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GERALD S K AND § IN THE DISTRICT COURT  
ELIZABETH K §  
§  
VS. § 96<sup>TH</sup> JUDICIAL DISTRICT  
§  
WOODFORD LIVESTOCK TRANSPORT, §  
GARRY BOWLING, AND CATHY §  
COLVIN SNEED § TARRANT COUNTY, TEXAS

**DEFENDANTS' JOINT MOTION TO STRIKE EXPERT TESTIMONY OF  
GERALD CASENAVE, TERENCE CLAURETIE, AND RICHARD FULBRIGHT**

COME NOW Woodford Livestock Transport and Garry Bowling, and Cathy Colvin Sneed, Defendants in the above-styled and numbered cause ("Defendants"), and file this their Joint Motion to Strike the Expert Testimony of Gerald Casenave, Terrence Clauretjie, and Richard Fulbright, and in support of said Motion, would show unto the Court the following:

**I. Introduction**

Defendants move to exclude the expert testimony of Plaintiffs' designated economic experts, Gerald Casenave and Terrence Clauretjie, on the grounds that they fail to meet the requirements of an expert under Rules 702 of the Texas Rules of Evidence, and of the expert requirements set forth by the Texas Supreme Court in *E.I DuPont deNemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995) and subsequent cases. Defendants base their Motion to Strike on the deposition testimony of Gerald Casenave and on the expert report jointly prepared by Gerald Casenave and Terrence Clauretjie.

Defendants further move to strike the expert designation of Richard Fulbright, a treating physician of Plaintiff Gerald S K and a designated expert witness. Defendants base their

motion to strike Richard Fulbright based on Plaintiffs' failure to comply with Texas Rule of Civil Procedure 194.3(e).

Defendants request that the Court conduct a pre-trial hearing on this Motion outside the presence of the jury prior to allowing this expert to testify in front of the jury.

## **II. Argument Regarding Gerald Casenave and Terrence Clauretie**

### **A. Standard for expert testimony**

Texas Rule of Evidence 702 contains the following requirements for the introduction of expert testimony:

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 opinion or otherwise.

The Texas Supreme Court has determined that in order for expert testimony to be admissible, it must be both reliable and relevant. *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 726 (Tex. 1998). These requirements are applicable to all expert testimony. *Gammill*, 972 S.W.2d at 726. The trial court acts as a "gatekeeper" and must make the initial determination whether the expert's opinion is relevant and whether the methods upon which it is based are reliable. *Id.* at 558. Whether a witness is qualified to render an expert opinion is committed to the trial court's discretion. *United Blood Services v. Longoria*, 938 S.W.2d 29, 30 (Tex. 1997).

The expert testimony of Gerald Casenave ("Casenave") and Terrence Clauretie ("Clauretie") should be stricken because it does not meet the relevancy and reliability requirements adopted by the Texas Supreme Court. The factors which were identified by the Texas Supreme Court for a trial court to consider when evaluating the reliability of scientific evidence are:

1. the extent to which the theory can be or has been tested;
2. the extent to which the technique relies upon the subjective interpretation of the expert;
3. whether the theory has been subjected to peer review and/or publication;
4. the technique's potential rate of error;
5. whether the underlying theory or technique has been generally accepted as valid by the scientific community; and
6. the non-judicial uses which have been made of the theory or technique.

*E.I DuPont deNemours & Co. v. Robinson*, 923 S.W.2d 549, 556-557 (Tex. 1995).

**B. Casenave's and Clauretjie's opinions are not reliable**

Plaintiff's have designated Casenave and Clauretjie to testify as Plaintiffs' economic expert witnesses. They have provided a joint report and Casenave has been deposed. Defendants have not yet been able to take the deposition of Clauretjie. The report provides an alleged economic assessment for Plaintiff Gerald S. K. that concludes that he has suffered a loss of earning capacity with a present value range of \$1,121,596 to \$1,641,928. See the report which is attached hereto as Exhibit "A." However, the techniques employed by Casenave and Clauretjie in reaching these numbers are highly subjective, have a huge potential rate of error, and ignore critical facts that are specific to Plaintiff Gerald S. K.'s situation. In short, the techniques employed by Casenave and Clauretjie are so flawed that their testimony on the issue of economic losses is inherently unreliable and would not assist the jury's determination of that issue at trial.

