

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Pierino Perciballi and Brigida R. Perciballi v. Mountain Creek Resort Inc.; Mountain Creek Management, LLC; Great Gorge; Snow Creek, LLC d/b/a Mountain Creek Resort, Inc.; Snow Operating, LLC; Snow Partners, LLC; John Doe Ski Resort Operators (1-5); John Doe Ski Resort Maintenance Companies (1-5); John Doe Ski Resort Inspection and Safety Companies (1-5)

Perciballi v. Mountain Creek Resort · No. 2:23-cv-00948 (BRM) (SDA) · Decided January 29, 2026

SUMMARY

The United States District Court for the District of New Jersey addressed defendants' motion to preclude plaintiffs' skiing-accident expert, Richard Penniman, and to impose discovery sanctions based on his unannounced inspection of the resort. The court held that the inspection did not violate Rule 34 or warrant sanctions and that Penniman's opinions were generally sufficiently reliable under Rule 702 and Daubert. The court excluded only opinions asserting that shadows caused the accident, while permitting testimony about fencing visibility, shadows generally, and ski-course design standards.

CASE DETAILS

COURT	United States District Court for the District of New Jersey
WRITING FOR THE COURT	Brian R. Martinotti
JURISDICTION	United States District Court for the District of New Jersey
DECIDED	January 29, 2026
DOCKET	2:23-cv-00948 (BRM) (SDA)
DISPOSITION	other
PROCEDURAL POSTURE	Defendants moved to preclude plaintiffs' expert witness and portions of his report under Daubert and the Federal Rules of Evidence, and sought discovery sanctions based on the expert's unannounced inspection of the ski resort. The court denied the motion in part and granted it in part, excluding opinions that the expert lacked a sufficient factual foundation to give concerning the ultimate cause of the accident.

STANDARD OF REVIEW	The court applied the Federal Rules of Evidence and its gatekeeping function under Federal Rule of Evidence 702, assessing expert qualifications, reliability, and fit. It also applied the Pennypack factors to the requested discovery sanction and exclusion of evidence.
PRECEDENTIAL VALUE	unpublished

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QUESTIONS PRESENTED

1. Whether Penniman's unannounced inspection of the publicly accessible ski resort violated Federal Rule of Civil Procedure 34 or otherwise warranted exclusion of his testimony and report as a discovery sanction.
2. Whether Penniman's opinions concerning fencing color, shadows, ski-trail organization, learning-area placement, and skier behavior satisfied Federal Rule of Evidence 702 and Daubert reliability and qualification requirements.
3. Whether Penniman could testify that shadows caused Perciballi's accident despite not witnessing the accident or personally interviewing the fact witnesses.

HOLDINGS

1. An inspection of premises open to the public does not violate Federal Rule of Civil Procedure 34(a)(2) when the inspecting expert has permission to enter, does not exceed the ordinary parameters of that permission, and does not pose a greater articulable danger or burden than that expected of a typical visitor. Penniman's inspection did not constitute a discovery violation, and exclusion was unwarranted in any event.
2. Penniman's opinions concerning the relative safety of fencing colors, the effect of shadows on visibility generally, ski-trail organization, learning-area placement, and skier behavior were sufficiently reliable and supported by an adequate factual foundation to be admissible under Rule 702, subject to cross-examination and challenges to weight.
3. Penniman may testify generally about how shadows can affect the visibility of hazards and may offer opinions grounded in his site inspection, but he may not testify that shadows caused Perciballi's accident or conclusively caused him to fail to see the fencing.

KEY QUOTATIONS

“where the premises are open to the public and the inspecting party has permission to enter (and does not deviate from the parameters of the permission), parties are not required to seek approval prior to inspection

under Fed. R. Civ. P. 34(a)(2), unless the inspection poses a greater, articulable danger or burden to the business, employees, or other visitors than is expected of a typical visitor.” (Section III.A)

“Therefore, the Penniman Report is precluded where it comments directly on the cause of the accident, for which Penniman has no personal knowledge, and he will not be permitted to testify that shadow cover conclusively caused the accident.” (Section III.B.2)

“Mountain Creek’s Motion to Preclude Penniman’s Testimony and Opinions is GRANTED IN PART, Penniman will not be permitted to offer an opinion or testify as to the ultimate cause of the accident, and DENIED on all other grounds.” (Conclusion)

FACTUAL BACKGROUND

On February 21, 2021, Pierino Perciballi collided with blue mesh fencing while skiing with his sixteen-year-old son on the Matchmaker trail at Mountain Creek Resort. He alleged that the fencing had been left down, was insufficiently visible, and reflected negligent resort design and maintenance; the collision caused significant injuries and continuing disability. Plaintiffs' expert, Richard Penniman, inspected the publicly accessible resort without announcing his presence, using a lift ticket and ordinary visitor access while taking photographs and making observations.

