

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ALAERIC TEVON BIRGE, a minor,)
by mother and next friend,)
PHENIQUESKI S. MICKENS)
)
Plaintiff,)

No. 04-2531 B/P

vs.)
)
DOLLAR GENERAL CORPORATION,)
DOLGENCORP, INC., TOMMY LEE)
TURLEY, JEREMY GARRETT, COREY)
RICHMOND,)
)

Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO EXCLUDE THE EXPERT OPINION
AND TESTIMONY OF DAVID H. CISCEL

Before the court is a Motion to Exclude the Expert Opinion and Testimony of David H. Ciscel, filed by defendants Dollar General Corporation and Dolgencorp, Inc. (collectively "Dollar General") (D.E. 62). Plaintiff Alaeric Tevon Birge opposes the motion, and filed a response in opposition. With leave of court, Dollar General filed a reply. The motion was referred to the Magistrate Judge for determination. For the reasons below, the motion is GRANTED.¹

¹The court, having carefully reviewed the record, finds that an evidentiary hearing is not necessary to decide this motion. The court is not required to conduct a hearing to determine whether a proposed expert's testimony meets the Daubert standards. Nelson v.

I. BACKGROUND

On March 29, 2004, at approximately 6:30 p.m., decedent Dexter Birge parked his GMC Yukon Denali in the parking lot outside of a Dollar General store located at 7110 East Shelby Drive, Memphis, Tennessee ("the Dollar General store") and went inside the store. Moments later, as he was leaving the store, Birge was confronted by three men who demanded that Birge give them his keys so that they could take his tire rims. During a struggle with his assailants, Birge was shot and killed. Shortly thereafter, the Memphis Police Department arrested Tommy Lee Turley, Jeremy Garrett, and Corey Richmond (collectively "criminal defendants") in connection with Birge's murder. All three criminal defendants have been indicted and await trial in Shelby County Criminal Court on charges of assault, robbery, and murder. On July 14, 2004, Alaeric Birge, a minor, by and through his mother Pheniqueski S. Mickens,² filed a complaint against Dollar General alleging that it was negligent in

Tennessee Gas Pipeline Co., 243 F.3d 244, 248-49 (6th Cir. 2001). With respect to this motion in particular, the court has considered Dollar General's memorandum in support of its motion to exclude and its reply brief, Birge's 34-page response in opposition to the motion, exhibits attached to the parties' briefs, including Dr. Ciscel's deposition transcript, expert report, and curriculum vitae, and the deposition testimony of Robert E. Birge, Carlton R. Dixon, and Pheniqueski Mickens.

²Alaeric Birge is the only child of decedent Dexter Birge. Mickens is the mother of Alaeric Birge. Robert and Dorothy Birge are Dexter Birge's parents. (Pla.'s Response at 4-5).

failing to prevent Birge's death on its premises.³

Dexter Birge was a high school graduate who worked at B's Quick Stop from 1994 until the date of his death. B's Quick Stop is a family-owned general convenience store and gas station in Como, Mississippi.⁴ Dexter Birge worked at the store with his parents, performing duties such as working the cash register, cooking, and assisting in running the day-to-day operations of the business. As part of his case, Birge retained forensic economist Dr. David H. Ciscel to provide expert testimony concerning the lost future net income of Dexter Birge. Because no documents were available to Dr. Ciscel relating to Dexter Birge's income history or net worth, such as W-2s, tax returns, pay check stubs, or bank account records, Dr. Ciscel was unable to calculate Birge's future income based on any actual past income data. Due to this lack of information, Dr. Ciscel calculated Birge's lost future income based on the assumption that Birge was a manager of B's Quick Stop.

³On March 11, 2005, Birge amended his complaint to add defendants Turley, Garrett, and Richmond.

⁴In December 1996, Robert Birge transferred ownership of B's Quick Stop to Dexter Birge. According to Robert Birge, he transferred ownership to Dexter because the parents were experiencing financial hardship which ultimately resulted in the filing of personal bankruptcy. (Robert Birge Dep. 12-13). Robert Birge testified that Dexter understood that his parents were the true owners of the store. Although the parties disagree as to whether Dexter Birge was the "true owner" of B's Quick Stop, the court need not resolve this dispute, as the court's determination of whether to exclude the expert's testimony on future lost income does not depend on whether Birge had a ownership interest in the convenience store.

