¹⁵ FED. R. EVID. 702 advisory committee's note (2000).

than on the methodology or theory behind their testimony.¹⁶ The opinion of a retail safety expert based on industry standards has been admitted in federal court for such reasons.¹⁷ Federal courts routinely admit expert testimony regarding industry standards, ordinances, and policies in slip-and-fall cases for the purpose of helping the fact-finder understand the evidence being presented.¹⁸ “Evidence of custom within a particular industry, group, or organization is admissible as bearing on the standard of care in determining negligence.”¹⁹ Generally, expert opinion testimony is admitted when the issue upon which the evidence is offered is one of science and skill, or similarly when the subject matter is outside the common knowledge of jurors.

VI. Conclusion

203. Civil juries will greatly benefit by filtering lapses in retail safety through the lens of expert testimony. The field of retail safety has matured in recent years to the point of standardizing the practices, policies, and procedures that minimize the risk of accidents. By familiarizing themselves with the requirements of the federal rules of evidence and civil procedure, retail safety experts will pass through the gate of admissibility. Use of the attached template will provide a sound foundation for a thorough forensic report. Through the inspection of the accident site, the analysis of photographic evidence, the consideration of deposition testimony, the gathering of peer-reviewed research specific to the case, the discovery of internal policies, and the application of industry standards, the reliability of the retail safety expert’s opinion will leap from the pages of their report.

Retail Safety Expert Opinion Template Pursuant to Federal Rule of Evidence 26(a)(2)

I. Opinion(s)

In the case at bar, in examining all materials available to me, I have concluded that: (1) first opinion, individually numbered, (2) second opinion, individually num-

¹⁶ *Peterson v. Scotia Prince Cruises, Ltd.*, 323 F. Supp. 2d 128, 129-30 (D. Me. 2004).

¹⁷ *Wisdom v. TJX Cos.*, 410 F. Supp. 2d 336, 341-43 (D. Vt. 2006).

¹⁸ *Garrity v. Wal-Mart Stores East, L.P.*, 288 F.R.D. 395, 402 (W.D. Ky. 2012).

¹⁹ *Silverpop Sys. v. Leading Mkt. Techs., Inc.*, 641 Fed. App’x 849, 853 (11th Cir. 2016) (citing *Muncie Aviation Corp. v. Party Doll Fleet, Inc.*, 519 F.2d 1178, 1180 (5th Cir. 1975)).

bered, (3) third opinion, individually numbered (continue as number of opinions dictate).

With regard to opinion (1), [restate opinion]: [discuss underlying data that led to the opinion, including the specific industry standards, guidelines, or regulations that provide context to this particular opinion.

With regard to opinion (2), [restate opinion]: [discuss underlying data that led to the opinion, including the specific industry standards, guidelines, or regulations that provide context to this particular opinion.

With regard to opinion (3), [restate opinion]: [discuss underlying data that led to the opinion, including the specific industry standards, guidelines, or regulations that provide context to this particular opinion.

II. List of Referenced Facts and Data:

1. [Insert fact and/or data relied upon]
2. [Insert fact and/or data relied upon]
3. [Insert fact and/or data relied upon]
4. [Insert fact and/or data relied upon]
5. [Insert fact and/or data relied upon]

III. Charts, Graphs, and Diagrams (employed in reaching opinions and/or integral to the opinions themselves)

IV. Expert's Qualifications for Purposes of Foundation

[This section should be tailored to include that which makes the expert, and his or her opinion, reliable. Generally, if formal education and certifications are relevant to the field of retail safety, safety, or the specific purpose of their testimony, they should be included. A strong reliance on the expert's years of experience and specific dealings with workplace safety should be exhibited. Any relevant publications, articles, and other published works by the expert should be exhibited].

V. List of Cases Within Which Expert Has Previously Testified

[An organized, numbered list beginning with the most recent case is suggested. Exhibit all cases by their proper styles].

