STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

REBECCA JOY TOMASZEWSKI and MICHAEL HOY, husband and wife,

Plaintiffs,

v

File No. 00-7647-NI
HON. PHILIP E. RODGERS, JR.

MICHAEL DAVID AMON, an individual, and CHERRY KE, INC., a Michigan corporation,

Defendants.
/

C. Enrico Schaefer (P43506)
Timothy P. Smith (P48259)
Attorneys for Plaintiffs

Mark P. Bickel (P28903)
Attorney for Defendants

DECISION AND ORDER GRANTING
DEFENDANTS' MOTION TO STRIKE PLAINTIFFS'
EXPERT STAN SMITH REGARDING HEDONIC DAMAGES

This is a third-party automobile negligence case. The Plaintiff, Rebecca Tomaszewski, alleges that she suffered a brain injury as a result of an automobile accident caused by the Defendant, Michael Amon.

The Plaintiff proposes to call Stan Smith as an expert to testify at the trial of this matter regarding various elements of Plaintiffs' non-economic damages, namely hedonic damages. Hedonic damages are damages for "loss of enjoyment of life" or "loss of social pleasures." The Defendants filed a motion to strike Mr. Smith claiming that expert testimony on hedonic damages does not meet the requirements of MCL 600.2955 for the admissibility of expert witness testimony. The Plaintiffs responded to the motion and, on December 18, 2000, the Court heard the arguments of counsel and took the matter under advisement. Subsequently, the parties filed supplemental briefs. The Court

now issues this written decision and order. For the reasons stated herein, the Defendants' motion is granted. Mr. Smith will not be permitted to testify at the trial of this matter regarding hedonic damages.

I.

MCL 600.2955 provides:

> (1) In an action for the death of a person or for injury to a person or property, a scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact. In making that determination, the court shall examine the opinion and the basis for the opinion, which basis includes the facts, technique, methodology, and reasoning relied on by the expert, and shall consider all of the following factors:
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> (a) Whether the opinion and its basis have been subjected to scientific testing and replication.
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> (b) Whether the opinion and its basis have been subjected to peer review publication.
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> (c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.
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> (d) The known or potential error rate of the opinion and its basis.
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> (e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, "relevant expert community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.
>
> (f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.
>
> (g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation.

(2) A novel methodology or form of scientific evidence may be admitted into evidence only if its proponent establishes that it has achieved general scientific acceptance among impartial and disinterested experts in the field.

(3) In an action alleging medical malpractice, the provisions of this section are in addition to, and do not otherwise affect, the criteria for expert testimony provided in section 2169.

MRE 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

MRE 702 provides:

If the court determines that recognized 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.

Mr. Smith's qualifications as an expert in the field of economics is not disputed. It is also undisputed that there is controversy, among economists as well as the courts, over the use of forensic economists to provide an economic appraisal of the magnitude of the hedonic loss that has been incurred by the plaintiff in a personal injury case.

The issues before the Court are whether Mr. Smith's expert opinions regarding hedonic damages are "reliable" and "will assist the trier of fact" and, if so, whether such evidence should be excluded because "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury." These issues have been well-briefed by counsel on both sides.

II.

The Defendants' position, in a nutshell, is that Mr. Smith's calculation of hedonic damages is "junk science" because no one can determine with any degree of mathematical certainty what the

value is of the reduction in the quality of Plaintiff's life as a result of her injuries. The Defendants also argue that permitting Mr. Smith to testify as an expert to such damages would be more prejudicial than probative and would invade the province of the jury.

