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STATE OF ILLINOIS )  
 ) SS.  
COUNTY OF KANE )

**IN THE CIRCUIT COURT FOR THE SIXTEENTH JUDICIAL CIRCUIT  
KANE COUNTY, ILLINOIS**

EMILY CELAREK, )  
 )  
 Plaintiffs, )  
 )  
 v. ) Case No. L KA 99 0140  
 )  
 RUTLAND DUNDEE TOWNSHIP FIRE )  
 PROTECTION DISTRICT and DENNIS )  
 DEMES, )  
 )  
 Defendants. )

**MOTION IN LIMINE TO BAR THE TESTIMONY OF  
PLAINTIFF'S EXPERT DR. ANTHONY GAMBOA**


NOW COME the Defendants, RUTLAND DUNDEE TOWNSHIP FIRE PROTECTION DISTRICT and DENNIS DEMES, by and through their attorneys, OTTOSEN, TREVARTHEN, BRITZ, KELLY & COOPER, LTD., and HERVAS, SOTOS, CONDON & BERSANI, P.C., and, move, in limine, for the Court to enter an order barring the testimony of Plaintiff's economist, Dr. Anthony Gamboa.

In support of said motion, the Defendants state as follows:

1. Plaintiff has named an economic expert who will testify that Plaintiff suffers disabilities that will result in future wage loss in a range of \$698,220 to \$1,205,458.
2. Dr. Gamboa's testimony is premised upon new work life expectancy tables that were developed by Dr. Gamboa. These work life expectancy tables are inherently unreliable and based upon methodology which is flawed and has not been accepted within the scientific/economic community. Indeed, the supreme court of Nebraska has barred the use of Dr. Gamboa's new work life expectancy tables in *Phillips v. Industrial Machine*, 257 Neb. 256, 597 N.W. 2d 377 (1999).
3. Any conclusions reached by Dr. Gamboa respecting Plaintiff's future earning capacity is mere conjecture and speculation and should not be allowed.
4. This motion incorporates the supplemental memorandum of law and multiple exhibits attached hereto.

WHEREFORE, the Defendants respectfully pray that this Honorable Court enter an order in limine barring the testimony of Dr. Anthony Gamboa relating to

conclusions that Plaintiff will suffer economic damages from diminished future earnings capacity.



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testimony is inadmissible because the underlying methodology of Gamboa's opinion is unreliable and speculative.

## ARGUMENT

### **I. DR. GAMBOA'S TESTIMONY REGARDING FUTURE WAGE LOSS SHOULD BE BARRED**

The admission of expert testimony "is a matter committed to the sound discretion of the trial judge." Modelski v. Navistar International Transportation Corp., 302 Ill. App. 3d 879, 885, 707 N.E.2d 239, 244 (1st Dist. 1999)(citing People v. Mack, 128 Ill. 2d 231, 538 N.E.2d 1107 (1989)). In Illinois, "the exclusive test for the admission of expert testimony is governed by the standard first expressed in Frye." Donaldson v. Central Illinois Public Service Co., 199 Ill. 2d 63, 66-67, 767 N.E.2d 314 (2002). Under the standard set forth in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), evidence must be "generally accepted in the relevant scientific community before it can be admitted." People v. Basler, 193 Ill. 2d 545, 550, 740 Ill. 2d 1, 4 (2000). The focus is not on the conclusion drawn by the expert, but rather on the underlying methodology used to reach the conclusion. Id. Courts must "critically evaluate the reasoning process by which an expert witness connects data to his conclusion and should not admit expert opinion that is based upon unreliable data and procedures." LaSalle National Bank v. Malik, 302 Ill. App. 3d 236, 241, 705 N.E.2d 938, 942 (2nd Dist. 1999).

#### **A. The Underlying Methodology Of Gamboa's Testimony Has Been Barred In Court And Is Not Suitable For Statistical Analysis In This Case.**

If the basis for an expert's opinion includes so many varying or uncertain factors that he is required to guess or surmise to reach an opinion, the expert's opinion is too speculative to be reliable." Modelski v. Navistar International Transportation Corp., 302 Ill. App. 3d 879, 885, 707 N.E.2d 239, 244 (1st Dist. 1999)(quoting First Midwest Trust Co. v. Rogers, 296 Ill. App. 3d

416, 701 N.E.2d 1107 (4<sup>th</sup> Dist. 1998)). If a defendant has evidence that the expert's opinion is based upon a technique that is "scientifically unsound," the court "has the right to bar its admission." People v. Basler, 193 Ill. 2d 545, 551-52, 740 N.E.2d 1, 4-5 (2000).

