

**IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA
BUSINESS COURT**

**GLADE SPRINGS VILLAGE PROPERTY
OWNERS ASSOCIATION, INC.,
a West Virginia non-profit corporation,**

Plaintiff,

v.

**Civil Action No. 19-C-357
Presiding Judge: Jennifer P. Dent
Resolution Judge: Michael D. Lorensen**

**EMCO GLADE SPRINGS HOSPITALITY, LLC,
a West Virginia limited liability company;
ELMER COPPOOLSE, an individual;
JAMES TERRY MILLER, an individual;
R. ELAINE BUTLER, an individual; and
GSR, LLC, a West Virginia limited liability company.**

Defendants.

**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' JOINT
MOTION TO EXCLUDE EXPERT TESTIMONY OF CARL H. LISMAN**

This matter came before the Court on the Defendants' *Joint Motion to Exclude Expert Testimony of Carl H. Lisman* (the "Motion"). The Plaintiff, Glade Springs Village Property Owners Association, Inc., by counsel, Ramonda C. Marling, Esq., and Defendants, EMCO Glade Springs Hospitality, LLC, Elmer Coppoolse, James Terry Miller, R. Elaine Butler, and GSR, LLC, by counsel, Arie M. Spitz, Esq., have fully briefed the issues necessary. The Court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process. So, upon the full consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows.

Defendants seek the exclusion of the testimony of Carl H. Lisman, Plaintiff's expert. *See* Defs' Mot., p. 1. Specifically, Defendants argue this is appropriate because Mr. Lisman's

testimony will usurp the role of the judge because he will impermissibly testify as to questions of law. *Id.* at 3.

This Court, having proper jurisdiction and having been fully advised of the matters herein, HEREBY MAKES THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

1. As an initial matter, it is well established that “[t]he admissibility of testimony by an expert witness is a matter within the sound discretion of the trial court.” *Gen. Pipeline Constr., Inc. v. Hairston*, 234 W. Va. 274, 284 765 S.E.2d 163, 173 (2014).

2. Further, Rule 702 of the West Virginia Rules of Evidence governs expert testimony. Rule 702 provides, in pertinent part:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

W. Va. R. Evid. 702(a).

3. Further, the West Virginia Supreme Court of Appeals has held that “[a]s a general rule, an expert witness may not testify as to questions of law such as the principles of law applicable to a case, the interpretation of a statute, the meaning of terms in a statute, the interpretation of case law, or the legality of conduct. It is the role of the trial judge to determine, interpret and apply the law applicable to a case”. Syl. Pt. 10, *France v. S. Equip. Co.*, 225 W. Va. 1, 5, 689 S.E.2d 1, 5 (2010)¹.

4. Instead, the West Virginia Supreme Court of Appeals has directed that “Rule 702 of the *West Virginia Rules of Evidence* only allows an expert to give an opinion that ‘will

¹ See also Syl. Pt. 5, *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 600 S.E.2d 346 (2004).

assist the trier of fact to understand the evidence or to determine a fact in issue". *Id.* at 14, 14. The Court notes the parties do not dispute this black letter law.

5. The Supreme Court further explained:

... [A]n expert's testimony is proper under Rules 702 and 704 if the expert does not attempt to define the legal parameters within which the jury must exercise its fact-finding function. However, when the purpose of testimony is to direct the jury's understanding to the legal standards upon which their verdict must be based, the testimony should not be allowed. A witness, expert or non-expert, should not be allowed to define the law of the case.

Indeed, it is black-letter law that it is not for witnesses but for the judge to instruct the jury as to applicable principles of law. In our legal system, purely legal questions and instructions to the jury on the law to be applied to the resolution of the dispute before them is exclusively the domain of the judge. The danger is that the jury may think that the "expert" in the particular branch of the law knows more than the judge—surely an impermissible inference in our system of law.

Because the jury does not decide such pure questions of law, such testimony is not helpful to the jury and so does not fall within the literal terms of Rule 702.

