

IN THE THIRD CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE

ASHA SMITH as natural parent and next of)
kin of deceased, TONY BROWN)
)
Plaintiffs,)
) No. 05C111
vs.)
)
)
WINDRIDGE, L.P. and MANAGING)
AGENT, LLC)
)
Defendants.)

**PLAINTIFF’S RESPONSE TO DEFENDANTS’ MOTION TO EXCLUDE PLAINTIFF’S
ECONOMIST EXPERT, DR. JOHN MOORE**

In this case for the wrongful death of a three-year-old child, the Defendants have filed a motion *in limine* to exclude the expert testimony of Dr. John Moore, an economist. Dr. Moore will testify as to the loss of earning capacity of Tony Brown due to his death at the age of three. Using statistical data, Dr. Moore will testify to the present value of Brown’s likely loss of earning capacity assuming that Tony would have graduated high school and entered the work force, and alternatively assuming that he would have graduated college and entered the work force. The Defendants’ motion should be denied because:

- I. Dr. Moore’s testimony will substantially assist the jury in determining the present value of Tony Brown’s loss of earning capacity had Tony reached common education levels, while properly leaving to the jury to determine whether the evidence presented at trial adequately demonstrates that Tony would have reached those education levels.
- II. The Plaintiff properly provided a supplemental and rebuttal disclosure of Dr. Moore’s opinion based upon the Defendants’ own expert witness disclosures and the Defendants’ deposition of Dr. Moore, and the Defendants have not been prejudiced in any manner by the supplemental and rebuttal disclosure.
- III. It is the Defendants’ burden to set forth proof in support of a deduction for personal maintenance expenses, not the Plaintiff’s, and thus Dr. Moore has fairly and properly addressed the question of personal maintenance expenses under Tennessee law.

I. Dr. Moore's testimony will substantially assist the jury in determining the present value of Tony Brown's loss of earning capacity had Tony reached common education levels, while properly leaving to the jury to determine whether the evidence presented at trial adequately demonstrates that Tony would have reached those education levels.

As this Court is aware, a jury determines the present value of loss of earning capacity in a wrongful death case based on the evidence presented at trial. The Plaintiff will present proof that will guide the jury to a decision as to Tony's likely loss of earning capacity. The jury will make a determination as to what they, as the trier of fact, believe Tony Brown more probably than not would have earned over the course of his lifetime. The jury is not constrained to select an education, career level, or earning potential suggested by the Plaintiff, nor any presented by the Defendants. Instead, the jury is to use its own common sense in analyzing the evidence before it and come to a rational conclusion as to three-year-old Tony Brown's likely educational and professional achievements had he lived.

To assist the jury in calculating the present value of Brown's loss of earning capacity, Dr. Moore will explain how to calculate the present value based on average earnings of individuals with high school and/or college degrees. Using statistical data relied on by economists and not part of the knowledge of the average juror, Dr. Moore will provide average annual earnings of African-American male Tennessee residents with high school and/or college degrees, including other compensation in the form of fringe benefits. Dr. Moore will also provide average worklife expectancies at those education levels. He will explain how to account for average wage increases, and to discount to present value. These figures and calculations are not common knowledge for the jury. Thus, Dr. Moore's testimony will substantially assist the jury in determining the present value of Brown's loss of earning capacity based upon sound economic principles as contemplated by

Tenn. R. Evid. 702.

The Defendants attack Dr. Moore's opinion because he has not independently assessed the likelihood that Tony would have graduated high school and/or college. The Defendants assert that, because Dr. Moore does not have an independent basis for verifying Tony Brown's likely education level, the two assumptions that underlie his opinion – that Tony would have graduated high school and/or college – are untrustworthy. The Defendants conclude that Dr. Moore's opinion should be inadmissible under Tenn. R. Evid. 702, 703, and 403.

The Defendants misunderstand the nature of Dr. Moore's testimony. Dr. Moore will merely address the present value of loss of earning capacity at two levels of educational achievement. Dr. Moore has not been asked to and will not render an opinion as to the likelihood that Tony Brown would have reached either of those levels. It remains *up to the jury* to decide whether the evidence presented *at trial* persuades them that Tony Brown would have graduated from high school and/or college, and whether his earnings would have been on par with other African-American males of this State. It is not Dr. Moore's role to carry the day as to the sum total of the Plaintiff's proof of damages, but simply to help the jury understand how to calculate the present value of loss of earning capacity as required by Tennessee law.

