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| DISTRICT COURT, ADAMS COUNTY, COLORADODATE  FILIN | FILED: February 1, 2019 4:40 PM  G ID: 39AE746544A1B |
| CASE | NUMBER: 2018CV30347 |
| 1100 Judicial Center Drive |  |
| Brighton, Colorado 80601 |  |
| **Plaintiff:** |  |
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|  | ▲ **COURT USE ONLY ▲** |
| **v.** | Case No: 18CV030347 |
| **Defendants:** | Division: |
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| *Attorneys for Defendants:* |  |
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| **DEFENDANTS’ MOTION TO STRIKE PLAINTIFF’S EXPERT’S TESTIMONY AND REPORT PURSUANT TO C.R.E. 702** | |

Defendants FPA5 Washington Park, LLC a/k/a The Oslo Apartments and Trinity Property Consultants, LLC, by and through their attorneys of record, Jachimiak Peterson, LLC, hereby state as follows in support of their motion:

# CERTIFICATE OF CONFERRAL

The undersigned has conferred with counsel for Plaintiff and has been informed that Plaintiff is opposed to the relief sought herein.

# SUMMARY OF FACTS

This matter arises out of a fall suffered by the decedent, Edward Makowski, on February 2, 2017 at The Oslo Apartments located at 11501 North Washington Street in Northglenn, Colorado. Plaintiff raises only one cause of action against Defendants: wrongful death grounded in the Colorado Premises Liability Act (“PLA”). The First Amended Complaint alleges: “Edward J. Makowski slipped on icy unmaintained stairs on the property and fell resulting in his death.” Nowhere in the complaint or pleadings does Plaintiff make any allegations regarding: (1) the construction of the stairs; (2) the Americans with Disabilities Act (ADA); or (3) the Fair Housing Act (FHA). Plaintiff has alleged only one cause of the fall: “icy unmaintained stairs.”

# PLAINTIFF’S EXPERT REPORT AND QUALIFICATIONS

1. Plaintiff disclosed Tony DiNicola from Fort Worth, Texas as a retained expert.

DiNicola’s report states that he was retained to “evaluate the fall of Edward Makowski and determine if the stairs located at the Oslo Apartments … [were] a contributing factor to the fall of Edward Makowski on February 2, 2017.” Exhibit A, 12/05/18 report. During DiNicola’s

deposition, he was unable to clearly identify his assignment for this case. Exhibit B, Deposition

at 22:7-25. Further, he apparently did not review the complaint, and could not identify the claim Plaintiff has alleged against the Defendants nor Plaintiff’s theory of the case. Ex. B, 37:4–39:9.

In short, his assignment was a fishing expedition.

1. DiNicola determined snow and ice did not play a role in Mr. Makowski’s fall, and that there was no snow or ice on the stairs at the time of the incident. Ex. B, 115:23–116:8. In

other words, DiNicola confirmed there was no Rule 11 basis for Plaintiff to file this lawsuit in the first place. Without the ability to support Plaintiff’s allegations, DiNicola then spent his time

and the Plaintiff’s money creating a report based on speculation and assumptions as to other possible causes of Mr. Makowski’s fall—which he failed to support with any valid facts or scientific analysis.

1. DiNicola was *not* asked by Plaintiff or her attorneys to review any issues related to the ADA (Ex. B, 26:1-7) or the FHA (Ex. B, 27:1-4). During his deposition, DiNicola held

himself out to be an expert in: (1) architecture; (2) the ADA; (3) the FHA; and (4) standard of care. Ex. B, 25:14-15; 106:17-19. None of these areas support or are related to the actual claim

Plaintiff has asserted in this case—that Mr. Makowski fell on snow or ice on the stairs—as alleged in the First Amended Complaint.

1. Despite the areas in which DiNicola claims to be an expert, he offers opinions throughout his original and rebuttal reports on numerous topics including, but not limited to: (1) alleged glossy paint on the stairs; (2) the condition of the stair treads (an allegation never raised by Plaintiff); (3) the handrails (again, never mentioned in Plaintiff’s pleadings); (4) the route in which Mr. Makowski chose to take from the leasing office to the stairs (irrelevant); (5) areas of the sidewalk on the property that have nothing to do with the stairs or Mr. Makowski’s fall; (6) how an individual obtains a valid handicap placard for their car (outside the scope of his claimed expertise/irrelevant); (7) Defendants’ employees’ communications with Plaintiff after the incident occurred and with Mr. Makowski before the incident (irrelevant, speculation and outside the scope of his claimed expertise); (8) Mr. Makowski’s physical capabilities; and (9) the location of the model apartment. The comments offered by DiNicola on these various topics are primarily garnered from his review of deposition testimony from witnesses in this case—not on any scientific or expert analysis.
2. As an architect who lives in Texas and is admittedly reliant on laws from the State of Texas, DiNicola has never consulted on a case involving alleged snow and/or ice on stairs— nor any other prior case in Colorado—and did not visit the property or research applicable Colorado building codes or laws prior to writing his initial report. Ex. B, 7:24–8:6. As such,

DiNicola’s report and testimony should be excluded because he is not qualified to offer any expert opinions in this matter. Further, DiNicola cited legal authority that applies to the state of Texas, conceded that Colorado does not have any laws related to the ADA, and did not rely on any Colorado law to create his report. Ex. B, 16:14–17:15; 108:11-18.

