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CIVIL DIVISION

Case No. 21-CV-01103

Marc Rancourt v. Norman Messier, et al

Opinion and Order on Mr. Messier's Motion in Limine to Preclude Mr. Rancourt's Economic Expert's Opinions and on Motion for Evidentiary Hearing

Plaintiff Marc Rancourt alleges that he was injured when Defendant Norman Messier negligently operated a skidder while they were cutting down a tree. Mr. Messier and Defendant Messier House Moving & Construction, Inc. (collectively, Mr. Messier) have filed a motion seeking to exclude from trial substantially all anticipated testimony of Mr. Rancourt's "economic" expert, Ms. Catharine Newick, whose opinions address Mr. Rancourt's "lost earning capacity" from injury to retirement, assuming a total inability to resume his carpentry business.[1] Mr.

[1] The parties' usage of the expression *earning capacity* vis-à-vis *lost wages* or *lost income* has not been entirely clear. Upon review of the record, it appears that by *earning capacity,* the parties are referring to the maximum amount of earnings Mr. Rancourt would have earned had he continued in the ordinary course as a carpenter until retirement but for a total inability to do so allegedly caused by the injury. By *lost wages* or *lost income*, they are referring to his *actual* lost income, which would account for adjustments related to additional income that he might earn regardless of the injury (such as by substitute employment), an early retirement or reduction in ordinary hours worked, etc. Ms. Newick's opinions relate to Mr. Messier's total earning capacity as a carpenter without consideration of adjustments that might reveal a lower amount of actual lost income.

Messier does not challenge Ms. Newick's qualifications as an expert, but he argues that her opinions are unreliable, and thus inadmissible, under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).[2]

Ms. Newick has calculated two earning capacity figures. The first is predicated on standard hourly wage and benefits figures for carpenter–employees in the region of New Hampshire where Mr. Rancourt lives. Mr. Messier argues that this calculation is unreliable because Mr. Messier has worked mostly in Vermont rather than New Hampshire, and he has worked for himself rather than as a third party's employee. He does not otherwise object to the manner by which she used those data to perform the calculation, at least for *Daubert* purposes.

Ms. Newick calculated an alternative earning capacity figure by examining Mr. Rancourt's 2018 tax filings, arriving at an annualized income figure, and extrapolating from there. The injury occurred in 2018, and Mr. Rancourt worked only part of that year. Mr. Messier objects, among other things, to the manner by which Ms. Newick arrived at an annualized income figure for 2018 and that she disregarded his previous years' income that would have, in his view, generated a more representative assessment of Mr. Messier's income.

I. The *Daubert* standard

The Vermont Supreme Court has described the *Daubert* standard in detail as follows:

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[2] Ms. Newick's expertise evidently is in the narrow field of calculating earning capacity figures. There is deposition testimony to the effect that there is some certification available for this discipline, though she does not currently hold it.

We start with the law governing the admissibility of expert testimony. Vermont Rule of Evidence 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.

As the Reporter's Notes explain, Rule 702 is identical to its federal counterpart, as originally drafted and as amended in response to a trilogy of United States Supreme Court cases, beginning with *Daubert*, that expound the limits of admissibility for expert testimony and create workable standards for use by trial judges in assessing the qualifications of experts and the reliability of the methods by which they reached their proffered opinions. The *Daubert* Court held that [F.R.E.] 702 superseded the traditional "general acceptance" test . . . by removing the barriers to admissibility inherent in the general acceptance test and instead instituting a flexible standard guided by the dual principles of relevance and reliability.

To assist trial judges in determining whether an expert's opinion is sufficiently rooted in scientific knowledge, the *Daubert* Court delineated four nonexclusive factors a judge may consider when assessing admissibility: (1) whether the theory or technique involved is capable of being tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential error rate associated with the scientific technique; and (4) whether the theory or technique has been generally accepted in the scientific community. We adopted those factors . . . to "promote more liberal admission of expert evidence." Following *Daubert*, trial judges "must now act as gatekeepers who screen expert testimony ensuring that it is reliable and helpful to the issue at hand before the jury hears it." Although courts have diverged on how exacting the *Daubert* inquiry must be, we have focused on the "liberal thrust" of Rule 702, stating that "the trial court's inquiry into expert testimony should primarily focus on excluding 'junk science'—because of its potential to confuse or mislead the trier of fact—rather than serving as a preliminary inquiry into the merits of the case."

