

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

THOMAS C. BARNETT, JR., SHARON)
B. TYSON, and DAVID ALAN)
HARRIS, in their capacities as)
Trustees of THE THOMAS O.)
BARNETT TRUST and as Executors)
of THE ESTATE OF T.O. BARNETT,)
deceased,)

Plaintiffs,)

No. 06-2171 P

v.)

AMERICAN HERITAGE LIFE)
INSURANCE COMPANY,)

Defendant/Third-Party)
Plaintiff,)

v.)

ANGELINA VIRGINIA BARNETT,)

Third-Party Defendant.)

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO EXCLUDE
HAND-PRINTING COMPARISON EVIDENCE

Before the court is Third-Party Defendant Angelina Virginia Barnett's ("Mrs. Barnett") Motion to Exclude Hand-Printing Comparison Evidence, filed September 17, 2007. (D.E. 43). Plaintiffs Thomas C. Barnett, Jr., Sharon B. Tyson, and David Alan Harris filed a Brief in Opposition to the motion on October 2, 2007. The court held an evidentiary hearing on the motion on

October 17, 2007. Counsel for all parties were present and heard.¹ The plaintiffs' proposed expert witness, Thomas W. Vastrick, testified at the hearing, and several exhibits were admitted.² At the conclusion of the hearing, the court took the matter under advisement.

The court has considered the arguments of counsel, briefs submitted in support of and in opposition to the motions and their attached exhibits, exhibits to the hearing, the expert's report and curriculum vitae, and the expert's testimony at the hearing. For the reasons below, the motion to exclude is GRANTED in part and DENIED in part.

I. BACKGROUND

The claims at issue in this litigation arise from a dispute over the proceeds of Thomas O. Barnett's ("Mr. Barnett") annuity policies. Plaintiffs Thomas C. Barnett, Jr., Sharon B. Tyson, and David Alan Harris are the grandchildren of Mr. Barnett. They are co-trustees of The Thomas O. Barnett Trust ("Trust") and co-executors of Mr. Barnett's estate. American Heritage is the provider of the policies at issue, and Mrs. Barnett is Mr. Barnett's widow.

Mr. Barnett died of cancer on March 1, 2002, and his will was

¹Defendant/Third-Party Plaintiff American Heritage takes no position on this motion.

²See Exhibit and Witness List to Vastrick Hearing. (D.E. 65).

admitted into probate in the Shelby County Probate Court on June 28, 2002. The plaintiffs were appointed co-executors of the estate by the Probate Court. Prior to his death, Mr. Barnett had purchased two deferred annuity policies from American Heritage. Initially, Mr. Barnett had named his estate as the beneficiary of each policy. On or about October 17, 2000, an agent acting on behalf of Mr. Barnett attempted to change the ownership of the policies from Mr. Barnett to the Trust and the beneficiary of the policies from his estate to the Trust, by submitting change of beneficiary request forms to American Heritage.³ American Heritage did not accept the change of beneficiary requests because the incorrect forms were used. On November 3, 2000, American Heritage wrote Mr. Barnett's agent and enclosed a blank beneficiary change form and asked for a copy of the Trust. On November 27, 2000, American Heritage received the correct forms with Mrs. Barnett's name hand-printed as beneficiary in Section 1 of each form and the "Trust" typed as beneficiary in Section 2 of each form. American Heritage signed the acknowledgment on the beneficiary change forms on November 28, 2000.

After Mr. Barnett's death, Mrs. Barnett submitted a request to American Heritage asking that she be paid survivor benefits as the beneficiary of the annuity policies. After American Heritage confirmed that its records showed that Mrs. Barnett was the

³Mr. Barnett married Mrs. Barnett on October 19, 2000.

beneficiary of the policies, on April 1, 2002, American Heritage sent Mrs. Barnett endorsements on the policies listing her as the owner. At Mrs. Barnett's request, American Heritage retained the principal of the policies and issued monthly interest-only payments to Mrs. Barnett.