Id. citing 2 Franklin D. Cleckley, *Handbook On Evidence For West Virginia Lawyers* § 7-4(B), pp. 7-78-7-79 (2000).

6. Here, Defendants seek this Court to preclude Plaintiff's expert, Mr. Lisman's, testimony, arguing its purpose is impermissibly directing the jury's understanding to the legal standards upon which their verdict must be based, in violation of West Virginia law. Specifically, Defendants argue that Plaintiff has admitted it seeks to elicit testimony from Mr. Lisman regarding the following forbidden questions of law: interpretation of the Uniform Common Interest Ownership Act (hereinafter "UCIOA") and meaning of its terms, interpretation of case law related to real property in the context of the UCIOA and common interest communities, interpretation of West Virginia Code §36B-3-103 and whether Defendants owed a fiduciary duty to Plaintiff under that statute, and the legality of

Defendants' conduct related to their alleged said statutory fiduciary duty. See Defs' Mot., p. 5-6. The Court notes Defendants attached Plaintiff's Expert Witness Disclosure as Exhibit A to the instant motion. *Id.* at Ex. A; see also *Id.* at 1-2.

7. Based on the Court's review of the motion and responsive pleadings, as well as the exhibits, the Court concludes that Mr. Lisman must be precluded from testifying as to any conclusions of law as to any fiduciary responsibilities of the Defendants. The Court finds this would improperly infringe on the province of the jury, as this determination and conclusion is to rest with the jury.

8. However, the Court cannot conclude that a blanket prohibition of Mr. Lisman's testimony is appropriate at this stage. The case law has made clear that an expert may testify as to more general information. Specifically, Plaintiff has proffered that Mr. Lisman has been designated on the ordinary practices of creating, governing, and operating common interest communities. See Pl's Resp., p. 7. Further, Plaintiff averred in its response that it intends to offer Mr. Lisman to explain relevant principles about common interest communities, without testifying "regarding applicable law or to make conclusions of law". *Id.* at 9. As long as this testimony does not "cross the line" into opining on legal opinions, the Court concludes the anticipated testimony appears that it will be appropriate under the Rules of Evidence and the relevant case law.

9. The Court finds if this type of permissible testimony were to cross over into impermissible testimony regarding legal instruction or statutory interpretation, the proper avenue would be an objection and a limitation of testimony at that time. The Court agrees with Plaintiff that it would be inappropriate to exclude Mr. Lisman as a witness at this

stage in the proceedings. See Pl's Resp., p. 7.

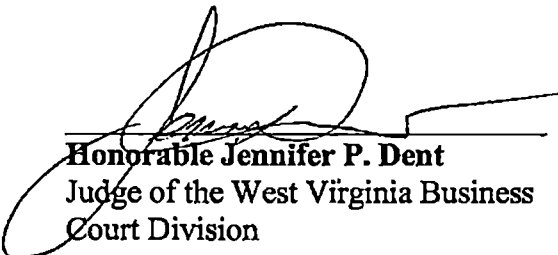
10. Taking into account all of the foregoing, the Court finds and concludes that the instant motion shall be granted in part and denied in part and Mr. Lisman's testimony will not be stricken as a whole on the basis laid out in the motion, but the motion is granted as to any impermissible testimony regarding conclusions of law, or opinion of statutory interpretation or case law, including opinion testimony as to whether or not a breach of fiduciary duty occurred.

CONCLUSION:

Therefore, it is hereby ADJUDGED, ORDERED and DECREED that Defendants' *Joint Motion to Exclude Expert Testimony of Carl H. Lisman* is hereby GRANTED IN PART AND DENIED IN PART. The Court notes the objections and exceptions of the parties to any adverse ruling herein.

The Clerk of this Court shall enter the foregoing and forward attested copies hereof to all counsel, to all *pro se* parties of record, and to the Business Court Central Office at Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia 25401.

ENTERED this 16th day of July, 2020.


Honorable Jennifer P. Dent
Judge of the West Virginia Business
Court Division