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COMMONWEALTH OF KENTUCKY  
PERRY CIRCUIT COURT  
CIVIL ACTION NO. 02-CI-00014

MOUJAHED ACHTAR

PLAINTIFF

v.

**CURTIS GREEN AND CLAY GREEN, INC.,**  
**D/B/A GREEN'S TOYOTA'S**  
**MOTION TO EXCLUDE TESTIMONY OF JOHN TIERNEY AND**  
**DAVID GIBSON**

CURTIS GREEN AND CLAY GREEN,  
INC. d/b/a GREEN'S TOYOTA and  
TOYOTA MOTOR CORPORATION

DEFENDANTS

**INTRODUCTION**

Curtis Green, Clay Green, Inc. d/b/a Green's Toyota ("Green's Toyota") moves to exclude the testimony of John P. Tierney, who purports to be a vocational expert, and Mr. Tierney's employee, David Gibson, a CPA, regarding alleged loss of future earning capacity resulting from Plaintiff's claimed injuries in a car crash. Tierney has given his discovery deposition in this case and is expected to give similar testimony at trial.<sup>1</sup> Gibson has given an evidentiary deposition.

Tierney's opinions are not based upon accepted or reliable sources and will not assist jurors in understanding the evidence or determining a fact in issue. Gibson's quantifications are predicated upon Tierney's opinions. Tierney does not have a degree in medicine, accounting, economics, or statistics. [Tierney depo., pp. 97-98]. He is not a member of any boards or associations for rehabilitation counselors. [Tierney depo., p. 99]. He has not practiced as a vocational rehabilitation counselor in eighteen years. [Tierney depo., pp. 97-98]. For most of

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<sup>1</sup> Green's Toyota objects to using Tierney's discovery deposition to present expert testimony at trial, even if the court should deem Tierney's testimony admissible.

the past two decades, he has served as a professional witness. During the last four years, he has never testified for a defendant. [Tierney depo., pp. 99-101].

### TESTIMONY OF JOHN TIERNEY AND DAVID GIBSON

Plaintiff Moujahed Achar, a medical doctor, was injured in a single-vehicle accident on the Hazard Bypass on December 12, 1999. He claims permanent loss of earning capacity as a result of his injuries. Plaintiff has called upon the Tierney-Gibson duo to offer expert opinions on this subject. According to their depositions and reports, Tierney and Gibson, in tandem, will testify that Dr. Achar suffers economic damages of over two million dollars as a result of orthopedic injuries sustained in his August 12, 1999 accident, with "vocational expert" Tierney pronouncing Dr. Achar disabled, and CPA Gibson, Tierney's employee, totting up the alleged damages.

Tierney testified at his discovery deposition that Dr. Achar falls into a category classified as "not severely disabled," as the U.S. Department of Commerce defines that term. [Tierney depo., pp. 8-9]. Tierney explained that during his brief interview with Dr. Achar, Dr. Achar complained of various orthopedic injuries; that he relied upon Dr. Achar's self-reported limitations, and that he did not do or see any actual testing of Dr. Achar for such limitations. [Tierney depo. p. 19] Tierney says he relied upon Dr. Achar's self-assessment because he [Tierney] is not a doctor, and because "it's the problems for doctors to say, for example, are problems with pain, are problems with arthritis, are problems with concentration, focus, and memory, are problems with fatigue and all those kinds of things, are those things likely to affect a person in the future in terms of the kind of work a person can do." [Tierney depo. p. 19].

Tierney testified that he also bases his opinions about Dr. Achar's limitations upon the report of Dr. Robert Granacher, a forensic psychiatrist. [Tierney depo. pp. 8-9] Tierney noted

nothing whatsoever about cognitive problems on his interview form. [Tierney depo., p. 115]. However, Dr. Granacher testified at *his* discovery deposition that his expected testimony goes *solely* to mental function, that he is not qualified to discuss orthopedic injuries, and that he will not be offering an opinion on anything other than the alleged cognitive deficits he says Dr. Achtar has suffered. [Granacher depo., p. 8].

Tierney, however, has used Dr. Granacher's admittedly incompetent testimony about orthopedic limitations to justify applying to Dr. Achtar a definition of disability that the United States Department of Commerce as part of an attempt to determine what sources of income various people had. Tierney does not mention memory, concentration or focus in his report. Rather, he lists Dr. Achtar's "reported problems" only as "numbness and tingling in fingers, forearm and elbow; cramps in left shoulder and arm; aching from shoulder to hand; fatigue." [Tierney depo., Exhibit 1]. The definition Tierney uses broadly and circularly provides that a work-related disability exists whenever a person has *any* health problem that limits the amount or kinds of work he can do. [Tierney depo., p. 10].

