IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

STERLING ASKEW and SYLVIA ASKEW,	)	
Plaintiffs,	)	
vs.	)	**No. 14-cv-02080-STA-tmp**
CITY OF MEMPHIS, TONEY ARMSTRONG, Individually and in his Official Capacity as the Police Director of the Memphis Police Department, OFFICER NED AUFDENKAMP, Individually and in his Official Capacity as a Police Officer with the Memphis Police Department, and OFFICER MATTHEW DYESS, Individually and in his Official Capacity as a Police Officer with the Memphis Police Department,	)	
Defendants.	)	

ORDER GRANTING IN PART AND DENYING IN PART CITY OF MEMPHIS'S MOTION TO EXCLUDE TESTIMONY OF DR. DAVID H. CISCEL

Before the court by order of reference is Defendant City of Memphis's ("City") Motion to Exclude Testimony of Plaintiffs' Proposed Expert, David H. Ciscel, Ph.D., filed October 23, 2015. (ECF No. 173.) Plaintiffs Sterling and Sylvia Askew ("Plaintiffs") filed a response in opposition to this motion on November 16, 2015. (ECF No. 216.) The City filed a reply on

November 30, 2015. (ECF No. 235.) For the reasons below, the City's motion to exclude is granted in part and denied in part.

I. BACKGROUND

On the evening of January 17, 2013, the Memphis Police Department ("MPD") received a call concerning loud music coming from an apartment located at 3193 Tyrol Court in Memphis, Tennessee. MPD Officers Ned Aufdenkamp and Matthew Dyess ("Officers") were dispatched to respond to the call. For reasons unknown, the Officers left the Tyrol Court location after responding to the noise complaint and went to an adjacent apartment complex, the Windsor Place Apartments, located at 3197 Royal Knight Cove. From here, the parties' versions of events diverge drastically.

The City and the Officers (collectively "Defendants") allege that while checking the same general area around the Tyrol Court apartments on the night in question, the Officers saw Steven Askew passed out behind the wheel of a running vehicle in the parking lot of the Windsor Place Apartments. When the Officers approached the vehicle to assess the situation, Officer Aufdenkamp noticed a handgun in Askew's lap and notified Officer Dyess. The Officers then woke Askew up by tapping loudly on his car window and shouting loud verbal commands, at which time Askew made hand gestures towards the

Officers and pointed the gun at Officer Aufdenkamp. Both Officers opened fire on Askew, which ultimately resulted in his death.

Plaintiffs allege that on the night in question, Askew was asleep in his car in the parking lot of the Windsor Place Apartments, waiting for his girlfriend who resides there to return from work. Upon spotting Askew in his vehicle, the Officers angled their patrol car towards Askew's car and turned on their overhead lights to illuminate his vehicle; however, the Officers never activated any blue lights, sirens, or other devices to get Askew's attention. Plaintiffs do not dispute that Askew had a gun in the car (which he was legally permitted to carry), but assert that he never pointed the gun at the Officers, and certainly did not fire the weapon. Plaintiffs also point out that although one officer reported that he saw Askew with a gun in his right hand, Askew actually had a cigar in his right hand at the time of the incident. The Officers fired a total of twenty-two shots that night, hitting Askew multiple times and killing him. Plaintiffs subsequently filed an action pursuant to 42 U.S.C. § 1983 and the Fourth and Fourteenth Amendments of the United States Constitution alleging that Defendants wrongfully and unconstitutionally caused the death of their son.

Plaintiffs retained David H. Ciscel, Ph.D., to provide expert testimony regarding Askew's lost future earning capacity. Dr. Ciscel is a forensic economist and has served as the director of Memphis Forensic Economics since 1986. Dr. Ciscel received a bachelor's degree, a master's degree, and a doctoral degree in economics from the University of Houston in 1965, 1969, and 1971, respectively. Dr. Ciscel worked as an economics professor at Drake University from 1971 to 1973 and at the University of Memphis from 1973 to 2006. Additionally, Dr. Ciscel served as the Associate Dean for Graduate Programs at the University of Memphis's Fogelman College of Business and Economics from 1986 to 1992, and served as the Dean of the University of Memphis's Graduate School from 1992 to 1995. Since 2006, Dr. Ciscel has worked as a professor emeritus at the University of Memphis. Dr. Ciscel also served as the Dean of the School of Business at Christian Brothers University in 2009, and was employed as an adjunct professor at Christian Brothers University from 2010 until 2012. Among other professional experience, Dr. Ciscel was employed as a Senior Consultant at the Federal Reserve Bank of St. Louis from 1999 to 2001. Dr. Ciscel has published numerous articles and has given numerous presentations on topics relating to economics. Lastly, Dr.

