

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION AT COVINGTON

BRANDI STEWART, *et al.*,

Plaintiffs,

v.

TYLER BROCKMAN, *et al.*,

Defendants.

: Case No. 2:15-cv-52
:
: Judge David L. Bunning
:
: Magistrate Judge J. Gregory
: Wehrman
:
: PLAINTIFFS' RESPONSE TO
: MOTION TO EXCLUDE PORTIONS
: OF THE REPORT AND
: TESTIMONY OF PLAINTIFFS'
: EXPERT, DR. RICHARD
: ZIERNICKI (DOC. 89)

I. INTRODUCTION

None of the opinions of expert reconstruction engineer, Dr. Richard Ziernicki, should be excluded from this case. The motion to exclude his testimony should be denied. (Doc. #: 89.) Defendants cite to *Davies v. City of Lakewood*, No. 14-CV-01285-RBJ, 2016 WL 614434 (D. Colo. Feb. 16, 2016), but in that police shooting case the *Daubert* motion seeking to restrict the testimony of Dr. Ziernicki was completely denied. He was permitted to testify regarding his reconstruction of a police shooting event without restriction. *Id.* at **9-10. That case recently settled for \$3.5 million.¹

The testimony of an expert witness is governed by Fed. R. Evid. 702 and 703. Under Rule 702, an expert witness may testify if the testimony meets four requirements:

¹ Kieran Nicholson, *Widow of Fallen Lakewood Police Officer Settles Federal Lawsuit for \$3.5 million*, DENVER POST (Sep. 14, 2016), available at <http://www.denverpost.com/2016/09/13/widow-fallen-lakewood-officer-settles-lawsuit/>.

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

In applying Rule 702, the court performs a "gatekeeping" function, limiting expert testimony to relevant and reliable testimony that will assist jurors in understanding the facts at hand. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993). The trial judge has discretion in performing this role. *Johnson v. Manitowoc Boom Trucks, Inc.*, 484 F.3d 426, 429 (6th Cir. 2007). "In short, under *Daubert* and its progeny, a party proffering expert testimony must show by a preponderance of proof that the expert whose testimony is being offered is qualified and will testify to scientific knowledge that will assist the trier of fact in understanding and disposing of relevant issues." *Sigler v. Am. Honda Motor Co.*, 532 F.3d 469, 478 (6th Cir. 2008) (citing *Pride v. BIC Corp.*, 218 F.3d 566, 578 (6th Cir. 2000)). This test has also been applied to non-scientific expert testimony. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). An expert is reliable when he uses in the courtroom the "same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Best v. Lowe's Home Ctrs., Inc.*, 563 F.3d 171, 177 (6th Cir. 2009). The trial court's focus should be on principles and methodology, not on conclusions that they generate. *Daubert*, 509 U.S. at 595. Expert testimony is relevant when it will "assist the trier of fact to understand the evidence or to determine a fact in issue." *Daubert*, 509 U.S. at 591.

Defendants attack only a small portion of the reports and testimony of this expert. Dr. Ziernicki took the point cloud data from the Leica scan completed by the Kentucky State Police

and used that data along with physical evidence, witness statements, radio traffic, video images, and photographs of the shooting scene to recreate the events that occurred between the time the Ramsey vehicle leaves the cruiser cam screen to the time it comes to final rest against the embankment across from the exit from the field party. Dr. Ziernicki applied rigorous scientific methodology to his work. Defendants do not challenge the vast majority of his opinions. What defendants do challenge is actually misrepresented.

II. ARGUMENT

A. Dr. Ziernicki offered opinions well within his area of expertise.

Under Rule 702 of the Federal Rules of Evidence, a qualified expert may provide opinion testimony if the evidence is both relevant and reliable. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993). “[A] proposed expert witness should not be required to satisfy an overly narrow test of his own qualifications.” *United States v. Barker*, 553 F.2d 1013, 1024 (6th Cir. 1977)(internal citations omitted). Rather, “the only question for the trial judge who must decide whether or not to allow the jury to consider a proffered expert's opinions is, whether his knowledge of the subject matter is such that his opinion will most likely assist the trier of fact in arriving at the truth.” *Id.*

