

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

VINCENT L. GUINN, M.D.,

Plaintiff,

v.

Case No. 2:09-cv-226

JUDGE EDMUND A. SARGUS, JR.

Magistrate Judge Terence P. Kemp

MOUNT CARMEL HEALTH, et al.,

Defendants.

**OPINION AND ORDER**

This matter is before the Court on Defendants' Motion *in Limine* to Preclude at Trial Opinion Testimony by Plaintiff's Damages Expert. For the reasons set forth below, the Court **DENIES** Defendants' motion in accordance with the parameters set forth herein.

**I.**

Defendants move pursuant to Rule 702 of the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), to preclude opinion testimony of Plaintiff's damages expert, Brain A. Russell, "on the ground that his opinion is based on a flawed methodology that was created solely for the purpose of this litigation and therefore is not reliable." (Defs.' Mot. at 1.) Plaintiff has filed a memorandum in opposition to Defendants' motion. Additionally, the Court discussed this issue with counsel at the Final Pretrial Conference held on September 10, 2013.

**II.**

Defendants challenge Mr. Russell's testimony regarding his damages study. Pursuant to Rule 702 of the Federal Rules of Evidence, "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 . . . .” Fed. R. Evid. 702. “In *Daubert*, the Supreme Court ‘established a general gatekeeping [or screening] obligation for trial courts’ to exclude from trial expert testimony that is unreliable and irrelevant.” *Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 792 (6th Cir. 2002) (quoting *Hardyman v. Norfolk & W. Ry. Co.*, 243 F.3d 255, 260 (6th Cir. 2001) (alteration in original)). “The district court must determine whether the evidence ‘both rests on a reliable foundation and is relevant to the task at hand.’” *Id.* (citation omitted).

“In assessing relevance and reliability, the district court must examine ‘whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.’” *Id.* (citing *Jahn v. Equine Servs., PSC*, 233 F.3d 382, 388 (6th Cir. 2000)). This involves a preliminary inquiry as to whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue. *Id.* “Some of the factors that may be used in such an inquiry include: (1) whether the theory or technique has been tested and subjected to peer review and publication, (2) whether the potential rate of error is known, and (3) its general acceptance.” *Id.* (citing *Hardyman*, 243 F.3d at 260). “This inquiry is a flexible one, with an overarching goal of assessing the scientific validity and thus the evidentiary relevance and reliability of the principles and methodology underlying the proposed expert testimony.” *Id.* (citing *United States v. Langan*, 263 F.3d 613, 621 (6th Cir. 2001) (internal quotations omitted)). A “trial judge must have considerable leeway in deciding in a particular case how to go about

determining whether particular expert testimony is reliable.” *Kumho Tire Co., LTD v. Carmichael*, 526 U.S. 137, 152 (1999); *see also Jahn*, 233 F.3d at 388 (explaining that *Daubert* made clear that Rule 702 relaxes the “traditional barriers” to admitting opinion testimony).

### III.

In the Court’s view the issue before it has more to do with the framing of the questions and answers yet to be elicited from Mr. Russell. In regard to qualifications, Defendants do not dispute Mr. Russell’s qualifications, and the Court here finds that he is qualified to testify as an expert. Therefore, Mr. Russell is entitled to give a range of opinion testimony in accountancy and financial damages.

What the Court is not prepared to do at this juncture is to rule in the abstract as to methodology used and final damages computed. Neither party has asked for a *Daubert* hearing before trial. The Court recognizes that, as Defendants’ argue, “expert testimony prepared solely for purposes of litigation, as opposed to testimony flowing naturally from an expert’s line of scientific research or technical work, should be viewed with some caution.” *Johnson v. Manitowoc Boom Trucks, Inc.*, 484 F.3d 426, 434 (6th Cir. 2007). However, the Court is not required to automatically exclude a “prepared-solely-for-litigation” methodology as unreliable, and instead may consider it as a factor in addition to those specifically enumerated in *Daubert*. *Id.* (citing *Avery Dennison Corp. v. Four Pillars Enterprise Co.*, 45 F. App’x 479, 484 (6th Cir. 2002) (noting that the prepared-solely-for-litigation factor is often assessed in addition to those specifically enumerated in *Daubert* ); *Smelser v. Norfolk Southern Ry. Co.*, 105 F.3d 299, 303 (6th Cir. 1997) (same)).

As the Court indicated at the Final Pretrial Conference, to the extent Dr. Guinn explains


his damages through admissible testimony, the expert may use such factual information and form opinions based upon the Doctor's testimony and financial records. To the extent that testimony goes beyond historical financial data, the Court will at that time determine the admissibility of such testimony. As the Court understands the testimony at this point, (of course it will be reevaluated at trial), Dr. Guinn will provide a significant foundation for the testimony in that the expert has admitted he is not an expert in cardiology.

**IV.**

Based on the foregoing, the Court **DENIES** Defendants' Motion *in Limine* in accordance with this Opinion and Order. (Doc. No. 143.)

**IT IS SO ORDERED.**

9-11-2013  
DATE

  
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EDMUND A. SARGUS, JR.  
UNITED STATES DISTRICT JUDGE