> The United States Supreme Court issued a subsequent decision that provides guidance here. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), expanded the applicability of *Daubert* to nonscientific expert testimony—i.e., testimony relying upon "technical" and "other specialized knowledge," as termed in the amendments to Rule 702. Prior to *Kumho*, the question of *Daubert's* reach remained unanswered, with states taking either a liberal or conservative approach to the admissibility of nonscientific testimony. The Supreme Court resolved this issue in *Kumho*, holding that the trial judge's gatekeeping obligation applies equally to testimony based on "technical" and "other specialized knowledge." In so holding, the Court explained that *Daubert* is not a one-size-fits-all analysis, but rather the trial judge may consider one or more of the factors "when doing so will help determine the testimony's reliability." It further explained that the factors are not a "definitive checklist or test" and "neither necessarily nor exclusively appl[y] to all experts or in every case." "[T]here are many different kinds of experts, and many different kinds of expertise," the Court observed, and in some cases "the relevant reliability concerns may focus upon personal knowledge or experience." The Court further emphasized that "Rule 702 [does not create] a schematism that segregates expertise by type while mapping certain kinds of questions to certain kinds of experts." In light of this expanded view of Rule 702 and the *Daubert* inquiry, the Court rearticulated the objective of the gatekeeping requirement as "ensur[ing] the reliability and relevancy of expert testimony" and "mak[ing] certain that an expert . . . employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."
>
> We have endorsed this approach, stating that the *Daubert* factors "are not exhaustive, and a trial court has broad discretion to determine, on a case-by-case basis, whether some or any of the factors are relevant in evaluating the reliability of expert evidence before it."

State v. Pratt, 2015 VT 89, ¶¶ 16–19, 200 Vt. 64, 72–75 (citations omitted).

II. The Calculation Based on Standardized New Hampshire Figures

The Court is not persuaded that *Daubert* counsels in favor of a pretrial determination excluding Ms. Newick's anticipated testimony as to earning capacity derived from standard figures based on carpenters employed by third parties and

working in the area of New Hampshire where he lives. The chief objection is not that Ms. Newick incorrectly or deceptively performed that calculation (*i.e.,* that the opinion is unreliable "junk science"). Rather, Mr. Messier essentially argues that the opinion has limited utility to the jury because Mr. Rancourt in fact was self-employed and mostly worked in Vermont.

As to the ostensible geographic disparity, the Court's understanding of the record is that Mr. Messier always lived on the New Hampshire side of the border and worked more frequently over the years on the Vermont side, though all in the same general geographic region. It is not clear to the Court that an opinion derived exclusively from data arising from work on the New Hampshire side of the border would be misleading in any appreciable way to the jury. The extent to which there may be some difference in average income for carpenters working so closely geographically, though across the border, is a straightforward issue that counsel can explore at trial, including during cross-examination of Ms. Newick.

That this calculation is based on the income earned by carpenters with third-party employment rather than those who are self-employed also does not counsel in favor of exclusion under *Daubert*. This calculation of earning capacity merely provides one benchmark for the jury to consider. As Mr. Messier is aware, another is Mr. Rancourt's actual income history as reported in his tax filings. This is a straightforward matter for the jury to understand and to assess in the context of all the evidence presented. The opinion is not junk science or so misleading in nature that it should be excluded under *Daubert*.

III. The Calculation Extrapolated From Mr. Rancourt's 2018 Tax Forms

Mr. Messier's arguments as to Ms. Newick's alternative calculation based on Mr. Rancourt's 2018 tax forms gain more traction. Mr. Rancourt worked only part of 2018. Ms. Newick took the partial-year figures as reported for tax purposes, treated them all as applying only to the portion of the year actually worked, annualized them, *added* all annualized business expenses to income to arrive at a new (much higher) net income figure, and used that as a base figure for her calculation of earning capacity. Mr. Rancourt argues, among other things, that (1) adding deductions for business expenses to income makes no sense, (2) some figures "annualized" by Ms. Newick already were already annual figures, and (3) basing her calculation on 2018 numbers alone, rather than a more representative average taken from a range of years, is deceptive.

