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COMMONWEALTH OF KENTUCKY
PIKE CIRCUIT COURT
FIRST DIVISION
CIVIL ACTION NO. 02-CI-1355

JENNIFER BENTLEY and
WILLIAM BENTLEY

PLAINTIFFS

VS.

JEFFREY ROSE, ADAMS TRUCKING CORPORATION
and ADAMS CONSTRUCTION CORPORATION

DEFENDANTS

AND **MOTION TO EXCLUDE WITNESSES AND EVIDENCE PURSUANT
TO DAUBERT V. MERRELL DOW PHARMACEUTICALS, INC.,
509 U.S. 579 (1993)**

ADAMS TRUCKING CORPORATION

THIRD-PARTY PLAINTIFF

VS.

PINE MOUNTAIN TRUCKERS, LLC

THIRD-PARTY DEFENDANT

*** **

The Defendants, Jeffrey Rose and Adams Trucking Corporation, by counsel, move this Court to exclude the testimony of John P. Tierney and Edward P. Berla because such testimony cannot withstand scrutiny under the standards set forth in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). In support of their motion, Defendants state as follows:

FACTS

This action arises from an August 19, 2002 motor vehicle accident in which a vehicle operated by Plaintiff, Jennifer Bentley, collided with the motor vehicle operated by the

Defendant, Jeffrey Rose. Plaintiff seeks loss of capacity damages for the injuries she allegedly suffered as a result of this accident.

The Plaintiff has sued seeking damages for (among other things) an alleged permanent impairment of her ability to earn money. As evidence of this impairment, the Plaintiff offers the report and testimony of John P. Tierney, who has a master's degree in guidance and counseling, and Edward P. Berla, who has a Ph.D. in psychology, to express opinions on damages for loss of earning capacity over Plaintiff's lifetime. Neither Mr. Tierney nor Dr. Berla is qualified under controlling case law to give such an assessment, and, thus, such testimony by these witnesses must be excluded from trial.

I. **DAUBERT V. MERRELL DOW PHARMACEUTICALS, INC. EXCLUDES THE EVIDENCE AND TESTIMONY OF EDWARD P. BERLA AND JOHN P. TIERNEY.**

In order to be admissible, expert testimony and evidence must meet clear and specific standards. Expert opinion evidence is admissible if: (1) the witness is qualified to render an opinion on the subject matter; (2) the subject matter satisfies Daubert requirements; (3) the subject matter is relevant and its probative value is not substantially outweighed by undue prejudice; and (4) the opinion will assist the trier of fact to understand evidence or to determine a fact in issue. R.C. v. Commonwealth, Ky.App., 101 S.W.3d 897 (2002). The Kentucky Supreme Court adopted the standards set forth in Daubert v. Merrell Dow Pharmaceuticals, Inc. for admission of expert testimony in Mitchell v. Commonwealth, 908 S.W.2d 100 (1995), which make relevance and reliability the central concerns of the admission of such testimony. Thus, in order to present an expert opinion into evidence, a witness must be qualified to render an opinion on the subject matter and the evidence must be relevant to the facts in issue and reliable in basis. Edward P. Berla's and John P. Tierney's testimony fails to meet these requirements.

A. **Neither Edward P. Berla Nor John P. Tierney Is Qualified To Render An Opinion On This Subject Matter.**

The United States District Court for the Eastern District of Kentucky previously held that Edward P. Berla is not qualified to testify on the subject of a plaintiff's lost earning potential. (See Order in Kelly, et al. v. McFarland et al., attached as Exhibit A). Specifically, the court stated in relevant part:

In assessing Dr. Berla's qualifications, an obvious question arises as to why Dr. Berla, a psychologist, has been retained to testify as an economist. The extent of Dr. Berla's formal education in economics is limited to various post-graduate courses, training that hardly qualifies him as an 'expert.' Also, and more significantly, Dr. Berla's testimony requires him to make various critical assumptions about the status and permanence of plaintiff's injuries. But Dr. Berla is not a medical doctor. This, too, is troubling.

Id. at p. 3. As the court clearly states, Edward P. Berla is not qualified to testify as an expert concerning the loss of earning capacity due to his lack of necessary education and training in economics and medicine. Without such a background, Dr. Berla certainly is not qualified to render expert opinion evidence under Daubert and R.C. v. Commonwealth.

In assessing the qualifications of Dr. Berla and John P. Tierney, it is clear that neither witness is properly qualified to render an opinion concerning the loss of earning capacity sustained by Plaintiff. As the federal court pointed out above, Dr. Berla is a psychologist with a Ph.D. in psychology. John P. Tierney is a counselor with a M.A. in guidance and counseling. Neither witness has a degree in economics or in any field relating to economics. The extent of both Edward Berla's and John Tierney's education in economics is limited to various post-graduate courses. Neither witness is an economist and, therefore, neither witness is properly qualified to testify as an economist, which would logically be the background required to be an expert in the economic assessment of earning capacity.

