Loyd v. Griffin, 2023 NCBC Order 12.

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
IREDELL COUNTY	20 CVS 2394
ASHTON K. LOYD, Plaintiff, v. JAMES MICHAEL GRIFFIN and GRIFFIN INSURANCE AGENCY, INC., Defendants.	**ORDER ON PLAINTIFF'S MOTION TO EXCLUDE DEFENSE EXPERT AND DEFENDANTS' MOTION TO SUPPLEMENT JOINT APPENDIX**

1. **THIS MATTER** is before the Court on Plaintiff Ashton K. Loyd's ("Mr. Loyd" or "Plaintiff") Motion to Exclude Defense Expert, filed 6 June 2022 ("Motion to Exclude"). (ECF No. 96 ["Mot. Exclude"].) Pursuant to Rule 56(e), Plaintiff requests that the Court exclude any opinions and testimony of Defendants' expert witness Earnest Anton Janik, Jr. ("E.J. Janik" or "Mr. Janik") from consideration on summary judgment. (ECF No. 97 ["Br. Supp. Mot. Exclude"].)

2. Following full briefing on the Motion to Exclude, as well as on other motions before the Court not addressed herein, Defendants filed a Motion to Supplement Joint Appendix ("Motion to Supplement") on 28 December 2022. (ECF No. 137 ["Mot. Suppl. J.A."].) Pursuant to Business Court Rule ("BCR") 7.11, Defendants request that the Court allow them to supplement the record with evidence of Defendants' actual damages for the Court's consideration when ruling on the pending summary judgment motions. (Mot. Suppl. J.A. 1.) However, Defendants state that the Motion to Supplement is "only relevant" if "the Court grants Plaintiff's pending Motion to

Exclude." (Br. Supp. Defs.' Mot. Suppl. J.A. 1, ECF No. 138 ["Br. Supp. Mot. Suppl. J.A."].)

3. For the reasons set forth herein, the Court **DENIES** the Motion to Exclude, and therefore, the Motion to Supplement is **DENIED** as moot.

Levine Law Group, P.A. by Michael J. Levine and Cathy A. Williams, Austin Law Firm by John S. Austin, and Mauney PLLC by Gary V. Mauney, for Plaintiff Ashton K. Loyd.

Bennett & Guthrie, PLLC by Mitchell H. Blankenship and Joshua H. Bennett, for Defendants James Michael Griffin and Griffin Insurance Agency, Inc.

Robinson, Judge.

I. FACTUAL AND PROCEDURAL BACKGROUND

4. The Court sets forth herein only those portions of the factual and procedural history relevant to its determination of the motions. *See Hyde Ins. Agency, Inc. v. Dixie Leasing Corp.*, 26 N.C. App. 138, 142 (1975) (encouraging the trial court to articulate a summary of the relevant evidence of record to provide context for the motion(s)).

A. Factual Background

5. In 2012, while working as an insurance agent for Griffin Insurance Agency, Inc. ("GIA"), Mr. Loyd formed Loyd Insurance Agency, Inc. ("LIA"), and it became an "independent contractor" of GIA. (J.A. Part 1, 294, 301.)[1] Following LIA's formation,

[1] The Joint Appendix, containing the materials relevant to each parties' motion for summary judgment, was electronically filed in ten parts but is consecutively paginated. (*See* ECF Nos. 118–27.) For brevity, the Court uses an abbreviated citation as follows, (J.A. Part [ ], [page no.]). Depositions are cited using the internal pagination of the deposition transcript, rather than the J.A. Part and page number, (Dep. [name], [transcript page:line].)

Mr. Loyd continued to sell insurance policies for GIA and Nationwide Mutual Insurance Company ("Nationwide"). (J.A. Part 1, 594; Part 8, 2546–50.)

6. In 2018, LIA merged into GIA after Nationwide announced a plan to allow agents to purchase their books of business. (Dep. James M. Griffin 15:21–16:21, ECF No. 122 ["Griffin Dep."].) On 25 June 2018, Mr. Loyd and James M. Griffin ("Mr. Griffin"), in his capacity as trustee of the J. Michael Griffin Revocable Trust,[2] executed the GIA Shareholders' Agreement (the "25 June Shareholders' Agreement"). (J.A. Part 1, 352.) That same day, LIA and GIA executed the Agreement and Plan of Merger Between GIA and LIA, which was effective on 1 July 2018. (J.A. Part 1, 345–51.)

7. In the summer following the merger with LIA, GIA initiated a merger with Patton Insurance Agency, Inc. ("Patton Insurance"). (*See* Dep. Ashton K. Loyd Apr. 22, 2022, 275:9–20, ECF No. 118 ["Loyd Dep. Apr. 2022"]; J.A. Part 1, 571.) The merger of Patton Insurance into GIA was effective 1 December 2018. (J.A. Part 1, 565–66.)