Dr. Gamboa acknowledges that he has not been allowed to testify in court as to an individual's earning capacity in several cases, including one Illinois case where the court found his testimony as to earning capacity speculative. (Ex. B, Gamboa Deposition Testimony, pages 16-17). Additionally, Dr. Gamboa's "New Work Life Expectancy Tables" were barred as a basis of expert testimony by the supreme court of Nebraska in Phillips v. Industrial Machine, 257 Neb. 256, 597 N.W.2d 377 (1999). In Phillips, the plaintiff's expert testified utilizing Gamboa's "New Work Life Expectancy Tables" in forming his opinion. Id. at 259. The expert explained that "included in the category of disabled persons under the tables were persons with very mild disabilities that did not affect their work." Id. The Nebraska supreme court noted that the expert concluded that the plaintiff was disabled based upon a permanent medical condition, to which the court stated, "The fact that a medical condition is permanent does not equate with a medical opinion that a person is disabled." Id. at 265. The trial court rejected the expert's opinion because of its conclusory determination of disability status and because the Tables relied upon, "do not discern between minor and serious disabilities or take into consideration whether such disability affects an individual's ability to work." Id. at 264. Likewise, the Nebraska supreme court found that the expert's opinion "lacked probative value" and held that the trial court did not abuse its discretion in finding that it was error to admit the expert's testimony. Id.

In this case, Dr. Gamboa intends to rely on the very tables that were barred in Phillips. The Tables have not been corrected to apply to disabled persons with a work disability. Rather, Gamboa ignores the fact that his data is overly broad and continues to disregard the importance of distinguishing between those persons with a true work disability and those who may have a disability, but one that does not affect their ability to work. In addition, no adjustments or allowances were made in the Tables for individuals who may have a temporary work impairment. (See Exhibit C, Affidavit of Defendants' economic expert, Dr. Gary Skoog, at ¶ 17). Instead, Gamboa's tables blindly assume that once a disability exists, it is permanent; and, even more astoundingly, that a non-disabled person will never have a disability or work related impairment. (Ex. C., Skoog Aff, at ¶ 17).

The definition of "occupational disability" according to Gamboa is "when a person is limited in terms of the amount or kind of work he or she can do on a job because of a physical or mental impairment." (Ex. A, Gamboa Rule 213 Report, pg 4) Gamboa relies upon the Census Bureau CPS definition, but he ignores the fact that the Census definition of "work disability" also includes people "who ever retired or left a job for health reasons" or those who received a Veterans Administration disability. (See Exhibit D, U.S. Census Bureau Methodology for Identifying Work Disabilities in the CPS). In addition, the Census Bureau itself states that, "the preferred source" for examining disability issues is the Survey of Income and Program Participation (SIPP), not the CPS. (See Exhibit E, U.S. Census Bureau Data on Disability).

Researchers in the field who determine economic damages note that it is statistical folly to estimate the effect of an impairment on work life without identifying those for whom the impairment is not work-related. (Ex. C, Skoog Aff., at ¶ 12). Economists know that any attempt to estimate worklife expectancy can only be reliable if founded upon results that take into

account individuals with similar work related impairments or conditions. (Ex. C, Skoog Aff. at ¶ 11, 12) Researchers studying disability statistics rely on the Survey of Income and Plan Participation (SIPP) over the CPS. (Ex. C, Skoog Aff. at ¶ 13).

Gamboa's methodology, incorporated in his "New Work Life Expectancy Tables," is founded upon data that has been barred by other courts and that which is not recommended for this type of statistical analysis by its very source. Any testimony based upon such an unreliable and statistically unsound methodology is inherently unreliable and inadmissible.

**B. Dr. Gamboa's Testimony As To Future Earnings Capacity Is Inadmissible Conjecture.**

"Impairment of earning capacity is the difference between the amount the plaintiff was capable of earning prior to his injury, and the amount he is capable of earning after the injury." Antol v. Chavez-Pereda, 284 Ill. App. 3d 561, 573, 672 N.E.2d 320, 329 (1<sup>st</sup> Dist. 1996). Any amount of damages recovered "must be limited to such loss as is reasonably certain to occur." Christou v. Arlington Park-Washington Park Race Tracks Corp., 104 Ill. App. 3d 257, 260, 432 N.E.2d 920 (1<sup>st</sup> Dist. 1982). Testimony as to loss of earnings that is too remote or uncertain is improper. Id. Additionally, the jury must be presented with "reasonably certain proof that such damages [will] endure." Brown v. Chicago and North Western Transportation Co., 162 Ill. App. 3d 926, 936, 516 N.E.2d 320, 327 (1<sup>st</sup> Dist. 1987). Mere conjecture is not regarded as proof of an existing fact or of a future condition that will result. Id. (citing Stevens v. Illinois Central R.R. Co., 306 Ill. 370, 377, 137 N.E.859 (1922)).

