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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DISTRICT

BREANNE BENNETT,)
)
 Plaintiff,)
)
 vs.)
)
 HIDDEN VALLEY GOLF)
 & SKI, INC.,)
)
 Defendant.)

Case No. 4:00CV01765CDP

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S
MOTION IN LIMINE TO STRIKE PLAINTIFF'S EXPERT DR.
ANTHONY GAMBOA**

Defendant, Hidden Valley Golf & Ski, Inc., submits this memorandum of law in support of its motion to strike plaintiff's expert, Dr. Anthony Gamboa. As stated in its motion, defendant believes the record is fully developed so as to allow the Court to make its order striking plaintiff's expert, Dr. Anthony Gamboa. In the event that the Court believes that additional information is necessary, then this defendant requests that the Court hold a hearing prior to trial pursuant to Rule 104 of the Federal Rules of Civil Procedure.

Defendant's motion is based on two separate grounds which are by themselves sufficient to bar the testimony of plaintiff's expert, Dr. Anthony Gamboa. An analysis of Dr. Gamboa's experience and opinions in this case shows that his testimony is inadmissible under Rule 702 of the Federal Rules of Evidence, McGowne v. Challenge-Cook Bros., Inc., 672 F.2d 652, 667 (8th Cir. 1982); and Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S.Ct. 2786 (1993), for one or all of the following reasons:

- A. Dr. Gamboa's proposed testimony on plaintiff's loss of future earning capacity is inadmissible under Rule 702 as set forth in Missouri substantive law; and
- B. Dr. Gamboa's proposed testimony is inadmissible, because his proposed testimony does not conform to the requirements of Rule 702 as set forth in Daubert v. Merrell Dow Pharmaceuticals, Inc.
- C. Dr. Gamboa's testimony does not possess the professional safeguards ensuring objectivity.

Dr. Gamboa's testimony should, therefore, be excluded.

A. Dr. Gamboa's proposed testimony on plaintiff's future earning capacity is inadmissible under Rule 702 as set forth by Missouri substantive law.

The admissibility of expert testimony is governed by Rule 702 of the Federal Rules of Evidence. Under Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311 (9th Cir. 1995), expert testimony is only admissible if it is both relevant and reliable. To determine the admissibility of expert testimony on the measure of damages and the relevancy thereof in this case, this Court must apply Missouri substantive law. McGowne v. Challenge-Cook Bros., Inc., 672 F.2d 652, 667 (8th Cir. 1982); *See* Johnson v. Serra, 521 F.2d 1289, 1294 (8th Cir. 1975).

In Missouri, expert testimony regarding loss of future wages is inadmissible if based upon mere speculation and conjecture. McGowne, 672 F.2d at 667; Sampson v. Missouri Pacific R.R. Co., 560 S.W.2d 573, 589 (Mo. 1978); Hodges v. Johnson, 417 S.W.2d 685, 689 (Mo. App. 1967). To be admissible, evidence of loss of future wages must be established with "reasonable certainty." McGowne, 672 F.2d at 667; Sampson, 560 S.W.2d at 573; Greer v. Continental Gaming Co., 5 S.W.3d 559, 565-66 (Mo. App. 1999); *see* Honeycutt v. Wabash R.R. Co., 313 S.W.2d 214, 217 (Mo. App. 1958). Merely establishing substantial personal injuries or a permanent injury is not sufficient evidence to show a loss of past or present earning capacity. Hodges, 417 S.W.2d at 689.

Expert testimony regarding loss of future earning capacity is only admissible when:

[T]he extent of future harm to the earning capacity of the injured person is measured by the difference viewed as of the time of trial between the value of plaintiff's services as they will be in view of the harm and as they would have been had there been no harm.

Sampson v. Missouri Pacific R.R. Co., 560 S.W.2d 573, 589 (Mo. 1978); *citing* Coffman v. St. Louis-San Francisco Ry. Co., 378 S.W.2d 583, 595 (Mo. 1964). An expert may premise his opinion on hypothesized facts; however, for the opinion to be admissible, this hypothesized information must also be admissible as evidence or be part of the record. Greer, 5 S.W.3d at 566.

In Sampson v. Missouri Pacific R.R. Co., the plaintiff, employed in the automotive industry, presented expert testimony as to his loss of future earning capacity based upon his prior employment history, his pre-injury wage, his average annual hourly work rate, a projected wage growth in the automotive industry of 7.3%, and a Department of Labor work expectancy projection of 12½ years. Sampson, 560 S.W.2d at 588. The court found that this testimony was reasonably calculated and, consequently, admissible, because the testimony was so closely based upon the plaintiff's prior employment history and was specific to his area of employment. Id. at 589. The court also noted that this type of testimony in the area of future wage loss necessarily involves a certain degree of speculation, but the fact that the testimony was specifically grounded in plaintiff's prior work history and area of employment created an assurance that the conclusion was based upon reasonable calculations. Id.