Ciscel has testified as an expert witness in several state and federal court cases.

In its motion, the City does not challenge Dr. Ciscel's qualifications or methodology, but instead argues that his testimony should be excluded because his assumption that Askew could have worked as an aircraft mechanic and his projections of lost future earning capacity based on that assumption are "without factual support" and are "wild speculation." In their response in opposition, Plaintiffs argue that after reviewing additional materials, Dr. Ciscel subsequently supplemented his original opinion by concluding that Askew could have also become an automotive body repairer or automotive service technician; however, his final projection of Askew's lost future earning capacity "was basically unchanged." Plaintiffs argue that they provided the City with Dr. Ciscel's updated expert report reflecting this change on October 5, 2015, and that by failing to raise any issue regarding Dr. Ciscel's updated opinion in its motion, the City "has waived any claims related to the filing of the updated report."[1] In its reply, the City alleges that "over

[1]In their response in opposition to the City's motion, Plaintiffs request an evidentiary hearing. However, after reviewing the entire record, the court does not believe that a hearing is necessary for the resolution of this motion. The court is not required to conduct a hearing to determine whether a proposed expert's testimony meets the Daubert standards. Nelson v.

two weeks after his deposition and nine months after the Scheduling Order's deadline to disclose expert opinions, [Dr.] Ciscel drafted an entirely new opinion on [Askew's] lost earning capacity." The City asserts that Plaintiffs did not obtain leave of court or consent from the City to reopen discovery or extend the scheduling order deadline, and that Plaintiffs have violated both the court's scheduling order and Federal Rule of Civil Procedure 26(a)(2) by failing to timely disclose all of Dr. Ciscel's opinions and the bases for those opinions. Consequently, the City argues that Dr. Ciscel's October 5 updated expert report should be excluded under Federal Rule of Civil Procedure 37(c).

II. ANALYSIS

A. Dr. Ciscel's October 5 Report

Federal Rule of Civil Procedure 26 requires a party to supplement an expert report "if the party learns that in some material respect the [report] is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed. R. Civ. P. 26(e)(1)(A). "'The purpose of the supplementation rule is to avoid ambush at trial and to assure

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Tennessee Gas Pipeline Co., 243 F.3d 244, 248-49 (6th Cir. 2001).

that all material information has been disclosed in the expert reports.'" Union Ins. Co. v. Delta Casket Co., No. 06-2090, 2009 WL 6366865, at *2 (W.D. Tenn. Nov. 30, 2009) (quoting Potluri v. Yalamanchili, No. 06-CV13517-DT, 2008 WL 5060574, at *2 (E.D. Mich. Nov. 24, 2008)). The duty to supplement extends not only to information included in an expert's report, but also "to information given during the expert's deposition." Fed. R. Civ. P. 26(e)(2). "[C]hanges in the opinions expressed by the expert whether in the report or at a subsequent deposition are subject to a duty of supplemental disclosure under subdivision (e)(1)." Fed. R. Civ. P. 26 Advisory Committee Notes, 1993 Amendments. However, "a party may not use the supplementation process to introduce entirely new expert opinions that could have been provided prior to the expert's report and deposition." Jermano v. Graco Children's Products, Inc., No. 13-CV-10610, 2015 WL 1737548, at *4 (E.D. Mich. Apr. 16, 2015); see also Campbell v. United States, 470 F. App'x 153, 157 (4th Cir. 2012) ("To construe [Rule 26(e)] supplementation to apply whenever a party wants to bolster or submit additional expert opinions would [wreak] havoc in docket control and amount to unlimited expert opinion preparation.") (alterations in original) (internal quotation marks and citation omitted); Am. Nat'l Propery & Cas. Co. v. Stutte, No. 3:11-CV-219, 2015 WL 2095868,

