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COMMON PLEAS
WARREN COUNTY

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Jeffrey T. Kenney (0051807)
Attorney for Defendant

COURT OF COMMON PLEAS
WARREN COUNTY, OHIO

KEVIN ARTL

Plaintiff,

v.

BERNARD WRIGHT
aka BERNARD WRIGHT, JR.

Defendant.

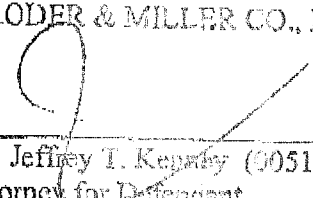
CASE NO. 02CV59010
(Magistrate Fedders)

DEFENDANT'S
MOTION IN LIMINE
RE: GAMBOA

Now comes the Defendant, Bernard Wright, Jr., by and through counsel and hereby moves this Court in limine, pursuant to Rule 702, 703, and 803 of the Ohio Rules of Evidence asking the Court to exclude the reports and testimony of A.M. Gamboa. Said Motion is based upon the Memorandum attached hereto and incorporated herein.

Respectfully submitted,

DRODER & MILLER CO., L.P.A.


By Jeffrey T. Kenney (0051807)
Attorney for Defendant
125 W. Central Parkway
Cincinnati, Ohio 45202-1006
(513) 721-1504, Ext. 211

MEMORANDUM

As this Court is aware, the Defendant has previously filed a motion in limine on September 2, 2003 seeking to exclude the testimony of A.M. Gamboa and his report. This motion and A.M. Gamboa's testimony was discussed briefly between the parties and the Court at the September 2, 2003 settlement conference and pretrial. The Motion in Limine was filed prior to A.M. Gamboa's trial deposition that occurred on September 4, 2003. A supporting memorandum was filed on September 4, 2003 regarding Dr. Gamboa's report and testimony. In order to clarify the Defendant's position in this regard the Defendant is submitting this memorandum for the Court's consideration.

Rule 702 of the Ohio Rules of Evidence provides in pertinent parts as follows:

"A witness may testify as an expert if all the following apply:

(c) the witness' testimony is based upon reliable scientific, technical or other specialized information."

Rule 703 of the Ohio Rules of Evidence provides in pertinent part as follows:

"The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by him or admitted in evidence at the hearing."

In this case, A.M. Gamboa prepared a report dated February 6, 2003 and his testimony was completed for trial on September 4, 2003. The entire report is based upon national averages and statistics from the United States Census Bureau. None of the statistics have been offered or introduced into evidence. Dr. Gamboa relies entirely upon these national statistics in his testimony. Despite this reliance, Dr. Gamboa never identifies the actual figures and/or statistics that he is relying upon. His opinions are all based upon hearsay evidence that does not fit into any of the exceptions recognized in Rule 803 of the Ohio Rules of Evidence. In addition, Dr. Gamboa does not rely upon data admitted into evidence as required by Rule 703 of the Ohio Rules of Evidence.

In any case involving future damages, the Plaintiff must establish future damages that are reasonably certain to result from the injury. See, Powell v. Montgomery (1971), 27 Ohio App.2d 112. In this case Dr. Gamboa projects that the Plaintiff will sustain a future loss of earning capacity in the range of \$681,908 to \$992,104 as a result of an occupational disability. All of the projections are derived from the national income averages of the U.S. Census Bureau. See, Gamboa deposition at pages 41-44. None of the projections used by Dr. Gamboa utilize case specific projections that apply to this Plaintiff or the Plaintiff's occupation or the Plaintiff's alleged condition. See, Gamboa deposition at pages 45-49. The wage loss calculations are not based upon the evidence and are speculative. Dr. Gamboa simply uses national income averages for people without an occupational disability and then takes the national income averages for people with an occupational disability and computes the loss. The national income averages have no reasonable relationship to the facts of this case. The national income averages utilized are not case specific. For example, Dr. Gamboa does not utilize national income averages for people suffering from an occupational disability to the cervical spine. Dr. Gamboa uses a national average that includes all allegedly disabled people, regardless of the disability. This is improper.

There is no testimony or evidence to indicate that the Plaintiff will ever suffer a future wage loss or disability. There is no evidence that he can not work. Dr. Gamboa believes that the Plaintiff suffers from a work disability based upon what the Plaintiff told him about his condition. See, Gamboa deposition at page 47. Dr. Gamboa theorizes that since the Plaintiff allegedly suffers from an occupational disability, he will suffer a future loss in his ability to earn, based upon the averages from the U.S. Census Bureau. This is total speculation. No medical Doctor has testified that he will suffer a diminished ability to earn a living. Dr. Gamboa's testimony is all based upon national statistics that have no relationship to the facts of this case. In fact, Dr. Gamboa admitted that his

figures are estimates. See, Gamboa deposition at page 47.

It is important for the Court to recognize that the higher wage loss figure calculated by Dr. Gamboa represents an alleged loss of earning capacity should the Plaintiff attain a Bachelor's Degree. This, by Dr. Gamboa's own admission, is speculative, because the Plaintiff does not currently possess a Bachelor's Degree and may never attain such a degree.


It is believed that the Plaintiff may seek to introduce into evidence a portion of Dr. Gamboa's testimony, wherein Dr. Gamboa states that the Plaintiff's work life expectancy has been diminished as a result of an occupational disability. However, the testimony on this subject utilizes national averages and not case specific work life expectancy information. See, Gamboa deposition at page 24-25.

It is the Defendant's position that the entire testimony of Dr. Gamboa should be excluded from the evidence based upon Rules 702, 703, and 803 of the Ohio Rules of Evidence and because the testimony is speculative.

WHEREFORE, it is respectfully requested that this Motion in Limine be granted and that A.M. Gamboa, Jr. be excluded from testifying in this case for the reasons set forth herein.

Respectfully submitted,

DRODER & MILLER CO., L.P.A.



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion in Limine has been served upon John R. Ipsaro, Esq., Attorney for Plaintiff, Law Office of John R. Ipsaro, Inc., by telecopier and regular mail this 5th day of Feb., 2004.

DRODER & MILLER CO., L.P.A.


By Jeffrey T. Kenney (9051807)
Attorney for Defendant