NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES IRWIN BOBACHER, a single man, Plaintiff - Appellant, v. WACKER USA CORPORATION, a foreign corporation; et al., Defendants - Appellees.	No. 03-15752 D.C. No. CV-00-00741-EHC MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Earl H. Carroll, District Judge, Presiding

Argued and Submitted October 6, 2004
San Francisco, California

Before: TROTT, McKEOWN, Circuit Judges, and SHADUR, Senior District Judge.**

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The Honorable Milton I. Shadur, Senior Judge for the United States District Court for the Northern District of Illinois, sitting by designation.

Bobacher challenges the district court's exclusion of his expert witness on reliability grounds and grant of summary judgment on all of his claims, including his failure to warn claim.

Under General Elec. Co. v. Joiner, 522 U.S. 136, 139 (1997), we review the district court's reliability determination for the proposed admission of scientific or technical evidence under Federal Rule of Evidence 702 for abuse of discretion. Bobacher argues that the district court erred in finding that his technical expert's failure to perform any tests on the Wacker saw or to produce any published tests on the fastening systems renders the expert's proffered testimony unreliable. The factors outlined in Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993), "do not constitute a definitive checklist or test." Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 150 (1999) (internal quotations omitted). The district court has "broad latitude when it decides how to determine reliability," id. at 142, and the district court's consideration of indicia of reliability was not an abuse of discretion.

Summary judgment was proper on Bobacher's failure to warn claim. The Supreme Court has held that a "plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment . . . even where the evidence is likely to be within the possession of the defendant." Anderson v.

Liberty Lobby, Inc., 477 U.S. 242, 257 (1986). Although Bobacher's counsel did not waive his failure to warn claim in her letter to opposing counsel, Bobacher presented no affirmative evidence and failed to articulate any material factual dispute that would defeat the motion for summary judgment.

AFFIRMED.