Using a composite average annual salary for food service managers, first line supervisors and managers, and supervisors of retail workers in eight nearby counties in Arkansas, Tennessee, and Mississippi, Dr. Ciscel computed Dexter Birge's 2004 annual salary as \$37,918. Dr. Ciscel opined that had Birge continued to manage B's Quick Stop until his retirement in 2043, his future income discounted to present value would be \$1,019,889. (Ciscel Rep. at 1-2).

II. ANALYSIS

A. *Daubert* and Rule 702

In Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), the United States Supreme Court held that the Federal Rules of Evidence had superseded the "general acceptance" test of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), and that Federal Rule of Evidence 702 requires that trial courts perform a "gate-keeping role" when considering the admissibility of expert testimony. Daubert, 509 U.S. at 597. Rule 702 provides:

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.

Fed. R. Evid. 702. Rule 702 applies not only to scientific testimony, but also to other types of expert testimony based on

technical or other specialized knowledge. See Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 147, 149 (1999).

The court's gate-keeping role is two-fold. First, the court must determine whether the testimony is reliable. See Daubert, 509 U.S. at 590. The reliability analysis focuses on whether the reasoning or methodology underlying the testimony is scientifically valid. Id. The expert's testimony must be grounded in the methods and procedures of science and must be more than unsupported speculation or subjective belief. Id. The proponent of the testimony does not have the burden of establishing that it is scientifically correct, but that by a preponderance of the evidence, it is reliable. In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 744 (3d Cir. 1994).

To aid the trial courts in their determination of whether an expert's testimony is reliable, the Supreme Court in Daubert set forth four non-exclusive factors for the courts to consider: (1) whether the theory or technique has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error of the method used and the existence and maintenance of standards controlling the technique's operation; and (4) whether the theory or method has been generally accepted by the scientific community. Daubert, 509 U.S. at 593-94; see also First Tennessee Bank Nat. Ass'n v. Barreto, 268 F.3d 319, 334 (6th Cir. 2001).

The Court in Kumho Tire emphasized that, in assessing the reliability of expert testimony, whether scientific or otherwise, the trial court may consider one or more of the Daubert factors when doing so will help determine that expert's reliability. Kumho Tire, 526 U.S. at 150. The test of reliability is a "flexible" one, however, and the four Daubert factors do not constitute a "definitive checklist or test," but must be tailored to the facts of the particular case. Id. (quoting Daubert, 509 U.S. at 593); see also Ellis v. Gallatin Steel Co., 390 F.3d 461, 470 (6th Cir. 2004). The particular factors will depend upon the unique circumstances of the expert testimony at issue. See Kumho Tire, 526 U.S. at 151-52. As the Advisory Committee observed,

[s]ome types of expert testimony will not rely on anything like a scientific method, and so will have to be evaluated by reference to other standard principles attendant to the particular area of expertise. The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted. The expert's testimony must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so

Nothing in [the Rule] is intended to suggest that experience alone - or experience in conjunction with other knowledge, skill, training or education - may not provide a sufficient foundation for expert testimony. To the contrary, the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience. In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony. . . .

If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that

experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply "taking the expert's word for it."

Fed. R. Evid. 702 advisory committee's note (2000 amendment).

The second prong of the gate-keeping role requires an analysis of whether the expert's reasoning or methodology can be properly applied to the facts at issue, that is, whether the opinion is relevant to the facts at issue. See Daubert, 509 U.S. at 591-93. This relevance requirement ensures that there is a "fit" between the testimony and the issue to be resolved by the trial. See United States v. Bonds, 12 F.3d 540, 555 (6th Cir. 1993). Thus, an expert's testimony is admissible under Rule 702 if it is predicated upon a reliable foundation and is relevant.