As the Court is aware, this is the same role an economist may perform in a catastrophic injury case with millions of dollars in future medical expenses. An economist testifying as to the present value of future medical expenses need not determine the likelihood of those future expenses; indeed, it is doubtful many economists would ever be competent to do so. Instead, the economist may simply provide the present value of those future medical expenses based upon assumptions provided by the plaintiff's attorney in the case. At trial, the plaintiff presents evidence of what her

future medical needs will be, the economist testifies as to the present value assuming those needs are accurate, and the jury determines whether and how much of those future medical expenses are reasonably certain.

The Defendants fail to grasp this point, and erroneously argue that Dr. Moore's opinion in this case should be excluded because it "must presume educational attainment that has no foundation or methodology that can be tested, nor can there be any way to determine a potential rate of error." (Defs.' Memo. of Law, pp. 12-13). To the contrary, the evidence presented at trial need not definitively demonstrate an exact forecast of Tony Brown's likely educational achievements. If the Defendants believe that Dr. Moore's testimony is based on assumptions unsupported by the evidence at trial, the Defendants can test his testimony "with the crucible of vigorous cross-examination and countervailing proof." *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257, 265 (Tenn. 1997). Moreover, "the one committing the wrongful act causing the death of a human being should not be permitted to seek protection behind the uncertainties inherent in the very situation his wrongful act has created." *Jordan v. Baptist Three Rivers Hosp.*, 984 S.W.2d 593, 600 (Tenn. 1999). "[T]he estimation of compensation for wrongful death must take into consideration not only the most optimistic expectations of the future, but also the most pessimistic, and all of the uncertainties between the extremes." *Bellamy v. Sadler*, 640 S.W.2d 20, 22 (Tenn. App. 1982) (citation omitted). In short, there may be some ambiguity as to Tony's likely education and career achievements, especially before trial begins. That is not, however, a valid reason to disqualify Dr. Moore's testimony.

Importantly, trial has not yet begun, so the Plaintiff has yet to have the opportunity to produce a single witness to establish her son's future earnings had he not drowned in April 2004.

The Defendants are correct that socioeconomic and familial factors may be considered by the jury in determining Tony Brown's likely education and career achievements. The Plaintiff, however, takes a dramatically different view of this three-year-old child's likely future than do the Defendants. The Plaintiff will present evidence of the diametric distinction between the lives of Tony's parents in Somalia as opposed to Tony's anticipated life as a natural born United States citizen. The Plaintiff will present evidence of the nurturing family environment in which Tony would have grown, including not only his mother and two brothers, but his extended family as well. The Plaintiff will present evidence of the example set by Tony's live-in relative¹, who received the equivalent of a high school education in Somalia and now earns his living in Nashville as a car dealer. The Plaintiff will present more than enough evidence *at trial* for the jury to reasonably conclude that Tony Brown would likely have graduated high school and college. Because trial has not yet begun, however, the Defendants' motion is not only legally deficient but premature as well.

Still, even before trial starts and any evidence is presented, judicial notice is already sufficient to prove the likelihood that Tony Brown would at least have graduated high school. A court shall take judicial notice of an adjudicative fact if requested by a party and supplied with the necessary information. Tenn. R. Evid. 201(d). A judicially noticed fact must be one not subject to reasonable dispute, including one that is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Tenn. R. Evid. 201(b)(2). *See also* Advisory Committee Comment to Tenn. R. Evid. 201 (noting an almanac as one source of a judicially noticeable fact); Neil P. Cohen, et al., Tennessee Law of Evidence, § 2.01(4)(c) (5th ed. 2005) (noting "historical facts, statistics, [and] government matters" as examples of facts that can be

¹ Described as an "uncle," although that term is not a literal translation given the extended nature of Somali families.

the subject of judicial notice.). The State of Tennessee Department of Education reports that the high school graduation rate for Tennessee in the year 2004 was 75.7%. (*See* Exhibit 1, attached hereto, printout from the Tennessee Department of Education website, “Statewide Report Card 2004: Part I: State Profile,” <http://www.k-12.state.tn.us/rptcrd04/> (printed May 18, 2006)). That well over half of Tennessee students graduate high school is sufficient on its own for the jury to conclude that Tony Brown more probably than not would have also graduated.

