UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

NICHOLAS SIEWERTSEN	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CASE NO. 3:11-CV-2572**
	)	
WORTHINGTON INDUSTRIES, INC.	)	**JUDGE CARR**
	)	
Defendant.	)	

PLAINTIFF'S MOTION TO EXCLUDE "EXPERT" TESTIMONY OF DAVID HOOVER

Plaintiff Nicholas Siewertsen, by and through counsel, files this Motion to Exclude Expert Testimony of David Hoover. The basis for Plaintiff's Motion is explained in the attached Memorandum in Support.

Respectfully Submitted,
s/ Danny L. Caudill

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MEMORANDUM IN SUPPORT OF MOTION

I. Introduction

Defendant has provided Plaintiff with a report from David Hoover, a self-proclaimed expert in forklift safety. Plaintiff asks this Court to exclude Mr. Hoover from offering expert testimony at trial, if he is called. Mr. Hoover is a fact witness – but he is not an "expert" on any issue that will be relevant at trial.

Plaintiff specifically requests the following:

A. That the Court refuse to recognize Mr. Hoover as an expert;

B. Alternatively, that the Court prohibit Mr. Hoover from providing expert testimony on subjects he has admitted he is not an expert in or where he has otherwise failed to demonstrate he is an expert;

C. That Mr. Hoover be prohibited from offering an expert opinion regarding the correctness of Defendant's decision to prohibit Plaintiff from operating motorized equipment; and,

D. That the Court prohibit Mr. Hoover from offering testimony regarding anecdotal incidents contained in his report.

It is obvious Mr. Hoover prepared his report to justify his prior, uninformed advice to Defendant that Defendant not permit deaf workers to operate forklifts at its plants. In that report, Mr. Hoover offered opinions on subjects in which he has admitted he is not an expert. He offered hypothetical situations based on faulty assumptions. And he relied upon bald, unsubstantiated hearsay to suggest that Plaintiff was not a safe forklift operator – even while admitting that Defendant had already previously determined Plaintiff was safe.

II. Background

David Hoover is the owner and President of Forklift Training Systems based in Newark, Ohio. Hoover Dep. 9-10. Mr. Hoover's company sells forklift operator training and safety-related equipment to commercial customers, including Defendant. Hoover Dep. 12. Mr. Hoover founded the company in 1998. Hoover Dep. 17. He has a Bachelor's degree in business from

Miami University. Hoover Dep. Exhibit 19, pg. 2. At the time of his deposition, Mr. Hoover testified he had previously been retained as an expert witness between 5 to 10 times. Hoover Dep. 50.

Prior to his retention as an expert witness in this case, Defendant hired Mr. Hoover's company to perform "aerial-lift training" in 2003 and 2006. Hoover Dep. 13. Mr. Hoover believes Defendant also hired his company to "certify" aerial-lift trainers in 2009 or 2010. Hoover Dep. 14. Mr. Hoover testified that approximately 60% of his company's revenues derive from providing training services and 40% derives from selling safety-related equipment and products. Hoover Dep. 15. Although Mr. Hoover claims his company has only earned approximately $4,500 to $6,000 from Defendant, he admits that Defendant is a potentially big customer. Hoover Dep. 18.

According to Defendant's EEOC position statement dated August 22, 2011, Defendant's Corporate Manager of Employee Health and Safety, David Leff, e-mailed Mr. Hoover on January 18, 2011 at 8:45 AM, asking Mr. Hoover: "[W]hat would you think of a deaf forklift operator." Hoover Dep. Exhibit 17. Later that same morning, Mr. Hoover wrote back the following:

> Dave, my opinion has changed over the years. OSHA is not the biggest fear, it is keeping people safe and secondly avoiding litigation. I would suggest you not allow a fully deaf person run a forklift at WC, the risk is too great, you need all your senses to safely run a forklift and not being able to hear is just too much to overcome in a busy plant like yours. If he ran over a contractor that would be terrible and would expose WC to huge liability. As I said, years ago I would have maybe told you something different, but the court cases I have worked as an expert have exposed me to the terrible downsides of what happens when companies make a mistake, even one in good faith. Hoover Dep. Exhibit 17.