Although a witness may be qualified as an expert in one area of expertise, the expert may be precluded from offering opinions beyond that area of expertise or that are not founded on a reliable methodology. See, e.g., Kumho Tire, 526 U.S. at 154-55; Weisgram v. Marley Company, 169 F.3d 514, 518 (8th Cir. 1999); Allison v. McGhan Medical Corp., 184 F.3d 1300, 1317-19 (11th Cir. 1999); Cummins v. Lyle Indus., 93 F.3d 362, 371 (7th Cir. 1996).

The rejection of expert testimony, however, is the exception rather than the rule, and "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." Fed. R. Evid. 702 advisory committee's notes (2000 amendment) (quoting United States v. 14.38 Acres of Land, 80 F.3d 1074, 1078

(5th Cir. 1996)). "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." Daubert, 509 U.S. at 596. Finally, the proponent of the evidence has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence. Bourjaily v. United States, 483 U.S. 171, 175-76 (1987); Wynacht v. Beckman Instruments, Inc., 113 F. Supp. 2d 1205, 1207 (E.D. Tenn. 2000).

B. Dr. Ciscel's Qualifications

The court finds, and Dollar General does not dispute, that Dr. Ciscel is qualified as a forensic economist to offer expert testimony concerning lost future income and value of worklife. Dr. Ciscel received a doctorate in economics from the University of Houston in 1971. Since 1973, Dr. Ciscel has served as a Professor of Economics at the University of Memphis, and became a tenured professor in 1982. During his career with the University of Memphis, Dr. Ciscel served as the Chairman of the Department of Economics from 1983 to 1986, and Dean of the graduate school from 1992 to 1995. From 1999 to 2001, Dr. Ciscel was a senior consultant with the Federal Reserve Bank of St. Louis. Since 1986, Dr. Ciscel has also worked as a litigation consultant in calculating lost income in cases involving wrongful death, work injury, wrongful termination, and discrimination. Dr. Ciscel has

been admitted to testify as an expert economist in both state and federal courts. This court, therefore, concludes that Dr. Ciscel possesses specialized knowledge beyond the understanding of the average layperson and is preliminarily and generally qualified to testify as an expert on the subject of lost future income and value of worklife.

C. Insufficient Information About Dexter Birge and B's Quick Stop

In order for expert testimony to be admissible, Federal Rule of Evidence 702 requires that the opinion be based on "sufficient facts or data." Dollar General argues that Dr. Ciscel's testimony should be excluded because his opinion is based on insufficient and inaccurate information, and thus he is not able to give a reliable opinion on Dexter Birge's lost future income. (Def.'s Mem. at 1.) The court agrees.

Birge admits in his response brief that Dr. Ciscel was not provided with any information or documents regarding Dexter Birge's work history or net worth, such as W-2s, income tax returns, financial statements, or bank records, since the documents do not exist.⁵ Birge also admits that Dr. Ciscel was not provided with any information or documents showing the earnings, value, or

⁵According to Robert Birge and Pheniqueski Mickens, Dexter Birge did not have a bank account, and always used cash to pay his expenses. (Robert Birge Dep. 10; Mickens Dep. 15-16, 29, 60-61).

financial condition of B's Quick Stop.⁶ Because Dr. Ciscel did not have any information relating to Dexter Birge's income history, he instead used government salary data for positions that he believes are comparable to Dexter Birge's position as manager of B's Quick Stop. However, as there are no salary statistics available for convenience store managers, Dr. Ciscel used the composite average salary for food service managers, first line supervisors, and retail worker supervisors in eight nearby counties in Arkansas, Tennessee, and Mississippi to estimate Dexter Birge's salary as a convenience store manager of B's Quick Stop. Dr. Ciscel then used this estimated salary, which he calculated to be \$37,918 for 2004, to form the basis from which he made projections going forward from the time of Birge's death to his expected date of retirement. (Ciscel Dep. at 55, 69).

At his September 21, 2005 deposition, Dr. Ciscel testified about the methodology he employs in calculating lost income:

Q: Okay. Doctor, we talked a little bit this morning about your general approach to lost income cases, and you told me this morning that you have testified or given depositions in a number of other cases involving lost income evaluations. Can you tell me generally how you approach these kinds of cases?

A: Yes. . . . I want a record of . . . the injured or deceased party's work history, the regularity of the work history, the education of the plaintiff, and the level of income earned from job or jobs during their work history.