at *4 (E.D. Tenn. May 5, 2015) ("Rule 26's duty to supplement is not a declaration of open season for experts to undertake new analyses or to evolve their opinions."); Brown v. Scott, No. 2:12-CV-1071, 2013 WL 5923109, at *2 (S.D. Ohio Nov. 4, 2013) ("Instead, plaintiff is seeking leave to permit her experts to render new, additional opinions on topics that were not originally addressed in their original reports. This effort does not fall within the ambit of Rule 26's duty to supplement."); Eiben v. Gorilla Ladder Co., No. 11-CV-10298, 2013 WL 1721677, at *5 (E.D. Mich. Apr. 22, 2013) ("Rule 26(e) 'does not give the producing party a license to disregard discovery deadlines and to offer new opinions under the guise of the supplement label.'") (quoting Allgood v. Gen. Motors Corp., No. 1:02-cv-1077-DFH-TAB, 2007 WL 647496, at *3 (S.D. Ind. Feb. 2, 2007)).

Plaintiffs timely disclosed Dr. Ciscel's expert report, titled "A Report on the Lost Earning Capacity for Steven K. Askew," on January 19, 2015. In this report, Dr. Ciscel stated that Askew received "a training diploma as an aircraft mechanic" in 2008. Dr. Ciscel explained that his calculation of Askew's future earning capacity was based on the report of Dr. C. Greg Cates (another expert hired by Plaintiffs), and that the calculation was "based on the assumption that [Askew] would have

spent the rest of his work career as an aircraft mechanic," as recommended by Dr. Cates. Based on this assumption and a base annual salary beginning in February 2013 of $42,631, Dr. Ciscel concluded that the present value of Askew's future earning capacity, less a personal consumption deduction, was $957,801. (ECF No. 166-2.) The discovery period, as amended, closed on August 27, 2015. (ECF No. 129.)

Dr. Ciscel was deposed by the City on September 22, 2015. At his deposition, Dr. Ciscel clarified that his statement in his report that Askew earned a diploma as an aircraft mechanic was based on a graduation ceremony bulletin distributed by the Tennessee Technology Center at Memphis ("TTC") on August 19, 2008, which included Askew's name among the list of graduates. (ECF No. 166-1, pp. 66-67.) However, he testified that since producing his original report, he had received from Plaintiffs' counsel the deposition transcript of Diane Wilkerson, TTC's Assistant Director for Curriculum and Compliance, which indicated that Askew in fact had not actually earned a diploma in aircraft mechanics from TTC.[2] Dr. Ciscel was asked whether his opinion was still viable in light of this new information, to which Dr. Ciscel replied: "The viability of my opinion I

[2]Wilkerson's deposition was taken on May 22, 2015. (ECF No. 164-1.)

think remains fairly strong, but it certainly cannot be based on Dr. Greg Cates' projection that he was going to be an aircraft mechanic only." (Id., pp. 79-81.). Despite thorough questioning by the City regarding the bases of his opinions, at no point during his deposition did Dr. Ciscel indicate that his opinion also factored in the assumption that Askew would have been an automotive body repairer or automotive service technician. At the conclusion of the deposition, Plaintiffs' counsel declined to ask Dr. Ciscel any follow up questions.

On October 5, 2015, Plaintiffs served the City with a document prepared by Dr. Ciscel titled "An Updated Report on the Lost Earning Capacity for Steven K. Askew." In this report, Dr. Ciscel stated that "[t]he findings of the initial report remain accurate," but indicated that the following change was made to his analysis of Askew's lost future earning capacity:

> Mr. Askew had not finished his education to become an aircraft mechanic, nor had he taken the licensing examination. This update makes the reasonable assumption that, given Mr. Askew's skills and work experience, that he would have chosen to become an automotive body repairer or automotive service technician. It is still possible that he may become an aircraft mechanic.

In light of this change, and based on an annual base salary for automotive body repairers or service technicians of $42,980 in Memphis in 2014, Dr. Ciscel ultimately opined that the present

value of Askew's future earning capacity, less a personal consumption deduction, was $975,124. (ECF No. 215-1.)