Defendants challenge Dr. Ziernicki’s qualifications as an expert. However, Dr. Ziernicki is a highly experienced forensic engineer and accident reconstructionist. He has evaluated several thousand industrial and vehicular accidents. (Ziernicki C.V., Doc. 89-1, p. 1.) Dr. Ziernicki has testified as an expert witness over 500 times, including for such clients as the United States Department of Justice, Department of Defense, Colorado Attorney General’s Office, district attorneys, and public defenders. *Id.* He is eminently qualified to give expert testimony regarding the path of Samantha Ramsey’s vehicle, the actions that led to that path, and

Defendant Brockman's interaction with the vehicle. *See Davies*, No. 14-CV-01285-RBJ, 2016 WL 614434, *10 (discussing Dr. Ziernicki's "extensive credentials as a mechanical engineer" and finding that "he relied on physical evidence and recognized scientific methods of reconstruction in forming his opinions.").

Furthermore, Dr. Ziernicki did not offer opinions outside of his area of expertise. Defendants took issue in particular with two opinions: Defendant Brockman's foot injuries, and Samantha Ramsey's reaction to being shot.

Brockman's Foot Injuries. Defendants claim that Dr. Ziernicki has provided "medical opinions" about the injuries to Defendant Brockman's foot. They are wrong. Dr. Ziernicki's opinion was that Defendant Brockman's foot was not run over in the manner described by Dr. Smock. (Ziernicki Depo., Doc. 76, p. 112.) Dr. Ziernicki never rendered an opinion about the diagnosis or treatment of the foot injuries. He was very careful to limit his opinion to Dr. Smock's claim that the marks on Tyler Brockman's right foot are "striations" or imprints caused by the tire tread of the Subaru. Dr. Ziernicki reconstructs auto accidents including the impact autos have on the human body. He never diagnosed the injury, he simply opined that the marks on the ankle are not "striations" caused by the tire rolling against the ankle. This is obvious when one simply looks at the text of the material cited by the defendants in their motion:

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18 Q. That's not my question. My question is,
19 are you making any opinions as to whether or not these
20 striation marks are from the tire or not?
21 A. In my opinion, they are not from the tire
22 whatsoever. They are basically the blood clot and skin
23 misperfection.

He further explains:

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20 Because this foot discussion is not about

21 whether he was injured. Of course, he was injured.
22 There's a lot of different way how he could be injured,
23 and I'm not discussing that.
24 What I'm simply saying, when I look at
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1 mechanical appearance of that skin, trying to say that if
2 I spin tire through that boot, I will get a tire
3 striation marks on that foot? It is nonsense. You
4 can't.

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14 A. Okay. I want to make clear what I
15 testified to. I'm not testifying what caused that
16 injury. I testified that there is no striation marks on
17 that picture, period --

18 Q. Okay. Well --
19 A. -- left by tire, spinning tire or any
20 tire.

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22 A. That's physically impossible for that tire
23 to leave striation marks. Okay. You can get trauma from
24 tire running over his foot. I don't question that. But

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1 what I question is -- there is no way somebody say, Oh,
2 that line here is coming because tire is -- tires left
3 that on the foot.

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13 A. Look, I will provide what you ask for,
14 okay, but I want to make clear, I never said what that
15 made -- that injury. I said on that foot, when I look,
16 there is no striation marks here left by tire. That's
17 what I said. Nobody can -- nobody can look on the
18 picture and say, Oh, I see striation marks. They are
19 some marks, but they are not striation marks left by
20 automotive tire.

(Ziernicki Depo.) Dr. Ziernicki does not need medical knowledge to make such a conclusion, rather it is based on his knowledge of the types of marks that are left by tires.

Ramsey conduct after shooting; Body's Reaction to Trauma. Dr. Ziernicki routinely studies car, truck and industrial accidents. He has also provided expert testimony in police shooting cases. (Ziernicki CV, Doc. 89-1, p. 1.) *See, e.g., Davies*, No. 14-CV-01285-RBJ, 2016

WL 614434, **9-10. As part of this work, he studies and provides opinions concerning the likely response of the human body to various types of trauma. Ziernicki CV, Doc. 89-1, p. 9. Dr.