On February 11, 2005, the plaintiffs submitted to American Heritage a competing claim to the benefits and filed this lawsuit against American Heritage in Tennessee state court. American Heritage removed the case to federal court on March 17, 2006.⁴ The plaintiffs claimed that the court should disregard Mrs. Barnett's name on the change of beneficiary form because Mr. Barnett's intent was to name the Trust as the beneficiary of the policies, and requested that the court award all of the survivor benefits to the Trust.⁵ The plaintiffs alleged that the change of beneficiary forms "were altered in a crude attempt to substitute another beneficiary, Angelina Virginia Barnett, for the trust." (Compl. ¶ 10). At her deposition, Mrs. Barnett testified that she did not see the change of beneficiary forms in November of 2000, that she did not know that Mr. Barnett had designated her as the beneficiary, and that the hand-printing on the forms is not hers.

⁴After the plaintiffs filed suit, American Heritage stopped paying the survivor benefits to Mrs. Barnett. On March 24, 2006, American Heritage filed its answer, a third-party complaint joining Mrs. Barnett as a third-party defendant, and an action for interpleader.

⁵Alternatively, the plaintiffs argued that the court should award all benefits to Mr. Barnett's estate.

In support of their claim, the plaintiffs retained Thomas W. Vastrick, a forensic document examiner, as a trial expert. Through Vastrick, the plaintiffs seek to offer, and Mrs. Barnett in her present motion seeks to exclude, the opinion that "[t]here are indications that Angelina Barnett wrote the questioned beneficiary information entries" based on Vastrick's comparison of the handprinting that appears on the beneficiary change forms with various known samples of Mrs. Barnett's writing. (Vastrick Report at 2). Specifically, in his expert report, Vastrick opines that there are "indications that Angelina Barnett wrote the questioned beneficiary information entries on Exhibits Q-1 and Q-2 to include the date entry on page two." (Vastrick Rep. at 2.) This conclusion is based on Vastrick's comparison of copies of the two change of beneficiary forms with two original documents and copies of ten documents containing Mrs. Barnett's handwriting. These specimens include signed checks, notes on a yellow note pad, letters, notes written on the back of pictures, a claim form, and notes written on a typed letter listing Mrs. Barnett's investments. Vastrick's report lists seventeen bases for his conclusion of "indications."⁶ Vastrick's report also states that his finding is

⁶The following are listed as the bases for Vastrick's opinion:

1. The length of the cap of the numeral 5.
2. The shape of the bottom curve of the numeral 5.
3. The short initial stroke of the numeral 8.
4. The slope of the initial stroke of the numeral 8.
5. The position and shape of the terminal stroke of the

"a limited association . . . due to the small amount of submitted known hand printed . . . specimens." (Vastrick Rep. at 2). He also states, however, that the specimens provided "adequate samples of numeric entries for comparison purposes." (Id.) Further, Vastrick notes that the lack of original questioned documents could limit future examinations. (Id.)

In the current motion, Mrs. Barnett argues that Vastrick's testimony should be excluded because his opinions do not satisfy the standards under Federal Rule of Evidence 702 and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

II. ANALYSIS

A. Daubert and Rule 702

In Daubert, 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

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- numeral 8.
 6. The shallow cap of the numeral 2.
 7. The variation in design of the bottom portion of the numeral 2.
 8. The location of the initial and terminal stroke of the numeral zero.
 9. The length of the terminal stroke of the numeral 3.
 10. The curve at the end of the terminal stroke of the numeral 3.
 11. The shape of the terminal loop of the numeral 6.
 12. The relative position to the baseline of the "39" combination.
 13. The long staff of the upper case "M".
 14. The short leg of the upper case "M".
 15. The rounded peak of the upper case "A".
 16. The slope of the crossbar of the upper case "A".
 17. The spacing between characters.

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 Tenn. Bank Nat. Ass'n v. Barreto, 268 F.3d 319, 334 (6th Cir. 2001). In addition, the court may consider "whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying" because the former "provides important, objective proof that the research comports with the dictates of good science." Smelser v. Norfolk S. Ry., 105 F.3d 299, 303 (6th Cir. 1997).