The report attached hereto as Exhibit "A" provides two different analyses of Plaintiff Gerald S. K's ("K") economic losses.<sup>1</sup> The only difference between the two analyses is that the second one assumes that K will experience a decrease in functionality and mobility and a future increase in pain, thus reducing his post-injury worklife expectancy. Exhibit "A," p. 3. Aside from that one difference, the techniques employed by Casenave and Clauretje in reaching their conclusions are identical under both analyses. *Id.* at pp. 2-3. Thus, both analyses are similarly flawed. The analyses consist of a five-part formula: first, a determination of pre-injury earning capacity is made; second, pre-injury worklife expectancy is determined; third, post-injury earning capacity is established; fourth, post-injury worklife expectancy is determined; and fifth, the numbers are calculated to determine the present value of K's alleged economic damages. The flaws with this formula lie in the methods by which Casenave and Clauretje arrive at the numbers under each subpart.

1. Pre-injury earning capacity

To arrive at pre-injury earning capacity, one would think that it would be helpful to consider and rely upon an individual's past earnings history and other facts and traits specific to that individual. In fact, the boilerplate language employed by Exhibit "A" provides that "In conducting the [economic losses] assessment, vocational and economic experts consider the unique characteristics of the individual being assessed..." *Id.* at Vocational Economic Rationale p. 1. In the present case though, Casenave and Clauretje decided not to rely upon K's past work history, which was unremarkable at best. It is undisputed that prior to the accident which forms the basis of

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<sup>1</sup>Much of the report consists of a "Vocational Economic Rationale" that is boilerplate language developed by various employees and/or independent contractors of Vocational Economics, Inc. See Deposition of Gerald Casenave, the relevant portion of which are attached hereto as Exhibit "B," p. 108, line 20 - p. 109, line 24.

this lawsuit, K. had never reported income exceeding \$20,434.00. His income in 1998 was only \$11,148.00. K.'s 1999 income was \$19,907.00. Contrary to Plaintiffs' anticipated rebuttal to this argument, that cannot be blamed on K.'s studies. He received his undergraduate degree in business administration/finance in 1998 at the age of 26; yet two years later, at the time of the accident which forms the basis of this lawsuit, K. had recently been hired to work as an appliance salesman at Stone Appliance in Fort Worth, where he was to be making a yearly salary of only \$24,500.00 plus commissions. See Deposition of Gerald S. K., relevant portions of which are attached hereto as Exhibit "C," p. 20, lines 9-22; p. 26, lines 11-22.

Despite K.'s lackluster work history, Casenave and Clauretie have concluded that his pre-injury earning capacity was \$66,700 per year. See Exhibit "A." They even used this number when determining his past lost earnings, despite the fact that he had only worked as an appliance salesman and a mattress salesman. See Exhibit "B," p. 58, line 23 - p. 59, line 6. However, this "proxy" number does not take into account K.'s work history or other factors specific to him. See Exhibit "B," p. 94, lines 4-8. Rather, it is simply pulled from a United States government chart which is comprised of numbers obtained during a United States census poll from the years 1995 to 2000. Specifically, that number reflects the mean yearly salary of a U.S. male, age 25-64, with 16 years of education. See Exhibit "A." It does not factor in race, location, occupation, specific age, the type of degree earned, or anything else. See Exhibit "B," p. 63, line 19 - p. 64, line 18. By using this chart, Casenave and Clauretie would reach the same pre-injury number if they were doing an analysis of the pre-injury earning capacity of an 64 year-old Mississippi elementary school janitor and the president of Microsoft Corp., Bill Gates. Casenave and Clauretie have totally ignored facts specific to K. in reaching the \$66,700.00 number. In fact, Casenave has testified that

information about K [redacted]'s prior earnings and the fact that he had never held down one job for more than a few months never even entered into their calculations. *See* Exhibit "B," p. 123, lines 11-25. Their decision to use the number of \$66,700.00 is based entirely on speculation that K [redacted] would ever achieve the national earnings average had the accident never occurred. Based on the only real numbers and facts we know, those provided by K [redacted]'s spotty work history, that is a far-fetched speculation indeed.