1. DiNicola prepared an initial report dated December 5, 2018 (Ex. A) and a rebuttal

report dated January 23, 2019 (Exhibit D). *DiNicola did not inspect the property until January 9,*

*more than a month after his initial report*. He did not research the year the building was constructed to determine what building codes apply to the property prior to drafting his initial report. Ex. B, 34:25–35:24. DiNicola’s initial report, as it relates to the stairs, contains no

scientific support or basis and no measurements of any kind. DiNicola is not familiar with, and in fact has never heard of, the PLA—yet he claims he is an expert in the standard of care for this case, something he was unable to explain or define. Ex. B, 38:14-19; 105:23–108:14.

1. Not only is DiNicola not qualified to opine on the relevant issues in this case, but Plaintiff has failed her disclosure obligations. She has not identified in what areas of expertise she intends to offer DiNicola at trial. She neglected to provide this information in the CMO and in her expert disclosures as required by C.R.C.P. 26(a)(2). Plaintiff’s attorney, Mr. Hemmat, stated on the record during DiNicola’s deposition that he had not yet decided in what areas of expertise DiNicola will be designated. Exhibit C, pp. 76-80. Due to the fact there is not one shred

of evidence in this case that Defendants knew or should have known of any snow or ice on the property, nor any evidence the stairs were anything but dry and that defendants properly maintained the property, plaintiff is attempting to keep her theory of the case as a moving target to 1) thwart the defendants from being able to prepare a proper defense and 2) creating any additional issue they can in order to move past the unsupported and false allegations that the stairs were slick in any way. Plaintiff is attempting to use DiNicola as the tool to achieve these goals.

1. DiNicola speculated in his deposition that Mr. Makowski’s shoes must have been wet from Mr. Makowski “being allowed” to walk across grass to get to the building with the model apartment. He also speculated that Ms. Roe, the leasing agent, had a responsibility to be forceful with Mr. Makowski and stop him from walking on the grass, a legal duty that does not exist. Ex. B, 104–105. This is but one example of many improper opinions contained in the

report, and it should be stricken.

1. DiNicola offers a number of opinions that that do not provide any scientific, technical or other specialized knowledge that will assist the trier of fact to understand the evidence to determine a fact at issue. Further, most of the opinions contained in the report fall outside of his scope of claimed expertise. As a result, the following statements/opinions should be stricken:

* The model apartment was on the second floor. Ex. A, pp. 3-4.
* Any reference to training received by the Defendants’ employees. Ex. A, pp. 5, 9. (In addition, there is no allegation that Defendants violated any training or had insufficient training, or that training has any connection to the fall.)
* There was ice on the property that required salt. Ex. A, p. 5; Ex. B, 61:3–62:4. (Further, the relevant question is whether the stairs required salt.)
* The stairs are worn and have missing paint. Ex. A, p. 6. (Note that DiNicola had *not*

inspected the property when he rendered this opinion/statement.)

* The stairs were painted with gloss paint. Ex. A, p. 7; Ex. B, 39:1-4; 62:2 – 65:2.
* Gloss paint would make the stairs slippery, especially when wet. Ex A, pp. 7, 34. There is no scientific basis for this opinion. DiNicola did not perform any slip or coefficient of friction tests. Ex. B at 66:12–69:3. He has no information about the paint.
* A doctor has to confirm you are disabled before the state will give you a placard. Ex. A, p. 8. (In addition, this is completely irrelevant.)
* The weather was slick and icy. Ex. A, p. 8. (Further, the only relevant issue is whether the stairs where Mr. Makowski fell were slick or icy.)
* The management reached out to Ms. Makowski after the fatal accident of Mr. Makowski. Ex. A, p. 8. (This is also irrelevant.)
* Plaintiff commented on the difficulty of navigating around because of the weather conditions. Ex. A, p. 8. During her deposition, Plaintiff testified that she has never been to the property. Exhibit E, 38:19-21.
* Any reference to Mr. Makowski’s physical abilities with regard to walking. Ex. A, pp. 10-11, 33. (DiNicola has no medical degree.)
* Any reference to the route Mr. Makowski took to get to the stairs. Ex. A, pp. 11, 33-

34. (Further, Mr. Makowski insisted on walking through the grass rather than on the sidewalk, which is irrelevant.)