Mr. Hoover's e-mail prompted one or more of Defendant's managers to prohibit Plaintiff from operating any motorized equipment at all and to restrict Plaintiff to a mere three relatively menial, entry-level positions. At his deposition, Mr. Hoover claimed he referenced the following

in formulating his response to Mr. Leff: (1) an OSHA interpretation letter, (2) his own "basic" knowledge of the Americans with Disabilities Act ("ADA"), (3) ANSI standard "B56.1", and, (4) "the MIOSHA standard." Hoover Dep. 30-39.

Mr. Hoover admitted, however, he didn't have any specific details regarding Mr. Leff's inquiry - including whether the inquiry pertained to a specific person. Hoover Dep. 24, 41-42. Indeed, Mr. Hoover testified: "Like I said, I had no background on what prompted the question, and provided the answer and moved on and never thought twice about it." Hoover Dep. 39.

Mr. Hoover testified he never heard anything more about the matter until he was contacted by Defense Counsel in Spring 2014. Hoover Dep. 42-43. He testified Defense Counsel asked him whether he gave the opinion to Mr. Leff and whether he still held the same opinion. Mr. Hoover testified he confirmed he sent the opinion and still held it. Hoover Dep. 43. He testified Defense Counsel hired him as an expert witness shortly thereafter. *Id.* at 49.

Mr. Hoover prepared an "expert" report, which was later delivered to Plaintiff. During his deposition, Mr. Hoover described a list of materials he reviewed to write his report. He testified the materials were provided by either Defendant or Defense Counsel. Hoover Dep. 77. Notably absent from the list were Plaintiff's (1) safety and training records, (2) personnel file and (3) peer review reports. *Id.* at 124-127. Mr. Hoover never asked for those documents. *Id.*

III. Legal Standard

In *Daubert v. Merrill-Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Supreme Court established what are now well known parameters concerning the admissibility of expert testimony. The Supreme Court charged trial courts with the task of "gatekeeping" to protect juries from being exposed to misleading or unreliable testimony. Id. at 592-593, 597. The party offering the expert testimony must prove its admissibility by a preponderance of the proof. Id. at

593 n. 10. Today, trial Judges have an unequivocal duty to give careful scrutiny to the testimony of paid experts. *Greenwell v. Boatwright*, 184 F.3d 492 (6th Cir., 1999).

A trial court must watch for certain "red flags," those things which, if present, may caution against certifying a witness as an expert. *Hamilton v. Menard, Inc.*, No. 3:10-CV-1997, 2012 U.S. Dist. LEXIS 139519 at *19 (N.D. Ohio September 27, 2012)(citing *Newell Rubbermaid, Inc. v. Raymond Corp.*, 676 F.3d 521, 527 (6th Cir. 2012). These "red flags" include "reliance on anecdotal evidence, improper extrapolation, failure to consider other possible causes, lack of testing . . . subjectivity . . . [and] if a purported expert's opinion was prepared solely for litigation." Id. Furthermore, a trial court should be careful to exclude purported "expert" testimony based on nothing more than personal opinion. See *Turpin v. Merrell Dow Pharmaceuticals, Inc.* 959 F.2d 1349 (6th Cir. 1992).

IV. Discussion

A. The Court should refuse to recognize Mr. Hoover as an expert in this case.

At his deposition, Mr. Hoover testified he considers himself an expert in "forklift safety training, forklift safety operations and pedestrian safety as it applies to industrial facilities." Hoover Dep. 51-52. He further testified he has only previously given expert testimony on those subjects. Hoover Dep. 52-53.