8. In late 2019, Mr. Griffin began preliminary sale discussions with various entities that were interested in acquiring GIA. (Griffin Dep. 98:1–13.) Pursuant to those discussions, some interested purchasers sent Letters of Intent ("LOIs") to GIA, with various non-binding terms expressing interest in the possible acquisition of GIA. (*See, e.g.*, J.A. Part 5, 1807 (providing a copy of the 28 January 2020 LOI from Relation Insurance, Inc. to Mr. Griffin).)

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[2] The J. Michael Griffin Revocable Trust held the shares for the benefit of Mr. Griffin.

9. While negotiations were ongoing, Mr. Griffin became aware that Mr. Loyd may have directed GIA employees to issue Certificates of Insurance ("COIs") containing false or inaccurate information. (Aff. James M. Griffin ¶ 20, J.A. Part 5, 1177.) During an investigation into those COIs, Mr. Loyd admitted to instructing GIA employees to create COIs containing false or inaccurate information and to personally issuing or generating at least one such COI. (J.A. Part 1, 686; Part 2, 995.) Mr. Loyd was terminated by both Nationwide and GIA on 11 March 2020. (J.A. Part 2, 996; Part 3, 1107.)

10. While the investigation into Mr. Loyd's conduct was ongoing, Mr. Griffin signed a LOI from Relation Insurance, Inc. ("Relation") for the purchase of GIA. (J.A. Part 5, 1836–42.) However, on 20 May 2020, Mr. Griffin withdrew from the Relation LOI due to "unforeseen circumstances" involving Mr. Loyd which "caused considerable stress" to Mr. Griffin and GIA's employees. (J.A. Part 5, 1846.)

11. Negotiations to sell GIA resumed in late 2020, and ultimately, on 31 December 2020, GIA reached an agreement with Leavitt Group Enterprises ("Leavitt Group") for the purchase of its outstanding shares. (J.A. Part 2, 982.) While Leavitt Group was pursuing that agreement, Keith Callister, in his capacity as Controller for Leavitt Group, created several pro forma spreadsheets on GIA at various times throughout 2020. (Aff. Keith Callister ¶¶ 5, 7–10, ECF No. 103.4 ["Callister Aff."]; ECF Nos. 107.1–107.3; J.A. Part 5, 1872–75; Part 6, 2263–79.)

B. Procedural Background

12. Defendants retained E.J. Janik as an expert witness to opine on "the amount of monetary damages the Defendants suffered as a result of the Plaintiff's conduct, [accounting for] Plaintiff's actions/conduct and the offers to purchase the business both before and after Plaintiff's actions/conduct came to light" as well as "the damages, if any, allegedly suffered" by Plaintiff. (*See* Defs.' Designation Expert Witnesses 3–4, ECF No. 97.1 ["Defs.' Expert Desig."].) Mr. Janik has provided Defendants with his expert report containing opinions relevant to that analysis, (Janik Jan. 2022 Report, ECF No. 97.5 ["Janik Report"]), and has also provided deposition testimony about his opinions in that report, (ECF No. 97.3 ["Janik Dep."]).

13. Contemporaneous with the filing of the motions for summary judgment in this action, (ECF Nos. 98, 100), Plaintiff filed the Motion to Exclude, (Mot. Exclude). A hearing was held on the Motion to Exclude on 9 November 2022 (the "Hearing") where all parties were present and represented by counsel.[3] (*See* ECF No. 131.)

14. Defendants filed the Motion to Supplement on 28 December 2022 while supplemental briefing related to the summary judgment motions was ongoing. (ECF Nos. 136–37.) Following completion of all briefing, on 14 February 2023, the Court held a hearing on the Motion to Supplement (the "Subsequent Hearing") in which all parties participated. (*See* ECF No. 145.)

15. The Motion to Exclude and the Motion to Supplement are now ripe for resolution.

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[3] The Court also heard argument on the cross-motions for summary judgment at the Hearing.

II. LEGAL STANDARD

16. The Court evaluates a motion to exclude an expert's testimony under Rule 702 of North Carolina Rules of Evidence, which is now "virtually identical to its federal counterpart and follows the *Daubert* standard for admitting expert testimony." *Safety Test & Equip. Co. v. Am. Safety Util. Corp.*, 2016 NCBC LEXIS 100, at **5 (N.C. Super. Ct. Dec. 16, 2016) (citing *State v. McGrady*, 368 N.C. 880, 884 (2016)). Rule 702 has three essential elements: (1) expert testimony must be based on specialized knowledge that will assist the trier of fact, (2) the expert must be qualified by "knowledge, skill, experience, training, or education," and (3) the testimony must be reliable. N.C. R. Evid. 702(a); *McGrady*, 368 N.C. at 889–90. An expert's testimony is reliable 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. N.C. R. Evid. 702(a)(1)–(3).