Dr. Gamboa's proposed testimony has no such assurances that his calculations are reasonable. None of Dr. Gamboa's conclusions directly relate to plaintiff's specific injury, her present condition or the possibility of future rehabilitation. In addition, none of Dr. Gamboa's conclusions are premised upon plaintiff's prior employment history. Indeed, Dr. Gamboa never even

specifies a particular area of employment, let alone a specific occupation.

To the contrary, Dr. Gamboa uses generic data to calculate plaintiff's pre-injury and post-injury earning capacity. (Ex. 1, pp. 20-21). His data is not specific to any particular occupation nor is it specific to persons who have suffered injuries similar to plaintiff. Instead, Dr. Gamboa plucks his figures from historical income tables for educational attainment contained in government databases. (Ex. 1, p. 20). These databases separate incomes into earning sets of disabled and nondisabled individuals. (Ex. 1, p. 20-21). The disability earning set only includes persons with a "work disability," which is defined as persons who are limited in the amount or type of work that they can perform due to a physical or mental impairment. (Ex. 1, p. 20-21). Within this disability earning set, the government does not distinguish between severe and non-severe disabilities and does not identify the type of impairment that exists. (Ex. 1, p. 21). The tables do distinguish between male and female average incomes, with female incomes being lower on average. (Ex. 1, p. 19)

Dr. Gamboa calculates plaintiff's proposed loss of future income capacity by contrasting the average income of a female without a disability against the average of the incomes of females and males with disabilities. (Ex. 1, pp. 11-14, 18). By using the average income tables, Dr. Gamboa's calculation does not even contemplate a specific occupation or area of employment nor does it specifically relate to persons recovering from a head trauma. Further, Dr. Gamboa's calculations fail to take into account any rehabilitation that may occur. As such, his calculations and any testimony expressing his opinions is mere speculation and conjecture.

Although the Sampson court acknowledges that testimony regarding loss of future income capacity necessarily involves a certain degree of speculation, Dr. Gamboa's proposed testimony lacks the assurances present with the expert's testimony in Sampson. As shown, Dr. Gamboa's

testimony is not specifically grounded in plaintiff's prior employment. Dr. Gamboa's opinion fails to allow for future rehabilitation and speculates that plaintiff will be categorized as having a work disability for the remainder of her work life. This opinion is directly contrary to the facts in this case.

First, plaintiff's own treating physician, Dr. Michael Oliveri, did not place any restrictions on plaintiff as far back as April of 1993. (Ex. 2, pp. 47-48). Further, Dr. Oliveri states that plaintiff continued to improve during the time that he treated her. (Ex. 2, pp. 51-52). Finally, Dr. Oliveri does not rule out the possibility of future rehabilitation, does not rule out the possibility of a complete recovery, and does not rule out the possibility of a "good recovery." (Ex. 2, pp. 52-53). Although Dr. Oliveri states that plaintiff's condition today is her maximum improvement level, he does acknowledge that patients can be treated for commonly associated residual problems, such as depression. (Ex. 2, p. 36). Further, he states that plaintiff is a good candidate for pursuing academic activities, including attending college, and that she could benefit from special academic accommodations, including tutoring and taping lectures. (Ex. 2, p. 37, Ex. 3). These facts and opinion hardly support Dr. Gamboa's supposition that plaintiff will have a "work disability" for the rest of her work life.

Additionally, the government income tables are themselves the best evidence that Dr. Gamboa's proposed testimony is pure speculation and conjecture. The tables make no delineation between the incomes of severely and non-severely disabled workers. (Ex. 1, p. 21). Further, the tables make no distinction between physical and mental disabilities. (Ex. 1, p. 20-21). Dr. Gamboa does not intend to offer any testimony specific to the average income of a non-severely, mentally disabled female. Instead, he proposes to testify to the average income of a severely or non-severely, physically or mentally disabled, male or female worker. Dr. Gamboa admits that his conclusion is

not specific to plaintiff's particular injury or to any specific level of disability. (Ex. 1, p. 21). Consequently, no firm evidence exists to believe that Dr. Gamboa's calculations are reasonable as required by Rule 702, McGowne, Sampson, and Daubert. As such, this proposed testimony is inadmissible due to its speculative nature.

B. Dr. Gamboa's proposed testimony is inadmissible, because his proposed testimony does not conform to the requirements of Rule 702 as set forth in Daubert v. Merrell Dow Pharmaceuticals, Inc.