* Mr. Makowski’s ability to hold the handrail. Ex. A, p. 13. (In addition to DiNicola’s lack of expertise, there is no evidence Mr. Makowski had any difficulty holding or trying to hold the handrail when he fell.)
* Vague references to the steps being “improper.” Ex. A, p. 13.
* The Defendants’ actions or inactions regarding the “safety” of the property. Ex. A, p.

14. (Further, the only relevant question is the subject stairs.)

* Any reference to the ADA or FHA, as these are federal laws and regulations and no violation of any of these laws are referenced in Plaintiff’s First Amended Complaint, her responses to written to discovery, nor in her deposition testimony. Ex. A, pp. 15- 30, 33. (Further, the ADA and FHA do not apply to the stairs. A separate motion will be filed by Defendants to strike any reference to the ADA and FHA at trial.)
* Any reference to the Defendants’ policies regarding how or when to show the model apartment to possible future tenants. Ex. A, p. 33.
* “The fall was a direct result of the model apartment located on the second floor, accessed through the extremely dangerous stairs.” Ex. A, p. 35. (This opinion is an ultimate conclusion that must be left to the jury. There is no scientific, technical or specialized knowledge included anywhere in DiNicola’s report to support this opinion.)
* “Mr. Makowski should not have been allowed to go through the snow and try to go up the extremely dangerous steps.” Ex. A, p. 35. (Again, there is no scientific analysis or basis offered by DiNicola in his December 5 report to support calling the stairs “extremely dangerous,” and further, there was no legal duty for Defendants’ employee to control Mr. Makowski’s path. This side comment made by DiNicola is a lay opinion and should be stricken.)
* “The model apartment should not have been located on the second floor.” Ex. A, p.

35. (DiNicola does not identify any Colorado law or building code that prohibits a model apartment on a second floor.)

* Any reference to standard of care. (As referenced above, DiNicola (1) could not define what he meant by “standard of care,” he has never heard of the PLA, and he makes reference to a “reasonable person standard” which has no place in this case.)
* Any reference to the cause of Mr. Makowski’s death. (This falls outside the scope of his claimed expertise.)

1. DiNicola offers a number of opinions based on speculation and conjecture, unsupported by any evidence in this case. He further relies upon non-existent evidence in the case he creates via speculation, conjecture and assumptions. Most notably, the following opinions and/or references should be stricken:

* References to Mr. Makowski receiving medical treatment after the incident. Ex. A, p. 32.
* The thoughts and intentions of both Mr. Makowski and any of Defendants’ employees before, during or after the incident.
* References to the owner of the footprints on the ground after the incident occurred. Ex. A, p. 34. (There is no evidence in this case as to who made the footprints seen in photographs taken after the incident.)
* The cause of Mr. Makowski’s fall. Ex. A, p. 35; Ex. B, pp. 21-25. (This ultimate conclusion is not only based on speculation, but must be left to the jury to decide.)

1. In initial report, DiNicola created a fact pattern of how Mr. Makowski’s fall occurred, substituting his lay opinions for those of the jury. DiNicola wrote an entire report on:

(1) a set of stairs he never inspected or researched; and (2) theories he created that—prior to his report—were never once mentioned or alleged by Plaintiff. His report is one giant fishing expedition absent any expert knowledge or bases.

1. DiNicola’s “rebuttal report” dated January 23, 2019 is anything but—it contains all new information and, thus, the report should be stricken in its entirety. The “rebuttal report” in no way responds to or rebuts any information previously contained in the record. The report

includes 67 never-before-seen photos and measurements of the stairs and handrails that were never referenced or mentioned by Plaintiff or DiNicola prior to January 23, 2019. All of this new information falls squarely outside of the information alleged, disclosed, and addressed in this case. DiNicola did not provide any measurements, analysis or alleged code violations based on any scientific information prior to January 23. DiNicola’s initial report is 42 pages long, while the “rebuttal report” containing all new information is 100 pages long.

1. Most importantly, ***all of the information*** contained in the “rebuttal report” (i.e., access to/inspection of the property, access to property records to determine the year the building was constructed, applicable building codes, measurements of the stairs and handrails) was ***available*** to DiNicola prior to the creation of his initial report dated December 5, 2018. DiNicola’s lack of diligence and failure to timely include or properly research information that he now deems critical to this case does not provide a reasonable basis for disclosing this information at the 11th hour—after the defense expert’s allotted time to review DiNicola’s findings—and this close to trial.
2. Allowing DiNicola’s rebuttal report and all of the new information contained therein—and DiNicola’s only attempt at including scientific or technical information—would highly prejudice the defense. This new information not only changes the entire make up of the case by focusing on issues and facts never pled or alleged—depriving Defendants of the ability to mount a proper and adequate defense—but it also deprives the Defendants of adequate time to analyze and rebut the new information prior to trial, as expert discovery is closed and trial is just over a month away. The 1/23/19 rebuttal report and all of the information contained within should be stricken.

