

Fourth Circuit Report

Court Jettisons Future Damages Opinion of Expert Who Seemed to Meet Many *Daubert* Criteria

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Can *Daubert* still preclude the future-damages opinions of an expert who (1) is both a doctor and a licensed life care planner and (2) bases his opinions on sci-

entific literature, (3) interviews the plaintiff and administers a formal pain survey, and (4) reviews the patient's medical records? In a recent District of Maryland case, the answer was a firm "yes." See *Chapman v. Manuhehri*, No. 1:17-CV-3719-SAG, 2019 WL 2359270 (D. Md. June 4, 2019),

Because the *Chapman* defendant admitted liability for negligently injuring a pedestrian plaintiff's leg with her car, only damages were disputed. Through his expert witness, Dr. Thomas Garzillo, a Doctor of Chiropractic and a certified life care planner, plaintiff claimed future medical expenses of \$220,500. At first glance, Dr. Garzillo's methodology seemed thorough and reasonable. He interviewed the plaintiff, and assessed his pain using a standardized form, the "Short Form McGill Pain Questionnaire 2" ("SF-MPQ-2"). He reviewed the patient's records from two hospitals, a treating physician, the local fire and rescue squad and the physical therapy facility. He also authored a 16-page report, referencing scholarly articles on pain that spanned over a 40-year period.

The key article supporting the opinion was a 2011 NIH study on pain in America, which established that patients in moderate pain, according to a standardized pain survey, spend \$4,516 more per year than individuals without pain. Because the plaintiff would likely suffer moderate pain for the remainder of his life expectancy, Dr. Garzillo relied on the NIH study's annual cost estimates to project his future medical expenses. Plaintiff derived \$220,500 in future economic damages for his projected lifetime of moderate pain by rounding down to \$4,500 and multiplying by the plaintiff's remaining 49-year life expectancy.

This expert's credentials, review, and proffered literature suggested an adequate predicate for his opinions and provided no obvious basis for a *Daubert* challenge. Many defendants would have opted not to mount any *Daubert* challenge. But after the defendant exposed several

vulnerabilities in Dr. Garzillo's analysis, the Chapman court precluded the opinion.

First, the court noted that the SF-MPQ-2 pain survey used by the expert was not the same survey (the "SF-12") used in the NIH study on which the economic damages were based. *Id.* at *5. Plaintiff argued that the SF-MPQ-2 itself is "commonly used" and has "excellent reliability and validity." *Id.* But the plaintiff offered no evidence that moderate pain using the SF-12 is the equivalent of moderate pain according to the SF-MPQ-2 survey. The court rejected Dr. Garzillo's methodology under *Daubert*, because it differed from that applied in the NIH study, and there was no evidence that annual expenditures for moderate pain are the same under both surveys. Without an independent basis for validation, Dr. Garzillo's methodology had "too great an analytical gap." *Id.* at *6 (quoting *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)).

Second, the court determined that the NIH study was not intended to calculate a particular patient's future medical expenses and could not be validated under *Daubert* to measure those damages. 2019 WL 2359270, at *6. Although the study offered estimated annual costs related to particular pain levels, the study also acknowledged that other individual factors (like age, race and gender) impact a patient's future expenditures for pain. Those factors apparently were not accounted for by Dr. Garzillo. Also, the study itself offered several caveats to its applicability. The authors conceded that they "cannot infer causality" and they "cannot estimate the impact of pain associated with musculoskeletal conditions." *Id.* (quoting "Relieving Pain in America: A Blueprint for Transforming Prevention, Care, Education and Research" (2011)).

The 2011 study's data were also stale. The 2011 study was based on 2008 data, eight years before the plaintiff's injury. Plaintiff offered no basis for basing a lifetime of future pain-related costs on a single article derived from eight-year old data. Given inevitable advances in pain-management techniques over time, and the changes in overall costs, Dr. Garzillo's methodology of predicting specific future costs solely on this article lacked adequate validation under *Daubert*. *Id.*

Third, the court took issue with the bases for Dr. Garzillo's opinions, especially his failure to examine the plaintiff. One of the studies cited by Dr. Garzillo emphasized the importance of a "comprehensive evaluation" of the chronic pain patient as "essential" for treatment decisions. *Id.* at *7 (internal citations omitted). Dr. Garzillo himself admitted that his specialty (chiropractic) is inherently a "hands-on" approach, yet he never laid hands on or examined the plaintiff. *Id.* Also, of the records reviewed by Dr. Garzillo, the most recent ones were from nearly two years before the trial. And within those records, Dr. Garzillo acknowledged that neither of the plaintiff's treating physicians indicated that the patient would have a permanent injury or deficit. The record of a later visit indicated that the patient had "no complaints of pain" and a "completely normal exam of the leg." *Id.* (internal citations omitted). No records corroborated Dr. Garzillo's premise that the plaintiff would suffer a lifetime of chronic leg pain. For each of these reasons, the court found a "lack of sufficient facts or data" underlying Dr. Garzillo's opinions that rendered them "excludable" under *Daubert*. *Id.*

Chapman illustrates well the need to delve deeply into an expert's foundation for his/her opinions, and to evaluate critically each study cited, each record reviewed, and each step in the expert's methodology underlying the opinions. Carefully identifying distinctions in studies relied upon, medical records contrary to the expert's assumptions, and limitations in the expert's own evaluation could expose a successful *Daubert* challenge unimagined when the expert was first designated. The payoff from such a deep and critical analysis of the opposing expert's damages opinions can be rewarding; in *Chapman*, the \$220,500 future damages

claim could not be pursued after Dr. Garzillo's opinions were precluded, and the jury's verdict totaled \$3,000.

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