The admissibility of expert testimony is governed by Rule 702 of the Federal Rules of Evidence. The rule provides as follows:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to 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, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Consequently, if an expert fails to rely on sufficient facts, fails to use reliable methods to reach an opinion or fails to reliably apply the facts to his method in reaching an opinion, the court should, upon its own discretion exclude the proposed testimony of the expert. Daubert. The Rule 702 gatekeeping duties of the trial court apply to all expert testimony, whether scientific, technical or of some other specialized knowledge. Smith v. Ingersoll-Rand Co., 214 F.3d 1235, 1243 (10th Cir. 2000). In doing so, the trial court is granted "broad latitude in deciding the manner in which to determine whether expert testimony is reliable as well as ultimately deciding whether that testimony is reliable. Id.; Daubert.

1. Dr. Gamboa's testimony is not based upon sufficient facts or data.

First and foremost, Rule 702 compels an expert to base his opinion on sufficient facts or

data. As previously set forth, Dr. Gamboa fails to rely upon sufficient facts and data in formulating his opinion. None of Dr. Gamboa's conclusions directly relate to plaintiff's specific injury, present condition or any possibility of future rehabilitation. Further, he does not base any of his calculations on her prior employment. In fact, Dr. Gamboa never even specifies a particular area of employment, let alone a specific occupation. Dr. Gamboa makes a blanket prediction using government generated statistics of income tables for disabled individuals based upon educational attainment. (Ex. 1, pp. 7, 20). Specifically, he draws conclusions from government income tables for persons with a "work disability," which make no distinction between severe and non-severe disabilities and make no distinction between physical and mental disabilities. Dr. Gamboa admits that his conclusion is not specific to plaintiff's particular injury or to any specific level of disability. (Ex. 1, p. 21). Clearly, these facts are not sufficient as contemplated under Rule 702, but rather are mere speculation and conjecture.

2. Dr. Gamboa's proposed testimony is not the product of reliable principles and methods.

The "overarching" subject of Rule 702 is scientific validity and the reliability of principles that underlie the proposed submission. Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 Sup. Ct. 2786, 2797 (1993). Consequently, the rule mandates that "the trial judge...ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." Daubert, 113 Sup. Ct. at 2795. This obligation is imposed because Rule 702 "clearly contemplates some degree of regulation of the subjects and theories about which an expert may testify." Id. The word "scientific" connotes "a grounding in the methods and procedures of science." Id. Similarly, the term "knowledge" connotes more than subjective belief; the term "applies to any body of known facts or

to any body of ideas inferred from such facts or accepted as truths on good grounds.” Id. Therefore, “in order to qualify as ‘scientific knowledge’ an inference or assertion *must be derived by the scientific method.*” Id. (emphasis added).

In Daubert v. Merrell Dow Pharmaceuticals, Inc., *supra*, the United States Supreme Court articulated certain criteria the trial court should consider in determining whether proposed expert testimony conforms to the requirements of Rule 702. In assessing the admissibility of expert testimony, the trial court should consider: (1) whether a theory or technique can be or has been tested; (2) whether the concept has been subject to peer review and publication; (3) the known rate of error; and (4) whether the concept is generally accepted by the relevant scientific community. Daubert, 113 S.Ct. at 2796-97. Proposed expert testimony that fails to meet these criteria should be stricken. See, e.g., Pestel, *supra*, Stanczyk v. Black & Decker, Inc., 836 F.Supp. 565, 567-68 (N.D. Ill. 1993). An analysis of Dr. Gamboa’s opinions in the present case show that his testimony fails to satisfy any of the guidelines set forth in Daubert.

Dr. Gamboa proposes to testify to a specific dollar amount that represents plaintiff’s loss of future earning capacity. This testimony should be deemed inadmissible, because the method that Dr. Gamboa used in calculating this dollar amount has never been tested and, as such, has no known rate error. Further, his method has not been subject to peer review, and no evidence exists to show that his method is generally accepted in the scientific community.

No evidence exists to suggest that Dr. Gamboa has ever tested the method that he utilizes in calculating loss of future income capacity in a scientific setting. In fact, all evidence suggests that Dr. Gamboa merely predicts future losses while on the witness stand and has never actually tracked any of these predictions to see if they prove valid. More specifically, Dr. Gamboa has never

specifically tested the reliability of his calculations in predicting the loss of future income for individuals who have suffered injuries similar to plaintiff. Instead, Dr. Gamboa makes a blanket prediction using government generated statistics of income tables for disabled individuals based upon educational attainment. (Ex. 1, pp. 7, 20). These tables make no distinction between severe and non-severe disabilities, and Dr. Gamboa admits that his conclusion is not specific to plaintiff's particular injury or to any specific level of disability. (Ex. 1, p. 21).