VI. Disclosure of Expert's Compensation for Services Rendered

[A disclosure of the total amount in which the expert is being compensated for his or her services, followed by a brief breakdown of the expert's compensation leading up to trial and compensation for testifying at trial].

Representative Sample of Peer-Reviewed Retail Safety Expert Research

I. Articles

B. Johnson, *Plan, Train to Reduce Slip and Falls*, FACILITY SAFETY MANAGEMENT (July 2012).

Dave Mesko, *Risky Business: The Cost of Unsafe Floors*, FMJ (Jan./Feb. 2013).

G. Gorte and C. Kunzler, *Diagnosis of Safety Culture in Safety Management Audits*, SAFETY SCIENCE 131 (Feb. 2000).

Jan K. Wachter & Patrick L. Yorio, *A System of Safety Management Practices and Worker Engagement for Reducing and Preventing Accidents: An Empirical and Theoretical Investigation*, ACCIDENT ANALYSIS AND PREVENTION 117 (July 2014).

Kent J. Nielsen, *Improving Safety Culture Through the Health and Safety Organization: A Case Study*, J. SAFETY RESEARCH 7 (Feb. 2014).

Kevin Duhamel, *How to Build an Effective and Comprehensive Fall Protection Plan*, INDUSTRIAL HYGIENE NEWS (Nov. 2012).

Kyle W. Morrison, *Step by Step: How Can Employers Mitigate the Risk of Slips, Trips and Falls*, SAFETY+HEALTH (Mar. 2013).

Lars Harms-Ringdaul, *Relationships Between Accident Investigations, Risk Analysis, and Safety Management*, 111 J. HAZARDOUS MATERIALS 13 (April 2004).

Michael J. Burke, et al., *Relative Effectiveness of Worker Safety and Health Training Methods*, 96 AM. J. PUB. HEALTH 315 (Feb. 2006).

R. Scott Lawson, *Safety Teams: Transforming Safety Committees to Improve Results*, PROFESSIONAL SAFETY 26 (Mar. 2015)

R. Vajko, *A Complete Fall Prevention Program in 9 Simple Steps*, WORKPLACE SAFETY NEWSLETTER (Aug. 2015).

S. Moore, *Determine Slip Risk*, OTI-FACILITY SAFETY MANAGEMENT (Apr. 2013).

Shafik M. Shovik, *Safety Issues, Impact & Its Consequences in Retail Business*, SERVICE BRANCH 2 (Oct. 2012).

Susanna Larsson Tholén et al., *Causal Relations Between Psychological Conditions, Safety Climate and Safety Behavior – A Multi-Level Investigation*, SAFETY SCIENCE 62 (June 2013).

Thomas Kramer, *Top Five Ways to Reduce Fall Hazard Risk*, OCCUPATIONAL HEALTH & SAFETY (July 2013).

Tim Page-Bottorff, *Incident Investigation and Reporting*, SAFETY+HEALTH (Feb. 2015).

V. Anderson, *Focus On: Risk Management*, CHAIN STORE AGE (Feb. 2010).

William C. Balek, *Managing Slip and Fall Liability: A Legal Perspective*, ASTM-IN TECHNOLOGY OF FLOOR MAINTENANCE AND CURRENT TRENDS 141 (2004).

II. Books

JAMES REASON & ALAN HOBBS, *MANAGING MAINTENANCE ERROR: A PRACTICAL GUIDE* (2003).

III. Federal Regulations

29 C.F.R. § 1910.22 (2014).

IV. Governmental Publications

Preventing Slips, Trips, and Falls in Wholesale and Retail Trade Establishments, NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH–WORKPLACE SOLUTIONS (Oct. 2012).

V. Nationwide Industry Standards

ANSI/NFSI Standard B101.6 for Commercial Entrance Matting in Reducing Slips, Trips, and Falls, AMERICAN NATIONAL STANDARDS INSTITUTE (2012).

VI. Safety Manuals

Zurich Retail Safety Orientation Manual, ZURICH SERVICES CORP. (2011).