The first issue alone is sufficient to demonstrate that this earning capacity opinion by Ms. Newick lacks the sort of basic reliability required by Rule 702 and *Daubert* principles. Mr. Rancourt was self-employed for many years. On his 2018 tax forms, he deducted substantial business expenses, including depreciation, utilities, etc. For purposes of her earning capacity calculation, Ms. Newick took the value of the deducted expenses and added it to his reported income to derive a new estimate of his annualized 2018 net income. She then used that figure to calculate her estimate of total earning capacity from the time of disability to retirement.

At the hearing on Mr. Messier's motion, counsel for Mr. Rancourt was unable to provide any cogent explanation as to why Ms. Newick would have deducted such expense and reassigned them as net income.

Repeatedly pressed to explain during her deposition, Ms. Newick also was unable to provide any lucid explanation. On this point, the transcript largely speaks for itself and is worth quoting at length.

> Q. So if depreciation shows or reflects expenses for a business, why do you add it back in for your calculations?
>
> A. I add it back in because it is an allowment by the IRS to lower your tax burden by accelerating depreciation. It is a noncash item. And so that cash is available to you as if you were not—as if you were working for an employer.
>
> Q. So say someone buys a truck for business purposes. They're going to be using that truck to drive back and forth. They need that truck in order to do their carpentry business. That's a business expense to buy that truck, right?
>
> A. You can count it as a business expense, and that's what I'm saying. But if you drive the truck to the grocery store, and you put it down as a business expense, that's an advantage to you.
>
> Q. Are people supposed to do that on their tax forms? Are they supposed to get a deduction or depreciation on items which are not being used for business purposes?
>
> * * *
>
> A. I think you'd have to talk to a tax attorney on something like that. I think it is interpreted both by the IRS and probably by tax people in a very broad sense.
>
> Q. So the same question for utilities. To the best of your understanding, is somebody supposed to deduct utilities from their IRS tax—from their business income for tax purposes if those utilities have not been used for business purposes?

* * *

A. I would answer the same way. There's broad interpretation of that. If you need electricity to run your computer, but you also need it for something else, and put it down as a total cost—yeah—you put it down. That is something that you put down for utilities. But I don't think people break out how much of utilities you use for business versus personal.

Q. In your opinion it is appropriate to consider utilities as profit, not an expense that's necessary for a business, even when a person has reported on their tax forms that they incurred those utilities as part of the business, right?

* * *

A. I added utilities back in there because if he's working as a carpenter, as you say, in a location in Vermont, he does not have too many utilities in his house. And, for example, in 2016 he had no utilities. So if you're telling me he can operate his business without utilities, well, he did in 2016.

Q. Exactly. So for 2018 Mr. Rancourt reported to the IRS that he had utilities of $5,130 that were related to his business, and he did so by putting that on the Schedule C that he submitted to the IRS, right?

A. That is—the date I have is from the Schedule C. And I think—I think you're highlighting why I used the measure for earning capacity the wage rate for a carpenter. And the reason I did is for the very reasons you're pointing out. A lot of these expenses are very subjective. This individual, Mr. Rancourt, reported that he charged $50 an hour, and that is more than double the average wage rate. So what I'm—you've asked me a lot of questions about why I added this back in. It's specifically because on Schedule C there's broad interpretation about what and how much you can deduct for expenses.

Q. Just for clarity, I'm trying to find out why you added back in utilities, which Mr. Rancourt reported as a business expense. Why you added those back in and claim that as his profit for earnings for the year; why did you do that?

A. Because I think that the utilities—he operated his business out of his house. Whether or not he had this incurred for utilities, how he separated that out, I don't know. But if he's out working at a job, he's

still heating his house, and which is a utility. He still has a computer, which is a utility. And so what I'm saying is a lot of the deductions that are allowed are discretionary.

Q. And in his discretion he reported those as business expenses. Why do you not consider them to be business expenses? Why do you put those back into the profit box despite the fact that Mr. Rancourt has chosen to, in his discretion, call those business expenses and, in fact, has told the IRS that they're business expenses? Why have you done that?

A. Because he is working outside the household and, as far as I know, there aren't utilities used while he's on another location.