The court finds that Dr. Ciscel's October 5 report does not "supplement" his original report as contemplated under Rule 26(e)(2). Contrary to Plaintiffs' assertions, Dr. Ciscel's October 5 updated report does much more than supplement his original report. Rather, his updated report expresses new opinions based on facts different from those relied upon in reaching his original opinions. For the first time, Dr. Ciscel assumes that Mr. Askew would have become an automotive body repairer or automotive service technician. This assumption was not part of Dr. Ciscel's original analysis. Dr. Ciscel's updated report is essentially a new expert report, as it provides a different calculation based on entirely different information, and should have been disclosed by the January 20, 2015 expert disclosure deadline. See Fed. R. Civ. P. 26(a)(2)(B) (stating that an expert witness's report must contain "a complete statement of all opinions the witness will express and the basis and reasons for them" and "the facts or data considered by the witness in forming them"); see also R.C. Olmstead, Inc., v. CU Interface, LLC, 606 F.3d 262, 270-71 (6th Cir. 2010).

In any event, even assuming, *arguendo*, that Dr. Ciscel's updated report could be construed as a supplement to his original report, such supplementation would nevertheless still be untimely. On July 28, 2015, the parties filed a Joint Motion for Extension of Deadlines to Complete Discovery. In that motion, the parties jointly asked to extend multiple deadlines, including the deadline for expert supplementation under Rule 26(e)(2) to August 27, 2015. (ECF No. 128.) On that same day, the district judge granted the motion, extending the deadline for supplementation to August 27, 2015. (ECF No. 129.) Dr. Ciscel's updated report was not provided to the City until October 5, over a month after the supplementation deadline and the close of the discovery period, and almost two weeks after Dr. Ciscel's deposition had been completed. Thus, under either interpretation, Dr. Ciscel's October 5 report was untimely disclosed in violation of Rule 26 and the amended scheduling order.

The court, having found the above-described violation, must next look to Rule 37(c)(1) in order to decide whether the opinions contained in the October 5 report should be excluded. That rule provides as follows:

> If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to

> supply evidence on a motion, at a hearing, or at a trial, *unless the failure was substantially justified or is harmless*. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:
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> (A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;
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> (B) may inform the jury of the party's failure; and
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> (C) may impose other appropriate sanctions.

Fed. R. Civ. P. 37(c)(1) (emphasis added). The Sixth Circuit has held that "'[t]he exclusion of non-disclosed evidence is automatic and mandatory under Rule 37(c)(1) unless non-disclosure was justified or harmless.'" Dickenson v. Cardiac & Thoracic Surgery of E. Tenn., 388 F.3d 976, 983 (6th Cir. 2004) (quoting Musser v. Gentiva Health Servs., 356 F.3d 751, 758 (7th Cir. 2004)); see also Dennis v. Sherman, No. 1:08-cv-1055-JDB-egb, 2010 WL 1957236, at *1 (W.D. Tenn. May 12, 2010); Bekaert Corp. v. City of Dyersburg, 256 F.R.D. 573, 578 (W.D. Tenn. 2009).

Recently, in Howe v. City of Akron, 801 F.3d 718 (6th Cir. 2015), the Sixth Circuit adopted a five-factor test from the Fourth Circuit for assessing whether a party's late disclosure was "substantially justified" or "harmless" for purposes of Rule 37. The Sixth Circuit instructed that courts should consider the following factors:

> (1) the surprise to the party against whom the evidence would be offered; (2) the ability of that party to cure the surprise; (3) the extent to which allowing the evidence would disrupt the trial; (4) the importance of the evidence; and (5) the nondisclosing party's explanation for its failure to disclose the evidence.

