Intersal, Inc. v. Wilson, 2024 NCBC Order 12.

STATE OF NORTH CAROLINA — IN THE GENERAL COURT OF JUSTICE
COUNTY OF WAKE — SUPERIOR COURT DIVISION
15 CVS 9995

INTERSAL, INC.,
Plaintiff,

v.

D. REID WILSON, Secretary, North Carolina Department of Natural and Cultural Resources; NORTH CAROLINA DEPARTMENT OF NATURAL AND CULTURAL RESOURCES; THE STATE OF NORTH CAROLINA; and FRIENDS OF QUEEN ANNE'S REVENGE, a Non-Profit Corporation,

Defendants.

ORDER ON DEFENDANTS' MOTION IN LIMINE TO EXCLUDE THE OPINION TESTIMONY OF SAMUEL WEISER

1. **THIS MATTER** is before the Court on Defendants' Motion in Limine to Exclude the Opinion Testimony of Samuel Weiser (the "Motion"), (ECF No. 206).

2. Having considered the Motion, the related briefing, and the arguments of counsel at a hearing on the Motion, the Motion is hereby **GRANTED in part** and **DENIED in part**, as provided below.

I. FACTUAL AND PROCEDURAL BACKGROUND

3. The facts surrounding this case have been recounted at length in the Court's previous orders. *See, e.g.*, *Intersal, Inc. v. Wilson*, 2023 NCBC LEXIS 29, at **2-21 (N.C. Super. Ct. Feb. 23, 2023).

4. Relevant to this Motion, Plaintiff Intersal, Inc. ("Plaintiff" or "Intersal") seeks to recover damages for Defendant Department of Natural and Cultural Resources's ("DNCR's") alleged failure to collaborate with Plaintiff on "commercial narratives" in breach of Section 15 of the 2013 Settlement Agreement (the "2013 Agreement").[1] More specifically, Plaintiff alleges that Defendants were obligated to collaborate with it to produce a "blockbuster tour" of artifacts salvaged in the *Queen Anne's Revenge* ("QAR") Project. *See Intersal*, 2023 NCBC LEXIS 29, at **42-44 (discussing Plaintiff's theory of breach regarding an exhibition).

5. In support of its position, Plaintiff retained Samuel Weiser ("Mr. Weiser") as an expert to offer opinions on:

> (i) the viability of, and potential revenue stream from, touring exhibitions utilizing the artifacts and intellectual property" related to the discovery [of the QAR]; (ii) the sufficiency and quality of the artifacts recovered from QAR and the corresponding video and images of the recovery operations to support touring exhibitions; and (iii) the importance of intellectual property and imagery related to the QAR recovery in creating and preserving the value of the potential touring exhibitions.

(Expert Report of Samuel Weiser ["Weiser Report"] 1, ECF No. 219.10.)

[1] Section 15 states:

> **Other Commercial Narrative.** D[N]CR and Intersal agree to collaborate in making other commercial narrative such as, but not limited to, books and e-books, mini- and full-length documentaries, and video games. Any profit-sharing agreements shall be based on the amount of work contributed by each entity. If D[N]CR and Intersal cannot reach an agreement on the sharing and production of any such commercial ventures that they propose to undertake, D[N]CR and Intersal will refer the issues to a mutually selected, neutral arbitrator for binding arbitration, with arbitration to be concluded within three (3) months of selection of the neutral arbitrator.

(2013 Agreement, Section 15, ECF No. 219.9.)

6. A former Ernst & Young partner and a CPA by training, from 2011 to 2015, Mr. Weiser served as the CEO and Executive Chairman of Premier Exhibitions, Inc. ("Premier"), a touring exhibition company. Premier was the salvor in possession of the *RMS Titanic* wreck site and the owner of the artifacts recovered from that wreck. Premier toured a number of Titanic exhibitions, as well as exhibitions that included King Tut, Cleopatra, Pompei, BODIES, Real Pirates, and Dialog in the Dark. Mr. Weiser oversaw the development and financing of the company's *Saturday Night Live* Exhibition in New York. He has also advised a business on a potential exhibition based on *Duck Dynasty*, a reality television series, and is a partner in a venture for a new permanent exhibition for artifacts recovered from the Titanic. (Weiser Report ¶¶ 12-13, 22, 24.)

7. Prior to the instant case, Mr. Weiser has testified as an expert in securities and employment litigation. He has not testified as an expert regarding the touring exhibition industry. (Weiser Dep. Excerpts ["Weiser Dep."] 32:7-24, ECF No. 219.12; Weiser Report, Ex. 2.)