The Supreme 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 Daubert factors do not constitute a "definitive checklist or test," but must be tailored

to the facts of the particular case. Kumho Tire, 526 U.S. at 150 (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,

Some 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." . . . The more subjective and controversial the expert's inquiry, the more likely the testimony should be excluded as unreliable.

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

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. 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; Allison v. McGhan Med. Corp., 184 F.3d 1300, 1317-19 (11th Cir. 1999); Weisgram v. Marley Co., 169 F.3d 514, 518 (8th 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. The proponent of the evidence has the burden of establishing that all of the pertinent admissibility requirements are met by a preponderance of the evidence. See Fed. R. Evid. 104(a); see also Bourjaily v. United States, 483 U.S. 171, 175-76 (1987); Smelser, 105 F.3d at 303; W. Tenn. Chapter of Associated Builders and Contractors, Inc. v. City of Memphis, 300 F. Supp. 2d 600, 602-03 (W.D. Tenn. 2004).

The Daubert reliability factors may not be helpful in cases involving expert testimony derived largely from the expert's own practical experiences. As the Sixth Circuit explained in First Tennessee Bank:

. . . In United States v. Jones, 107 F.3d 1147, 1158 (6th Cir.), cert. denied, 521 U.S. 1127, 117 S.Ct. 2527, 138 L.Ed.2d 1027 (1997), this court recognized that the four specific factors utilized in Daubert may be of limited utility in the context of non-scientific expert testimony. We noted that "[i]f [the Daubert] framework were to be extended to outside the scientific realm, many types of relevant and reliable expert testimony - that derived substantially from practical experience - would be excluded. Such a result truly would turn Daubert, a case intended to relax the admissibility requirements for expert scientific evidence, on its head." Id. at 1158. Indeed, even the Berry court itself recognized that "[t]he distinction between scientific and non-scientific expert testimony is a critical one[,]" and that Daubert is "only of limited help" in assessing technical or experiential expertise. Berry, 25 F.3d at 1349. Consequently, in Jones we declined the appellant's invitation to apply the factors outlined in Daubert to testimony involving a non-scientific field. Jones, 107 F.3d at 1158.

Following our ruling in Jones, the Supreme Court clarified the applicability of the so-called "Daubert factors" to non-scientific evidence in Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 119 S.Ct. 1167, 143

L.Ed.2d 238 (1999). In Kumho, the Court reaffirmed Daubert's central holding that a trial judge's "gatekeeper" function applies to all expert testimony, regardless of whether such testimony is based upon scientific, technical, or other specialized knowledge. Id. at 141, 147-49, 119 S.Ct. 1167. With respect to the individual factors enumerated in Daubert, the Kumho Court held that trial courts may consider such factors when assessing the reliability of all types of expert testimony. Id. at 149-52, 119 S.Ct. 1167. The Court stressed, however, that "Daubert's list of specific factors neither necessarily nor exclusively applies to all experts or in every case." Id. at 141, 119 S.Ct. 1167. In some cases (even cases involving non-scientific expert testimony), the factors may be pertinent, while in other cases "the relevant reliability concerns may focus upon personal knowledge or experience." Id. at 150, 119 S.Ct. 1167. "[W]hether Daubert's specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine." Id. at 153, 119 S.Ct. 1167.

Id. at 334-35 (internal footnote omitted).

B. Vastrick's Qualifications

Vastrick obtained a Bachelors degree in Forensic Science from California State University at Sacramento in 1977. (Vastrick Curriculum Vitae at 1). He also completed a full-time, two-year training program with the United States Postal Inspection Service Headquarters Crime Laboratory in Washington, D.C. from 1977 through 1979. (Id.). Vastrick subsequently served as a Forensic Document Examiner with the United States Postal Inspection Service Southern Region Crime Laboratory from 1980 through 1992, and he has been engaged in private consulting services in forensic document examination since 1990. (Id.). Currently, Vastrick has offices for his private consulting business in Memphis, Tennessee and

Altamonte Springs, Florida. (Id.). Vastrick's document examinations include handwriting, hand-printing, alterations, typewriting, indented writing, counterfeiting, ink and paper analyses, burned document restoration, and mechanical impressions. (Id.).