2. Pre-injury worklife expectancy

Again, to determine K [redacted]'s pre-injury worklife expectancy, Casenave and Clauretie simply relied upon government charts. The charts they relied upon determine worklife expectancies based on only the following factors: age, educational level and gender. These charts are incorporated into a computer program, written and sold to the general public by the company for which Casenave serves as an independent contractor, Vocational Economics, Inc., which allows the user to plug in the age-range of the specific individual in question. *See generally*, Exhibit "B," p. 60, line 6 - p. 61, line 13. In this instance, Casenave and Clauretie relied upon national average statistics for any male, regardless of race, occupation, or location, between the ages of 31 and 74, having a college degree. That's it. When one plugs those very vague parameters into the Vocational Economics, Inc. software, the number 32.9 is calculated based on government statistics. There is nothing scientific about these methods, and the numbers are based only on national averages—averages that may or may not apply to K [redacted].

In short, Casenave and Clauretie have relied on speculation and vague national averages, only, in determining K [redacted]'s pre-injury worklife expectancy. The inherent subjectiveness of this method leaves it open to a huge potential rate of error. The same number could apply to a

professional football player, a stuntman, a high-rise construction worker—occupations that common sense dictates likely do not provide a very long worklife expectancy. Not surprisingly then, Plaintiffs have failed to establish that this questionable technique has ever been relied upon by experts in this field (other than those similarly under contract with Vocational Economics, Inc.), and there is no evidence that it has ever been subjected to peer review.

3. Post-injury earning capacity

Like the other two parts of Casenave's and Clauretie's formula discussed above, their techniques for establishing post-injury earning capacity are highly questionable and subjective. Again, they simply rely on very non-specific government data. In fact, they looked at the same table that was used to determine pre-injury earning capacity. See Exhibit "B," p. 65, line 25 - p. 66, line 13. That table contains information gathered by the United States government during the years 1995 and 2000, on full-time working males ages 25-64 with *some* level of disability and with a college degree, and provides that on average, those individuals make \$50,883.00 per year. *Id.* at p. 115, line 19 - p. 116, line 12. Importantly, it does not take into account the level or type of disability possessed by those males and is not limited in any other way (i.e., by specific age, occupation, geographic location, type of college degree, etc.). See Exhibit "A;" Exhibit "B," p. 116, lines 5-12. In other words, that figure equally applies to a male who has a speech impediment and a male who is wheelchair bound. The male could work in Silicon Valley as a computer engineer or could be a Texas high school teacher. As long as they were disabled and working, the number would be the same.

Use of this general government chart completely ignores the effect of facts which are specific to K . . . The \$50,883.00 figure used by Plaintiffs' designated experts in no way reflects

's level of disability, if any. Nor does it take into effect any disability that K may have had before the accident. Plaintiffs' designated experts simply speculate that K will now only reach the national average for "disabled" working males, when in fact he may far exceed it. Casenave and Clauretje have simply conducted an analysis that anyone could make—look at some government charts and see what the average number is. They have in no way tailored their analysis to the facts specific to K. As with their other methods detailed above, there is no indication that simply relying on government averages is an accepted practice for determining post-injury earning capacity. To put it simply, it is ridiculous to think that post-injury earnings can be calculated, within a range of remote reliability, without even considering the disability level of the individual in question.

#### 4. Post-injury worklife expectancy

Plaintiffs' experts make no exception to their methods when calculating K's post-injury worklife expectancy. In their first analysis of this element, they again simply rely on government census poll data that has been plugged into software which does the summation for them. *See generally*, Exhibit "B," p. 101, line 13 - p. 104, line 21. Like the other data relied upon by Casenave and Clauretje, this data is extremely general and vague. Specifically, they simply looked at all males of his age, with at least 16 years of education, who were disabled (not severely). When those parameters are plugged into the software, the computer does the summation of the standard government census tables and arrives at a figure of 26.9 years. This data is even more vague than the pre-injury worklife data because it includes all males who have *at least* 16 years of education. That means that it applies equally to those having J.D.s, Ph.D.s, and M.D.s. *Id.* at p. 104,

line 22 - p. 105, line 17. Of course, it also has the same vagaries inherent to the pre-injury data discussed above.

