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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

BREANNE BENNETT,)
Plaintiff,)
)
)
VS.) Cause No. 4:00CV01765CDP
)
HIDDEN VALLEY GOLF & SKI, INC.,)
)
Defendant.)

**PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION
TO STRIKE PLAINTIFF'S EXPERT ANTHONY GAMBOA**

COMES NOW Plaintiff, by and through her counsel of record, and for her Response to Defendant's Motion to Strike Plaintiff's Expert Anthony Gamboa, states as follows:

Plaintiff timely designated Anthony Gamboa, Jr., Ph.D., MBA of Vocational Economics, Inc., and produced his report as well as all documents and disclosures required by this Court. Defendant then had an ample opportunity to depose and in fact did depose Dr. Gamboa. Defendant now seeks to preclude Dr. Gamboa from testifying about his vocational and economic assessment of the Plaintiff.

**Dr. Gamboa's Assessment is Admissible under Missouri Substantive Law
and Meets the Requirements of Daubert**

At the outset, Plaintiff attaches hereto as Exhibit 1 Dr. Gamboa's curriculum vitae which sets out his educational and work history, where he has studied, lectured, written and worked within the vocational and economic fields since the mid 1960's. Briefly, Dr. Gamboa has a masters degree in guidance and counseling with the emphasis on vocational counseling from Miami University, and a Ph.D. in vocational counseling with a minor in vocational education. He had additional postdoctoral study and research in vocational rehab counseling, economic assessment of earnings, macro and microeconomics from the University of Cincinnati, the University of Louisville, Purdue and the University of Chicago. Dr. Gamboa has written, worked and lectured within the areas of economic

and vocational assessment as more fully on the attached CV. Clearly, Defendant cannot challenge the qualifications of Dr. Gamboa to provide a vocational or economic assessment in this case.

Dr. Gamboa performed a vocational economic assessment on the Plaintiff Breanne Bennett, a copy of which opinion is attached hereto as Exhibit 2. (Although challenging the report of Dr. Gamboa, Defendant failed to attach a Copy for the Court's review and examination.) Defendant states however, that Dr. Gamboa's opinions are not admissible in this case based upon what they consider to be a faulty or unreliable method of calculation. Specifically, at the time of Plaintiff's brain injury, she was a 16-year old girl with no significant work history. She was a high school student who anticipated herself to be college-bound, but who for the time being, she worked evenings as a waitress at a pizza restaurant. Defendant apparently objects to using any method of economic assessment of Plaintiff's future lost wages unless the lost wages are tied into Plaintiff's prior employment history. However, in the Instant case, where the injured party has not yet entered the work force in any meaningful way due to her age, using prior employment history is not a reasonable indicator. As Dr. Gamboa states in his Affidavit, attached hereto as Exhibit 3, using work history to estimate future work patterns for someone of the Plaintiff's age would be extraordinarily inappropriate. As Dr. Gamboa states, it is common knowledge that the specific work performed by high school age individuals has no direct bearing on future jobs. Many will work at restaurants and retail stores in order to earn spending money or to put themselves through school, even though the work may have no relation to their occupational goals. In his affidavit, Dr. Gamboa details how the use of past work history for an individual of this age is both inappropriate and how the use of government earnings and worklife expectancy data is the most appropriate and accurate assessment that can be done.

Merely because future income may not be predicted with perfect confidence, future economic assessments are not invalid if based upon credible factors. The United States Supreme Court recognized the inherent uncertainty several years ago in their decision in Jones and Laughlin Steel Corporation v. Howard E. Pfeifer. 462 U.S. 523 (1983):

By its very nature the calculation of an award for lost earnings must be a rough approximation. Because the lost stream can never be predicted with complete confidence, any lump sum represents only a “rough and ready” effort to put the plaintiff in the position he would have been in had he not been injured.

Future economic assessments of plaintiffs are rarely if ever challenged on the basis of speculation or conjecture. In fact, in Dr. Gamboa’s affidavit, he describes in some detail, with the use of various attachments, why his method of calculating future lost wages is in fact superior and in fact less subject to speculation and conjecture than others may be. Defendant attempts to assert that Dr. Gamboa does not employ a science, technical skill or any other specialized knowledge, nor does he base his opinions on scientific study or empirical research. Dr. Gamboa’s education and training set out hereinabove and in his CV clearly dispute such an assertion. In addition, as Dr. Gamboa states in some detail in his affidavit, Dr. Gamboa bases his conclusion also on studies conducted by the U.S. Census Bureau. The education level and worklife expectancy statistics used in the analysis for Plaintiff were based on the Bureau’s Current Population Survey (“CPS”), which is the primary source of employment data for the United States and the source of the government’s monthly unemployment rates as well as the source for a wide variety of purposes within the Federal government. Various government and private researchers commonly rely on the CPS data as more fully discussed by Dr. Gamboa in his affidavit and the attachments thereto.