PROCEDURAL HISTORY

Plaintiffs filed a diversity personal-injury action alleging negligent management and design of Mountain Creek Resort and loss of consortium. Defendants answered without moving to dismiss. After fact and expert discovery concluded and mediation failed, defendants moved to preclude the testimony and report of Richard Penniman and sought discovery sanctions. The court declined oral argument, denied sanctions and most of the evidentiary challenges, but precluded Penniman from testifying that shadows caused the accident.

DISPOSITION

other

CASES CITED

- Holbrook v. Lykes Bros. Steamship Co., Inc., 80 F.3d 777, 780 (3d Cir. 1996)
- DeLuca v. Merrell Dow Pharmaceuticals, Inc., 911 F.2d 941 (3d Cir. 1990)
- Kannankeril v. Terminix International, Inc., 128 F.3d 802, 806-07 (3d Cir. 1997)
- Karlo v. Pittsburgh Glass Works, LLC, 849 F.3d 61, 80 (3d Cir. 2017)
- In re TMI Litigation, 193 F.3d 613, 665 (3d Cir. 1999), amended, 199 F.3d 158 (3d Cir. 2000)
- Calhoun v. Yamaha Motor Corp., U.S.A., 350 F.3d 316, 321 (3d Cir. 2003)
- In re Paoli R.R. Yard PCB Litigation, 35 F.3d 717 (3d Cir. 1994)
- Elcock v. Kmart Corp., 233 F.3d 734 (3d Cir. 2000)
- Gloucester Township Board of Education v. E.N., Civ. A. No. 22-6568, 2024 WL 4834851, at *5 (D.N.J. Nov. 19, 2024)

- *Nicholas v. Pennsylvania State University*, 227 F.3d 133, 148 (3d Cir. 2000)
- *Konstantopoulos v. Westvaco Corp.*, 112 F.3d 710 (3d Cir. 1997)
- *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 298 (3d Cir. 2012)
- *Meyers v. Pennypack Woods Home Ownership Association*, 559 F.2d 894 (3d Cir. 1977)
- *Varner v. Target Corp.*, 2025 WL 475706, at *4 (U.S.D.C. Feb. 12, 2025)
- *Baugus v. CSX Transportation, Inc.*, 223 F.R.D. 469, 470-71 (N.D. Ohio 2004)
- *Trevelyn Enterprises, LLC v. SeaBrook Marine, LLC*, Civ. A. No. 18-11375, 2020 WL 4437236, at *4 (E.D. La. Aug. 3, 2020)
- *Willink v. Boyne USA, Inc.*, Civ. A. No. 12-74, 2013 WL 12141324, at *3 (D. Mont. Dec. 20, 2013)
- *Grabau v. Target Corp.*, 2008 WL 616068, at *3 (D. Colo. Feb. 29, 2008)
- *McConnell v. Canadian Pacific Realty Co.*, 280 F.R.D. 188, 193 (M.D. Pa. 2011)
- *Janssen Pharmaceuticals, Inc. v. Alkem Laboratories Ltd.*, Civ. A. No. 23-2939, 2025 WL 2355957, at *3 (D.N.J. Aug. 14, 2025)
- *Betterbox Communications Ltd. v. BB Technologies, Inc.*, 300 F.3d 325, 327-29 (3d Cir. 2002)
- *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149-50 (1999)
- *Gumbs v. International Harvester, Inc.*, 718 F.2d 88, 98 (3d Cir. 1983)
- *Fedorczyk v. Caribbean Cruise Lines, Ltd.*, 82 F.3d 69, 75 (3d Cir. 1996)
- *Matlin v. Langkow*, 65 F. App'x 373, 383 (3d Cir. 2003)
- *Fernandez v. Baruch*, 244 A.2d 109, 112 (1968)
- *Floorgraphics, Inc. v. News America Marketing In-Store Services, Inc.*, 546 F. Supp. 2d 155, 167 (D.N.J. 2008)