IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.: 14-cv-03111-REB-KLM

JULIE REISKIN *et al.*, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

REGIONAL TRANSPORTATION DISTRICT,

Defendant.

PLAINTIFFS' MOTION TO STRIKE DEFENDANT'S EXPERT WITNESS DISCLOSURE AND ACCOMPANYING REPORT

Plaintiffs hereby move this Court to strike defendant's Expert Witness Disclosure and accompanying report for failures to comply with Fed. R. Evid. 702.

CERTIFICATE OF COMPLIANCE WITH D.C.COLO.LCivR 7.1(A)

Pursuant to D.C.COLO.LCivR 7.1(A), Plaintiffs' counsel has conferred with counsel for Defendant. Defendant opposes this motion.

BACKGROUND

On September 25, 2015, Defendant provided Plaintiffs with RTD's Initial Expert Disclosure) and a written report reportedly in compliance with Fed. R. Civ. P. 26(a)(2) ("Report") (attached as Ex. B). The Disclosure and Report should be stricken by this Court for the following reasons: (1) The purported expert attempts to usurp the role of this Court by opining on the meaning of the law; (2) the opinions reached fail miserably to comply with the requirements that the proposed expert opinion uses reliable principles, methods

and methodology; and (3) any area of proposed expertise the proposed expert has have no bearing on the opinions offered. For all of these reasons, the testimony to be offered by Defendant's proposed expert will not provide any expertise that will assist the trier of fact in this case, which is the purpose of expert witness testimony.

ARGUMENT

I. Standard of Review

Rule 702 of the Federal Rules of Evidence, which governs the admissibility of expert witness testimony, provides:

> 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: (a) 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) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case

Bagher v. Auto Owners Ins. Co., 1:12-cv-00980-REB-KLM, 2013 WL 4781600, at *1 (D. Colo. Sept. 6, 2013) (quoting Fed. R. Evid. 702). "As interpreted by the Supreme Court, Rule 702 requires that an expert's testimony be both reliable and relevant"*.* ***Id***. (citing ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579, 589–92 (1993); ***Truck Insurance Exchange v. MagneTek, Inc.***, 360 F.3d 1206, 1210 (10th Cir.2004). The Supreme Court has described the court's role in weighing expert opinions against these standards as that of a "gatekeeper." *See* ***Kumho Tire Company, Ltd. v. Carmichael*****,** 526 U.S.137, 147 (1999). The proponent of the expert testimony carries a substantial burden under Rule 702. ***Cook ex rel. Estate of Tessier v. Sheriff of Monroe***

Cnty., Fla., 402 F.3d 1092, 1107 (11th Cir. 2005) "The burden of laying the proper foundation for the admission of the expert testimony is on the party offering the expert, and admissibility must be shown by a preponderance of the evidence." ***Id***. (citing ***Daubert***, 509 U.S.at 592 n.10). "The proponent of expert testimony bears the burden of proving the foundational requirements of Rule 702 by a preponderance of the evidence. *See* ***Cook***, 402 F.3d at 1107 (citing ***Daubert*****,** at 592 n.10.(". . . the proponent must show that the witness has sufficient expertise to choose and apply a methodology[.]"

II. Ames' Opinions Improperly Attempt to Set Forth the Law.

As this Court recognized in the ***Bagher*** case, "[i]t is 'the court's duty to set forth the law' applicable to the facts presented at trial." ***Bagher*** at *2 (quoting ***Specht v. Jensen***, 853 F.2d 805, 808 (10th Cir.1988) (en banc), *cert. denied*, 109 S.Ct. 792 (1989). "Generally, it is improper for an expert witness to opine about what law is applicable to a case on trial." ***Bagher*** at *2. "The basis for this distinction is that testimony on the ultimate factual questions aids the jury [or Court] in reaching a verdict; testimony which articulates and applies the relevant law, however, circumvents the jury's [or Court's] decision-making function by telling it how to decide the case." ***Id***.(quoting **Specht** at 808). "While expert witnesses may testify to the ultimate matter at issue . . . this refers to testimony on ultimate facts; testimony on ultimate questions of law; i.e., legal opinions and conclusions, is not favored." ***Id***. (quoting ***Anderson v. Suiters***, 499 F.3d 1228, 1237 (10th Cir.2007).