To arrive at the post-injury worklife expectancy numbers contained in their second analysis (18.5 years), Plaintiffs' experts rely on even greater logical leaps and speculation. Specifically, they employ a government chart that uses an average of all disabled; that is, an average worklife expectancy for those who are disabled non-severely and those who are severely disabled. In addition to the various assumptions built into the data which are discussed above in regard to the first analysis conducted by Plaintiffs' designated experts, the second analysis of K [redacted]'s post-injury worklife expectancy is riddled with even greater assumptions. The biggest of these assumptions is that K [redacted] may someday be categorized as being somewhere between disabled non-severely and severely disabled. No evidence to support that assumption was ever provided to Casenave or Clauretie. Moreover, Casenave, the only one of the two to have ever met with K [redacted], only met with him for approximately 1 ½ hours in the lobby of the Belagio Hotel in Las Vegas, Nevada. *Id.* at p. 68, line 8 - p. 69, line 7. The only medical report he was provided was that of Richard Fulbright, which does not support an assumption that K [redacted] may someday be more disabled than he is alleged to be today. Moreover, Casenave did not do any independent examination of K [redacted]. *Id.* at p. 73, line 7 - p. 74, line 8. His opinions about K [redacted]'s future disability are based entirely on speculation and conjecture. As such, they are of no assistance to the jury and are inadmissible pursuant to Rule 702, Tex. R. Evid. and the reliability requirements adopted by the Texas Supreme Court. The methods employed by Casenave and Clauretie simply cannot satisfy the standard for expert testimony.

C. Summary of argument against Casenave and Clauretje

To summarize the techniques employed by Casenave and Clauretje as outlined in their expert report and as confirmed by the deposition testimony of Casenave, they: (1) determined that K is a male, at least 25 years of age, with an educational level of 16 years; and (2) plugged that information into some tables generated by the United States government based on census poll data. The results of this elementary analysis produce non-specific numbers that could apply to any one of the millions of Americans who possess similar characteristics. Most children can look at a government chart and run a simple mathematics software program. "Expert opinions are admitted in evidence on the theory that the expert, by reason of study, has special knowledge which jurors do not possess, and is therefore better able to draw conclusions from fact." *Id.*; *Perry v. Texas Municipal Power Agency*, 667 S.W.2d 259, 264 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.). The techniques employed by Casenave and Clauretje do not rise to the level of economic expertise.

Even worse than being vague and non-specific, the data relied upon by Plaintiffs' designated experts simply ignores the facts specific to K. Casenave and Clauretje have speculated that had this accident not occurred, K might one day reach the national salary average despite the fact that he had never made even \$21,000.00 before the accident. They have speculated that he would have worked for 32.9 years even though he had never held any one job for more than a few months. They have speculated that he will now make at most \$50,883.00 per year, even though he is currently in the same line of work he was in before the accident—retail sales—and even though there is no medical basis for discounting the possibility that he may one day exceed that average. Finally, they have calculated his post-injury worklife expectancy without regard for the level of disability that

he allegedly currently possesses. This speculative method of economic loss calculation has not been subjected to unbiased peer review and has certainly not been recognized as an accepted practice in the field of economics. As such, it is of no assistance to the jury and is inadmissible because it does not meet the requirements for expert testimony pursuant to Rule 702, Tex. R. Evid., and the reliability requirements adopted by the Texas Supreme Court.

The Defendants will be unfairly prejudiced by the expert testimony of Casenave and Clauretje because it fails to meet the reliability requirements established for expert testimony. As the Texas Supreme Court has noted "A witness who has been admitted by the trial court as an expert often appears inherently more credible to the jury than does a lay witness. Consequently, a jury more readily accepts the opinion of an expert witness as true simply because of his or her designation of an expert." *E.I. DuPont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 553 (Tex. 1995). Because the techniques employed by Casenave and Clauretje fail to satisfy the several requirements outlined by the Texas Supreme Court in *Robinson*, their testimony should be stricken because it does not show indicia of reliability.