Q. Did you attempt at any point to ask him whether or not what he reported to the IRS as being his actual utility expenses related to his business was true and accurate?

A. I did not.

Q. Instead you just took that number and said, "Well, I'm just going to add it back to profit." What was the basis for that?

A. I think I've answered that three times.

Q. Okay. You agree with me that depreciation is for items placed into service with a business to help the business make money?

A. I agree that the depreciation is on a capital investment that is used for the business.

Q. And would you agree with me that the depreciation is an annual income tax deduction that allows you to recover the cost or other basis of certain property over the time you use the property? It's an allowance for the wear and tear, deterioration, or obsolescence of the property, which is being used for business purposes, correct?

A. I would not agree with that statement.

Q. Can you do depreciation for personal items which are not being used for business?

A. I assume if you're using a car or a truck for your business, whether or not you're using it fully or not, you can depreciate it.

Q. Can you depreciate items that are being used for personal use?

A. Well, I just stated that. If you're—for example, if you're using a car or truck and you depreciate that, and you bought it for the use of your business but you also use it for personal, I believe that that is deducted from your taxes, Schedule C.

Q. Are you allowed to depreciate the portion that you use for personal use only as opposed to business use?

A. I think it's a combined total.

Q. Can somebody depreciate an item that they used solely for personal use without any business use whatsoever?

* * *

A. I don't know the answer to that.

Newick Depo. Transcript 71–77. Counsel for Mr. Messier returned to this subject a short time later.

Q. . . . . But what steps did you take to determine if the 50 percent of car and truck values were appropriately added back in?

A. I did not—I do not analyze the individual data. It is based upon just my experience in terms of looking at individual cases.

Q. For car and truck expenses, is a person allowed to—is a person allowed to take a deduction for the percentage of use of that vehicle where it's being used for personal use?

Counsel for Mr. Rancourt: Again, I'm going to object to this line of questioning. You're asking her questions that are the scope of a tax expert. She has not been disclosed as a tax expert. She's not a tax expert. She will not be offering tax questions. And it's also been asked and answered.

Q. I was just making sure specific to the car and truck expenses. Because I asked about depreciation and utilities. Just to clear up why I'm asking the question, in this situation you'd agree with me that Mr. Rancourt delineated and itemized on his Schedule C that 50 percent of

> his car and truck expenses were for business use, and that's why he put it on the Schedule C? Is that your understanding of why those are on the Schedule C?
>
> A. I do not know why he—I can't answer that question. I basically used 50% of the costs.

Newick Depo. Transcript 88–89.

Plainly, at deposition, counsel for Mr. Messier tried mightily to understand why Ms. Newick would add the amount of Mr. Messier's business deductions straight into her calculation of his net income for earning capacity purposes. The rationale for having done so is hardly any clearer after counsel's questions than before. The clear impression is that Ms. Newick is simply unable to provide any cogent explanation for inflating Mr. Rancourt's income in this manner, yielding an opinion that is unreliable for *Daubert* purposes.

Counsel for Mr. Rancourt attempted to come to Ms. Newick's rescue by objecting that she is not a tax expert and would not be offering any opinions on tax matters. As an expert, of course, her opinion has to be within the scope of her expertise. And her opinion necessarily involves manipulating numbers from tax forms in certain ways as a predicate to her eventual calculation of earning capacity. Regardless whether she is a "tax expert" in any more general sense, she has to be able to explain—within the scope of her own expertise—how and why she did what she did. It is clear that she cannot.

This unexplained gap in her process is fundamental. Treating Mr. Rancourt's business expenses as income dramatically increased Ms. Newick's calculations, and there is no way for the jury to meaningfully understand why she did that, much less

whether it makes any sense to have done so. While perhaps this deficiency in Ms. Newick's testimony could be elucidated by Mr. Messier's expert and by appropriate cross-examination, the purpose of *Daubert* is to screen unreliable and unhelpful expert testimony so the jury never hears it in the first place.