Finally, the Plaintiff must address the Defendants’ harsh and unwarranted indictment of Dr. Moore. The Defendants assert that Dr. Moore should not be allowed to testify because, according to the Defendants, he did not abide by his professional principles in rendering his opinion in this case. The Defendants argue that Dr. Moore violated his principles as a forensic economist in failing to disclose the hypothetical nature of his assumptions as to the level of education Tony Brown would have achieved, and in changing his methodology to suit the Plaintiff’s needs. (Defs.’ Memo. Of Law, p. 13). The Defendants’ attack is untrue, unjustified, and unrelated to the admissibility of his testimony as an expert.

Dr. Moore clearly disclosed in his written report that his opinion “assumes completion of” high school and college. (Ex. A to Defs.’ Motion, Moore depo., ex. 1). Likewise, in his deposition Dr. Moore testified that: “it’s understandable that they are hypothetical because they’re based upon – as I state in Exhibit 0 [to my report] – they’re based upon assumptions” and “[a]ssumptions are necessary for hypotheticals, so it’s implicit, I think, that they’re hypothetical.” (Ex. A to Defs.’ Motion, Moore depo., 17:13-19). The Defendants’ efforts to twist this into something less than a proper disclosure of the facts underlying his opinion are disingenuous at best.

Moreover, Dr. Moore did not alter any aspect of his methodology to suit the Plaintiff. The

Defendants assert that, because Dr. Moore based his opinion on the assumptions that Plaintiff's counsel provided to him, Dr. Moore's opinion is somehow tainted. To the contrary, Dr. Moore provided a proper economic analysis of the present value of the loss of earning capacity of Tony Brown given the assumptions the Plaintiff expects to prove through other witness at trial. Dr. Moore did not calculate Tony's potential earnings for higher earnings levels, such as that for an individual with a graduate degree or other specialized training. Dr. Moore's methodology would have been the same regardless of the assumed education levels for the three-year-old child who died too young to even start school.

Thus, there is nothing remotely duplicitous about Dr. Moore's opinion or the information and assumptions it is based upon. If the Defendants truly believe these attacks to be warranted criticisms of Dr. Moore's testimony, they can attack the weight of his testimony at trial. The Defendants' critiques of Dr. Moore's report do not, however, call into question the admissibility of Dr. Moore's testimony.

II. The Plaintiff properly provided a supplemental and rebuttal disclosure of Dr. Moore's opinion based upon the Defendants' own expert witness disclosures and the Defendants' deposition of Dr. Moore, and the Defendants have not been prejudiced in any manner by the supplemental and rebuttal disclosure.

In January (four weeks before the scheduling order deadline), the Plaintiff disclosed her intent to present Dr. Moore's testimony at trial and produced a copy of Dr. Moore's written report. Two months later, the Defendants disclosed their own expert witnesses, including an economist who is apparently expected to testify regarding the amount of a personal maintenance deduction and cost of child-rearing to apply for Tony Brown. Three weeks after that, on April 18, 2006, the Defendants deposed Dr. Moore and asked him about his own opinions regarding those two issues.

Within a week, the Plaintiff produced “a supplemental and rebuttal report of Dr. John Moore” to the Defendants. (Ex. 2, letter from Plaintiff’s counsel to Defendants’ counsel, dated April 24, 2006). The Plaintiff’s cover letter explained that, because these issues were raised in the Defendants’ own expert witness disclosures and were inquired of during the deposition of Dr. Moore, the Plaintiff was providing a “supplemental and rebuttal report of Dr. Moore to clarify in writing his opinions with respect to personal maintenance and child-rearing expenses.” (Ex. 2, letter from Plaintiff’s counsel to Defendants’ counsel, dated April 24, 2006). The Plaintiff further offered to make Dr. Moore available for an additional deposition if the Defendants felt it necessary to address these specific issues. (Ex. 2, letter from Plaintiff’s counsel to Defendants’ counsel, dated April 24, 2006). At that time, the parties were still within the time allowed in the scheduling order for completion of expert discovery depositions, but the Defendants did not accept the Plaintiff’s invitation.