### **III. Argument Regarding Richard Fulbright**

Defendants' motion to strike the expert designation and testimony of Richard Fulbright is conditioned on this Court's ruling on Defendants' Joint Motion for Continuance and Motion to Strike.

Defendants move this Court to strike the designation of Richard Fulbright as a testifying expert witness because Plaintiffs have failed to comply with Texas Rule of Civil Procedure 194.2(f)(4) which requires that Plaintiffs provide Defendants with "all documents, tangible things,

reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony."

On August 27, 2002, Defendants initially subpoenaed all of Richard Fulbright's medical records on K [redacted], but he refused to provide all of the documents in his possession in violation of that subpoena. Then, on April 16, 2003, Defendants finally were able to take the deposition of Richard Fulbright. In that deposition, Richard Fulbright testified that he had approximately eighty (80) pages of raw test data that he had compiled on K [redacted] that were neither produced in accordance with the subpoena nor brought to the deposition pursuant to the duces tecum that was served on Richard Fulbright for that purpose. See Deposition of Richard Fulbright, the relevant portions of which are attached hereto as Exhibit "D," page 12, lines 11-20. Richard Fulbright simply refused to provide Defendants with that data, even after being served with a subpoena for all of his records. *Id.*, page 8, line 3 - page 12, line 8. He did, however, testify that he would be willing to produce that raw data to Defendants Woodford Livestock Transport and Garry Bowling's expert, Dr. David Price, upon request that he do so. *Id.* page 10, line 20 - page 11, line 21. This request was made by Defendants on April 22, 2003. Other requests for this information were made of Plaintiffs on May 2, 2003 and May 6, 2003. Plaintiffs have still refused to produce this raw data. See letters attached hereto collectively as Exhibit "E."

The raw data is critical to this case because it contains several tests that were conducted on K [redacted] by Richard Fulbright. In addition, it contains several questionnaires that were completed by K [redacted] and his wife, Plaintiff Elizabeth K [redacted], which detail K [redacted]'s prior medical history, his functional status prior to the accident and post-accident, his medications, his daily living

abilities, and other critical information. See Exhibit "D," p. 29, line 5 - p. 30, line 11. All of that information is exactly on point with the issues which are critical to this lawsuit.

Rule 193.6 contains the remedy for a party's failure to properly supplement or provide information requested through written discovery. This rule provides in pertinent part:

**(a) Exclusion of evidence and exceptions.** A party who fails to make, amend, or supplement a discovery response in a timely manner may not introduce in evidence the material or information that was not timely disclosed, or offer the testimony of a witness (other than a named party) who was not timely identified . . . .

Richard Fulbright should be stricken as an expert and should be prevented from testifying at the trial of this cause due to the failure of the Plaintiffs to fully respond to Defendants' Request for Disclosure. Defendants will be substantially hindered in the cross examination of Richard Fulbright because of the Plaintiffs' failure to provide this critical information. He should thus be prohibited from offering expert testimony.

WHEREFORE, PREMISES CONSIDERED, Defendants Garry Bowling, Woodford Livestock Transport, and Cathy Colvin Sneed, move and pray that the expert testimony of Gerald Casenave and Terrence Clauretje be stricken and excluded in its entirety; that the Plaintiffs' designation of Richard Fulbright be stricken and that Richard Fulbright be excluded from offering expert testimony; and for such other and further relief, both general and special, legal and equitable, to which Defendants are otherwise justly entitled.

Respectfully submitted,

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**CERTIFICATE OF CONFERENCE**

This will certify that Plaintiffs' counsel was contacted regarding the filing of this Motion and advised that she is opposed to same. Therefore, this Motion is being submitted to the Court for consideration.

\_\_\_\_\_  
Roy L. Stacy

Respectfully submitted,

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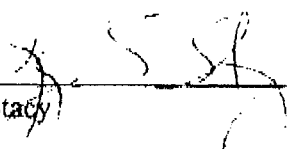
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\_\_\_\_\_  
Roy L. Stacy

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 27<sup>th</sup> day of May 2003, a copy of the foregoing was delivered via U.S. Mail, first-class postage prepaid, to all counsel of record.

  
\_\_\_\_\_  
Roy L. Stacy

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