Vastrick has been certified by the American Board of Forensic Document Examiners ("ABFDE") since 1982, and he has served on ABFDE's Board of Directors.⁷ (Id.) Vastrick maintains affiliations with a number of professional organizations, including the American Society of Questioned Document Examiners, the American Academy of Forensic Sciences, the Southeast Association of Forensic Document Examiners, and the Scientific Working Group - Forensic Document Examination ("SWGDOC"). (Id. at 2). Additionally, Vastrick has been the sole author or a contributor to many research papers and books, and he has presented numerous professional papers across the country. (Id.) Vastrick has also conducted lectures, workshops, and training sessions on forensic document examination for a variety of organizations. (Id.).

Vastrick has testified as an expert in forensic document examination approximately 250 times in federal, state, and local courts as well as at military hearings, arbitration proceedings, and administrative law hearings. (Tr. at 91-92; Vastrick

⁷The ABFDE is the sole recognized organization for accreditation of qualified forensic document examiners. Wolf v. Ramsey, 253 F. Supp. 2d 1323, 1346 (N.D. Ga. 2003).

Curriculum Vitae at 2). Vastrick has been accepted as an expert each time. (Vastrick Curriculum Vitae at 2).

Based on his background and experience, the court finds that Vastrick possesses specialized knowledge beyond the ken of the average layperson in the area of forensic document examination, including handwriting analysis, and thus is preliminarily and generally qualified to testify as an expert witness on that subject.

C. Cases Involving Daubert Challenges to Handwriting Experts

The parties have cited - and the court in conducting its own case law research has found - numerous cases that have addressed the admissibility of opinions offered by handwriting experts such as Vastrick. All of the Courts of Appeals that have considered this issue, including the Sixth Circuit, have upheld the trial court's decision to admit handwriting expert testimony.⁸ See, e.g., United States v. Prime, 431 F.3d 1147, 1154 (9th Cir. 2005); United States v. Mornan, 413 F.3d 372, 380 (3d Cir. 2005); United States v. Crisp, 324 F.3d 261, 271 (4th Cir. 2003); United States

⁸The Sixth Circuit has not expressly addressed the impact of Kumho Tire on the Jones decision, in which the Court of Appeals held that the Daubert factors did not apply to non-scientific expert testimony such as handwriting expert testimony. In an unpublished opinion, United States v. Sanders, 59 Fed. Appx. 765 (6th Cir. 2003), the court affirmed the district court's decision to allow a handwriting expert to testify, as "the trial judge ensured that the testimony came from a highly experienced handwriting examiner who carefully explained the basis for his opinion. We thus find no error in admitting the testimony." Id. at 767. The court in Sanders, however, did not discuss Jones.

v. Sanders, 59 Fed. Appx. 765, 767 (6th Cir. 2003); United States v. Mooney, 315 F.3d 54, 62 (1st Cir. 2002); United States v. Jolivet, 224 F.3d 902, 905-06 (8th Cir. 2000); United States v. Paul, 175 F.3d 906, 909-12 (11th Cir. 1999); United States v. Jones, 107 F.3d 1147, 1159-61 (6th Cir. 1997); United States v. Velasquez, 64 F.3d 844, 848-50 (3d Cir. 1995); see also Versace, Inc. v. Gianni Versace S.p.A., 446 F. Supp. 2d 252, 267 n.14 (S.D.N.Y. 2006); United States v. Morris, No. 06-87-DCR, 2006 WL 2054585, at *2 (E.D. Ky. July 20, 2006); United States v. Campbell, No. 04-424, 2006 WL 346446, at *3 (N.D. Ga. Feb. 13, 2006); United States v. Ferguson, No. 03-019, 2004 WL 5345480, at *7-8 (S.D. Ohio July 30, 2004); United States v. Gricco, No. 01-90, 2002 WL 746037, at *5 (E.D. Pa. Apr. 26, 2002); United States v. Richmond, No. 00-321, 2001 WL 1117235, at *3 (E.D. La. Sept. 21, 2001).