In this case, Gamboa states that while he believes Plaintiff will complete her Bachelor's Degree, he claims that she will achieve only what is expected of someone with only 13-15 years of education. (See Exhibit B, Deposition of Dr. Gamboa, at pgs. 73, 77). Any statistical analysis

from Gamboa's Tables is apparently irrelevant to Gamboa's opinion, for Gamboa states simply that "I am assigning to her an earnings figure" that is below the level of educational attainment Plaintiff will achieve. (Ex. B, Gamboa Dep. at 73). Strangely, Gamboa subsequently comments that, "what I believe is that like others with a Bachelor's Degree, she will function at lower level occupations." (Ex. B, Gamboa Dep. at 73). This testimony is irreconcilable with his use of the Tables and other statistical analysis.

Gamboa also states that Plaintiff has "some orientation towards sales." (Ex. B, Gamboa Dep. at 78). He explains that occupations in sales exist in both the 13-15 years of education category, and the 16 or more years category. (Ex. B, Gamboa Dep. at 78-79). Although Gamboa makes it clear that occupations may cross both of these educational categories, he insists, arbitrarily, that Plaintiff will not be "functioning in occupational categories that are specific to people with Baccalaureate Degrees." (Ex. B, Gamboa Dep. at 77). Gamboa explains that, "She's still functioning at the same levels that she was functioning previously" (Ex. B, Gamboa Dep. at 74); however, this statement refers to her level of functioning in June 2001, when he completed his report, which would still place Plaintiff in the 16 or more educational level category. (Ex. B, Gamboa Dep. at 74) Gamboa's conclusions directly contradict any notions of the efficacy and applicability of the Tables, and opens the floodgates for Gamboa's unsubstantiated assumptions.

The court in Valencia v. Lee, found that an economist's testimony as to the plaintiff's earning capacity was unsupported by the evidence and speculative. 123 F. Supp. 2d 666, 693 (E.D.N.Y. 2000). In Valencia, the plaintiff's expert testified that the plaintiff would be relegated to earning minimum wage for the duration of his working life as a result of lead poisoning. Id. The court rejected this testimony, stating that "[i]t would be an overly pessimistic speculation to

assume that this is [the plaintiff's] fate.” Id. The court noted that “common sense indicates that too many other variables would have an effect on what [the plaintiff] will earn.” Id. The court refused to accept this testimony as it was based upon the “speculative premise that [the plaintiff's] fate has already been decided.” Id.

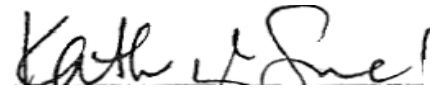
Here, Dr. Gamboa opines that regardless of the fact that Plaintiff will have a college degree, she will only earn what is typical of individuals with a high school degree. This is precisely the type of speculative, pessimistic testimony that was rejected in Valencia. This wildly speculative opinion, like the opinion given in Valencia, ignores what the court pointed out is simply common sense: there are too many variables that will have an impact on what Plaintiff will earn to seal her fate as beneath what she has proven is her potential.

Admittedly, there is no Illinois case law addressing the type of expert testimony challenged by the defendants; however, the law is clear that any expert testimony that is speculative and does not address damages that are reasonably likely to occur, is inadmissible. Gamboa's rampant speculation finds no support in his statistical analysis, and is based upon incongruous conclusions.

### **CONCLUSION**

The underlying methodology Gamboa relies upon incorporates overly broad definitions of “work disability” that have been rejected by other courts, and his analysis of this data is not accepted as statistically sound by other researchers in the field. In addition, Gamboa conveniently ignores this methodology when considering the plaintiff's future earnings potential. Gamboa's reliance on improper data analysis combined with his unsupported speculation as to occupations within Plaintiff's reach, yield a formula for calculating damages that is inherently flawed. As such, Dr. Gamboa's testimony on future wage loss should be barred.

WHEREFORE, the Defendants, RUTLAND DUNDEE TOWNSHIP FIRE PROTECTION DISTRICT and DENNIS DEMES, respectfully request this Court bar the testimony of Dr. Anthony Gamboa, Jr.

A handwritten signature in black ink, appearing to read "Kathryn A. Smetana". The signature is written in a cursive style with a horizontal line underneath.

KATHRYN A. SMETANA, One of  
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