17. The focus of the trial court's inquiry "must be solely on [the] principles and methodology" used by the expert, "not the conclusions that they generate." *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 595 (1993). As our Court of Appeals has explained,

> questions relating to the bases and sources of an expert's opinion affect only the weight to be assigned that opinion rather than its admissibility. In other words, this Court does not examine whether the facts obtained by the [expert] witness are themselves reliable -- whether the facts used are qualitatively reliable is a question of the weight to be given the opinion by the factfinder, not the admissibility of the opinion.

Pope v. Bridge Broom, Inc., 240 N.C. App. 365, 374 (2015) (internal marks and citations omitted).

18. "The trial court is tasked with making the preliminary decision of the testimony's admissibility and has discretion in determining how to address the three prongs of the reliability test." *Insight Health Corp v. Marquis Diagnostic Imaging of N.C., LLC*, 2017 NCBC LEXIS 14, at *40 (N.C. Super. Ct. Feb. 24, 2017) (citing *McGrady*, 368 N.C. at 892–93). "In applying the *Daubert* standard, North Carolina courts may seek guidance from federal case law." *Id.* (citing *McGrady*, 368 N.C. at 888).

III. ANALYSIS

19. Plaintiff requests that the Court exclude Mr. Janik's opinions and testimony, contending that it is unreliable because Mr. Janik's work is based on speculative letters of intent and pro forma EBITDA calculations generated by a third party. (Br. Supp. Mot. Exclude 14–16, 20–21.) Plaintiff vigorously disputes Mr. Janik's opinion and report, arguing that it is based on conjecture, and that his calculations are inaccurate. (Br. Supp. Mot. Exclude 11–12, 21–22.)

20. Plaintiff does not dispute the relevance of Mr. Janik's opinion and testimony pursuant to Rule 401, nor does Plaintiff dispute Mr. Janik's qualifications. Instead, Plaintiff focuses squarely on the reliability analysis.

21. "The Supreme Court of North Carolina has held that our state's Rule 702 incorporates the standard set by Federal Rule of Evidence 702." *Winner's Mktg. v. Cavazos*, 2023 NCBC LEXIS 2, at *3–4 (N.C. Super. Ct. Jan. 6, 2023) (citing

McGrady, 368 N.C. at 888.) As noted by the Fourth Circuit, courts "should be mindful that Rule 702 was intended to liberalize the introduction of relevant expert evidence." *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 261 (4th Cir. 1999) (citing *Cavallo v. Star Enter.*, 100 F.3d 1150, 1158–59 (4th Cir. 1996)). Importantly, expert testimony, like all other admissible evidence, "is subject to being 'tested by vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof.' " *Id.* (quoting *Daubert*, 509 U.S. at 596). It is with this standard in mind that the Court analyzes the reliability of Mr. Janik's opinions and testimony.

A. Element One: Sufficient Facts

22. First, the expert's testimony and report must be based on sufficient facts or data, meaning "that the expert considered sufficient data to employ the methodology." *Pope*, 240 N.C. App. at 374 (citations and marks omitted).

23. Here, Mr. Janik's proffered opinion is based on information already before the Court on the cross-motions for summary judgment, including: Mr. Griffin's deposition testimony; the LOIs; K-1s and stock certificates issued to GIA shareholders; GIA income statements; shareholder meeting minutes; and GIA's Profit Loss Statements and EBITDA, or earnings before interest, taxes, depreciation, and amortization. (*See* Janik Report Addendum 2.) Mr. Janik has obtained the data that this kind of damages analysis at least minimally demands, and therefore, the Court concludes that Mr. Janik's Report and opinions contained therein are based on sufficient facts and data.

B. Element Two: Reliable Principles and Methods

24. An expert's testimony and report must be based on reliable principles and methods. Plaintiff argues that Mr. Janik's opinions are based on speculative LOIs and EBITDA[4] projections and, therefore, that Mr. Janik's opinions are unreliable as a matter of law. (Br. Supp. Mot. Exclude 11, 14.)

25. As a preliminary matter, "experts may rely on data and other information supplied by third parties . . . . Unless the expert's opinion is too speculative, it should not be rejected as unreliable merely because the expert relied on the reports of others." *Pope*, 240 N.C. App. at 374 (quoting *Southwire Co. v. J.P. Morgan Chase & Co.*, 528 F. Supp. 2d 908, 934 (W.D. Wis. 2007)).

