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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

DESTINEE MIDDLETON
and TONY MIDDLETON

Plaintiff

vs.

SEARS, ROEBUCK and
COMPANY,

Defendant

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CASE NO. 5:99CV157
JURY

**REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO
STRIKE OR EXCLUDE THE TESTIMONY OF GERALD CASENAVE, PH.D.**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Defendant, Sears, Roebuck and Company (hereinafter "Sears"), and files this Reply to Plaintiffs' Response to Defendant's Motion to Strike or Exclude the Testimony of Gerald Casenave, Ph.D., and in support thereof would respectfully show the Court as follows:

I.
EXHIBITS RELIED UPON

In this Reply, Defendants rely upon all exhibits attached to its Motion to Strike filed with the Court on October 27, 2000. Furthermore, Defendant relies upon all case law, arguments, and authorities included in its Motion to Strike, as well as all case law, arguments and authorities cited herein. Defendant specifically contests all issues in Plaintiffs' Response and stands by its assertions in its Motion to Strike, even if Defendant does not specifically address all of Plaintiffs' Responses in this Reply.

REPLY TO PLAINTIFFS' CLAIMS IN SECTION IV OF THEIR RESPONSE

Defendant continues to assert the Dr. Casenave's training in the area of economics has been obtained solely for, by, and through Vocational Economics, Inc., an entity designed only for litigation purposes. As such, Dr. Casenave's "experience" and "training" do not qualify him to testify in the area of economics.

REPLY TO PLAINTIFF'S CLAIM IN SECTION V OF THEIR RESPONSE

The fact that Dr. Casenave has had his "expert testimony" accepted in other Courts is of no precedential value. See Elcock v. K-Mart Corp., 228 F. 3d. 448, 457 (3rd. Cir. 1999) (citing Thomas J. Kline, Inc. v. Lorillard, Inc., 878 F. 2d. 791, 800 (4th Cir. 1989):

"[I]t would be absurd to conclude that one can become an expert simply by accumulating experience in testifying."

First, in other cases where Dr. Casenave's testimony may have been admitted, the parties may have stipulated to his methodology and/or his qualifications. The Defendant does not do so here. Second, there is no way to know if Dr. Casenave used the same methodology in those cases and/or if the issues in those case are even comparable to the issues before this Court. Third, the only opinion Defendant can locate, and the only opinion to which Plaintiffs cite, the Burch v. Coca Cola opinion, is an unpublished opinion from the Northern District of Texas which does not give any insight into Dr. Casenave's methodology or any challenges made to his qualifications or methodology. Oddly enough, the Burch case includes a front pay calculation which was discounted to present

value, a method with which Dr. Casenave purports to disagree.

REPLY TO PLAINTIFFS' RESPONSE IN SECTION VI OF THEIR RESPONSE

The Plaintiffs appear to have misread the Elcock case cited above. The Court in Elcock did not say that the psychologist was qualified to testify as a vocational rehabilitation expert, much less did it agree that the psychologist possessed the requisite qualifications to testify as an economic expert. What the Court did say is that the District Court erred in not holding a Daubert hearing to make this determination. In fact, the Court said that the psychologist's qualifications were "thin." Elcock at 454-455. Moreover, the Court seemed skeptical that the psychologist's qualifications would hold up in the wake of a full blown Daubert hearing. The Third Circuit actually vacated the District Court's decision to admit this psychologist's testimony and remanded the case for a Daubert hearing on the issue.

REPLY TO PLAINTIFFS' RESPONSE IN SECTION VII

Contrary to what the Plaintiffs' state, Dr. Casenave does give medical testimony on pages 34-36, 40-42, and 46-47 of his deposition. In fact, his testimony on those pages is almost identical to the testimony that was held to be improper in Baker Marine v. Herrera. Further, in response to Plaintiffs' footnote on page 5, Defendant does not concede that Dr. Casenave is a medical doctor, but has simply referred to him as "Dr." pursuant to professional courtesy, as was discussed during his deposition. Dr. Casenave is not a physician, he does not hold himself out to be a physician, and thus cannot possible provide admissible testimony

regarding the nature, extent, or duration of Ms. Middleton's injuries.

**REPLY TO PLAINTIFFS' RESPONSE CONCERNING
DR. A.M. GAMBOA, JR. PH.D.**

While Plaintiffs make numerous arguments that Dr. Gamboa's Worklife Expectancy Tables ("The Tables") are reliable, Plaintiffs fail to inform the Court the Dr. Gamboa is the Chief Executor Officer of Vocational Economics, Inc., the company that employs Dr. Casenave and is a litigation support business "specializing in defining economic damages." Consequently, Defendant reasserts its argument that The Tables have been created by Vocational Economics, Inc., in order to inflate future damages, for the Plaintiffs for whom it does the vast majority of its work. Further, while not conceding that The Tables are generally accepted in the economic community, Defendant reasserts its argument that Dr. Casenave is not the qualified person to testify regarding their general acceptance or Ms. Middleton's economic damages, even if the Court finds that The Tables are acceptable. Finally, the fact that Dr. Gamboa's testimony or The Tables may have been accepted elsewhere is not relevant to Dr. Casenave's qualifications or his methodology in this case. See Elcock, supra.