Id. at 748 (quoting Russell v. Absolute Collection Servs., Inc., 763 F.3d 385, 396-97 (4th Cir. 2014)); see also Callen Mfg. Corp. v. Nexteer Auto. Corp., No. 15-cv-11363, 2016 WL 865733, at *5-6 (E.D. Mich. Mar. 7, 2016); Nat'l Credit Union, Admin. Bd. v. Cumis Ins. Soc'y, Inc., No. 1:11 CV 1739, 2015 WL 6658670, at *3 (N.D. Ohio Oct. 30, 2015). Because of the scant case law within the Sixth Circuit applying this new Howe test, and since the Howe test was adopted from the Fourth Circuit, the court will look to Fourth Circuit jurisprudence for guidance on the application of this test.[3]

The burden of establishing that a late disclosure is substantially justified or harmless lies with the non-disclosing party. See Wilkins v. Montgomery, 751 F.3d 214, 222 (4th Cir. 2014); Campbell, 470 F. App'x at 156; S. States Rack & Fixture, Inc. v. Sherwin-Williams Co., 318 F.3d 592, 596 (4th Cir. 2003). Furthermore, the Fourth Circuit (like the Sixth Circuit) has

[3]As of the date of the issuance of this opinion, only seven cases within the Sixth Circuit have cited Howe. Of those seven, only two (which are cited above) discuss the five-factor test set forth in Howe, and neither of those cases is factually analogous to the present case.

held that Rule 37(c) *requires* exclusion of a late disclosure unless the non-disclosing party establishes substantial justification or harmlessness. Campbell, 470 F. App'x at 156.

The first factor the court must consider is the surprise to the City caused by Plaintiffs' late disclosure of Dr. Ciscel's updated report. Plaintiffs' disclosure of Dr. Ciscel's new report was made over a month after the expert supplementation disclosure deadline and the close of discovery, and almost two weeks after the City deposed Dr. Ciscel. (ECF No. 129.) Until Plaintiffs' late disclosure was made, the City had been given no indication (during Dr. Ciscel's deposition or otherwise) of Dr. Ciscel's reliance on the assumption that Askew would have become an automotive body repairer or automotive service technician. Based on these facts, the court finds that Plaintiffs' late disclosure was a significant surprise to the City. See Wilkins, 751 F.3d at 223 ("Appellant's initial disclosure failed to provide Appellee with any concrete explanation of Dr. Voskanian's potential testimony. The disclosure was made after the agreed-upon expert disclosure date, after discovery was closed, after Appellee filed a motion for summary judgment, and on the very date set by the court for the filing of motions to exclude experts. It is hard to accept that these events would not serve as a surprise to Appellee . . . ."); see also Digital

Vending Servs. Int'l, Inc. v. Univ. of Phoenix, Inc., No. 2:09CV555, 2013 WL 5533233, at *8 (E.D. Va. Oct. 3, 2013); Contech Stormwater Solutions, Inc. v. Baysaver Technologies, Inc., 534 F. Supp. 2d 616, 624 (D. Md. 2008).

Second, the court must consider the ability of the City to cure the surprise caused by Plaintiffs' late disclosure. Because discovery closed in this case on August 27, 2015, the City could not have cured the surprise caused by Plaintiffs' October 5 disclosure without re-opening discovery. In their response in opposition to the City's motion, Plaintiffs seem to argue that the City could have cured the surprise caused by the late disclosure during Dr. Ciscel's deposition. Plaintiffs allege that "once counsel for the City learned that Dr. Ciscel was no longer willing to rely on Dr. Cates's report, counsel for the City abruptly ended the deposition and failed to even address Dr. Ciscel's ultimate opinion or the full and revised basis supporting that opinion." Plaintiffs further assert that the City "failed to consider, or even ask Dr. Ciscel at his deposition, what other facts or data unrelated to employment as an aircraft mechanic, he relied upon in rendering his opinion." (ECF No. 216.) A full reading of Dr. Ciscel's deposition transcript, however, reveals that the City conducted a reasonable inquiry into the bases of Dr. Ciscel's opinion, even

after he testified that his opinion could no longer be based on Dr. Cates's report alone. Nothing in the deposition transcript suggests that the City abruptly ended the deposition or otherwise failed to fully question Dr. Ciscel regarding his opinions. If Dr. Ciscel, at the time of his deposition, had in fact based his projections on the assumption that Askew would have worked as an automotive repairer or technician, it is reasonable to believe that this important piece of information would have come out in response to the questions asked by the City. The court finds that the City could not have cured the surprise caused by the untimely disclosure. See MicroStrategy Inc. v. Bus. Objects, S.A., 429 F.3d 1344, 1357 (Fed. Cir. 2005) ("MicroStrategy could not cure the surprise without postponing trial and reopening discovery."); S. States, 318 F.3d at 598 (adopting district court's reasoning that defendant was unable to cure surprise caused by late disclosure because "the ability to simply cross-examine an expert concerning a new opinion at trial is not the ability to cure," and because "rules of expert disclosure are designed to allow an opponent to examine an expert opinion for flaws and to develop counter-testimony through that party's own experts").