Dr. Gamboa's methodology is not capable of being subjected to peer review. His calculations are based on averages of from government income tables and work life probabilities tables. He does not employ a science, technical skill or any other specialized knowledge in forming his opinion nor does he base his opinions on scientific study or empirical research. Dr. Gamboa has never tracked or studied individuals to determine the veracity of his calculations, and he freely admits that he has no intention tracking plaintiff or her progress in this particular case. (Ex. 1, p. 30).

Since Dr. Gamboa has never bothered to study or track any of the individual for whom he has predicted a loss of future earning capacity, his method of calculating an individual loss of future earning capacity has no known rate of error. This evidence clearly does not meet the criteria for scientific validity set forth in Daubert.

Regarding general acceptance of Dr. Gamboa's calculations and their reliability in the scientific community, Dr. Gamboa is unable to offer any support for his idea. He is unable to offer any studies of his own or of others that establish through scientific testing or review that his calculations are reasonable and reliable.

Nothing in Dr. Gamboa's work experience indicates that he possesses "scientific, technical or other specialized knowledge [that] will assist the trier of fact to determine the issues in this case

regarding lost future earning capacity as required under Rule 702. To say that Dr. Gamboa has a methodology is to overstate the effort that he has put forth in arriving at his opinion. Dr. Gamboa merely plugs numbers into a computer thereby cross-referencing government income tables and work life probability tables. The tables that he uses are non-specific and, consequently, generate equally non-specific predictions. Dr. Gamboa admits that his calculations are not specific to plaintiff or to her particular disability. (Ex. 1, p. 26). He further admits that he cannot conduct a more in depth analysis of plaintiff's specific disability, because her age and present level of educational attainment make it impossible to predict what type of work she may eventually do. (Ex. 1, p. 26). As such, the overwhelmingly speculative nature of Dr. Gamboa's testimony would only serve to confuse the trier of fact rather than assisting the trier of fact in understanding the evidence or determining a fact in issue. Dr. Gamboa's testimony fails to meet (or even approach) any of the Daubert criteria and, therefore, should be excluded.

C. Dr. Gamboa's testimony does not possess the professional safeguards ensuring objectivity.

The requirement that expert testimony be scientifically based extends the inquiry into the reliability of the evidence, which necessarily involves an inquiry into the credentials of the expert witness. See In Re Paoli R. R. Yard PCB Litigation, 35 F.3d 717, 742 n.8 (3d Cir. 1994). In Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311 (9th Cir. 1995) ("Daubert II"), the Ninth Circuit, in discussing the Supreme Court's mandate that expert testimony be based on scientifically valid principles, expressed its skepticism of courthouse experts who have more expertise in testimony than science. The court stated:

One very significant fact to be considered is whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted

independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying. That an expert testifies for money does not necessarily cast doubt on the reliability of his testimony, as few experts appear in court merely as an eleemosynary gesture. *But in determining whether proposed expert testimony amounts to good science, we may not ignore the fact that a scientist's normal workplace is the lab or the field, not the courtroom or the lawyer's office.*

Daubert, 43 F.3d at 1317 (emphasis added). Consequently, the trial court must always make an initial assessment of the reliability and relevance of the proposed testimony of an expert. Greenville, 184 F.3d 492. Federal courts have expressed skepticism at the proposed testimony of "experts" who have more experience in the courtroom than in the laboratory.

Dr. Gamboa is the quintessential "professional witness." His company, Vocational Economics, Inc., is a forensic economic consulting company. (Ex. 1, pp. 4, 28.) Dr. Gamboa is not a scientist and has not conducted any independent monitoring or testing to determine any rate of error for his proposed method for calculating loss of future earning capacity. To the contrary, ninety-nine percent of Dr. Gamboa's work consists of consulting for attorneys for the purpose of testifying in court. (Ex. 1, p. 28). The other one percent of his business is consulting with individuals who reach him through the company web site and request a "vocational economic assessment" to determine whether to pursue an a claim. (Ex. 1, p. 28). Having no independent research or data to support his conclusions, Dr. Gamboa does not possess the professional safeguards which ensure objectivity. Tokio Marine & Fire Ins. Co., Ltd. v. Grove Mfg. Co., 958 F.2d 1169 (1st Cir. 1992),

A copy of the foregoing was mailed this 21st day of September, 2001, to: **Mr. Mark T. McCloskey**, Attorney for Plaintiffs, 120 S. Central, Suite 1750, Clayton, Missouri 63105.

A handwritten signature in black ink, appearing to read "T. Magee". The signature is written in a cursive style with a large, sweeping initial "T" and a vertical line through it.

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