⁶According to Robert Birge, B's Quick Stop is an all cash business, and no federal tax returns were ever filed for the business. (Robert Birge Dep. 9-10, 24-25, 63-64)

At that stage of the game, we are looking at two or three issues as we project that income into the future that the individual did not have. And we look at how their income would have grown, from what base would it have grown from, how long would they have earned that income and what benefits, if any, should we add to that income. And then we take that whole package and return it to its present discounted value, in this case 2005 dollars. . . . And so that is the fairly straightforward process and, you know, it is simple or complicated based upon the individual's work history.

* * *

Q: You talked about the methodology you would use. Does this methodology find support in the literature?

A: Yes. There are two academic journals that are published in this area, one is the Journal of Forensic Economics, which I subscribe to and publish, and the other is the Journal of Legal Economics, which I do not subscribe to. Both of those journals review and suggest methods for estimating projected loss incomes and they act as an academic advisor to practitioners in this area.

Q: You believe that the methodology that you described, looking at, for example, looking at Mr. Birge's record of work history and determining what his level of income was from that work, this is an accepted - this is the accepted methodology, in your view?

A: It is the dominant methodology for estimating or projecting future lost income, is to take a look at past income records.

(Ciscel Dep. at 52-53, 55-56). In calculating Birge's lost future income, however, Dr. Ciscel testified that he was not provided with any information relating to Birge's income history or net worth, which he needed to calculate damages in this case:

Q: Talking about the record of work history, why is that important to you?

A: Record of work history is the key piece of information and it was the key piece of information

missing in this case because in order to project the future you have to know the income path of the past. And that was missing in this case. What you want is an accurate and reliable path of income. Mr. Birge had worked and managed and may have owned this company, and my information was that he had worked there since high school graduation as a full-time employee as a continuous work experience. So we had one of the most important aspects of someone's work history which is continuity. And then you want the income that is available from that job.

Q: So in Mr. Birge's case, the fact that he had worked at B's Quick Stop continuously from high school until the point of time that he was 28 years old, approximately ten years, the income that he earned from that work would have been very important to you in projecting his future income?

A: That is correct, sir.

Q: But you had no information regarding that?

A: I asked for and was not provided any information on that record of income.

* * *

Q: But you've never had a case dealing with an adult where you have been presented, as you have in this case, with no economic facts?

A: I believe this is the first case I've worked where I had to use exclusively general averages from the regional economy for a working adult who was injured or killed.

(Ciscel Dep. 53-54, 101). Thus, although Dr. Ciscel testified that "information on the economic status of the person or entity that [he is] studying is the key to the reliability of [his] future projections," because he was not provided with any financial information regarding Dexter Birge's work history, he was not able to employ his methodology. Dr. Ciscel testified that the missing

information was vital to his methodology. (Id. at 39). Dr. Ciscel testified that the reliability of his projections hinges on the decedent's income history: "information on the economic status of the person or entity that I am studying is the key to the reliability of my future projections." (Id. at 155).

"The fundamental objective when considering the admissibility of 'expert' testimony is 'to ensure the reliability and relevancy' of that testimony." First Tenn. Bank Nat'l Ass'n v. Barreto, 268 F.3d 319, 335 (6th Cir. 2001) (quoting Kumho Tire, 526 U.S. at 152). By his own admission, Dr. Ciscel's expert opinion regarding future lost income projections for Dexter Birge cannot be considered reliable without an assessment of Birge's actual income history prior to his death. As such information was not available to Dr. Ciscel and not considered in his calculations, the court concludes that his opinion is highly speculative. See Trevino v. Gates, 99 F.3d 911, 922 (9th Cir. 1996) (holding that trial court did not err in excluding damages expert's testimony where economist projected decedent's future income based on assumption that decedent was employed as a full time mechanic when he was killed; "[t]here were no pay stubs, no W-2s, no tax returns, no cancelled checks, and no employer testimony offered as foundational evidence"); Joy v. Bell Helicopter Textron, Inc., 999 F.2d 549, 568-69 (D.C. Cir. 1993) (reversing trial court's decision to allow testimony of damages expert because assumption that decedent would move into consulting and wholesaling, and assumption regarding