In Kumho Tire v. Carmichael, 526 U.S. 137 (1999), the Court applied the Daubert criteria to the social (non-hard) sciences such as vocational rehabilitation and economics. In that case, the Court stressed that not all of the four Daubert factors for reliability (testing, peer review, error rates and general acceptance) may apply in every single case-especially in the social science. Rather, the trial court is left as the gatekeeper using the factors as flexible guidelines to assure the expert employs the same level of intellectual rigor as he or she would outside the courtroom when working in the relevant discipline. With that as a backdrop, the applicability of each of the four factors is discussed hereinafter.

Testing

Dr. Gamboa's report and analysis are drawn directly from actual data uniformly recognized as accurate and reliable. As stated in Dr. Gamboa's affidavit with accompanying attachments, with regard to the issue of scientific testing of human life and probabilities, this criteria is less applicable in this context as scientific testing criteria are principally directed at the hard sciences (e.g. engineering) and have less significance for vocational and economic testimony, since such studies are concerned with the future experience of people, which can never be tested or known with absolute certainty.

Peer Review and Publication

As Dr. Gamboa sets out in detail in his affidavit and attachments, Dr. Gamboa's analysis is based upon recognized and credible data relied upon by the government and professionals alike. Plaintiff incorporates such affidavit and attachments herein for a full discussion thereof.

Error Rates

Again, the criteria are primarily intended to apply to the "hard" sciences in conjunction with the testing performed there (reliability of a bolt securing a heavy sheet of metal, for example). With regard to error rates in this context however, Dr. Gamboa describes in his affidavit how one can compute the standard error or a worklife expectancy using the formula for the standard error of a probability. Further, he states that due to the large sample size of the CPS, one could show that the standard error of a worklife expectancy would not exceed 3 percent of the estimate.

In addition to the extent that Defendant challenges Dr. Gamboa's analysis on the basis that he does not follow up with the people whom he assesses to compare their future status with his assessment. Plaintiff notes that it is impossible to test accurately and derive error rates out into the future for a single expert's caseload. Doing so would require a tremendous amount of time into the future as well as money since a single plaintiff's analysis may extend to 50 years or more into the future.

Defendant would suggest that Dr. Gamboa not be allowed to provide testimony on his methodologies for another 30 years! In addition, the sample size that would result from examining a single expert's caseload would not be large enough to provide statistically significant results.

General Acceptance

Forecasting a plaintiff's future earnings stream is not an exact science. As such, there is no single step in the loss computation process that enjoys widespread acceptance in the relevant community. This is certainly true of determining discount rates, projecting earnings growth, defining earning capacity and computing worklife expectancy. General acceptance of the use of CPS data to examine the earnings and employment experience of people with a work disability is documented hereinafter.

With regard to Defendant's assertion that Dr. Gamboa is the "quintessential professional witness", as noted in his affidavit and in his CV, Dr. Gamboa has extensive education and work experience in the vocational rehabilitation field. Prior to concentrating exclusively on forensic consulting, his experience included working with and helping people with disabilities in jobs, as well as working in formal education settings to teach others to work with people with disability.

In short, the type of analysis conducted in this case is requested in order to assist the trier of fact in deriving a fair award. Unlike such fields as engineering and medicine, the product provided to the courts by vocational economic experts is only needed in litigation. Defendant's contention that Dr. Gamboa's forensic work must mirror what he does in a laboratory is unrealistic in this context.

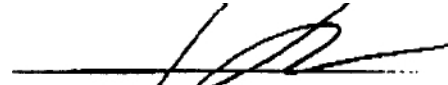
Finally, Plaintiff notes that Dr. Gamboa has utilized his economic analysis in many courts throughout the country, including multiple times in Missouri, and has not ever, to the best of the Plaintiff's knowledge, been stricken on the basis that his opinions are speculative, conjecture or otherwise contrary to the rules of the State of Missouri, and has not ever, to the best of the Plaintiff's knowledge, been stricken on the basis that his opinions are speculative, conjecture or otherwise contrary to the rules of the State of Missouri or the rule as set out in Daubert or Kuhmo, (See for example, the Seventh Circuit opinion in the matter of O'Shea v. Riverway Towing Company, 677 F.2d 1194 (7th Cir. 1982))

In further support hereof, Plaintiff incorporates herein fully by reference the attachments

hereto as well as the attachments to the Affidavit of Dr. Anthony Gamboa.

Wherefore for the foregoing reasons, Plaintiff respectfully requests that Defendant's Motion to Strike Plaintiff's expert Anthony Gamboa be in all things denied.

McCLOSKEY, P.C.



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Certificate of Service

The undersigned hereby certifies that a true and correct copy of the foregoing was mailed first class, postage prepaid, this 10th day of October, 2001, to: *Mr. Thomas J. Magee, 200 North Broadway, Suite 700, St. Louis, Missouri 63102-2730.*

