

STATE OF MAINE

BUSINESS AND CONSUMER COURT

Cumberland, ss.

ARUNDEL VALLEY, LLC

Plaintiff

v.

Docket No. BCD-CV-13-15

BRANCH RIVER PLASTICS, INC.

Defendants

ORDER ON MOTIONS IN LIMINE

The remaining parties, Plaintiff Arundel Valley, LLC and Defendant Branch River Plastics, Inc. have filed a total of eight motions in limine in anticipation of trial. This Order addresses all such motions beginning with Plaintiff's unopposed motions in limine and continuing with Plaintiff's opposed motions and then Defendant's motions. The court elects to decide the motions without oral argument.

1. Plaintiff's Motion In Limine To Exclude Testimony Of Larry Turner: The Plaintiff's Motion seeks to exclude any testimony by Larry Turner, who at one point was identified as possible defense witness. The court has previously ruled that any testimony by Mr. Turner would be limited to non-expert testimony, and the Plaintiff's motion seeks to exclude him as a fact witness as well. No opposition to the motion was filed. Without objection, Plaintiff's Motion In Limine To Exclude Testimony Of Larry Turner is granted: It is ORDERED that Larry Turner is excluded as a witness.

2. Plaintiff's Motion In Limine To Exclude Evidence Of Comparative Fault: This Motion seeks to preclude the Defendant from presenting any evidence for the purpose of

demonstrating comparative negligence on the part of Plaintiff, *see* 14 M.R.S. § 156. Given that there are no negligence or tort claims remaining in this case, as a result of the court's prior summary judgment ruling, the Motion is appropriate, and perhaps for that reason, was unopposed. The Plaintiff's Motion In Limine To Exclude Evidence Of Comparative Fault is granted. It is ORDERED that evidence relevant solely to comparative negligence is excluded. This ruling does not, in and of itself, bar evidence relevant to other defenses, including failure to mitigate damages, nor does it preclude Defendant from challenging the necessity or reasonableness of the steps taken by Plaintiff to address the circumstances that underlie the claims that are going to trial.

3. Plaintiff's Motion in Limine to Exclude Evidence and Apportioning of the Settling Defendants' Fault: This Motion, which is also unopposed, seeks to exclude any evidence of fault on the part of the Defendants who have settled the Plaintiffs' claims against them, and to preclude any apportionment of fault by the jury, on the ground that Branch River has elected to have the amount obtained in settlement from the settling Defendants deducted from any award against this Defendant. *See* 14 M.R.S. § 163. Given that the Motion is unopposed, the court infers that the Defendant concurs, and therefore grants the Motion. It is ORDERED: Branch River Plastics, Inc. may not enter evidence whose sole relevance is to prove that the settling Defendants were at fault in this matter; and the court will not instruct the jury to apportion Plaintiff's damages among Defendant Branch River and the settling Defendants.

4. Plaintiff's Motion in Limine to Exclude Testimony of Craig E. Barnes: This Motion, which is opposed, seeks to preclude Defendant from calling Craig E. Barnes as a

witness. Mr. Barnes is a professional engineer who participated in testing Branch River structural insulated panels (SIPs) in the course of the investigation of the Plaintiff's claims that Branch River's SIPs failed to comply with Plaintiff's specifications. The court has already ruled that Mr. Barnes will not be permitted to present any expert testimony. *See Order On Plaintiffs' Motion In Limine To Exclude Testimony Of Craig Barnes, P.E. And Larry Turner* (Nov. 14, 2014).

Defendant's opposition to the Plaintiff's Motion maintains that Mr. Barnes should still be considered a fact witness only, not an expert, regarding the testing.

A fact witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. M.R. Evid. 701. The witness's testimony must be "adequately grounded on personal knowledge or observation." *Chrysler Credit Corp. v. Bert Cote's L/A Auto Sales, Inc.*, 1998 ME 53, ¶ 21, 707 A.2d 1311 (quoting Field & Murray, *Maine Evidence* 701.1 (4th ed. 1997)). "[O]pinion testimony that . . . is not within the common knowledge of an ordinary person . . . may not be given by a lay witness." *State v. Marden*, 673 A.2d 1304, 1311 n.5 (Me. 1996); *accord Chrysler Credit*, 1998 ME 53 at ¶ 22, 707 A.2d at 1317 (holding that opinion that was "derived from . . . specialized knowledge . . . and was not within the realm of the ordinary layperson"). Further, when opinion is derived from . . . specialized knowledge . . . [it is] not within the realm of the ordinary layperson. *Id.*

In this case, Mr. Barnes' testimony must be limited to his personal knowledge of facts relevant to this case, and any testimony he gives, whether or not in the form of an opinion,

cannot be based on scientific, technical, or other specialized knowledge. This may limit his admissible testimony drastically, but the court is not prepared to decide that Mr. Barnes has no admissible testimony at all to offer as a fact witness.