Third, the court must examine the extent to which allowing Plaintiffs' late expert report would disrupt the trial, which is

set to begin on June 6, 2016. The court, at a minimum, would have to re-open discovery. Not only would the City have to be given an opportunity to re-depose Dr. Ciscel, but the City would also need time to independently investigate Dr. Ciscel's new bases and opinions. Additionally, the court would have to provide the City with an opportunity to file another motion to exclude Dr. Ciscel based on his new opinions. The trial date in this case has been reset three times, and the district judge has warned the parties that "no further extensions of any kind will be granted absent extraordinary circumstances."[4] (ECF No. 231.)

[4]As the district judge pointed out in his Order Granting Plaintiffs' Motion to Extend to Respond to Motions for Summary Judgment, the court has approved twenty-one motions for extension of time. (ECF No. 231.) See, e.g., Joint Motion to Extend Deadline (ECF No. 7), Motion for Extension of Time to Respond to Motion to Dismiss (ECF No. 23), Motion for Extension of Time to Respond to Motion to Dismiss (ECF No. 27), Motion to Continue Scheduling Conference (ECF No. 28), Motion for Extension of Time to Respond to Motion to Dismiss (ECF No. 33), Joint Motion to Extend Deadlines (ECF No. 50), Joint Motion for Extension of Time to Complete Discovery (ECF No. 57), Joint Motion for Extension of Time to Complete Discovery (ECF No. 64), Motion for Extension of Time to Complete Discovery (ECF No. 105), Joint Motion for Extension of Time to Complete Discovery (ECF No. 128), Joint Motion for Extension of Time to File Dispositive Motions (ECF No. 137), Joint Motion for Extension of Time to File Motions to Exclude Experts (ECF No. 140), Motion for Extension of Time to Respond to Motion to Exclude Expert (ECF No. 147), Joint Motion to Extend Deadlines (ECF No. 181), Motion for Extension of Time to Respond to Motion to Exclude Expert (ECF No. 182), Motion for Extension of Time to Respond to Motion to Exclude Expert (ECF No. 185), Motion for Extension of Time to Respond to Motion to Exclude Expert (ECF No. 188), Motion for Extension of Time to Respond to Motion to Exclude

The court finds that allowing Plaintiffs' late expert report would likely cause a significant disruption of the trial. See S. States, 318 F.3d at 598 (adopting district court's reasoning that granting a continuance to accommodate party's late disclosure would have significantly disrupted the trial); Markle v. United States, No. 3:13-CV-138, 2015 WL 4477726, at *3 (N.D. W. Va. July 22, 2015) (holding that the admittance of late disclosed evidence would significantly disrupt the trial because trial was imminent and allowing the evidence would require delaying the trial to allow time for plaintiff to investigate defendant's undisclosed opinions); King v. Sears Roebuck & Co., No. 1:10-CV-01024, 2013 WL 663308, at *5 (S.D. W. Va. Feb. 22, 2013) (finding that granting extension would significantly disrupt scheduled trial because discovery was set to close soon, the case had been pending before the court for more than two and a half years, and the court was already operating on its third scheduling order).

Fourth, the court must evaluate the importance of Plaintiffs' late-disclosed evidence. Proving the amount of Askew's lost future earning capacity through expert testimony is

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Expert (ECF No. 190), Motion for Extension of Time to Respond to Motion to Exclude Expert (ECF No. 206), and Motion for Extension of Time to Respond to Motion to Exclude Expert (ECF No. 217).