Indeed, even those district courts that have expressed concern regarding the reliability of this type of testimony have nevertheless allowed the expert to testify about similarities between a challenged document and a known exemplar, even though the courts prohibited the expert from expressing his ultimate opinion on authorship of the challenged document. See, e.g., United States v. Oskowitz, 294 F. Supp. 2d 379, 384 (E.D.N.Y. 2003); Wolf, 253 F. Supp. 2d at 1347-48; United States v. Hidalgo, 229 F. Supp. 2d 961, 968 (D. Ariz. 2002); United States v. Rutherford, 104 F. Supp. 2d 1190, 1194 (D. Neb. 2000); United States v. Van Wyk, 83 F. Supp. 2d

515, 524 (D.N.J. 2000); United States v. Santillan, No. 96-40169, 1201765, at *5 (N.D. Cal. Dec. 3, 1999); United States v. Hines, 55 F. Supp. 2d 62, 70-71 (D. Mass. 1999); United States v. McVeigh, 96-68, 1997 WL 47724 (D. Colo. Feb. 5, 1997).

Only a few district courts have concluded that handwriting expert testimony does not meet the Daubert factors and have excluded such testimony in its entirety. See, e.g., United States v. Lewis, 220 F. Supp. 2d 548, 552-53 (S.D. W. Va. 2002); United States v. Brewer, No. 01 CR 892, 2002 WL 596365, at *7-8 (N.D. Ill. April 16, 2002); United States v. Saelee, 162 F. Supp. 2d 1097, 1105-06 (D. Alaska 2001); United States v. Fujii, 152 F. Supp. 2d 939, 942 (N.D. Ill. 2000). With these cases in mind, the court will address the admissibility of Vastrick's testimony.

As in Hidalgo, the court finds that the plaintiffs have not carried their burden of demonstrating that the principle of uniqueness of handwriting or handprinting satisfies the Daubert/Kumho analysis. Hidalgo, 229 F. Supp. 2d at 967. As the court explained in Hidalgo,

The Government offers the uniqueness of handwriting as a scientific principle. But there is no evidence before me to support the thesis that handwriting is unique. The Srihari study supports the proposition that very few people write in a similar way. Mr. Flynn asserts the uniqueness of handwriting but while the hypothesis is testable within the meaning of Daubert, it has not been fairly tested. It is true that the uniqueness principle is generally accepted in the forensic document examiner field, but that in itself is insufficient under Daubert. Peer review in this area cannot be said to be any different from its general

acceptance in the forensic document examiner community. Indeed, not even Professor Kam posited the theory that handwriting is unique. His research supports the proposition that document examiners are better than lay persons in excluding false positives. Professor Kam understands that while this may be helpful to a jury, it does not support the uniqueness principle upon which identification opinion is based.

We therefore find and conclude that the principle of uniqueness of handwriting or handprinting fails to satisfy a Daubert/Kumho analysis. If the principle of uniqueness could be proven, then one would know how to analyze handwriting or handprinting with an error rate of zero percent. But there is not support for the proposition, nor does the government contend that document examiners have a zero percent error rate.

The foundation for a document examiner's identification between a known document and a questioned document is the principle of uniqueness. Because the principle of uniqueness is without empirical support, we conclude that the document examiner will not be permitted to testify that the maker of a known document is the maker of the questioned document. Nor will a document examiner be able to testify as to identity in terms of probabilities.

Id. at 967. In the present case, the plaintiffs have similarly failed to present sufficient evidence to support the uniqueness principle. At the hearing, Vastrick cited the same 2002 Srihari study examined in Hidalgo. (Tr. at 93-94). Although Vastrick also testified generally about other studies that reportedly document error rates of 2.4 to 6.5 percent for experts compared to 38 to 40 percent for laypersons (Tr. at 100-102), the court did not receive into evidence copies of these studies mentioned by Vastrick nor was there any detailed testimony regarding these studies so as to allow the court to evaluate the applicability of those studies to the

