CV15 6018031S	:	SUPERIOR COURT
CHICAGO TITLE INS. CO.	;	JUDICIAL DISTRICT OF
VS.	:	ANSONIA/MILFORD AT MILFORD
ELIZABETH LAPUMA, ET AL.	:	JUNE 9, 2017

MEMORANDUM OF DECISION RE:
DEFENDANTS' MOTION IN LIMINE #184

The present case involves the defendants' motion in limine to preclude testimony of Attorney John Bushnell Nielsen on the ground that his proposed testimony amounts to a legal opinion.

In its revised disclosure of expert witnesses, filed October 18, 2016, the plaintiff offers Nielsen as an expert for his "expertise in the area of the title insurance industry, the purpose and interpretation of owner's policies of title insurance, the coverage provided thereunder, customs and practices in the title insurance industry, the manner and date on which damages should be measured and the general methodology to be utilized in doing so." The plaintiff states that it anticipates Nielsen will testify that the policies issued in the present case are standard forms issued by the American Land Title Association, is a contract of indemnity, and that it is designed to insure title to the property rather than any particular use thereof. It is also anticipated that he will testify that "in measuring damages, the custom and practice is to value the property with the insured access and without the insured access as of the date of discovery of the loss of access, rather than applying a methodology which applies the highest and best use of the properties." By

stipulation of the parties, the only issues pending before the court is the determination of the measure and amount of damages due to the defendant under the title insurance policy.

The defendants argue that the manner and date on which damages should be measured is a legal issue reserved for the court and that Nielsen's proposed testimony is contrary to existing law in Connecticut.[1] Specifically, the defendants argue that Nielsen's proposed testimony is his own legal opinion and interpretation concerning what the law in Connecticut should be and relies on nonbinding case law and his own legal treatise, and that, according to *Ratner* v. *Willametz*, 9 Conn. App. 565, 584, 520 A.2d 621 (1987), the measure of damages for injury to real property is the resultant diminution in its value. The defendants also note that a federal court has recently excluded his testimony on the same issue he seeks to testify about in this case.[2]

In its objection to the motion in limine, the plaintiffs contend that as to the issues for which the proposed testimony is proffered, there is no Connecticut law which would provide

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[1] Nielsen is not familiar with Connecticut law and is not admitted to practice law in the state. Nielsen has admitted under oath that he does not generally know what the law of damages is in Connecticut, and has not researched how damages are calculated in this state.

[2] In *Stewart Title Ins. Co.* v. *Credit Suisse*, United States District Court, Docket No. 1:11CV227 (BLW) (D. Idaho July 13, 2015), the court noted that "Nielsen's two reports, totaling about 45 pages, include numerous citations to cases, statutes, and Nielsen's own treatise. This testimony is excludable, as another court has so found in ruling on Nielsen's testimony. See *Nationwide Life Ins. Co.* v. *Commonwealth Land Title Ins. Co.*, [United States District Court, Docket No. CV-05-281 (E.D. Penn. January 20, 2011)] (excluding Nielsen's opinions based on case law and statutes while admitting his testimony confined to industry standards)." One of Nielsen's statements included the following: "[l]oss under a title insurance policy is not measured based on the future value of land that might be developed even when the development plan is frustrated or limited due to a covered title defect. *Pulte Home Corp.* v. *Industrial Valley Title Ins. Co.* is still the leading case observed by the industry on the subject." (Internal quotation marks omitted.) Id. The court characterized Nielsen's testimony on damages as "simply describ[ing] the law" and "opining on the method a jury should use to calculate damages . . . ." The court relied on *Basic American, Inc.* v. *Shatila*, 133 Idaho 726, 745, 992 P.2d 175 (1999), for the proposition that "[a] determination of the proper measure of damages is a question of law."

precedent or guidance. The plaintiff also argues that because the contract is silent on the issue of damages, expert testimony may be admissible if interpretation of contract terms are beyond the field of ordinary knowledge and experience of the fact finder. On June 7, 2017, the court heard argument on the motion.

"The judicial authority to whom a case has been assigned for trial may in its discretion entertain a motion in limine made by any party regarding the admission or exclusion of anticipated evidence. If a case has not yet been assigned for trial, a judicial authority may, for good cause shown, entertain the motion. Such motion shall be in writing and shall describe the anticipated evidence and the prejudice which may result therefrom. All interested parties shall be afforded an opportunity to be heard regarding the motion and the relief requested. The judicial authority may grant the relief sought in the motion or such other relief as it may deem appropriate, may deny the motion with or without prejudice to its later renewal, or may reserve decision thereon until a later time in the proceeding." Practice Book § 15-3. "[T]he motion in limine . . . has generally been used in Connecticut courts to invoke a trial judge's inherent discretionary powers to control proceedings, exclude evidence, and prevent occurrences that might unnecessarily prejudice the right of any party to a fair trial." (Internal quotation marks omitted.) *McBurney* v. *Paquin*, 302 Conn. 359, 378, 28 A.3d 272 (2011).

"[T]he trial court has wide discretion in ruling on the admissibility of expert testimony. . . . Expert testimony should be admitted when: (1) the witness has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge is not common to the average person, and (3) the testimony would be helpful to the court or jury in considering the issues. . . . Furthermore, [t]he proffering party bears the burden of establishing the relevance of the offered

testimony. Unless such a proper foundation is established, the evidence . . . is irrelevant. . . . Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . One fact is relevant to another if in the common course of events the existence of one, alone or with other facts, renders the existence of the other either more certain or more probable. . . . All that is required is that the evidence tend to support a relevant fact even to a slight degree, so long as it is not prejudicial or merely cumulative." (Citations omitted; internal quotation marks omitted.) *Daley* v. *Wesleyan University*, 63 Conn. App. 119, 135-36, 772 A.2d 725, cert. denied, 256 Conn. 930, 776 A.2d 1145 (2001).