Ames' opinion is laden with testimony on ultimate questions of law. "The circulation

(maneuvering) clearance and minimum clear (floor) space for wheelchairs in Siemens light rail cars (model numbers SD100 and SD160), used by RTD-Denver, in my expert opinion, comply with the U.S. Department of Transportation (DOT) Title 49 Code of Federal Regulations Part 38 specifications, found in Subpart D, §38.77(c)." Report at 1. "In my opinion, this means, it is understood and permitted by DOT regulations, that the use of public fixed route transit is, at times, more difficult and less convenient for people with disabilities." *Id.* "In my opinion, the presence of two, or even three, wheelchairs that fit within spaces measuring 48 inches by 30 inches, on Siemens models SD 100 and SD 160, does "not unduly restrict movement of other passengers." *Id.* at 2. "In my opinion, the Part 38 accessibility specifications fall short of the degree of architectural design specificity in the 2010 ADA Standards for Accessible Design which apply to facilities, and certainly need improvement." *Id.* at 3.

> Finally, RTD-Denver, in its purchase of model SD 100 LRVs in the 1990s, and its purchase of model SD 160 LRVs in the past five years, has made a good faith effort to purchase LRVs that are fully compliant with DOT's Part 38 specifications. Siemens designed and built these cars to meet the specifications of §38.83(a) to provide "sufficient clearances to permit at least two wheelchair or mobility aid users to reach areas, each with a minimum clear floor space of 48 inches by 30 inches, which do not unduly restrict passenger flow." Siemens designed and built these cars to meet the specifications of §38.77(c) "to allow a route at least 32 inches wide so that at least two wheelchair or mobility aid users can enter the vehicle and position the wheelchairs or mobility aids in areas, each having a minimum clear space of 48 inches by 30 inches, which do not unduly restrict movement of other passengers."

Id. The Report goes on to specify that the vehicles meet Department of Transportation regulations. *Id.* at 4.

III. This Witness Cannot Be Qualified as an Expert by Knowledge, Skill, Experience, Training, or Education

Mr. Ames lacks the knowledge, skill, experience, training or education to opine on the matters in his Report. Mr. Ames' Report purports to demonstrate that he is an expert in measuring legally required accessible areas on light rail trains. Nothing in his background demonstrates that he has any expertise in this area whatsoever. Mr. Ames' website is most telling of his background.[1] Although Mr. Ames purports to be and "Accessibility Implementation Consultant," his website explains that he is "a subject matter expert," and he states, "my only real skill is imagination." His educational background is a degree from Lewis University in December 1976 in Religious Studies, although his website states "his real major was cross-country running."

IV. Mr. Ames Has No Scientific, Technical, or Other Specialized Knowledge That Will Help the Trier of Fact to Understand the Evidence or to Determine a Fact in Issue.

Whatever background Mr. Ames may have with respect to his connection to the organization known as Meeting the Challenge has no bearing on the opinions he offers in this case, which are solely based on the taking of measurements. Mr. Ames does not purport to have any expertise or specialized knowledge in the field of measurement, and the photographs that are provided with the report further demonstrate that the measurements he did take are wholly unreliable. These photographs and Mr. Ames' opinions will not help the trier of fact to understand the evidence or determine a fact in issue as explained below. Perhaps the best way for this Court to determine the evidence

[1] *See* http://www.mtc-inc.com/archives/portfolio-items/geoff-ames.

and facts in this case is to board Defendant's light rail trains with Plaintiffs to see first-hand the problems about which Plaintiffs complain.

V. Mr. Ames' Testimony is Not Based on Sufficient Facts or Data.

The first major error in the Report is that Mr. Ames applies the wrong law in formulating his opinions, which serves only to demonstrate his lack of knowledge of the applicable regulations:

> The DOT regulation (§37.123(e)(3)(i)) further states, with regard to the use of fixed route transportation and eligibility to use ADA complementary paratransit: "A condition which makes traveling to [a] boarding location or from a disembarking location more difficult for a person with a specific impairment-related condition than for an individual who does not have the condition, but does not prevent the travel, is not a basis for eligibility under this paragraph." In my opinion, this means, it is understood and permitted by DOT regulations, that the use of public fixed route transit is, at times, more difficult and less convenient for people with disabilities.