increase in value of real estate investments, were "highly speculative" and based on little, if any, evidentiary support); see also In re Air Crash Disaster, 795 F.2d 1230, 1235 (5th Cir. 1986) ("we find the assumptions of plaintiffs' economist so abusive of the known facts, and so removed from any area of demonstrated expertise, as to provide no reasonable basis for calculating how much of [decedent's] income would have found its way into assets or savings to be inherited by his children."); Villalobos v. American Airlines, Inc., No. 96-6413, 1998 WL 1770592, at *6 (S.D. Fla. Nov. 13, 1998) (unpublished) ("While the Court recognizes that an estimation of future income is likely to be somewhat speculative, it nevertheless must have [sic] some basis in reality and not be the product of wholesale speculation. When an expert opinion is based upon speculation and guesswork, it has no significant probative value.").

Moreover, the unreliability of Dr. Ciscel's opinion is further underscored by the fact that the only evidence in the record regarding Dexter Birge's actual past income is the uncontradicted testimony of his father, Robert Birge, who testified that he paid his son \$50.00 a day for working at B's Quick Stop:

Q: Okay. Let me ask you, did your son, Dexter Birge, work for B's Quick Stop?

A: Dexter continued to work under my supervision at B's Quick Stop. Dexter - B's Quick Stop was put in Dexter's name through financial hardship of me and my wife for a temporary basis, but Dexter continued to work and get paid through me at B's Quick Stop.

Q: All right. What was he paid?

A: He was paid weekly, roughly \$50 a day.

Q: When you say "roughly," how did you determine how he would be paid?

A: Well, that is about what he was making, \$50. He was always - if he worked six days he would bring home about \$300 a week. If he worked five days he brought \$250. He was making \$50 a day; is what it amounted to.

Q: Okay. Did you pay him a certain amount an hour, or is that - you just agreed that you would pay -

A: That was the agreement. He worked sometimes a little over and sometimes a little less, but it would average out to \$50 a day, whatever day he worked that is what it would average out to.

Q: Okay. And how long did he work for B's Quick Stop?

A: Well, I guess he had been off and on at B's Quick Stop ever since we opened it, and that would have been probably in early '94.

Q: Was he paid the same throughout that time period?

A: Well, probably when we started, I can't say exactly what he was getting when he started, but I know what he was getting when we - when everything went out.

(Robert Birge Dep. 6-7).⁷ Dr. Ciscel, however, did not consider this information in his calculations:

Q: All right. Doctor, if Mr. Birge's father, who ran this business for a number of years, gave sworn testimony in this case as to what his son's income was, would that be important to you?

A: Probably useless information.

⁷At fifty dollars per day, Dexter Birge's annual salary in 2004 would have been approximately \$14,300. According to Dollar General, in the Memphis area, the cashier and service station attendant positions paid on average \$16,040 and \$18,980 respectively in 2004. (See Defs.' Memorandum in Support at 14) (citing May 2004 Metropolitan Area Occupational Employment and Wage Estimates Memphis, TN - AR - MS MSA, <http://www.bls.gov/oes/current/oes>).

Q: Why is that?

A: What I'm interested in is accounting records or tax records.

Q: So if the manager of the business, the employer, gave sworn testimony under oath, under penalty of perjury, and said I don't have any tax records, but I can tell you under oath that this is what my son was paid, you're saying that you would not take that into account?

A: No. It is just hearsay.

(Ciscel Dep. 57-58).⁸ Therefore, the court concludes that Dr. Ciscel's opinion that Dexter Birge's future income discounted to present value would be \$1,019,889, is too speculative and unreliable to be admissible at trial.

III. CONCLUSION

For the reasons above, defendant's Motion to Exclude the Expert Opinion and Testimony of David H. Ciscel is GRANTED.

IT IS SO ORDERED.

s/ Tu M. Pham

TU M. PHAM
United States Magistrate Judge

September 25, 2006

Date

⁸Dr. Ciscel also apparently discredited the testimony of Robert Birge because plaintiff's counsel told him that Robert Birge is a contestant in this case. (Ciscel Dep. 59).