26. Here, the pro forma EBITDA calculations at issue were authored by Keith Callister and are projected EBITDA assumptions used to evaluate the likelihood of various post-sale earnings scenarios. (Br. Supp. Mot. Exclude 25; Janik Dep. 174:5–11.) Mr. Callister confirmed in his Affidavit that, while working as a Controller for the Leavitt Group, he had personal involvement with the Leavitt Group's acquisition of GIA, and he created several pro forma spreadsheets related to GIA throughout 2020. (Callister Aff. ¶¶ 5, 7.) As part of the due diligence process, Leavitt Group and Mr. Callister "received, reviewed, and analyzed a multitude of financial records

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[4] EBITDA calculations are a widely accepted valuation tool in appraisal of businesses prior to a sale or merger, given the need to value a company and compare it to others. *See Reynolds Am. Inc. v. Third Motion Equities Master Fund Ltd.*, 2020 NCBC LEXIS 56, at **207 (N.C. Super. Ct. Apr. 27, 2020), *aff'd*, 379 N.C. 524 (2021) (quoting *In re Appraisal of the Orchard Enters.,* 2012 Del. Ch. LEXIS 165, at *29 (Del. Ch. July 18, 2012)) ("The idea is that if the market expects comparable companies to grow at a certain rate, then one can infer the growth of the subject company by applying a multiple drawn from the comparables to a relevant metric, such as EBITDA or revenues.").

relating to GIA" which were "not projections of future financial performance" but were "records of GIA's historical financial performance." (Callister Aff. ¶¶ 9–10.) Mr. Callister based his pro forma EBITDA calculations on the same historical financial performance. (*See* Callister Aff.)

27. Mr. Janik reviewed Mr. Callister's pro forma EBITDA calculations and found that Mr. Callister engaged in "deep analysis" and that the calculations "are based on concrete and verifiable historical financial accounting, payroll and other data." (Aff. E.J. Janik ¶ 6b, ECF No. 103.5 ["Janik Aff."].) In conducting his analysis, Mr. Janik stated that the underlying data is "extremely reliable," but the "assumed growth rates" were ambitious and "unlikely to occur based on historic trends in GIA's EBITDA."[5] (Janik Aff. ¶ 6b.) He also explained that it was his practice to receive information but then to test, verify, validate, and compare it to other available information. (Janik Aff. ¶ 7a.) While the parties dispute his reliance on the pro forma EBITDA calculations, Mr. Janik analyzed and compared them to other available information to ensure its reliability. (*See* Janik Aff. ¶¶ 5a–5b.)

28. As to his methodology, Mr. Janik's damages calculation is based on the formula "E=D-C", which is the difference between the ultimate purchase price and

[5] At his deposition, Mr. Janik explained that the EBITDA projections for GIA assumed "a 3, 3.3, 3.5, 3.6, 3.97, and 8.5 percent compound organic growth" rate, but most of the LOIs used a 7 percent growth rate. (Janik Dep. 134:12–19.) Janik further stated, "I wanted to see how those earnout targets or thresholds measured with the projected EBITDAs. And I found that 3.1 is pretty aggressive compared to some other amounts." (Janik Dep. 136:7–11.) Thus, while Janik did not agree with the EBITDA calculations in full, he analyzed those calculations, made his own determination of what was feasible for GIA from his perspective, and proceeded with his analysis with all the information in mind. (*See* Janik Dep. 134:13–137:14.)

each of the LOI offers is the damage amount Mr. Janik calculated. (*See* Janik Report Addendum 2, J.A. Part 6, 2249–61.) Mr. Janik used this methodology to provide his opinions on the: (1) amount of past lost cash to Mr. Griffin; (2) amount of past lost equity to Mr. Griffin; (3) amount of past lost equity and cash combined; (4) cash and equity amounts guaranteed to Mr. Loyd under that same methodology; and (5) amount of maximum earnout under the LOIs. (J.A. Part 6, 2198–2200.)

29. As to his use of the EBITDA calculations, Mr. Janik pinpointed the relevant earnout provisions provided in the LOIs and compared them to the terms of the closing documents for the purchase of GIA. (Janik Dep. 114:13–115:8.) Mr. Janik then used the percent compound organic growth, which was determined based on his understanding of the pro forma EBITDA calculations, to determine the forward trend of GIA's agency valuation and potential earnout under each of the LOIs. (Janik Dep. 156:23–157:11; Janik Report Addendum 2, at E101.) Mr. Janik used this method to project the annual earnouts for a 3-year period for the purpose of determining the potential damages caused by Mr. Loyd to those earnout potentials, and to critique Mr. Loyd's expert's damages analysis. (Janik Dep. 130:10–131:7, 134:4–136:22, 138:3–12 (explaining his use of the EBITDA projections and pro forma growth rates, and their impact on his damages calculation).)