While Defendant does not support the idea that prior acceptance or rejection of expert testimony holds any precedential value, Defendant does support an accurate recitation of the cases cited by either Plaintiffs or Defendant. In that regard, Defendant refers the Court to Michels v. U.S., cited by the Plaintiffs in support of their position. The Plaintiffs have failed to inform the Court of the true

decision in the Michels case, stating that it holds “expert relied upon 1987 version of Dr. Gamboa’s tables in support of future lost earnings.” While it is true that the expert relied on The Tables, it is not accurate to imply that the Court upheld the expert’s reliance on The Tables. In Michels, the Court held that the “Gamboa report” (the 1987 Life Expectancy Tables) “suffers from several deficiencies which render it unreliable . . .” Michels at 1259. One reason the Court held The Tables to be unreliable is because “the Gamboa report lumped together without differentiation persons suffering from both mental and physical disabilities.” Id. at 1259. This deficiency is similar to the complaint made by Defendant that The Tables used by Dr. Casenave skew a person’s life expectancy by using data from only severely disabled persons. Because of the unreliability of The Tables, the Court in Michels excluded the Plaintiff’s expert testimony that relied on Gamboa’s tables. While the Court is not required to follow this example, the Court should note that Plaintiffs did not make any effort to bring this information to the Court’s attention.

DOCUMENTATION SUPPORTING PLAINTIFFS’ RESPONSE

The Court should completely disregard Exhibit “D” to Plaintiffs’ Response. This Exhibit purports to be a statement from Dr. Casenave. However, this statement is neither signed nor sworn to. As such, the statement is completely unreliable and must be excluded. Moreover, this purported statement from Dr. Casenave does not appear to be specific to this case, and it contains numerous self-serving, unqualified assertions without explanation. It appears to be nothing

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more than a marketing tool one might find on the Vocational Economic's website.

**REPLY TO PLAINTIFFS' RESPONSE REGARDING
THE TOTAL OFFSET METHOD**

Defendant continues to dispute Dr. Casenave's use of the total offset method as generally accepted in the economic community. In fact, an article written by Thomas Ireland in a peer-reviewed journal notes that the total offset method "is used by only a small number of forensic economists, but is commonly associated with employees of Vocational Economics, a business centered in Louisville, Kentucky . . . it appears to be a business practice of Vocational Economics, Inc. for this method to be used in all lost earnings cases and for the use of this practice to be justified in a particular way." Total Offsets in Forensic Economics: Legal Requirements, Data Comparisons, and Jury Comprehension, 9 J. Legal Econ. 9 (1999).

CULVER II

The Culver II decision is still the controlling case in the 5th Circuit on calculating future loss of earning capacity. It has been followed as recently as 1996. See Rhodes v. Guiberson Oil Tools, 82 F. 3d. 615, 622 (5th Cir. 1996). Further, Culver II does not conflict with Monessen Southwestern Railway Company, because it leaves the trier of fact some discretion in determining the amount of future lost wages or earning capacity. Finally, the most important statement in Culver II regarding the trial court using a zero discount factor is "[i]f supported

by appropriate expert opinion . . .” Culver II requires support from an appropriate expert for the trial court to use a zero discount factor. The Court in this case has no testimony from an appropriate expert, as Dr. Casenave is not qualified to give this type of testimony.

WHEREFORE, PREMISES CONSIDERED, Defendant reasserts its Motion to Strike and/or Exclude the Testimony of Dr. Gerald Casenave, and asks the Court to enter one of the Orders Defendant previously filed with its Motion on October 27, 2000. Defendant further requests all other relief to which it may show itself justly entitled.

Respectfully submitted,



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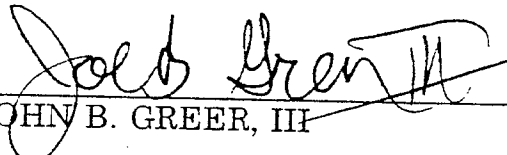
ATTORNEY FOR DEFENDANT,
SEARS, ROEBUCK and COMPANY

CERTIFICATE OF SERVICE

I, John B. Greer, III, do hereby certify that a true and correct copy of the above and foregoing instrument has been forwarded to the following attorneys of record on this 2nd day of November, 2000:

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JOHN B. GREER, III

APPENDIX

- (1) Elcock v. K-Mart Corporation, 228 F. 3d. 448, 457 (3rd. cir. 1999).
- (2) Burch v. The Coca-Cola Company, 1995 WL 674980 (N.D.Tex.1995).
- (3) Michels v. U. S., 815 F. Supp. 1244, (S.D. Iowa 1993, aff'd, 31 F. 3d. 686 (8th Cir. 1994).
- (4) Thomas J. Ireland, Total Offsets in Forensic Economics; Legal Requirements, Data Comparisons, and Jury Comprehension, 9 J. Legal Ecopn. 9 (1999).
- (5) Rhodes v. Guiberson Oil Tools, 82 F.3d. 615 (5th Cir. 1996).
- (6) Monessen Southwestern Railway Company v. Morgan, 486 U. S. 330, 108 S. Ct. 1837, 100 L. Ed. 2d 349 (1988).