Therefore, the ruling is essentially that Mr. Barnes's status remains as it was determined to be in the November 14, 2014 Order mentioned above. It is ORDERED: Plaintiff's Motion in Limine to Exclude Testimony of Craig E. Barnes is granted to the extent that Craig E. Barnes will not be permitted to testify as an expert witness, and is denied as to any testimony as a fact witness.

5. Plaintiff's Motion In Limine To Exclude Evidence That Arundel Valley Failed To Mitigate Damages: This Motion, which is also opposed, seeks to preclude Defendant from offering or eliciting any evidence that Plaintiff failed to mitigate its damages. The basis for the Motion is that Defendant Branch River has not designated any expert witness to contradict the Plaintiff's expert evidence that Plaintiff had to take the steps it did in response to the circumstances underlying Plaintiff's claims.

In Maine, a party who sustains any loss for which another may be liable has a duty to mitigate damages. *See Schiavi Mobile Homes, Inc. v. Girona*, 463 A.2d 722, 724 (Me. 1983); *see also Lindsey v. Mitchell*, 544 A.2d 1298 (Me. 1988). In other words, the law requires the injured party to "use ordinary care and take all reasonable measures within his knowledge and power to avoid the loss and render the consequences as light as may be; and it will not permit him to recover for such losses as by such care and means might have been prevented." *Schiavi Mobile Homes*, 463 A.2d at 724 (citing *Grindle v. E. Express Co.*, 67 Me. 317, 325 (1877)).

"The touchstone of the duty to mitigate is reasonableness. The nonbreaching party need only

take reasonable steps to minimize his losses; he is not required to unreasonably expose himself to risk, humiliation or expense.” *Id.* at 724-25.

Plaintiff contends its decision to remove the roof relied on the scientific, technical, and specialized knowledge of its experts. Plaintiff argues that the Defendant, who has not designated an expert as to the mitigation issue, may not use lay testimony to prove its mitigation defense.

There is no bright-line rule that requires the affirmative defense of failure to mitigate to be supported by expert evidence, although “[a] party presenting a failure to mitigate damages defense without expert testimony on causation will do so at his or her own peril.” *Willis v. Westerfield*, 839 N.E.2d 1179, 1189 (Ind. 2006).

In the court’s view, even if Branch River acts at its peril by not presenting expert evidence to counter the Plaintiff’s expert evidence, the Plaintiff’s Motion rests on two incorrect premises—that the only admissible evidence of failure to mitigate would consist of expert testimony, and that the jury will be compelled to believe Plaintiff’s experts. The first premise is incorrect because, for example, evidence that the Plaintiff removed the Branch River panels on its own initiative, without any order directing it to do so, clearly could be taken to show failure to mitigate damages, without any need at all for expert evidence. As to the second premise, whether or not the Defendant presents expert evidence, Defendant will be permitted to cross-examine any of Plaintiff’s experts on mitigation issues, and this court cannot assume, before trial, that the jury will credit any expert witness’s testimony. It is ORDERED: Plaintiff’s Motion In Limine To Exclude Evidence That Arundel Valley Failed To Mitigate Damages is denied.

6. Plaintiff's Motion In Limine To Bar Statement That The SIPs Were Not Defective: This Motion, which is also opposed, seeks an order barring Defendant's counsel from making any statement or argument to the effect that the SIPs manufactured by Defendant and installed at the Plaintiff's facility were not defective. The stated ground for the Motion is that the Plaintiff has developed "ample record evidence," mainly in the form of opinions from its designated expert witnesses, that the SIPs furnished by Branch River were defective in various respects. The flaw in this reasoning is that it assumes the credibility and weight that the jury will assign to that evidence. Thus, in effect, the Motion asks that the Defendant not be allowed to argue that the jury should reject the Plaintiff's evidence that the Branch River SIPs were defective, or that the Plaintiff has failed to prove any defect. As Defendant's opposition notes, there is simply no basis for the limitation that the Plaintiff seeks to impose. Counsel's argument cannot mischaracterize the evidence, but it certainly can suggest that the opposing party's evidence be discounted or rejected. It is ORDERED: Plaintiff's Motion In Limine To Bar Statement That The SIPs Were Not Defective is denied.