Though that determination is sufficient to persuade the Court that the proffered opinion is not sufficiently justified, the Court also agrees with Mr. Messier that Ms. Newick's annualization of Mr. Rancourt's income also suffers from another flaw. Ms. Newick accepted that Mr. Rancourt only worked 8.5 months in 2018. She took his income for that period and extrapolated it to a 12-month figure to establish his "full" yearly income. She did the same thing with his depreciation expenses, in essence, treating depreciation as covering only 8.5 months. She did not have any specific knowledge of what was actually being depreciated, however. Nor did she have a persuasive explanation of why the depreciation could somehow be cabined to the same 8.5 month period. Indeed, Ms. Newick conceded that depreciation set out in the tax return *already* reflected 12-month figures. Increasing those amounts for an additional (supposed) 3.5 months of depreciation provided an inaccurate depreciation figure for the year. She then used that inflated figure to add back into her calculations of Mr. Rancourt's net income. By artificially inflating the net income figure in this fashion, Ms. Newick made even worse the miscalculation the Court has identified in regard to Mr. Messier's first point.

When asked at her deposition for further explanation to justify such an approach, the following exchange occurred:

Q. What assessment did you make to find out whether or not the depreciation itself was only for 8.5 months?

A. I did not. . . .

Q. . . . . Would you agree with me that the depreciation on Schedule C is for the whole year?

A. Well, it's reported for the whole year, that's correct.

Q. So the same question—

A. Everything is reported for the whole year.

* * *

Q. So would you agree with me that you took depreciation that was reported on Schedule C to be $8,944, and applied a calculation to it which increased the depreciation more than it was for the full 12-month period?

A. I increased the net income and adjusted net income for eight months, assuming that what he's reporting for his business for the 8.5 months working as a carpenter, and assuming he did not work beyond September of 2015 [*sic*] based upon the 8.5.

Q. Hold hold, hold up. My question is a very straightforward one. In order to reach your calculations, you took the net income and then added back in the full year's depreciation, correct?

A. I added back in the full year depreciation, correct.

* * *

Q. And then you multiplied those?

A. I adjusted it to 12 months from 8.5 months, correct.

Q. You'd agree with me that the depreciation number set out on Schedule C had already been adjusted for the full 12 months because it was for the full 12 months, right?

A. No.

Q. You don't agree with that?

A. I do not agree with that.

Q. So it's your understanding that his Schedule C for 2018 only shows values for 8.5 months of . . . depreciation?

A. What I would agree is that his business and his business expenses were for the time he operated as a carpenter which—

Q. Stop. Depreciation. Let's focus on depreciation . . . as reported on his Schedule C. Do you agree with me that the values on his Schedule C are for the full 12-month period and need no annualization or amendment or changes whatsoever?

A. No, I do disagree with that.

Q. Okay. What's the basis for your disagreement that what's on the Schedule C is for the 12-month period?

A. The Schedule C represents his income as a carpenter. If he did not work beyond September of '15 [*sic*], then, as a carpenter . . . depreciation he doesn't have. So what I'm saying is this report, based on the information provided to me, is he no longer worked as a carpenter beyond mid September, then all these expenses reported ended in mid September.

Q. If you took depreciation . . . for a period during which he wasn't work, would that be, well, tax fraud?

* * *

A. I'm not a tax expert.

* * *

Q. Do you even know what actually was included in the depreciation number for that year?

A. I assume it's somewhere in the tax return, but off the top of my head, no.

* * *

> Q. . . . . So my question is not whether or not there is information somewhere out there. My question is narrowly focused. Do you know what was being depreciated?
>
> A. No.
>
> Q. Did you make any attempt to find out what was being depreciated?
>
> A. No.

Newick Depo. Transcript 63–68.

For both of the reasons identified above, Ms. Newick's opinion in this regard is not sufficiently reliable and fails the *Daubert* test. Further, allowing such evidence to be submitted to a jury would sow juror confusion over the issue presented. Vt. R. Evid. 403. Given that determination, it is unnecessary to address the any other reasons Mr. Messier has offered in support of the same outcome. Ms. Newick will not be permitted to offer this opinion at trial.

Conclusion

For the foregoing reasons, Mr. Messier's motion *in limine* is granted, in part, and denied, in part. In light of the Court's ruling and analysis, the Court determines that no additional evidence is required to resolve the motion. The request for an evidentiary hearing is denied.

Electronically signed on Wednesday, February 15, 2023, pursuant to V.R.E.F. 9(d).

Timothy B. Tomasi
Superior Court Judge