Tierney went from that imprecise definition to the precise conclusion that Dr. Achtar would experience 14.7 % loss in future earning capacity, as well as a loss of several years of work life expectancy. [Tierney depo. p. 11] As noted above, Tierney based these conclusions upon a statistical survey done by the Department of Commerce. The statistical pool consisted of all persons with a doctorate or professional degree, who the Department of Commerce had classified as "not severely disabled." [Tierney depo., pp. 11-12].

Tierney's conclusions are not based upon Dr. Achtar's actual earnings before or after the accident. In fact, Tierney said he had not even looked at Dr. Achtar's actual earnings from 2003 through 2005. [Tierney depo., p. 76-78]. Instead, Tierney looked to a statistical average for

internists. [Tierney depo., p. 78] According to Tierney, "...the question isn't what he's truly earning, the question is what he's likely to be earning and what reasonably represents his earning capacity in the future." [Tierney depo. p. 112] Upon cross-examination at his discovery deposition, Tierney admitted that it is not really possible to predict what someone is actually going to earn in the future and that estimates such as the one he offers are at best a "rough approximation." [Tierney depo., pp. 74-75].

David Gibson works for Tierney at Vocational Econometrics, in which Tierney owns a half interest. [Tierney depo., pp. 6-7, 65]. Gibson has concluded, also on the basis of the census figures Tierney used to derive that Dr. Achtar was "not severely disabled", that Dr. Achtar would suffer a lifetime loss of earning capacity of over two million dollars. Gibson admitted at his deposition, however, that without Tierney's expert conclusion that Dr. Achtar is in fact vocationally disabled, there would be no basis for his own quantification of the economic effects of that assumed vocational disability.

### ARGUMENT

Green's Toyota objects to Tierney's and Gibson's testimony because their sources for evaluating or estimating earning capacity are unreliable and not appropriate as a basis for either Tierney's pronouncement of disability or Gibson's calculations of lost earning capacity. Since Tierney's deposition is insupportable and therefore not properly admissible, Gibson's testimony must likewise be disallowed, as Gibson has acknowledged that without Tierney's pronouncement that Dr. Achtar is vocationally disabled, Gibson would have had no basis for his calculations.

Tierney's opinion is unreliable for several reasons. First, Tierney's assessment of Dr. Achtar's orthopedic limitations, which are the foundation of his determination that Dr. Achtar is disabled at all, derive solely from Dr. Granacher's report and Tierney's own discussion with Dr.

Achtar. Tierney testified that he considered Dr. Achtar "not severely disabled" because of his orthopedic injuries and his behavioral changes, as reported by Dr. Achtar and listed in Tierney's report. [Tierney depo. pp. 9-11] However, Dr. Granacher testified unequivocally that he was offering no opinion whatsoever about the effects of Dr. Achtar's physical limitations, if any, but only upon the effects of an alleged cognitive deficit caused by loss of circulation in the left temporal lobe of his brain. Thus, Tierney's assessment of disability, which relies in part upon assumptions of orthopedic limitations, cannot legitimately derive from Dr. Granacher's opinion, as Tierney claims. He certainly cannot base his opinion upon Dr. Achtar's self-assessment; otherwise, Dr. Achtar might as well just be his own expert. Lacking a medical degree, Tierney is not competent to offer an opinion about the nature or extent of a person's physical limitations. Further, Tierney's report makes no mention of behavioral changes, and he should not be permitted to backfill a weak opinion by echoing Dr. Granacher.

Tierney, and also Gibson, also improperly use a Census Bureau survey as authority for their opinions. The survey in question is the "Current Population Survey, the March Supplement to the Current Population Survey." Tierney and Gibson did not include this information with their nearly identical reports, and did not provide a copy at either of their depositions. Their reports refer to the Census Bureau web site as their authoritative source. ([www.census.gov/acs/www](http://www.census.gov/acs/www)).

**According to the very website from which the Gibson-Tierney team derived this survey information on post injury earning capacity, such information is inappropriate for the purpose for which they attempt to use it:**

Researchers and others often have used the current population survey to identify the population who are said to have a "work disability." The questions used for this purpose, however, were not designed or tested with the intent of measuring disability, and

thus the reliability and validity of the estimates generated for these questions is unknown. The questions were not placed in the CPS to measure disability, but rather, to achieve other goals....