To the extent he qualifies as an expert at all, his "expertise" is limited in a way that precludes him from offering probative, expert testimony in this case. This case is primarily about whether or not a deaf worker can safely operate a forklift and other motorized equipment. Mr. Hoover admits he has never had any formal training in the capabilities of deaf or hearing-impaired workers. Hoover Dep. 53. He admits he has only trained **one** deaf worker to operate a forklift. Hoover Dep. 57-58. That deaf worker successfully passed his training. Hoover Dep. 58. Although Mr. Hoover acknowledges he has "seen a couple of times deaf forklift operators

operating in different environments," he admits he never performed "any extensive or expansive observations" of deaf forklift operators. Hoover Dep. 57.

Mr. Hoover admits he has no specialized knowledge about how deaf people compensate for their lack of hearing in the work environment and any opinion he could give on that subject would be "conjecture." Hoover Dep. 62-63. He has never read any material on how loss of hearing affects a person's level of attentiveness or their visual acuity. Hoover Dep. 63. He is not an expert in human factors as they relate to perception and reaction time. Hoover Dep. 64. Not surprisingly, Mr. Hoover has never published any written works on the subject of deaf workers operating forklifts. Hoover Dep. 56. He has had no medical training beyond basic first aid and CPR. Hoover Dep. 53. He has never taken any formal classes at the college level in medical terminology. *Id.*

Mr. Hoover admits his opinion regarding deaf forklift operators changed over the years in favor of not permitting them to operate. Hoover Dep. 59. But he cannot explain when his opinion changed. *Id.* He did not tie his change of heart to a specific incident involving a deaf operator. *Id.* at 59-61. He did not seek the advice of medical professionals in changing his opinion. Hoover Dep. 70. He did not seek the advice of attorneys either. *Id.* at 70-71.

He merely attributed his change of heart to having trained numerous non-deaf forklift operators in general, having investigated numerous accidents[1] and having become more "risk averse" and "sensitive toward litigation" as a result. Hoover Dep. 59-61. It was clear from his testimony, that his opinion of deaf forklift operators is **not** based on any experience with deaf forklift operators, any formal studies of their capabilities or relative accident rates, or any other empirical evidence. Mr. Hoover is afraid of what he characterizes as "frivolous" lawsuits. Mr.

[1] Mr. Hoover admits he is not an expert in accident reconstruction. Hoover Dep. 65.

Hoover explained: "First of all, you don't have to turn on the news for very long to see different things, like people suing McDonald's for making them fat and whatnot. So, that – I guess, from my own personal experience and TV would be there are some things that are happening in litigation that seem kind of ridiculous." Mr. Hoover, however, admits he has never read any studies or literature with respect to what percentage of personal injury lawsuits brought are deemed frivolous. Hoover Dep. 74. Even though he warns employers that the risk of frivolous lawsuits is significant, he admits his concern is based on nothing more than his own personal opinion. Hoover Dep. 74. He further admits he does not intend to give an expert opinion regarding the risk of a frivolous lawsuits. *Id.*

Mr. Hoover's claims of expertise in certain subjects notwithstanding, this case is not about "forklift safety *training*" or "forklift safety operations" in a general sense. Nor is it about "pedestrian safety as it applies to industrial facilities." This case is primarily about whether Plaintiff – a deaf person - could safely operate a forklift and other motorized equipment at Defendant's plant and whether Defendant lawfully prohibited Plaintiff from continuing to do so.

Mr. Hoover's limited purported expertise will not be needed to resolve any contested issues in this case. He might be qualified to testify whether Plaintiff was properly trained. But that issue is not in dispute. He might be qualified to testify whether Defendant has a proper forklift operator certification program. But that issue is not in dispute either. He might be qualified to provide a critique of Defendant's forklift safety operations. But again, that would not be helpful to understanding any contested issues in this case. Probative expert testimony would shed light on whether Plaintiff could safely operate a forklift or other motorized equipment at Defendant's plant, which Mr. Hoover cannot provide.