8. In preparing his report,[2] Mr. Weiser relied on data that he acquired from Premier regarding the Titanic exhibition tour. (Aff. of Samuel Weiser ["Weiser Aff."]

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[2] Mr. Weiser also submitted an affidavit. (Aff. of Samuel Weiser ["Weiser Aff."] ¶ 1, ECF No. 228.) Defendants complain that Mr. Weiser's affidavit is a late-filed attempt to modify his opinions post discovery. (Reply Supp. Defs.' Mots. in Limine 8-9, ECF No. 241.3.) Plaintiff characterizes the affidavit as an attempt to resolve Defendants' misunderstanding of Mr. Weiser's analysis. (Pl.'s Resp. Defs.' Mot. Leave File Reply Supp. Mots. in Limine 3, ECF No. 243.) The Court notes some differences between Mr. Weiser's report and his subsequent affidavit that may be explored during cross-examination. However, the mainstay of Mr. Weiser's opinion did not change with the filing of his affidavit. Nevertheless, in light of the timing of Mr. Weiser's affidavit, the Court afforded Defendants the opportunity to submit a

¶¶ 11-12, ECF No. 228; Weiser Dep. 38:16-39:1.) He bases his opinion regarding damages on his calculation of the revenue stream that he believes would have been produced had the parties collaborated and agreed to move forward with an exhibition tour.

9. Based on his experience in the niche field of large-scale touring exhibitions of historical artifacts, Mr. Weiser opines that a third-party promoter, like Premier, would have been necessary to mount a QAR tour. According to Mr. Weiser, the promoter underwrites the cost of the tour in exchange for seventy percent (70%) of the revenue stream produced. (Weiser Report ¶ 49; Weiser Aff. ¶ 7.) In Mr. Weiser's opinion, "[t]he discovery of the QAR wreck, the recovery of the artifacts and the folklore of the Blackbeard legend would have made a 'blockbuster' tour[3] possible and successful[.]" (Weiser Report ¶ 31.) Mr. Weiser further opines that, in his experience, Premier and other firms would have been interested in cooperating on such an exhibition with Intersal and DNCR. (Weiser Report ¶ 38; Weiser Aff. ¶ 9.)

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reply brief in support of their motion *in limine*. (Order Defs.' Mot. Leave File Reply Supp. Defs.' Mots. in Limine, ECF No. 259.)

[3] Mr. Weiser defines "blockbuster tour" as:

> generally a 12,000 square foot exhibition that can be scaled down to 8,000 square feet or up to 15,000 square feet depending on the exhibition space available at hosting venues. Part of the square footage component is to create immersive galleries that are spacious enough to facilitate 'throughput' of visitors so that attendance and revenue are maximized. . . . [A]n exhibition of this scale requires large sets including scale (or close to scale) replicas of the ship from which to display the recovered artifacts[.]

(Weiser Report ¶¶ 36-37.)

10. Mr. Weiser testifies that it is standard in the industry for "content providers (in this case, DNCR and Intersal) [to] license the intellectual property and artifacts to a promoter which underwrites the build and tour and is reimbursed for its costs pursuant to the profit-sharing arrangement agreed to by the parties." (Weiser Aff. ¶ 6.) This arrangement eliminates the need for DNCR and Intersal to fund the majority of the costs to produce and operate the tour, as absorbing those costs would have been the risk of the promoter. (Weiser Aff. ¶ 6.)

11. Based on his experience in the industry, Mr. Weiser testified that in a standard third-party licensing agreement, the revenue split would have been seventy percent (70%) to the promoter and thirty percent (30%) to DNCR and Intersal together. (Weiser Report ¶ 49; Weiser Aff. ¶¶ 6-7.)

12. Further, Mr. Weiser believes that the parties would have settled on an equal division of their share of the revenue, given the need for cooperation between the parties in order for the exhibition to be mounted and toured and their relative contributions. (Weiser Report ¶ 53; Weiser Aff. ¶ 8.)

13. Mr. Weiser uses data, primarily from Premier's Titanic exhibition,[4] to estimate revenue from ticket and merchandise sales. He believes the Titanic exhibition is a suitable comparator because it integrated "recovered artifacts into a recreation of life onboard the ship, was a unique story which could not be replicated, and provided an immersive experience presenting the look and feel that someone on board the ship might have experienced." (Weiser Aff. ¶ 11.) He observes that DNCR

[4] Mr. Weiser also considered results for other blockbuster tours, namely Real Pirates, King Tut, and BODIES. (Weiser Report ¶ 41.)

also identified the Titanic tour as one of three sources of competition for a QAR tour. (Weiser Aff. ¶ 11.) Mr. Weiser testified that he "reviewed a large volume of projections, actual venue-related results, and new content packages that included build costs, financial projections, and risk/reward estimates." (Weiser Aff. ¶ 12.)