7. Defendant's Motion In Limine To Exclude Testimony of Paul Malko: This Motion, which is opposed, seeks to exclude any testimony by Paul Malko, whom Plaintiff has designated as an expert witness on Defendant's manufacturing process. Defendant's Motion rests on two grounds: first, that Mr. Malko is not qualified, and second, that his proposed expert testimony is not relevant to the warranty claims that remain in this case. Defendant further notes that Mr. Malko is or was employed by a competitor of Defendant, presumably to suggest bias. Plaintiff responds to the Defendant's qualification objection by asserting that Mr. Malko is an engineer with expertise and experience in the manufacture of SIPs. Plaintiff

responds to the relevance objection by asserting that the process by which Defendant's SIPs are manufactured is relevant to the issue of whether Defendant is in breach of warranty as alleged in the remaining claims. The court agrees with Plaintiff on both points—assuming the witness has the background that Plaintiff says he does, the issue becomes one of weight rather than admissibility. Moreover, the process by which a product is manufactured can be relevant to whether the product is as warranted. This does not mean that any and all testimony by Mr. Malko will be allowed, but only that the court is not prepared to exclude the testimony on an in limine basis. It is ORDERED: Defendant's Motion In Limine To Exclude Testimony of Paul Malko is denied.

8. Defendant's Motion In Limine Re: Branch River Price Quote and Invoices:

This Motion, which is opposed, seeks to exclude any evidence of a price quote submitted by Defendant to a former Defendant, House & Sun, for the SIPs furnished by Defendant to Plaintiff's project, as well as Defendant's invoices for those SIPs. The price quote and the invoices described the SIPs sold by Defendant as "R-Control."

The stated basis for the Motion is that the documents in question are not relevant to either of the remaining claims for breach of implied warranty of merchantability and breach of implied warranty of fitness for particular purpose. Defendant's reply to Plaintiff's opposition correctly notes that there is no express warranty claim in this case, and goes on to argue that there is no issue of reliance by Plaintiff.

But the court sees the price quote and invoices as being relevant to indicating exactly what the Defendant was selling, because exactly what a product purports to be is relevant to what implied warranties attach to the product, regardless of whether any express warranty is

made.

The implied warranty of merchantability is implicit in a contract for the sale of goods. 11 M.R.S. § 2-314 (2014). The seller warrants that the goods offered for sale are “fit for the ordinary purposes for which such [goods] are purchased.” *Lorfano v. Dura Stone Steps, Inc.*, 569 A.2d 195 (Me. 1990) (citations omitted). The comments to the implied warranty of merchantability statute indicate:

Goods delivered under an agreement made by a merchant in a given line of trade must be of a quality comparable to that generally acceptable in that line of trade under the description or other designation of the goods used in the agreement. The responsibility imposed rests on any merchant-seller.

11 M.R.S. § 2-314 cmt. 2.

The implied warranty of fitness for a particular purpose is narrower than the implied warranty of merchantability. It requires that:

(1) the purchaser have a particular purpose outside the scope of ordinary purposes; (2) the seller at the time of contracting has reason to know of the particular purpose; (3) the seller has reason to know that the purchaser is relying on the seller's skill or judgment to furnish appropriate goods; and (4) the purchaser must, in fact, rely upon the seller's skill or judgment.

Lorfano v. Dura Stone Steps, Inc., 569 A.2d 195, 197 (Me. 1990).

The price quote and invoices that Defendant seeks to exclude are relevant to both of the Plaintiff's warranty claims. Plaintiff offers the contested documents into evidence to demonstrate not only that it had an expectation that R-Control Air-Flo SIPs would be delivered, but that the Defendant agreed to deliver—and purported to deliver—R-Control Air-Flo SIPs to Plaintiff's project. Plaintiff contends that the products that were ultimately delivered, however, were not merchantable as R-Control Air-Flo SIPs and also were not fit for Plaintiff's particular purpose. The price quote and invoices indicating that R-Control SIPs

would be provided and were provided are thus relevant to whether the Defendant breached the implied warranties of merchantability and fitness for particular purpose.

Of course, the Defendant remains free to argue that the R-Control designation has no bearing on the performance of a SIP for purposes of either the implied warranty of merchantability or the implied warranty of fitness for particular purpose, and that, too, is an issue in the case. But the question at hand is one of relevance, and under the broad standard of relevance reflected in M.R. Evid. 401-02, the quote and invoices are relevant and admissible. It is ORDERED: Defendant's Motion In Limine Re: Branch River Price Quote and Invoices is denied.

Pursuant to M.R. Civ. P. 79(a), the clerk is directed to incorporate this Order by reference in the docket.

Dated June 3, 2015

/s
A. M. Horton, Justice