This Court is bound by the Michigan Rules of Evidence and existing case law. *Nelson v American Sterilizer Co (On Remand)*, 223 Mich App 485, 491; 566 NW2d 671 (1997) indicated that MRE 702 requires a trial court to "determine the evidentiary reliability or trustworthiness of the facts and data underlying an expert's testimony before that testimony may be admitted." *Amorello v Monsanto Corp*, 186 Mich App 324, 332; 463 NW2d 487 (1990) held that "[t]he facts and data upon which [an] expert relies in formulating an opinion must be reliable." *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579,592-593; 113 S Ct 2786; 125 L Ed 2d 469 (1993) stated that an expert's reasoning and "methodology" must be scientifically valid and properly applicable to the facts at hand. *Frye v United States*, 54 App DC 46, 47; 293 F 1013 (1923), which was superseded as applied to federal cases per *Daubert, supra* at 587, held that scientific evidence must be generally accepted in the scientific community to be admissible.

The Plaintiffs, of course, contend that Mr. Smith's opinions regarding hedonic damages meet these requirements. The basis for Mr. Smith's calculations are various studies of people's willingness to pay for safety devices such as seat belts and smoke detectors, wage-risk premiums and regulatory cost-benefit analysis. Mr. Smith purports to be able to determine the average value of a individual's life as a function of what people collectively are willing to pay to avoid injury or disease or, in other words, "to preserve their ability to lead a normal life."

The Court has taken considerable time to review the mass of information on this topic that was presented to it by these parties. Of particular note were the several articles in a three-ring binder presented by the Plaintiffs. The Court was impressed by the overwhelming acceptance of the willingness-to-pay model in the area of government regulation. For example, in the Report for Recommendation by Clayton P. Gillette and Thomas D. Hopkins, Administrative Conference of the United States, 1988, the authors discuss the necessity for putting a value on human life for "government regulation of hazards" and the utility of the willingness-to-pay model for this purpose. The authors note that "numerous willingness-to-pay studies have been completed." However, the authors note that the "willingness to pay" model has limitations stating:

> These criticisms of the willingness-to-pay approach strongly suggest that the methodology is inappropriate for defining an exact figure that represents the value of human life. Failure to accomplish that objective, however, does not necessarily render willingness-to-pay studies irrelevant to agency determinations of regulatory impact.

Likewise, in "The Relevance of Willingness-To-Pay Estimates of The Value of a Statistical Life in Determining Wrongful Death Awards" by Lauraine G. Chestnut and Daniel M. Violette that appeared in the *Journal of Forensic Economics 3(3)*, 1990, pp.75-89, the authors state:

> These willingness-to-pay studies have been widely reviewed for their potential applicability in evaluating government regulations involving changes in (small) risks across a given population group. . . .Although the use of benefit-cost analysis to evaluate policies aimed at protecting human life remains somewhat controversial, most economists agree (with various qualifications) that these types of 'value of life' estimates are the appropriate dollar values to use in this type of benefit-cost analysis.

However, with respect to the question of whether willingness-to-pay estimates are "an appropriate measure of fair compensation in the case of a wrongful death," the authors conclude that the answer is "a conditional maybe in some circumstances, with remaining uncertainties that cannot be resolved without further empirical research." The authors note that "[t]here are some potentially important differences between [willingness-to-pay] estimates and the legal definitions of compensation that apply in wrongful death cases."

In still other articles, the authors note that various aspects of the willingness-to-pay model "deserve further attention" and call for "further theoretical developments and empirical research." In Roy F. Gilbert's article, "The Application of Hedonic Models to Personal Injury Litigation, that appeared in the *Journal of Legal Economics*, Vol 4 No 3, Winter 1994, the author states that:

> Future research efforts will result in improved estimates of hedonic values that will result in improved appraisals of the value of life. This is the nature of progress.

This author concludes this particular article with the following paragraph:

> Life has value, the methodology used to compute hedonic values has a strong theoretical basis and empirical estimates emanate from scientific studies that use state-of-the-art statistical methods. The theoretical and empirical research on this topic should be useful to courts in evaluating damages concerning the impaired ability to enjoy life. **Improved estimates of the average value of life will likely result from future theoretical developments and empirical research.** As long as forensic economists base their appraisals on the best available information, they stand on solid ground. [Emphasis added.]