14. Mr. Weiser bases his damages opinion on the revenue that would have resulted from a twenty-city tour taking place over a ten-year period, from 2014-2024. In his opinion such a tour would have been "extremely successful." (Weiser Report ¶ 45.) He uses attendance figures from the Titanic tour to calculate ticket revenue and the industry standard of $3 per patron to calculate revenue from merchandise sales. (Weiser Report ¶ 54; Weiser Aff. ¶ 14.) He adds estimated revenue from audio tour and photo opportunities that he contends are consistent with the industry standard and were used by Premier. (Weiser Report ¶ 56; Weiser Aff. ¶ 15.) Ultimately, he concludes that, had the tour taken place, Intersal would have received more than $14 million. (Weiser Report ¶ 62, Ex. 3.)

15. In addition to his damages opinion with respect to an exhibition tour, and after first acknowledging the difficulty of ascertaining lost revenue to Intersal from other commercial narrative projects that did not materialize, Weiser opines that had Intersal and DNCR collaborated to produce a commercial documentary of the QAR project, Intersal would have received at least $1 million. He bases this opinion on the more than $1 million in revenue Premier received for monetizing the video content of its dive to the Titanic wreck in 2010. (Weiser Report ¶¶ 59-60.)

16. Pursuant to the deadline set forth in the pre-trial scheduling order, (*see* ECF No. 203), Defendants filed the Motion and its accompanying brief on 13 October 2023, (ECF Nos. 206, 207). On 3 November 2023, Plaintiff timely submitted its response to the Motion. (ECF No. 227.) In response to Defendants' motion, the Court permitted Defendants to file a reply brief. (ECF No. 241.3.)

17. On 12 January 2024, the Court held a hearing on the Motion. (Not. of H'rg, ECF No. 248.) The Motion is now ripe for consideration.

II. LEGAL STANDARD

18. The Court's determination is controlled by Rule 702(a) of the North Carolina Rules of Evidence.[5] "Whether expert witness testimony is admissible under Rule 702(a) is a preliminary question that a trial judge decides pursuant to Rule 104(a)." *State v. McGrady*, 368 N.C. 880, 892 (2016). "The focus of the trial court's inquiry 'must be solely . . . [the] principles and methodology' used by the expert, 'not the

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[5] Rule 702(a) provides in pertinent part:

> (a) 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 all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. R. Evid. 702(a).

conclusions that they generate.' " *Wallace v. Maxwell*, 270 N.C. App. 639, at *12 (2020) (quoting *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 595 (1993)).

19. North Carolina's Rule 702 "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 *McGrady*, 368 N.C. at 884). In applying this standard, North Carolina courts may seek guidance from the federal courts. *McGrady*, 368 N.C. at 888.

20. Determining admissibility involves a "three-step framework—namely, evaluating qualifications, relevance, and reliability." *Id.* at 892. Each of the three requirements must be satisfied in order for the expert's testimony to be admissible. *Id.* at 889. Moreover, "[t]he burden of satisfying Rule 702(a) rests on the proponent of the evidence[.]" *State v. Gray*, 259 N.C. App. 351, 355 (2018).

21. To be reliable, the expert's testimony must be (1) "based upon sufficient facts or data," (2) "the product of reliable principles and methods," and (3) the expert must have "applied the principles and methods reliably to the facts of the case." N.C.G.S. § 8C-1, Rule 702(a)(1)-(3). This reliability analysis will necessarily vary from case to case, and "the trial court has discretion in determining how to address the three prongs of the reliability test." *McGrady,* 368 N.C. at 890 (citation omitted).[6]

[6] Because North Carolina Rule of Evidence 702 adopts "virtually the same language from" Federal Rule of Evidence 702, federal case law is instructive, but not controlling, on these issues. *McGrady*, 368 N.C. at 888.

22. Our Court of Appeals has explained that the "requirement that expert opinions be supported by 'sufficient facts or data' means 'that the expert considered sufficient data to employ the methodology.'" *Pope v. Bridge Broom, Inc.*, 240 N.C. App. 365, 374 (2015) (quoting *Manpower, Inc. v. Ins. Co. of Pa.*, 732 F.3d 796, 808 (7th Cir. 2013)). The analysis is quantitative rather than qualitative. *Id.* "In other words, th[is] Court does not examine whether the facts obtained by the 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." *Id.* (emphasis in original) (quoting *United States v. Crabbe*, 556 F. Supp. 2d 1217, 1223 (D. Colo. 2008)).