Connecticut Code of Evidence, § 7-2 provides: "A witness qualified as an expert by knowledge, skill, experience, training, education or otherwise may testify in the form of an opinion or otherwise concerning scientific, technical or other specialized knowledge, if the testimony will assist the *trier of fact* in understanding the evidence or in determining a *fact* in issue." (Emphasis added.) Thus, there are two conditions on the admissibility of expert testimony. First, the witness must be qualified as an expert; see e.g., *State* v. *Wilson*, 188 Conn. 715, 722, 453 A.2d 765 (1982); and second, the expert witness' testimony must assist the trier of fact in understanding the evidence or determining a fact in issue. See e.g., *State* v. *Hasan*, 205 Conn. 485, 488, 534 A.2d 877 (1987). The sufficiency of an expert witness' qualifications is a preliminary question for the court. *Blanchard* v. *Bridgeport*, 190 Conn. 798, 808, 463 A.2d 553 (1983); see also Conn. Code Evid. § 1-3 (a) ("[p]reliminary questions concerning the qualification and competence of a person to be a witness . . . shall be determined by the court").

The subject matter upon which an expert witness may testify is not limited to scientific or technical fields, but extends to all specialized knowledge. See *State* v. *Correa*, 241 Conn. 322,

355, 696 A.2d 944 (1997) (FBI agent was allowed to testify about local cocaine distribution and its connection with violence).

Section 7-3 (a) further provides: "Testimony in the form of an opinion is inadmissible if it embraces an ultimate issue to be decided by the trier of fact, except that, other than as provided in subsection (b), an expert witness may give an opinion that embraces an ultimate issue where the trier of fact needs expert assistance in deciding the issue." "Experts may be called to define terms of art, to explain the principles of their science, where such principles are necessary to be understood; to state the condition and practice of their business, when material; but not to instruct the court as to the meaning of a contract. Sometimes a definition of a term or explanation of a principle may be decisive of the meaning of a document, but it is for the court to draw the conclusion; the opinion of any one else is immaterial." *Fuller* v. *Metropolitan Life Ins. Co.*, 70 Conn. 647, 677, 41 A. 4 (1898).

"It is well settled that [t]he true test of the admissibility of [expert] testimony is not whether the subject matter is common or uncommon, or whether many persons or few have some knowledge of the matter; but it is whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge or experience any aid to the court or the jury in determining the questions at issue. . . . Implicit in this standard is the requirement . . . that the expert's knowledge or experience must be directly applicable to the matter specifically in issue." (Internal quotation marks omitted.) *Czajkowski* v. *YMCA of Metropolitan Hartford, Inc.*, 149 Conn. App. 436, 441, 89 A.3d 904 (2014).

"Thus, expert opinion as to the ultimate issue in a case is admissible only when necessary

for the trier of fact to make sense of the proffered evidence, rendering the situation . . . of such a nature as to require an expert to express an opinion on the precise question upon which the court ultimately had to pass. . . . [A]n ultimate issue [is] one that cannot reasonably be separated from the essence of the matter to be decided [by the trier of fact]." (Citation omitted; internal quotation marks omitted.) *State* v. *Beavers*, 290 Conn. 386, 415, 963 A.2d 956 (2009). The plaintiff posits that the legal issues in this case are matters of first impression and that because Nielsen has special knowledge and experience in the industry of title insurance, proposed testimony from this witness is appropriate pursuant to § 7-2. The method in which one is to calculate damages, however, is well outlined by case law.

"The basic measure of damages for injury to real property is the resultant diminution in its value. . . . In order to assess the diminution in value, however, the trial court must first determine the value of the property, both before and after the injury has occurred. . . . In actions requiring such a valuation of property, the trial court is charged with the duty of making an independent valuation of the property involved. . . . [N]o one method of valuation is controlling and . . . the referee may select the one most appropriate in the case before him. . . . Moreover, a variety of factors may be considered by the trial court in assessing the value of such property. [T]he trier arrives at his own conclusions by weighing the opinions of the appraisers, the claims of the parties, and his own general knowledge of the elements going to establish value, and then employs the most appropriate method of determining valuation. . . . The trial court has broad discretion in reaching such conclusion, and his determination is reviewable only if he misapplies or gives an improper effect to any test or consideration which it was his duty to regard. . . . Such determinations are findings of fact, and therefore must stand unless clearly erroneous."

(Citations omitted; internal quotation marks omitted.) *Ratner* v. *Willametz*, supra, 9 Conn. App. 584-85. Furthermore, how to calculate damages is an issue of law for the court to determine. See *Mauro* v. *Yale-New Haven Hospital*, 31 Conn. App. 584, 593, 627 A.2d 443 (1993) (court properly instructed jury on how to calculate damages); *Marshall* v. *Bessemer Trust Co., N.A.*, Superior Court, judicial district of Litchfield, Docket No. CV-94-0065718-S (March 19, 1996, *Pickett, J.*).

For the foregoing reasons, the defendants' motion in limine to exclude the testimony of Nielsen is granted.

The Court

By _____
Hiller, J.T.R.