opinions at issue in this lawsuit. In any event, the courts in Hidalgo and Rutherford both considered several studies submitted by the plaintiffs in support of their experts, and the Hidalgo court even heard testimony from Dr. Moshe Kam - one of the most frequently cited authorities in the field and whose studies were cited by Vastrick - and nevertheless found that the studies did not support the uniqueness principle. See Rutherford, 104 F. Supp. 2d at 1193 ("Having reviewed the four Kam studies submitted by the government and critiqued by defense witness Professor Saks, the Court concludes that handwriting analysis testimony on unique identification lacks both the validity and reliability of other forensic evidence, such as fingerprint identification or DNA evidence."). Because the plaintiffs have not provided the court with sufficient evidence to support the uniqueness principle, the court will exclude Vastrick's testimony as to authorship, including his opinion that there are "indications" that Mrs. Barnett wrote the questioned beneficiary information entries. See id. at 1193-94 (precluding handwriting expert from testifying to the degree of probability, confidence, or certainty underlying his proffered opinions).

The court further concludes, however, based on Vastrick's extensive training and experience (see Section B, *supra*), that he is entitled to testify to the mechanics and characteristics of handwriting, his methodology, and his comparisons of similarities

and/or dissimilarities between Mrs. Barnett's known writings and those of the questioned documents. Hidalgo, 229 F. Supp. 2d at 968 ("It is intuitive that someone who is trained in and has experience in the analysis of handwriting is likely to be better at it than someone who is not."); see also Oskowitz, 294 F. Supp. 2d at 384 (notwithstanding the court's finding that the results of expert handwriting analysis has never been proven more reliable than the opinions of lay people, court allowed handwriting expert to testify about handwriting comparison based on expert's training and experience). Vastrick testified that in conducting his handwriting analysis in this case he followed ASTM 2290, a generally accepted standard within the field of forensic document examination.⁹ (Tr. at 105). He also testified about how he compared the specimens and questioned documents:

Q. I've gotten to the third slide now.

A. (Examining document.) Okay. The third slide is there to show the relative position of the initial stroke to the terminal stroke of the numeral "zero."

Q. And what is the significance of that?

A. The significance of that is you have what we call an "open-topped zero." It gives a kind of U shape. It's not a - it's not a closed zero in this particular instance. There's another slide that deals with "zero" later that I'm going to also be showing, but this one is

⁹This refers to ASTM E2290-07a, the "Standard Guide for Examination of Handwritten Items," promulgated by ASTM International, a voluntary standards development organization. See ASTM International website, <http://www.astm.org/> (follow "Read more about ASTM International" hyperlink).

to show the relative position of the initial stroke to the terminal stroke.

. . .

Q. All right.

A. This one shows the relative position of the initial and terminal stroke of the "zero" this time in a closed formation as opposed to the open to illustrate a variation in the design. You have one design where the opening and closing will have kind of an open top, which leaves a closed top, and you find a variation both in the questioned and numeral writing.

(Tr. at 112, 115). This excerpt illustrates Vastrick's testimony regarding his findings, which consisted of pointing out a series of visual comparisons between the questioned documents and the samples of Mrs. Barnett's writing.¹⁰ The court finds that, for the limited purposes discussed above, this expert comparison testimony is relevant, reliable, and will assist the trier of fact. Fed. R. Evid. 702.

III. CONCLUSION

For the reasons above, the motion to exclude is GRANTED in part and DENIED in part.¹¹

¹⁰Mrs. Barnett in her motion argues that Vastrick's testimony is even more problematic because this case involves handprinting instead of cursive writing. Vastrick testified that there is no significant difference between the two, and that his analysis is largely the same. At the hearing, plaintiffs admitted into evidence a November 2003 published study by Dr. Kam which they argue support Vastrick's point. (Ex. B). The court finds that this dispute goes to the weight of Vastrick's testimony, and not its admissibility.

¹¹Mrs. Barnett, of course, is entitled to cross-examine Vastrick at trial as to the other alleged deficiencies in his analysis. These issues more properly go to the credibility of Vastrick's testimony

IT IS SO ORDERED.

s/ Tu M. Pham

TU M. PHAM

United States Magistrate Judge

November 19, 2007

Date

and the weight the jury should give it, rather than to its admissibility. Van Wyk, 83 F. Supp. 2d at 520.