23. Opinions regarding damages must be "based upon a standard that will allow the finder of fact to calculate the amount of damages with *reasonable certainty*." *Olivetti Corp. v. Ames Bus. Sys., Inc.*, 319 N.C. 534, 547-48 (1987) (emphasis added). Absolute, mathematical precision is not required, but courts will not award damages "based upon hypothetical or speculative forecasts of losses." *Iron Steamer, Ltd. v. Trinity Rest., Inc.*, 110 N.C. App. 843, 847 (1993); *see also Mosley & Mosley Builders, Inc. v. Landin, Ltd.*, 87 N.C. App. 438, 446 (1987) ("Absolute certainty, however, is not required, but both the cause and the amount of loss must be shown with reasonable certainty.").

24. An expert's testimony is not helpful to the jury and, therefore, is inadmissible, when the expert does not use specialized knowledge to help the jury

understand the evidence or determine a fact in issue.[7] *See Braswell v. Braswell*, 330 N.C. 363, 377 (1991) ("When the jury is in as good a position as the expert to determine an issue . . . [the expert's testimony] is not helpful to the jury."). *See also State v. Wilkerson*, 295 N.C. 559, 568-69 (1978) (framing admissibility as a question of "whether the witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact.").

25. In addition, because it is the Court's duty to instruct on the law and the jury's province to apply the law to the facts and draw conclusions, an expert may not testify as to "whether legal conclusions should be drawn or whether legal standards are satisfied." *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 587 (1991). The expert may testify to "the underlying factual premise, which the fact finder must consider in determining the legal conclusion to be drawn therefrom, but may not be offered as to whether the legal conclusion *should* be drawn." *Norris v. Zambito*, 135 N.C. App. 288, 292 (1994).

26. Experts, however, may explain technical terms used in a contract "to explain the meaning of such terms as an aid in interpreting the instrument." *Smith v. Childs*, 112 N.C. 672, 681 (1993).

27. Ultimately, "[t]he decision to either grant or deny a motion *in limine* is within the sound discretion of the trial court." *State v. Fristsch*, 351 N.C. 373, 383

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[7] Rule 702 requires that experts have specialized knowledge. N.C. R. Evid. 702(a). Specialized knowledge "can come from practical experience as much as from academic training." *McGrady*, 368 N.C. at 889. But regardless of its source, "the question remains the same: Does the witness have enough expertise to be in a better position than the trier of fact to have an opinion on the subject?" *Id.*

(2000). *See also LaVecchia v. N. Carolina Joint Stock Land Bank of Durham*, 218 N.C. 35, 41 (1940) ("The competency of a witness to testify as an expert is a question primarily addressed to the sound discretion of the court, and [its] discretion is ordinarily conclusive.").

28. The Court applies these principles to Mr. Weiser's proposed testimony.

III. ANALYSIS

A. Weiser's Qualifications

29. Defendants first challenge Weiser's qualifications because he is an accountant, his experience with tour companies stems from the "now bankrupt" Premier, and Weiser has never before testified as an expert in the exhibition tour industry. (Defs.' Br. Supp. Mot. in Limine Exclude Op. Testimony Samuel Weiser ["Defs.' Br."] 2, ECF No. 207.) However, the Court has reviewed Weiser's qualifications and concludes that his education and, in particular, his experience in this niche industry, afford him sufficient expertise to evaluate the likelihood that an exhibition such as the one he describes would be successful and to estimate the revenue that might have been received from it.

B. Weiser's Methodology

30. Defendants next contend that Weiser's methodology is unreliable because he equates the loss of a potential revenue stream to lost profits damages. They argue that Weiser's opinion is speculative because it is dependent on the parties identifying and contracting with a promoter who would be willing to shoulder the costs of producing and operating the tour. (Defs.' Br. 6-10.)

31. Plaintiff responds that using the potential revenue stream as a measure of damages is appropriate because, as Weiser states, in the touring exhibition industry, content providers team up with promoters, and promoters fund the costs in exchange for an industry-standard seventy percent (70%) share of the revenues. (Pl.'s Resp. Defs.' Mot. in Limine Exclude Op. Testimony of Samuel Weiser ["Pl.'s Resp."] 3-6, ECF No. 227.) As for whether a promoter would have been interested in a QAR project exhibition tour, Plaintiff points out that Weiser, himself, would have been interested in Premier promoting the tour had it been offered. (Weiser Report ¶ 38.)