Thus, even though the willingness-to-pay model may be used by government for conducting benefit-cost analyses for regulatory purposes, this Court does not believe that it is a sufficiently reliable tool for determining the reduced value of a specific human life in the personal injury litigation context.[1] Perhaps with further research and development, forensic economists will be able

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[1]It is one thing to use this model to make generalizations about the average value of life to society as a whole for regulatory purposes and quite another to impute these numbers to any specific human being. Attempts to quantify the value of human life have met considerable criticism in the literature of economics as well as in the federal court system. Troubled by the disparity of results reached in published value-of-life studies and skeptical of their underlying methodology, the federal courts which have considered expert testimony on hedonic damages in the wake of *Daubert* have unanimously held quantifications of such damages inadmissable. See, e.g., *Saia v Sears Roebuck & Co*, 47 F Supp 2d 141, 148-49 (D Mass1999) (finding Stan Smith's hedonic damages testimony inadmissible because his calculations are untestable and the theory does not meet the requirement of general acceptability); *Crespo v Chicago*, No 96-C-2787, 1997 WL 537343 (ND Ill1997) (excluding Stan Smith's hedonic damages testimony due to the lack of unanimity among economists as to which life valuation studies ought to be considered) (citing *Mercado v Ahmed*, 756 F Supp1097 (ND Ill1991)); *Brereton v United States*, 973 F Supp 752, 758 (ED Mich1997) (finding Stan Smith's calculations of hedonic damages unreliable under *Daubert*); *Kurncz v Honda North America*, 166 FRD 386 (WD Mich1996) (finding Stan Smith's hedonic damages testimony inadmissable under *Daubert* for the reasons articulated in *Ayers v Robinson*, 887 F Supp 1049 (ND Ill1995)); *McGuire v of Santa Fe*, 954 F Supp 230, 232-33 (D NM 1996) (finding, under *Daubert*, hedonic damage testimony is neither testable nor generally accepted); *Ayers v Robinson*, 887 F Supp 1049 (ND Ill1995) (finding variation of results and assumptions underlying value of life studies made hedonic damages calculations unreliable under *Daubert*); *Hein vMerck & Co*, 868 F Supp 230 (MD Tenn1994) (rejecting hedonic damages testimony as insufficiently reliable or valid to meet the requirements of *Daubert*); and *Sullivan v United States Gypsum Co*, 862 F Supp 317 (D Kan1994) (finding Stan Smith's calculation of hedonic damages to lack sufficient validity to be admissible under *Daubert*).

to assist the jury in determining the reduction in the value of a particular plaintiff's life as a result of negligently inflicted injury or death. For now, however, such evidence is not sufficiently reliable and rather than assisting the jury would more likely create confusion. Therefore, the evidence proposed by Mr. Smith is not admissible.

The Defendant's motion to strike is granted.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 6/14/01

The same trend away from allowing expert opinion on hedonic damages may be traced through time in the opinions of legal commentators. Andrew J. McClurg, *It's a Wonderful Life: The Case for Hedonic Damages in Wrongful Death Cases*, 66 Notre Dame L Rev 57 (1990); Tina Tabacci, Note, *Hedonic Damages: A New Trend in Compensation*, 52 Ohio St L J 331 (1991); Dennis C. Taylor, Note, *Your Money or Your Life?: Thinking About the Use of Willingness-to-Pay Studies to Calculate Hedonic Damages*, 51 Wash. & Lee L Rev 1519 (1994); Thomas J. Airone, Note, *Hedonic Damages and the Admissibility of Expert Testimony in Connecticut After Daubert v Merrell Dow Pharmaceuticals, Inc.*, 15 Quinnipiac L Rev 235 (1995); Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 Cal L Rev 773, 811 (1995) ("Cases seem to be piling up saying that 'expert testimony of valuation of "hedonic" damages is unreliable and invalid under the teaching of *Daubert*.' We may be on the way to a kind of judicial notice of the unreliability of that particular methodology.")