Mr. Hoover's report and deposition testimony reveal his opinion regarding deaf forklift

operators is based solely on his own generalized knowledge regarding what deaf workers can and cannot do. Boiled down to its essence, his report is based on nothing more than his own personal opinions and subjective beliefs. Indeed, Mr. Hoover's opinion is based on the very same type of unsubstantiated fear and stereotypes that the ADA protects against.

B. Mr. Hoover admitted he is not an expert in certain subjects discussed in his report.

1. Mr. Hoover is not an expert on the subject of the ADA.

Mr. Hoover opines on the Americans with Disabilities Act ("ADA") in his report. He admits, however, he is not an expert in the requirements of the ADA. Hoover Dep. 33. He is not an attorney. *Id.* He has never been to law school. *Id.* He has never had any formal classroom training in the ADA. *Id.* He never read any texts or treatises on the ADA. *Id.* He does not know how the courts define "reasonable accommodations." *Id.* He does not know how the Department of Labor defines "reasonable accommodations." Hoover Dep. 103. He does not know how the EEOC defines the term "reasonable accommodations." *Id.* at 103-104. He has never talked to an attorney to find out what "reasonable accommodation" means. *Id.* at 33.

Mr. Hoover admits he does not know what the courts, the Department of Labor or the EEOC deem is an acceptable amount of risk in the context of "reasonable accommodations." Hoover Dep. 104. He does not know how courts interpret "direct threat" in the context of the ADA. Hoover Dep. 135. He does not know what the courts, the Department of Labor or the EEOC require to demonstrate whether or not a "direct threat" exists. Hoover Dep. 136.

2. Mr. Hoover is not an expert on "deafness" or the capabilities of deaf people in the work environment.

Mr. Hoover's report makes several assertions regarding what deaf workers can and cannot do in the workplace. But he admits he is not an expert on the capabilities of deaf workers in any particular work environment, including industrial workplaces. Hoover Dep. 55, 61. He

never read any literature or studies comparing the accident rates between deaf workers and non-deaf workers. Id. He never read any literature or studies comparing the accident rates between deaf workers and non-deaf workers with respect to operating equipment. Id. He never contacted any advocacy groups for the deaf or hearing impaired, professional safety boards or associations, the Department of Labor, the EEOC, or any governmental agencies working in other industries or regulating other types of worker standards to see if they knew of any such studies. Hoover Dep. 138. He never wrote or published any material regarding deaf workers operating forklifts.[2] Hoover Dep. 56. He never compared Plaintiff's safety record with non-deaf employees.

Although, he claims to have "seen a couple of times deaf forklift operators operating in different environments...," he admits he has not performed "any extensive or expansive observations of them." Hoover Dep. 57. He claims to have trained **one** deaf forklift operator. Hoover Dep. 57-58. He admits the operator successfully completed the training. Hoover Dep. 58. But he admits he never followed up to see how that deaf operator performed after the training. *Id.*

In his report, Mr. Hoover asserts deaf forklift operators cannot "compensate visually" to "overcome the fact they can't hear what is going on around them." Hoover Dep. Exhibit 19 pg. 6. He admits, however, he has no specialized knowledge regarding how deaf people compensate for lack of hearing. Hoover Dep. 62-63. He further admits any opinion he could offer would be "conjecture." Hoover Dep. 62. He never read any studies or literature devoted to the effect of a person's loss of hearing on their level of attentiveness. Hoover Dep. 63. He never read any literature or studies on the impact a person's loss of hearing has on their visual acuity. Id. He admits he is not an expert in human factors as it relates to perception and reaction time. Hoover

[2] Forklifts, "powered industrial truck" and "PIT" are used interchangeably. Hoover Dep. 29.

Dep. 65. Despite his report, he testified he did not intend to offer expert testimony regarding how deaf forklift operators use their vision to compensate for loss of hearing. Hoover Dep. 157.

3. Mr. Hoover admits he is not an expert in other motorized equipment.

Plaintiff alleges in his Complaint, and it is undisputed, Defendant prohibited him from operating **all** powered equipment – not just forklifts. This equipment includes cranes, motorized floor scrubbers and human-powered bicycles. Mr. Hoover admits he is not an expert on cranes, motorized floor scrubbers or human-powered bicycles. Hoover Dep. 114-117. Furthermore, he testified he did not plan to offer expert testimony on those subjects. *Id.*

4. Mr. Hoover is not an expert on automobile or semi-truck safety.

Mr. Hoover anticipated people might be inclined to believe that deaf workers can operate forklifts because they can operate automobiles. Hoover Dep. 166-167. He attempted to preempt that argument by comparing forklifts and automobiles. To make that comparison, he made several assertions regarding automobile safety manufacturing practices, automobile weight specifications and automobile operations from a safety standpoint. Hoover Dep. Exhibit 19, pg. 6-7. But Mr. Hoover admits he is not an expert on automobile safety and does not hold himself out as an expert on automobile safety. Hoover Dep. 167; Hoover Dep. Exhibit 19, pg. 6. With respect to his comparison, he admits his opinion was based on a mere "common knowledge of automobiles…." Hoover Dep. 167-168. When pressed where he obtained his knowledge of automobile safety manufacturing practices, Mr. Hoover claimed he learned about them, in part, by watching "Dateline" and "20/20" on television. Hoover Dep. 167. He also admits he is not an expert on semi-trucks. *Id.* at 169. And he admits he does not hold the same opinion regarding semi-truck vs. forklift safety as he does automobile vs. forklift safety. *Id.*

Mr. Hoover should not be permitted to offer any testimony regarding the differences between automobiles/semi-trucks and forklifts at trial. Any knowledge he has of such differences

is based only on common knowledge and not expert knowledge. The prejudice that would result from permitting him to offer such comparisons would greatly outweigh any probative value.

5. Mr. Hoover is not an expert on how OSHA decides to issue a citation.

In his report, Mr. Hoover suggests that OSHA could cite an employer for allowing a deaf worker to operate a forklift. Hoover Dep. Exhibit 19, pg. 4. Mr. Hoover suggests that OSHA could base a citation on the "General Duty Clause" contained in that section of the Code of Federal Regulations related to OSHA. Mr. Hoover further claims that OSHA could rely on ANSI standard B56.1 to issue a citation under the General Duty Clause.

Mr. Hoover, however, is not qualified to provide any reliable opinion about whether OSHA would cite an employer for permitting a deaf worker to operate a forklift. He admits he never worked at OSHA. Hoover Dep. 132. He was never asked to assist OSHA in interpreting whether or not a violation has been committed. Hoover Dep. 133. When asked if he read literature or materials that would give him expert knowledge on how OSHA interprets things within the OSHA regulations, he only claimed he reviewed citations on OSHA's public website and some unspecified "newsletters." Hoover Dep. 133-134.

Mr. Hoover admits he is unaware of any specific instance where OSHA enforced the ANSI standard with respect to deaf forklift operators. Hoover Dep. 134. He admits he is merely speculating this could happen. Hoover Dep. 135. Mr. Hoover should not be permitted to suggest to the jury that permitting deaf workers to operate forklifts could violate OSHA regulations. He is neither qualified to offer that opinion nor is there any evidence to suggest that is the case.

C. Mr. Hoover should not be permitted to offer an expert opinion that Plaintiff cannot safely operate a forklift at Defendant's plant.

1. Mr. Hoover failed to perform a sufficient investigation to support his opinion that Plaintiff cannot safely operate a forklift.

Although Mr. Hoover's report ultimately concludes Plaintiff should not be permitted to

operate a forklift at Defendant's plant, the method he used to arrive at that conclusion is so flawed it renders his opinion unreliable. Mr. Hoover admits he never reviewed Plaintiff's forklift training records. Hoover Dep. 125-126. He never reviewed Plaintiff's personnel file. *Id.* He never reviewed peer review reports of Plaintiff's work performance. *Id.* He admits he should have if they contained information concerning Plaintiff's safe operation of equipment. Hoover Dep. 128.

His methodology is also flawed because he ignored the available evidence. This goes to more than just the weight of the evidence. No reasonable expert would have failed to consider the following. Mr. Hoover admits he never saw a document showing Plaintiff was involved in a collision. Hoover Dep. 198. He never saw a document showing Plaintiff was disciplined for unsafe operation. Id. He never saw a near-miss report where Plaintiff drove the forklift. *Id.*

Mr. Hoover admits he never requested to see Plaintiff's forklift training records. Hoover Dep. 125. He testified because Defendant's representatives told him Plaintiff "went through the program successfully," he didn't feel [he] needed to go any deeper than that. Hoover Dep. 126. He agrees Plaintiff received structured training, annual evaluations and retraining in the operation of forklifts and overhead cranes during his 11 years of employment by Defendant. Hoover Dep. 198. He agrees Plaintiff received excellent reviews for safety. Hoover Dep. 200. He agrees Plaintiff received high grades on performance evaluations, which included safety evaluations. Hoover Dep. 195. He agrees Defendant evaluated Plaintiff and found him to be safe. Hoover Dep. 195, 200. He even admits Defendant determined Plaintiff was qualified to operate a forklift, crane and other mobile equipment. Hoover Dep. 199-200.

It is clear Mr. Hoover intended to ignore any information tending to prove Plaintiff could safely operate a forklift. In arriving at his opinion, he gave no weight to the fact Plaintiff

successfully completed Defendant's forklift training program. Hoover Dep. 127-128. He gave no weight to Plaintiff's peer reviews. Hoover Dep. 128-130. He apparently gave no weight to the fact Plaintiff consistently received high ratings for safety.

Mr. Hoover testified he could not offer any opinion regarding the likelihood Plaintiff would have a collision with someone, if he were put back on a forklift. Hoover Dep. 200. In this regard, Mr. Hoover also testified he is not a "statistics expert." Id. He could not explain why Plaintiff never hit anyone with a forklift despite operating one for over ten years – and he did not try. Hoover Dep. 199. Indeed, he claimed: "It's not a good question. No, I can't explain it." Id. Importantly, Mr. Hoover testified he did not believe a collision was imminent, if Plaintiff was put back on a forklift. Hoover Dep. 200-201.

D. Mr. Hoover should not be permitted to testify regarding the hypothetical scenarios and anecdotal incidents mentioned in his report.

1. The methodology he uses to draw conclusions from hypothetical situations is premised on unsubstantiated and unreliable assumptions.

In his report, Mr. Hoover creates hypothetical situations to support his opinion that Plaintiff should not be permitted to operate a forklift at Defendant's plant. For example, he claims deaf operators would not be able to hear problems developing in a forklift's mechanical systems. He also postulates a deaf operator could not hear a "semi-trailer floor cracking under pressure when being loaded or unloaded, indicating that a failure was about to occur." He admits, however, his opinions assume the operator would not detect these issues through other senses. Hoover Dep. 143. On this point, he admits his assumption is based merely on his own "generalized" knowledge regarding deaf workers – not an expert's knowledge. *Id.* at 145.

The jury does not need Mr. Hoover to tell them Plaintiff cannot "hear" problems developing in mechanical systems or semi-trailer floors beginning to crack. It is undisputed Plaintiff is deaf. This testimony from Mr. Hoover would simply be cumulative and prejudicial.

Plaintiff's response is that he can detect problems through the use of his other senses, that these contingencies happen so rarely as to not constitute valid reasons for precluding him from operating motorized equipment and that reasonable accommodations exist that can further reduce the risk. Mr. Hoover admits he has no expertise in Plaintiff's ability to compensate using his other senses. And, his testimony demonstrates he did not fully consider whether reasonable accommodations might exist to mitigate some of the risks he claims concerned him. *Id.* at 203-206.