32. Defendants also challenge the sufficiency of the facts or data on which Weiser relied, arguing among other things that he failed to conduct a market analysis. They contend that using data from one tour – the Titanic exhibition – is an insufficient foundation for his opinion. (Defs.' Br. 9-13.)

33. Plaintiffs respond that the "unique setting of this case and the subject matter of his testimony" necessarily limits the amount of data available to Weiser. (Pl.'s Resp. 1.) Still, as Plaintiff emphasizes, Weiser had access to data from a comparator – the Titanic exhibition — that is similar in some respects to an exhibition based on the sunken *Queen Anne's Revenge*. (Pl.'s Resp. 9-11.)

34. The Court has reviewed Weiser's methodology and finds it to be logical. His representation that it is standard practice in the "major tours of historically significant artifacts" industry to partner with promoters in the fashion he describes is based on his experience and is unchallenged by other industry experts. Given the niche field in which he is asked to opine and the limited information available, using

data from the Titanic exhibition is reasonable. Accordingly, the Court concludes that Weiser's lost revenue measure of damages for a QAR project exhibition tour meets the threshold for reliability required by Rule 702. Of course, Defendants are free to challenge the accuracy of Weiser's opinion on cross examination, but these challenges go to the weight to be afforded his opinion, not its admissibility. *See Daubert*, 509 U.S. at 596 ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."); *Breidor v. Sears, Roebuck & Co.*, 722 F.2d 1134, 1138-39 (3d Cir. 1983) ("Where there is a logical basis for an expert's opinion testimony, the credibility and weight of that testimony is to be determined by the jury, not the trial judge.").

35. On the other hand, the Court is not convinced that Plaintiffs have carried their burden to establish that Mr. Weiser's opinion regarding Intersal's alleged damages resulting from a commercial documentary that did not materialize satisfies the reliability requirements of Rule 702. Accordingly, absent a sufficient basis, Weiser will not be permitted to offer that opinion at trial.

B. Legal Conclusions

36. Defendants argue that Weiser's opinions are laced with his interpretations of language in the 2013 Agreement, including whether the term "commercial narrative" includes an exhibition tour, as well as Weiser's own views regarding Defendants' liability. (Defs.' Br. 15-16.) Plaintiff disagrees, arguing that Weiser was

asked to make certain assumptions in order to render an opinion on damages and that he does not intend to opine on these assumptions at trial. (Pls.' Br. 14.)

37. The Court agrees with Defendants that, at points in his report, the line between the assumptions Mr. Weiser was asked to make and his conclusions is not clear. The Court underscores that while Mr. Weiser may make assumptions in order to render an opinion,[8] Mr. Weiser may not offer his own interpretation of the 2013 Agreement at trial.[9] It is up to the Court to interpret unambiguous contract provisions and to the jury to interpret ambiguous ones. *Smith*, 112 N.C. App. at 681 ("A contract which is plain and unambiguous on its face will be interpreted by the court as a matter of law; however, if the contract is ambiguous, interpretation of the contract is a question for the jury.").

38. **WHEREFORE**, the Court, in the exercise of its discretion, hereby **GRANTS in part** and **DENIES in part** the Motion. Mr. Weiser will be permitted to offer testimony regarding damages, if any, that Intersal incurred as a result of Defendants' alleged breaches of paragraph 15 of the 2013 Agreement to the extent it pertains to a touring exhibition. On the other hand, Mr. Weiser will not be permitted

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[8] Again, Defendants may challenge Mr. Weiser's assumptions on cross examination. *See Insight Health Corp. v. Marquis Diagnostic Imaging of N.C., LLC*, 2017 NCBC LEXIS 14, at *49 (N.C. Super. Ct. Feb. 24, 2017) (observing that challenges to the soundness of an expert's opinion, as opposed to the validity of the expert's process, "go to the testimony's weight, and can be explored during cross-examination[.]").

[9] That is not to say that Mr. Weiser cannot define terms (such as "blockbuster tour") that appear to have a specialized meaning in the exhibition touring industry. *See Stewart v. Raleigh & Augusta Air Line R. Co.*, 141 N.C. 253, 263 (1906) (permitting experts to define terms of art and language used in certain businesses to inform the interpretation of contracts).

to offer testimony regarding damages allegedly resulting from other commercial narrative projects that did not materialize, such as a commercial documentary, and Mr. Weiser may not offer his own interpretations of the 2013 Settlement Agreement.

IT IS SO ORDERED, this the 1st of February, 2024.

/s/ Julianna Theall Earp

Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases