

**NOT INTENDED FOR PUBLICATION IN PRINT**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
EVANSVILLE DIVISION

AMBER McARTHYSHREVE,	)	
MARK SHREVE,	)	
	)	
Plaintiffs,	)	
vs.	)	NO. 3:07-cv-00047-RLY-WGH
	)	
WAL-MART STORES, INC.,	)	
	)	
Defendant.	)	

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
EVANSVILLE DIVISION

AMBER MCCARTHY-SHREVE and MARK )  
SHREVE, )  
Plaintiffs, )  
 )  
vs. ) 3:07-cv-047-RLY-WGH  
 )  
WAL-MART STORES, INC., )  
Defendant. )

**ENTRY ON DEFENDANT’S MOTION TO EXCLUDE TESTIMONY OF LEROY J. GROSSMAN AS A PURPORTED WITNESS**

Defendant, Wal-Mart Stores, Inc. (“Wal-Mart”), moves to exclude the testimony of Leroy J. Grossman (“Dr. Grossman”). Dr. Grossman is an economist who opines as to Plaintiff Amber McCarthy-Shreve’s (“Plaintiff”) lost earning capacity. For the reasons stated below, the court **DENIES** Wal-Mart’s motion.

**I. Background**

On April 21, 2006, while in the check-out line at a Wal-Mart store located in Owensboro, Kentucky, a gallon jug of tea fell off the bag carousel and landed on Plaintiff’s left foot. Plaintiff alleges that as a result of the injuries she sustained, she had to retire her position as a secretary for the circuit judge in Henderson County, Kentucky, and remains unable to work. Plaintiff alleges that her injuries are attributable to the negligence of Wal-Mart employees and agents. Accordingly, Plaintiff instituted this negligence action against Wal-Mart on March 29, 2007, seeking compensatory damages against Wal-Mart.

As part of Plaintiff’s case-in-chief, Plaintiff plans to call Dr. Grossman, who opines that Plaintiff would have worked to the age of 71.9, and that her lost earning capacity is \$233,970.00.

(Report of Dr. Grossman, Defendant's Ex. A).

## **II. Standards Governing Expert Testimony**

The admissibility of expert testimony is governed by Rule 702 of the Federal Rules of Civil Procedure and the principles announced in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Federal Rule of Evidence 702 ("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.

Before admitting expert testimony, *Daubert* requires that the district court function as a gatekeeper to ensure that expert testimony is both relevant and reliable. *Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir. 2000). "In other words, as a threshold matter 'a district court is required to determine (1) whether the expert would testify to valid scientific knowledge, and (2) whether that testimony would assist the trier of fact with a fact at issue.'" *Id.* (quoting *Walker v. Soo Line R.R. Co.*, 208 F.3d 581, 590 (7th Cir. 2000)).

To determine whether an expert's opinions are reliable, a court must first determine whether the expert is qualified in a relevant field and then examine the methodology the expert used in reaching his conclusions. *Smith*, 215 F.3d at 718. Thus, an expert's opinions must be substantiated; "providing only an ultimate conclusion with no analysis is meaningless." *Clark v. Takata Corp.*, 192 F.3d 750, 757 (7th Cir. 1999) (internal quotation and citations omitted). Once the court is satisfied that the expert's opinion is relevant and reliable, its inquiry is at an end. "The soundness of the factual underpinnings of the expert's analysis and the correctness of the

expert's conclusions based on that analysis are factual matters to be determined by the trier of fact." *Smith*, 215 F.3d at 718 (citing *Daubert*, 509 U.S. at 595 ("The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate."))).

### **III. Discussion**

Wal-Mart does not object to Dr. Grossman's qualifications nor the relevancy of his opinion. Rather, Wal-Mart contends his opinion is conclusory and speculative, and thus, unreliable, and should not be presented to the jury in this matter. In particular, Wal-Mart contends the following assumptions and omissions in Dr. Grossman's expert report render his opinion inadmissible:

1. Dr. Grossman's assumption that Plaintiff, who is 64.1 years old, would have worked to the age of 71.9;
2. Dr. Grossman's assumption that Plaintiff is permanently and totally unemployable;
3. Dr. Grossman's failure to reference Plaintiff's past income; and
4. Dr. Grossman's failure to offer analysis to support any of his opinions.

The court will discuss each of these objections below.

#### **A. Dr. Grossman's Assumption that Plaintiff Would Have Worked to Age 71.9**

Wal-Mart contends that Dr. Grossman's assumption that Plaintiff would have worked to age 71.9 is unrealistic, given Plaintiff's inconsistent work history. In particular, in 2001, Plaintiff earned only \$650.00; from 1998 to 2000, Plaintiff did not work; and from 1994 to 1997, Plaintiff worked for a temporary service agency. (*See* Answers to Plaintiff's Interrogatories of Defendant, Nos. 7-8, Defendant's Ex. B). However, during Plaintiff's deposition, she was clear and unequivocal that she intended to continue her job as a judicial secretary through the end of

the judge's eight-year term that had commenced in January 2007. Her testimony regarding that employment is as follows:

Q: And what were you doing before March 2, 2007?

A: Secretary for the circuit judge in Henderson, Kentucky.

Q: How long had you done that?

A: Almost three-and-a half years.

(Deposition of Amber McCarthy-Shreve ("Plaintiff Dep.") at 9).

\* \* \*

Q: Okay. When you stopped working in March of '07, how old were you?

A: Sixty-four.

Q: Okay. And pretend this incident had not ever happened. How long would you have continued working in general?

A: The judge had just been reelected for an eight-year term.

Q: Okay.

A: At least another eight years I would've worked.

\* \* \*

Q: But you were ready to go –

A: Yes.

Q: – eight more years with this judge?

A: Yes.

(*Id.* at 62). Thus, the dispute between the parties is one of fact, and is not related to the soundness of Dr. Grossman's methodology. As such, this dispute is not the subject of a *Daubert* motion; rather, it is one best left for a jury. *Smith*, 215 F.3d at 718. Wal-Mart's motion based

upon this assumption is therefore denied.

**B. Dr. Grossman's Assumption Plaintiff is Permanently and Totally Unemployable**

Wal-Mart also contends that Dr. Grossman's assumption that Plaintiff is permanently and totally unemployable is outside of Dr. Grossman's expertise. Plaintiff concedes this point. Wal-Mart's motion based upon this assumption is therefore granted.

**C. Dr. Grossman's Failure to Refer to Plaintiff's Past Income to Calculate Her Future Lost Income**

Wal-Mart cites Dr. Grossman's failure to refer to Plaintiff's past income to calculate her future lost income as evidence that his opinion is unreliable. Dr. Grossman has since filed a supplemental report, dated March 12, 2008, which delineates his review of Plaintiff's income and specifically addresses how he calculated her lost income capacity. (Amended Report of Dr. Grossman, Plaintiff's Ex. A). Accordingly, Wal-Mart's motion based upon Dr. Grossman's failure to reference Plaintiff's past income is denied.

**D. Dr. Grossman's Failure to Offer Analysis to Support His Opinions**

Finally, Wal-mart contends that Dr. Grossman offers no analysis in his report to support his opinion – just bottom-line numbers – and that therefore, he should be barred from testifying in the trial of this matter. Again, Dr. Grossman has since amended his report, and offers a sufficient analysis to support his opinions. For example, in his amended report, he includes a table of Plaintiff's earnings and her state-paid benefits (retirement, health and life insurance benefits) from the years 2004-2006, gleaned from her pay stubs for the above years. He then engages in a simple mathematical calculation to determine the average percentage income increase she was granted each year, and employs a discount rate to determine the present value of her lost earning capacity. Dr. Grossman's methodology is sound, and will be helpful to the jury in the event it determines that damages should be awarded. Accordingly, Wal-Mart's motion based upon Dr. Grossman's analysis is denied.

**IV. Conclusion**

For the reasons set forth above, the court finds Dr. Grossman's opinion is supported by a sound methodology and will be helpful to the jury. Defendant's Motion to Exclude Testimony

of Leroy J. Grossman (Docket # 25) is therefore **DENIED**.

**SO ORDERED** this 23rd day of July 2008.

s/ *Richard L. Young*  
RICHARD L. YOUNG, JUDGE  
United States District Court  
Southern District of Indiana

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