Report at 1. The ADA regulations pertaining to transit are broken up into several subparts. *See* 49 C.F.R., pts 37 &. 38. "The purpose of this part is to implement the transportation and related provisions of titles II and III of the Americans with Disabilities Act of 1990." 49 C.F.R. § 37.1 "This part provides minimum guidelines and requirements for accessibility standards in part 37 of this title for transportation vehicles required to be accessible by the Americans With Disabilities Act (ADA) of 1990 (42 U.S.C. 1201 et seq.)" 49 C.F.R. § 38.1. Each subpart of part 38 pertains to different aspects of transportation. For example, Subpart B pertains to "Buses, Vans and Systems," Subpart C pertains to "Rapid Rail Vehicles and Systems," Subpart D pertains to "Light Rail Vehicles and Systems," and so on. The quotation above from Mr. Ames' Report comes from the part of

the regulations that deals with "ADA paratransit eligibility: Standards"[2] and has nothing to do with light rail whatsoever. The regulation cited by the Report is taken completely out of context. The regulation states in its entirety:

> Only a specific impairment-related condition which prevents the individual from traveling to a boarding location or from a disembarking location is a basis for eligibility under this paragraph. A condition which makes traveling to boarding location or from a disembarking location more difficult for a person with a specific impairment-related condition than for an individual who does not have the condition, but does not prevent the travel, is not a basis for eligibility under this paragraph.

49 C.F.R. § 37.123(3)(i). This regulation is about whether an individual with a disability can use the regular bus system and discusses the ability of an individual to get to a bus stop or other fixed route boarding location. It has nothing to do with the interior layout of the light rail train. The applicable regulation is 49 C.F.R. § 37.79, which states:

> Each public entity operating a rapid or light rail system making a solicitation after August 25, 1990, to purchase or lease a new rapid or light rail vehicle for use on the system shall ensure that the vehicle is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

Defendant does not dispute that the light rail vehicles at issue were acquired after 1990. "For purposes of this part [37], a vehicle shall be considered to be readily accessible to and usable by individuals with disabilities if it meets the requirements of this part and the standards set forth in part 38 of this title. 49 C.F.R. § 37.7(a). Mr. Ames bases his entire Report on a standard that is not applicable to light rail trains. The term "readily accessible

[2] "[E]ach public entity operating a fixed route system shall provide paratransit or other special service to individuals with disabilities that is comparable to the level of service provided to individuals without disabilities who use the fixed route system. 49 C.F.R. § 37.121.Defendant's paratransit service is known as Access-a-Ride.

to and usable by individuals with disabilities" is defined in another part of the ADA regulations pertaining to public accommodations. "This requirement contemplates a high degree of convenient access. It is intended to ensure that patrons . . . are able to get to, enter, and use the facility." 28 C.F.R., pt. 36, app. C. "Readily accessible to and usable by" is a far cry from "more difficult" and "less convenient."

Furthermore, the Report provides numerous photographs that are completely unreliable and are unexplained in the report. The pictures show an empty vehicle with a piece of red material on the floor in various locations on the vehicle.[3] It is impossible to know whether the red material is flat on the floor or wrinkled up in some way. It is also impossible to tell if the tape measure is straight. Although the red material has written on it 48" and 30", the tape measure belies these measurements, and the photographs are completely unreliable. *See, e.g.,* Report at 8, 10, 11, 12, 35, 36, 37, 47, 49 (the tape measure extends as much as 1 inch beyond either side of the red material); at 9 (the tape measure shows the red material appears to be approximately 46 ½ inches; at 48 (the tape measure appears to show that the red material is 29 inches wide); at 13, 16, 17, 22, 25, 34, 38, 41, 42, 45, 48 (the tape measure purports to show a measurement, but, since the photograph does not show the other side of the tape measure, there is no way of knowing where the other side is positioned or whether the measurement is accurate); at 15, 19, 20, 21, 23, 24, 26, 27, 32, 33, 36, 37, 39, 40, 43, 44, 46, 47, 49, 50, 51, 54, 55, 56 (several of the photographs are just meaningless because they show a tape measure, but we can't

[3] Light rail vehicles are not empty when Plaintiffs use them, and wheelchairs and mobility devices and their users are three-dimensional, not one-dimensional.

tell what the measurements are because we can't see the numbers on the tape measure); at 18 (the photograph does not show whether the red material is under the seat); at 49, 53 (picture shows the operator cabin door opening up into a mobility aid, demonstrating the individual using the mobility aid has nowhere to go to get out of the way of the boarding or alighting passenger); at 54 (photo shows an area of the train into which it appears impossible to maneuver a mobility aid like a wheelchair). In fact, there is not a single photograph in the Report that is reliable in any way.