Ziernicki is the author of a number of papers on injuries resulting from vehicular accidents.²

In Dr. Ziernicki's supplemental report he reconstructed the events that occurred from the appearance of the Subaru on the cruiser camera to the final stop of the Subaru 38 seconds later. (Ziernicki Supp. Report, Doc 89-3, p. 9.) He used a variety of evidence to accomplish this task including the Subaru speed and positioning leaving the video frame, the Leica scan data, the bullet casing positions, the fact that the Subaru was shifted into reverse, the presence of a reverse inhibitor on the vehicle, Brockman's call to dispatch, the impact with the ditch at final rest, and Brockman, passenger and other witness statements. His methodology was carefully explained in the report and included over a million calculations. (*Id.* at pp. 19-21.) Dr. Ziernicki also carefully explained during his deposition how his methodology accounted for the time, distance and other constraints that had to be addressed in developing his opinion. (Ziernicki Depo, Doc. 76, pp. 174-179.) Dr. Ziernicki opined that Samantha Ramsey started braking and started shifting toward Park when the gun came out. After the first shot was fired she raised her arm away from the shifter before it has reached Park. She also stopped braking and the car coasted. When the vehicle reaches 6 m.p.h. the reverse inhibitor disengages and the car engine brakes. The car eventually moves backwards slowly and ends its travel in the ditch. Ziernicki's explanation of Samantha Ramsey's response to the trauma of getting shot fits in with the data that he has collected and the calculations he has performed to explain the known events that occurred. It is

² Richard M. Ziernicki, *et al.*, *Head Injury Prevention and Future Design Trends in the Automobile Industry*, Knott Laboratory, Inc. (January 1996); Richard Ziernicki, *et al.*, *Head Injury Risk Assessment and Prevention In Automobile Accidents*, ACCIDENT RECONSTRUCTION JOURNAL, 20 (September/October 1996); Richard Ziernicki, *et al.*, *Head Injury in Automobile Accidents*, Knott Laboratory, Inc. (November 1994).

not a medical opinion. It is a classic engineering reconstruction opinion. (See supplemental report, Doc. 89-3.) Consider also this discussion from his deposition:

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11 Now, let me finish my answer. I am in a
12 position that the first thing what she did when she was
13 shot, she abandoned her task to keep pushing shifter.
14 That's why she -- she didn't intend to put to reverse.
15 Nobody will argue with that. Her intent was to shift to
16 the park. She didn't get there. Why? Because she
17 responded, raising at least one hand because of the
18 bullets -- because of being shot, excuse me.
19 And at the same time, it is my opinion
20 that her braking disappeared -- she stopped braking
21 whatsoever. The vehicle went into the coasting phase of
22 the accident. The vehicle was just coasting. Okay. So
23 that's -- when the vehicle is coasting, that's when the
24 rest of the -- that's when the rest of the shots are

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1 fired. Then vehicle goes to the 6 miles per hour or that
2 neighborhood and transmission is engaged. It changed
3 from coasting -- coasting to braking. That was noticed
4 by officer by jerking of the vehicle. That vehicle came
5 to the full stop and then started reversing because
6 transmission engaged, reversed after being in a full
7 stop.

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A. I have studied and read that the shot will
19 cause a human to respond to trauma, body trauma. And one
20 of the reaction that's typical is to release the muscle
21 pressure. If you have a grip, you let it go.

Because Dr. Ziernicki has significant experience observing the response of the human body to trauma, he should be permitted to testify regarding the effects of the shooting on Samantha Ramsey.

B. Dr. Ziernicki's opinions are based on facts well documented in the record, not on speculation.

Defendants argue that Dr. Ziernicki made improper speculative conclusions in describing Defendant Brockman's actions, and as to what Brockman felt, heard, and saw. Federal Rule of

Evidence 702(b) requires that an expert's testimony be "based on sufficient facts or data." "The Federal Rules of Evidence allow an expert great liberty in determining the basis of his opinions and whether an expert opinion should be accepted as having an adequate basis is a matter for the trier of fact to decide." *United States v. L.E. Cooke Co.*, 991 F.2d 336, 342 (6th Cir. 1993), citing *Mannino v. International Mfg. Co.*, 650 F.2d 846, 853 (6th Cir. 1981). The Sixth Circuit has cautioned against excluding "an expert's testimony on the ground that the court believes one version of the facts and not the other." *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 529 (6th Cir. 2008), quoting Fed. R. Evid. 702 advisory committee's note, 2000 amend.