E. Mr. Hoover had insufficient evidence to rely on the anecdotal incidents described in his report.

Mr. Hoover's report also relied upon anecdotal evidence involving incidents allegedly reported to him by Defendant's representatives. This evidence is so unreliable, however, no reasonable "expert" would rely on it without more. For example, Mr. Hoover claims Plaintiff was involved in a near-miss accident as a forklift operator when the horn on his forklift allegedly failed. He did not know, however, the source of the alleged near-miss report - nor did he bother to ask who reported it. Hoover Dep. 148. He did not know who tested the horn or when it was tested – indeed, it is unclear whether he really knew that the horn had actually been tested. Hoover Dep. 149. He did not review any documentation related to the alleged horn failure or even a near-miss report. *Id.* He admitted he "didn't see any official document on that that." Hoover Dep. 197.

Mr. Hoover also claims to have learned about another incident where a non-deaf forklift operator allegedly struck a pedestrian, knocking the pedestrian to the ground. Unaware he had knocked the pedestrian down, the operator nevertheless allegedly stopped because he had a "sense" something "was not quite right." According to Mr. Hoover, the operator was preparing to move the forklift again when he heard the pedestrian scream. Mr. Hoover claims the operator

heard the scream and stopped – thereby avoiding a tragic incident. He uses this alleged incident to bolster his opinion only non-deaf workers should be permitted to operate forklifts at Defendant's plant.

Mr. Hoover, however, could offer no reliable, corroborating evidence this incident ever really occurred. He claims Defendant's manager, Ryan Lamb, told him about the incident. Mr. Lamb participated in the decision to prohibit Plaintiff from operating motorized equipment. Hoover Dep. 157. Mr. Hoover did not know where Mr. Lamb learned about the incident and he did not ask. Hoover Dep. 158. He couldn't recall if he asked Mr. Lamb when the incident occurred. Hoover Dep. 158. He did not believe Mr. Lamb personally witnessed the alleged incident. Id. He did not know if Mr. Lamb learned about the incident from a person or a document. Id. And, he did not know whether Mr. Lamb's source was a first-hand account or not. Id. Mr. Hoover could not explain what miraculous, alleged "sense" stopped the forklift driver from proceeding after he purportedly knocked the pedestrian down. Hoover Dep. 159. In sum, Mr. Hoover admitted this incident was communicated to him third-hand, "at a minimum." Id. Further, he admitted he "didn't investigate it at all to find out who was involved." Id.

V. Conclusion

It is common for parties in litigation to utilize expert testimony. But that testimony should have at least some minimum indicia of reliability. On its face, and examined in the light of his deposition, Mr. Hoover's "expert" report has been exposed as being totally unreliable. It is no wonder Defendant avoided relying on Mr. Hoover's report during the summary judgment briefing.

Mr. Hoover will be a fact witness at trial. He can testify Defendant sought his advice before prohibiting Plaintiff from operating motorized vehicles. He can testify he spoke with the

decision-makers, who informed him Plaintiff satisfied all of his forklift training requirements and had a good safety record. He can even testify that during his discussions with the decision-makers, they informed him Plaintiff was "qualified to operate forklift, crane and other mobile equipment." Hoover Dep. 199-200.

But Mr. Hoover's hypotheticals, assumptions and anecdotes are clearly unreliable. So, is his opinion Plaintiff cannot safely operate a forklift. The prejudice that would result from permitting him to offer these things at trial would greatly outweigh any probative value they would provide. The Court should not allow it.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney caused the foregoing to be served on all counsel for all parties via the Clerk of Court's CM/ECF system on August 11, 2016.

/s/ *Danny L. Caudill*
Danny L. Caudill (0078859)