It is not known whether respondents to this question have clear or common understanding of terms such as 'health,' 'disability,' 'type,' 'amount,' or 'work.'

(See printout from website, Attachment A hereto). In an article published in June 2001, in the United States Government Monthly Labor Review, Thomas Hale, an economist with the Office of Employment and Unemployment Statistics of the Bureau of Labor Statistics, stated that the use of such employment statistics for the purposes Gibson and Tierney exploit it is not valid:

The current CPS questions on work limitation and disability income did not begin with any definition of disability. In fact, the purpose of the work limitation question is to serve as a screen for the income questions. It was specifically designed to direct respondents to questions on sources of income. Neither the work limitation nor the income questions were designed to identify the population with disabilities, nor were they tested to determine if they do so.

(See Hale article, Attachment B hereto).

Finally, both Tierney and Gibson acknowledge that the survey upon which they premise their two-part joint opinion includes statistical information for anyone with a doctorate degree, including school teachers or workers in other fields. [Tierney depo. pp 12-13]. Thus, Gibson and Tierney have used unreliable and inappropriate data derived from a broad and non-representative sample in order to form their respective opinions. Opinions based on unreliable and inappropriate data cannot be helpful to a jury.

The law with regard to the admissibility of expert testimony under the Kentucky Rules of Evidence, §702, provides that 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.

Applying the identical federal rule, the United States Supreme Court decision in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), has become the landmark that provides guidance in the application of the rule. Kentucky has adopted the *Daubert* approach. *Miller v. Eldridge, Ky.*, 146 S.W.3d 909 (2004). *Mitchell v. Kentucky, Ky.*, 908 S.W.2d 100 (1995);

While *Daubert* on its facts discussed scientific knowledge, the rule was expanded by the Supreme Court in *Kumho Tire Company v. Carmichael*, 526 U.S. 137 (1999) to include expert testimony generally. The rule is that even though a person may be qualified as an expert, the trial court can and should examine the “method” used in analyzing data and making an analysis. Only if the trial court determines that the methodology, procedures, or data relied upon was reliable should it allow the testimony. As *Daubert* stated, the methods, procedures and data involved must be accepted in the area of expertise rather than upon subjective belief or unsupported speculation. The reliability of opinion evidence requires a determination as to its accepted validity within the field of expertise in which it is expressed.

Applying the logic and reasoning of *Daubert*, the trial court must make a preliminary assessment of whether the reasoning or methodology underlying the testimony is technically valid and whether the reasoning or methodology can be applied to the fact in issue. *Mitchell v. Kentucky, Ky.*, 908 S.W.2d 100 (1995). *Daubert*, of course, established that the trial court is a gatekeeper to apply its discretion and reasoning to keep out material which lacks the validity to assist the jury in understanding the evidence or to determine a fact in issue within the scope of Evidentiary Rule 702. Judges should not admit evidence which is “connected to existing data

only by the *ipse dixit* of the expert." *General Electric Co. v Joyner*, 118 S. Ct. 512, 519 (1997). Tierney has admitted outright that his opinion is only "a rough approximation." Where an expert's opinion amounts to a "mere guess or speculation," the court should exclude it. *U.S. v L.E. Cooke Company, Inc.*, 991 F. 2d 336, 3412 (6<sup>th</sup> Cir. 1993). Applying the foregoing rules to the case in question, it is obvious the opinions of Tierney and Gibson lack any validity or foundation.

### CONCLUSION

Tierney's and Gibson's testimony with regard to Dr. Achtar's alleged economic loss is based on flawed and unreliable data and poor methodology. Tierney's conclusion that Achtar is disabled derives in part from Tierney's conclusion that Dr. Achtar has orthopedic limitations that prevent him from doing his full job as an internist. Tierney's conclusion, however, is based only upon what Dr. Achtar reported and what Dr. Granacher said. No objective tests were done. Dr. Granacher's opinion, according to Dr. Granacher himself, goes only to cognitive deficits--a factor Tierney did not address in his report.

Tierney's and Gibson's mirror-image analyses involve a comparison of economic data which does not involve similar occupations or categories of income to those of Dr. Achtar. Moreover, the provider of the data they rely upon specifically disclaims its use for determining disability. For all of the foregoing reasons, Tierney's and Gibson's respective testimony and reports should be excluded at the trial of this case.

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**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing has been served upon the following via facsimile and first class mail, postage prepaid, on this the 30<sup>th</sup> day of August, 2005.

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