Here, Dr. Ziernicki's statements are sufficiently supported by facts in the record to allow a jury to determine whether his opinions are reliable. In his report, Dr. Ziernicki explains how each opinion regarding Brockman's behavior directly relates to an observation from the video. Ziernicki's opinion that Brockman made a "concerted effort to engage with the Subaru" is supported by Ziernicki's observation that Brockman took the shortest path to approach. (Ziernicki Report, Doc. 89-2, p. 38). Likewise, to support his conclusion that Brockman made a "deliberate effort to catch Ms. Ramsey," Ziernicki cites Brockman's sudden acceleration. (*Id.*) Ziernicki describes Brockman as "actively engaging" the Subaru based on the fact that Brockman slowed down after speeding up. (*Id.*)

Defendants argue that Ziernicki "erroneously concludes that Brockman's foot was not run over." This Court may not exclude Dr. Ziernicki's opinion merely because Defendants believe it to be erroneous. There are abundant facts in the record to support Dr. Ziernicki's opinion. Ziernicki cites a reconstruction analysis performed by Knott Laboratory and physical evidence which call into question Dr. Smock's theory of events. (Ziernicki Report, Doc. 89-2, p. 46). Dr. Ziernicki's opinion is further supported by the fact that Defendant Brockman's

testimony contradicts Dr. Smock's theory of events. Brockman testified that he does not remember his foot being run over, and admitted that he did not feel any pain until he dismounted from the vehicle. (Brockman, Doc. 84, p. 177, pp. 221-222). It will be Defendants' role to inquire into the factual bases for Dr. Ziernicki's opinions on cross-examination. It will then be the jury's role to determine whether Dr. Ziernicki's opinions are erroneous.

Defendants also claim that Dr. Ziernicki's opinions that Brockman felt the car speed up, heard its transmission transition, and that the car was moving slowly when Brockman fired are all speculative. All of these conclusions are based on Defendant Brockman's own description of what he experienced. Dr. Ziernicki cited in his report Brockman's testimony that he "sensed speeding up." (Ziernicki Supp. Report, Doc. 89-3, p. 15, quoting Brockman, Doc. 84, p. 218). Likewise, Brockman testified as to the noises that he heard from the vehicle while he was on the hood. (Ziernicki Supp. Report, Doc. 89-3, p. 16, quoting Brockman, Doc. 84, p. 205, p. 214). Dr. Ziernicki permissibly relied on Brockman's testimony in interpreting these sounds based on his knowledge of the Subaru and his area of expertise. Although Dr. Ziernicki describes the car as "slow" and moving at a "low speed," this statement is supported by specific speeds that were obtained through analysis of the video and other known facts. Ziernicki opined that the car "decelerated from [8 to 14 mph] to the low speed of only [6.6 to 7.5 mph]," and that the car coasted "to an even lower speed, between 6.0 and 6.7 mph." (Ziernicki Supp. Report, 89-3, pp. 22-23). The description of the speed as "low" or "slow" would be useful to a jury in comparing the car's relative speed at various points in time, or to the speed of the car that Deputy Brockman estimated.

Finally, Defendants take issue with Dr. Ziernicki's statement that Brockman "chose" to fire at Ramsey. However this was not even an opinion expressed by Dr. Ziernicki, it is an

undisputed fact from the record. There is no suggestion from either party that Brockman accidentally shot at Ramsey. Dr. Ziernicki has reliably opined that Brockman could have safely jumped off of the Subaru and avoided the choice of shooting the driver. He carefully uses the record and all of his analysis is admissible.

III. CONCLUSION

Dr. Ziernicki is a highly qualified expert in the field of accident reconstruction and his opinions are based on facts documented in the record. Plaintiffs respectfully request that this Court deny Defendants' motion to exclude portions of Dr. Ziernicki's reports and testimony. In the alternative Plaintiffs request that any ruling be deferred until after a *Daubert* hearing is held.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2016, a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing pleading and the Notice of Electronic Filing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically.

s/ Adam G. Gerhardstein
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