In their effort to manufacture an argument, the Defendants ignore the facts. The disclosure was provided in supplement as required by the Tennessee Rules of Civil Procedure. *See* Tenn. R. Civ. P. 26.05(1)(B) (“A party is under a duty seasonably to supplement the party’s response with respect to any question directly addressed to the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of that testimony”). The Defendants do not acknowledge in their brief that the disclosure was also provided in rebuttal to the Defendants’ own expert witness disclosures, produced two months after the Plaintiff’s disclosure of Dr. Moore. The supplemental and rebuttal disclosure addresses not just personal maintenance expenses, but also the cost of child-rearing to the extent the court deems such a deduction appropriate. The Defendants are not prejudiced by any aspect of the

supplemental and rebuttal disclosure, as they have already questioned Dr. Moore on these topics in their deposition of him. To the extent the Defendants felt additional questions necessary, the Plaintiff offered to make Dr. Moore available for an additional deposition within the timeframe provided in the Court's scheduling order. The Defendants ignore all of these facts because the facts demonstrate that Plaintiff's supplemental and rebuttal disclosure of Dr. Moore's opinion is practical, permissible, and not the least bit prejudicial.

III. It is the Defendants' burden to set forth proof in support of a deduction for personal maintenance expenses, not the Plaintiff's, and thus Dr. Moore has fairly and properly addressed the question of personal maintenance expenses under Tennessee law.

The jury in a wrongful death case is only to be instructed to deduct from the pecuniary value of the life of the decedent if there is sufficient evidence to support an amount based upon the decedent's personal maintenance expenses. *Wallace v. Couch*, 642 S.W.2d 141, 144 (Tenn. 1982) (holding a personal maintenance deduction is appropriate under Tennessee law, and distinguishing a prior case on the grounds that the earlier case did not have evidence on the issue to warrant an instruction); Tennessee Pattern Jury Instruction, Civil 14.30 Use Note ("The final paragraph, permitted by *Wallace v. Couch*, ... should be used only when there is sufficient evidence upon which the jury can base the deduction."). The burden of proof to put forth evidence of the amount of personal maintenance expenses rests with the Defendants. *See* Tennessee Pattern Jury Instruction, Civil 14.30 Advisory Committee Comment ("The court in *Wallace* appeared to place on the defendant the burden of going forward with evidence upon which the jury can base such a deduction."). No case has ever put the onus on the plaintiff, nor any of the plaintiff's expert witnesses, to affirmatively present proof of the amount of a deduction for personal maintenance

expenses. Otherwise, the Plaintiff would be in the untenable position of putting on sufficient proof to *disprove* her own damages.

In light of the law, the Defendants' attack on Dr. Moore for not discounting for personal maintenance expenses in his original report² is incredulous. Dr. Moore acknowledged in his deposition that this appears to be an appropriate case for a deduction for personal maintenance expenses. Such a deduction is not "mandatory" as the Defendants assert, however. Instead, it is incumbent on the Defendants to provide sufficient evidence to warrant the deduction. Based upon the Defendants' expert disclosure showing a deduction and the Defendants' deposition of Dr. Moore inquiring about his opinion as to an appropriate deduction, the Plaintiff provided a supplemental and rebuttal disclosure of Dr. Moore to respond to the Defendants' evidence on this issue. Thus, both Dr. Moore's original report and his supplemental and rebuttal report fairly address Tennessee law on personal maintenance expenses.

Even assuming *arguendo* that the Defendants were correctly interpreting the law (they are not), the Defendants have not presented any coherent argument that would merit excluding the testimony of Dr. Moore. The Defendants attack Dr. Moore's opinion because he disagrees with the Defendants as to whether a jury instruction on deducting personal maintenance expenses is mandatory in all wrongful death cases, regardless of whether evidence of the deduction is presented. The Court decides what law applies and which jury instructions to give in a particular case, not the expert witnesses. To the extent the Court instructs the jury on personal maintenance expenses in this case, Dr. Moore's supplemental and rebuttal opinion addresses the amount of such a deduction.

² The Defendants repeatedly refer to Dr. Moore's testimony that Plaintiff's counsel asked him not to include a deduction for personal maintenance expenses. For the record, Plaintiff's counsel did not instruct Dr. Moore to avoid calculating personal maintenance expenses; Dr. Moore was merely mistaken on this point. Most importantly, as detailed herein, this is absolutely irrelevant to the admissibility of Dr. Moore's testimony, and amounts to little more

Thus, the Defendants' criticism of Dr. Moore is not only merit less, but moot.

For the reasons detailed above, the Defendants' motion to exclude the testimony of Dr. John Moore should be denied.

Respectfully submitted,

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than an effort to malign Plaintiff's counsel and Dr. Moore.