Further, as the federal court pointed out in the above quote, the testimony of both witnesses requires them to make various critical assumptions regarding the status and permanence of Plaintiff's injuries. Neither Edward P. Berla nor John P. Tierney is a medical doctor. Neither has any formal training to equip them with the knowledge required to evaluate Plaintiff's current medical condition or future medical condition. Their evidence is based on an assumption that Plaintiff is currently disabled and that she will not improve in the future. However, neither witness is qualified to make a medical determination to any degree of certainty regarding the status and permanency of Ms. Bentley's injuries or the relation of such injuries to her economic status. Therefore, neither Edward P. Berla nor John P. Tierney is qualified to render an opinion on the subject matter of Plaintiff's lost earning potential and each witness's testimony and evidence must be excluded from trial.

B. The Testimony Of Edward P. Berla And John P. Tierney Does Not Meet The Daubert Standard Of Reliability And, Thus, Is Inadmissible.

Under Daubert, expert testimony is only admissible if the trial court finds that the testimony is (1) based on a reliable foundation, and (2) relevant to the issues at hand. Daubert v. Merrell Dow Pharmaceuticals, Inc. at 592-93. Both Edward P. Berla's and John P. Tierney's testimony fail to meet the reliability prong because their opinions are a product of speculation, not supported by the facts in issue, and lack any proper scientific basis.

The witnesses' report concerning Plaintiff's lost work-life and earnings is unreliable, as the report is pure speculation without any proper supporting evidence or underlying scientific basis. Dr. Berla and Mr. Tierney provide no explanations, research or other substantiating materials as a basis for their conclusions regarding Plaintiff's loss of earning capacity. There is no evidence that the conclusions reached by these witnesses are based in reliable methodology.

Rather, from reading the witnesses' report, it appears more likely that their conclusions are based on assumptions concerning Plaintiff's physical condition, assumptions regarding her future ability to work, and a minor and inadequate amount of consultation with standard charts displaying the average person's work-life and earning capacity versus that of a disabled person.

The report of Dr. Berla and Mr. Tierney is unreliable because it is not supported by the facts in issue in this case. This report is not tailored to the actual condition of the Plaintiff, but instead is based on the information of an average non-disabled female of Ms. Bentley's age and education versus that of an average disabled female of Ms. Bentley's age and education. These averages cannot possibly take into account the specific current and future physical condition of Ms. Bentley or her particular working abilities. Average figures certainly do not convey a reliable analysis of the Plaintiff, her physical condition, or her future ability to work and earn wages.

Finally, the report of Dr. Berla and Mr. Tierney is unreliable because of its vague, unclear and nonspecific nature. For example, in the report, the witnesses rate Plaintiff's pre-injury continuum as "50% between not severe and not disabled" and her post-injury continuum as "50% between severe and not severe." (*See* work-life probability computation of lost work-life and earnings section of report attached as Exhibit B.) These designations are given no definition or medical meaning, but are merely set forth as a vague and unintelligible category in which to place the Plaintiff's pre-injury and post-injury condition. Also, the pre-injury continuum designation seems to indicate that Ms. Bentley was somewhat disabled prior to the accident in issue. Also, Dr. Berla and Mr. Tierney's assessment of Plaintiff's work-life expectancy is questionable and unclear. They assess her pre-injury and post-injury earning capacity to be identical, but for some unknown reason, reduce her work-life expectancy from pre-injury to post-

injury by ten years. However, there is no supporting evidence or explanation given as to why Plaintiff would be unable to continue working after ten years.

In sum, not only are Dr. Berla and Mr. Tierney not qualified to give an economically-based assessment of Plaintiff's earning potential, the evidence they offer in support of their assessment lacks adequate support, is wholly unreliable, and is inadmissible under Daubert.

II. CONCLUSION

Under the above-cited case law, the expert opinion evidence offered by Edward P. Berla and John P. Tierney is clearly inadmissible. Neither witness is qualified to render opinions on the subject matter of economic assessment of lost earning capacity, and the evidence they purport to offer is lacking in proper support, unreliable, and inadmissible under Daubert. Thus, the testimony and evidence of Edward P. Berla and John P. Tierney must be excluded.

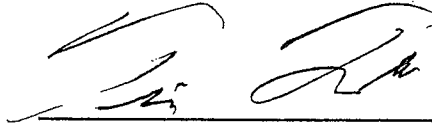
WHEREFORE, for the foregoing reasons, Defendants, Adams Trucking Corporation and Jeffrey Rose, respectfully request this Court to exclude the testimony and evidence of John P. Tierney and Edward P. Berla.

NOTICE

Please take notice that the foregoing Motion will come on for hearing before the First Division of the Pike Circuit Court in the Pike County Courthouse, Pikeville, Kentucky, on November 24, 2003, at the hour of 9:00 a.m., or as soon thereafter as counsel may be heard.

Respectfully submitted,

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CERTIFICATE OF SERVICE

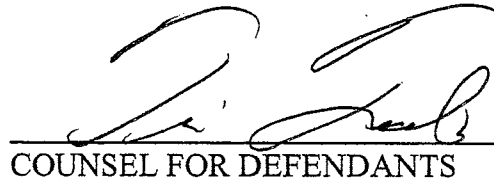
This is to certify that the foregoing has been served on this the 18th day of November

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