# STANDARD OF REVIEW

1. C.R.E. 702 governs the courts determination of the admissibility of expert testimony. *Meier v. McCoy*, 119 P.3d 519, 521 (Colo. App. 2005). C.R.E. 702 provides that if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact at issue, a witness qualified as an expert by skill, knowledge, training or education may testify thereto in the form of an opinion. The Colorado Supreme Court has held that a trial court’s inquiry requires a determination of: 1) the reliability of the scientific principles; 2) the qualificiation of the witness; and 3) the usefulness of the testimony to the jury. *People v. Shreck*, 22 P.2d 68, 78 (Colo. 2001). *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1933), *Kumho Tire Co. v. Carmichael*, 526 U.S. 173 (1999). *Id. at 78.* An expert witness may give an opinion with regard to matters within his care or skill only if the expert has some basis in fact for such opinion. *Pueblo West Metropolitan Dist. v. Southeastern Colorado Water Conservancy Dist.*, 717 P.2d 955, 960 (Colo. 1985).

# ARGUMENT

1. DiNicola’s report and testimony should be stricken because: (1) the opinions in his December 5, 2018 report are not supported by any scientific, technical or other specialized knowledge; (2) his opinions are based on speculation, assumption and conjecture; and (3) his opinions do not relate to or support Plaintiff’s allegations in any way, shape, or form. In fact, DiNicola’s reports create an entirely new case based on entirely new theories that Plaintiff failed to timely disclose and for which Defendants do not have a fair opportunity to prepare a proper defense.
2. As stated above, the only cause of the fall alleged by Plaintiff to date is “icy unmaintained stairs.” DiNicola took it upon himself to allege that the construction of the stairs and handrail violate the ADA and FHA. DiNicola offered these opinions without: (1) inspecting the property; (2) researching applicable Colorado building codes; (3) researching and understanding the PLA and the standard of care provided therein; and (4) by focusing on facts that either do not exist anywhere in the record or are based on assumptions and speculation. His reports and the statements and opinions contained therein lack any scientific basis, measurements to support his conclusions, or any specialized knowledge that would be above and beyond what the jury can review and analyze on its own without the need for expert opinion. Plaintiff is attempting to couch DiNicola’s statements and opinions as those of an “expert,” thereby encouraging the jurors to improperly place greater weight on his statements than is permitted.
3. DiNicola spent the bulk of his reports dissecting lay witness testimony and relying on that testimony to form his “opinions.” This does not amount to expert opinion. The jury does not need DiNicola’s lay witness opinions about the weather, Mr. Makowski’s physical capabilities or what others observed of Mr. Makowski, nor the path he took immediately prior to the incident. DiNicola’s initial report also guesses about deficiencies he alleges regarding the construction of the stairs and handrail, and fails to provide any measurements or other scientific evidence. DiNicola’s opinions based on assumption and guess work should not be allowed before a jury as those opinions will confuse a jury and inject inaccurate information into their deliberations, highly prejudicing the Defendants’ right to a fair trial.
4. Based on all of the above, DiNicola’s December 5, 2018 report, the opinions contained in his deposition, and his January 23, 2019 rebuttal report should be stricken, and he should not be permitted to offer any testimony to the jury at trial.

WHEREFORE, Defendants respectfully request an Order striking Plaintiff’s expert, Tony DiNicola’s December 5, 2018 report, his deposition testimony, and his January 23, 2019 rebuttal report, and precluding Mr. DiNicola from offering any expert opinions or testimony at the trial scheduled for the week of March 11, and for any other relief this Court deems just and proper.

Dated this 1st day of February, 2019.

COMPANY, LLC

*Pursuant to C.R.C.P. 121 §1-26 the duly signed original remains on file at the office of the undersigned*

*/s/ LAWYER NAME*

*Attorneys for Defendants*

# CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of February, 2018, a true and correct copy of the foregoing **DEFENDANTS’ MOTION TO STRIKE PLAINTIFF’S EXPERT’S**

**TESTIMONY AND REPORT PURSUANT TO C.R.E. 702** was electronically filed with the Court and served via Colorado Courts E-Filing upon all counsel of record.

*Pursuant to C.R.C.P. 121 §1-26 the duly signed original remains on file at the office of*

*/s/*