In addition, the regulations require that "[p]articular attention shall be given to ensuring maximum maneuverability immediately inside the doors." 49 C.F.R. § 38.77(c). Two of the areas that the Report suggests are usable mobility aid spaces are directly in front of the doors. *See* Report at 1 ("Of the three spaces, one space is located at the entrance doors on either side of the vestibule."); *see also* Report at 8, 10-12, 14-15, 44, 46, 47, 49-51, 53-54, 56 (expert's photos showing that one of the three recommended spaces for a wheelchair or mobility aid to ride on a light rail train is directly adjacent to that door that is used by individuals who use wheelchairs and mobility aids to enter and exit the vehicle).

VI. The Testimony is Not The Product of Reliable Principles and Methods

As set forth above, it is impossible to tell from the photographs taken what exactly it is that Mr. Ames is trying to measure, and the red material is not proven to be 30 inches wide by 48 inches long. Mr. Ames suggests that people who use wheelchairs and mobility aids sit in the doorways which defies the applicable regulations. For all of these reasons,

Mr. Ames' Report is not the product of reliable principles and methods. Mr. Ames does not purport to be an expert in the taking of measurements.

VII. The Expert Has Not Reliably Applied The Principles And Methods To The Facts Of The Case.

Placing a red cloth on the floor of an empty train and placing a tape measure over the top of it, neither of which show there actually is a 30 inch wide by 48 inch long clear floor space that does not unduly restrict the movement of other passengers and provides maximum maneuverability inside the doors, is not a reliable application of any principles or methods that bear on the facts of this case. 49 C.F.R. §§ 38.77 & 38.83. As stated above, there is simply no way to know if the pictures in the Report show us anything that demonstrates the appropriate dimensions. Plaintiffs are also entitled to clear floor space, which means they should not have to move their wheelchairs or mobility devices completely out of the way every time someone else gets on or off the vehicle, and their seating locations must not unduly restrict the movement of other passengers. Finally, the regulations require that particular attention be paid to having maximum maneuverability at the doors. The locations shown in the Report actually demonstrate why Plaintiffs do not have clear floor space and do unduly restrict the movement of other passengers. If a person who uses a wheelchair or mobility aid is seated in the designated wheelchair seating area, they stick out almost all the way across the aisle. Report at 23-24, 26-27, 32-33, 35-36. This completely prohibits individuals who use walkers from getting to the Priority Seating Area, has prevented individuals who use walkers from being able to ride the train and can make it impossible for someone who uses a walker to get out of the

vehicle. *See, e.g.,* McDonald 26:5-27:18; 61:25-62:19.

The space in the middle of the aisle clearly unduly restricts the movement of other passengers because the entire aisle is blocked. Report at 18-21, 37, 39-40. If there is another person using a wheelchair seated in that designated wheelchair seating section behind that spot, there is no place for that individual to move when the operator cabin door is open. Anyone needing to pass through the train or get out of the first set of seats must climb over the individual using a wheelchair or mobility aid seated in that section.

Finally, as already said, the regulations specifically require maximum maneuverability at the doors. Having someone sit in a wheelchair or mobility aid directly adjacent to that door obviously decreases maximum maneuverability at the doors.

CONCLUSION

Because Mr. Ames' Report fails to meet the requirements of Fed. R. Evid. 702, this Court should strike the report in its entirety and prohibit any further testimony from Mr. Ames.

Motion to Strike Expert Witness Disclosure Dated: December 27, 2015

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on December 27, 2015, I filed the foregoing document using the CM/ECF electronic filing system, which will serve the foregoing by electronic mail upon the following:

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