30. With this methodology in mind, the Court turns to Plaintiff's contention that Mr. Janik's opinions are based on speculative information and therefore are unreliable. Defendants rely on *Amigo Broadcasting, L.P. v. Spanish Board System*, which the Court finds informative. 2006 U.S. Dist. LEXIS 100610 (W.D. Tex. Apr.

21, 2006); (Defs.' Br. Opp. Mot. Exclude 13–14, ECF No. 103 ["Br. Opp. Mot. Exclude"]). In that case, defendant argued that plaintiff's expert's opinions were unreliable because the damages calculations were based on "management projections" and "profits that would [not be] realized until the sale . . . in December 2004 instead of those profits actually made" by defendant. *Id.* at *7–8. There, the court held the data on which the expert based his opinion was reliable and that defendant's criticisms went to the weight, if any, a jury might give the expert's opinions, not to their admissibility. *Id.* at *10. The Fifth Circuit agreed, stating that "[a]t a minimum, opinions or estimates of lost profits must be based on objective facts, figures, or data from which the amount of lost profits may be ascertained." *Amigo Broad., LP v. Spanish Broad. Sys.*, 521 F.3d 472, 483 (5th Cir. 2008). Because plaintiff's expert explained the basis of his growth estimate, and because his method of calculating revenue was appropriate under the specific facts of the case, the defendants' criticism merely affected the weight of the expert's opinions, not their admissibility. *Id.* at 485.

31. Here, although Plaintiff contends that Mr. Janik's Report is based on unreliable principles and methods because it relies largely on the LOIs, those LOIs are probative evidence of what a buyer in the marketplace was willing to pay for GIA in February 2020 compared to December 2020. Further, the LOIs and pro forma EBITDA calculations are just two data points among many that Mr. Janik considered in preparing his opinions in this matter. *See Amigo Broad.*, 521 F.3d at 483.

32. Given Mr. Janik's independent testing to ensure the accuracy of the information he relied on, the probative value of the LOIs, his stated methodology in analyzing them, and the widespread usage of pro forma EBITDA calculations in the industry, the Court concludes that Mr. Janik's opinions are based on reliable methods. Any question relating to the factual basis of Mr. Janik's opinions, such as whether the facts he received are qualitatively reliable, goes to the weight to be given the opinion by the factfinder, not the admissibility of the opinion. *See Pope*, 240 N.C. App. at 374; *Crescent Univ. City Venture, LLC v. AP Atl., Inc.*, 2022 NCBC LEXIS 9, at **30–31 (N.C. Super Ct. Feb 8, 2022) (Our courts "have recognized that a lack of testing or a failure to use specific types of testing only goes to the weight of the testimony and is not grounds for exclusion when an expert reaches an opinion through other reliable methods" because no single factor is dispositive.)

C. <u>Element Three: Application of the Methodology to the Facts</u>

33. Finally, an expert must have reliably applied the chosen methodology to the facts of the case at hand. "Courts following the *Daubert* standard . . . typically conclude such challenges go to the weight of an expert's opinion, not its admissibility." *Insight Health Corp.*, 2017 NCBC LEXIS 14, at *48–49 (citing federal case law where expert methodology was sound, but some errors found in the testimony or application of the methods went to the weight of that testimony rather than to its admissibility).

34. Plaintiff contends that Mr. Janik's failure to use and rely on certain figures is a fatal omission, arguing that "[t]he real numbers do not support any aspect of Janik's testimony or report, much less his conclusions." (Br. Supp. Mot. Exclude 22–

23.) Plaintiff also contends that Mr. Janik's "work shows there are no damages." (Br. Supp. Mot. Exclude 24.) However, these contentions go to the testimony's weight, and they can be explored during cross-examination at trial without foreclosing Defendants' ability to present their expert witness. To the extent Plaintiff disputes Mr. Janik's damages conclusions, the dispute is better left to the trier of fact.

IV. CONCLUSION

35. **THEREFORE**, for the foregoing reasons, the Court hereby **DENIES** the Motion to Exclude. Given the Court's conclusions herein, Defendants' Motion to Supplement the Joint Appendix is **DENIED** as moot.

SO ORDERED, this the 6th day of March, 2023.

/s/ Michael L. Robinson

Michael L. Robinson
Special Superior Court Judge
for Complex Business Cases