certainly important to Plaintiffs' case. While the exclusion of Dr. Ciscel's updated report will not result in the dismissal of Plaintiffs' case or, as discussed in the next section, prevent Plaintiffs from presenting expert testimony regarding lost future earning capacity, the court nevertheless finds that the fourth factor favors Plaintiffs. The fifth factor requires the court to examine Plaintiffs' explanation for their failure to timely disclose the updated report. Plaintiffs have not offered a justification for their late disclosure. Plaintiffs had a full and fair opportunity during the discovery period to update the report. At Wilkerson's May 22 deposition, Plaintiffs were informed that Askew did not complete the coursework necessary to obtain an aircraft mechanic diploma, needed to pass two qualifying tests to be eligible to take the Federal Aviation Administration ("FAA") aircraft mechanic exam, needed to take and pass the FAA exam, and needed to obtain an FAA license before he was eligible to seek employment as an aircraft mechanic. Plaintiffs also were aware prior to that deposition of Askew's work history, including his experience in the automotive body repair business. Therefore, Plaintiffs had all of the information they needed and could have provided the opinions contained in the October 5 report several months before it was disclosed. The court finds that this fifth factor weighs

against the Plaintiffs. See Campbell, 470 F. App'x at 156 (affirming district court's exclusion of late-disclosed expert, even though it resulted in summary judgment against Campbell, because "[a]lthough Campbell correctly notes the importance of her expert witness, as her medical malpractice case hinged upon his testimony, the other Southern States factors weigh against Campbell"); MicroStrategy, 429 F.3d at 1357 ("While this exclusion admittedly left MicroStrategy without evidence of damages or causation for most of its business tort claims, this factor is only one of five that does not tip the scale in favor of MicroStrategy, particularly where MicroStrategy alone is to blame for creating this situation."); Emerman v. Fin. Commodity Investments, L.L.C., No. 1:13CV2546, 2015 WL 6742077, at *11 (N.D. Ohio Nov. 2, 2015) (excluding late-disclosed expert because plaintiffs offered no reasonable explanation for their failure to timely disclose his identity and because they did not advance a plausible argument that their mistake was harmless); Silicon Knights, Inc. v. Epic Games, Inc., No. 5:07-CV-275-D, 2012 WL 1596722, at *8 (E.D. N.C. May 7, 2012) ("Fourth, proving damages is admittedly important to SK's case; therefore, the fourth Southern States factor favors SK. However, this single factor does not tilt the scale in SK's favor when it 'is only one of five [factors] . . . [and SK] alone is to blame for

creating this situation,' . . . and when the evidence 'is not essential to [SK's] underlying recovery.'") (alterations in original) (internal citation omitted).

The court, based on its application of the Howe test, finds that the late disclosure of Dr. Ciscel's October 5 report was neither substantially justified nor harmless. As such, Rule 37(c)(1) requires automatic exclusion of the October 5 report.

B. Daubert and Rule 702

The court must now examine whether Dr. Ciscel's original report can survive the City's motion to exclude. In Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), the United States Supreme Court held that Federal Rule of Evidence 702 requires that trial courts perform a "gate-keeping role" when considering the admissibility of expert testimony. Daubert, 509 U.S. at 597. Rule 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
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> (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;
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> (b) the testimony is based on sufficient facts or data;
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> (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. Rule 702 applies not only to scientific testimony, but also to other types of expert testimony based on technical or other specialized knowledge. See Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 147, 149 (1999).

The court's gate-keeping role is two-fold. First, the court must determine whether the testimony is reliable. See Daubert, 509 U.S. at 590. The reliability analysis focuses on whether the reasoning or methodology underlying the opinion is scientifically valid. Id.; see also Decker v. GE Healthcare Inc., 770 F.3d 378, 391 (6th Cir. 2014). "To be reliable, the opinion must not have 'too great an analytical gap' between the expert's conclusion, on the one hand, and the data that allegedly supports it, on the other." Lozar v. Birds Eye Foods, Inc., 529 F. App'x 527, 530 (6th Cir. 2013) (quoting Tamraz v. Lincoln Elec. Co., 620 F.3d 665, 675-76 (6th Cir. 2010)). The proponent of the testimony does not have the burden of establishing that it is correct, but that by a preponderance of the evidence, it is reliable. Rose v. Matrixx Initiatives, Inc., No. 07-2404-JPM/tmp, 2009 WL 902311, at *5 (W.D. Tenn. Mar. 31, 2009).

To aid the trial courts in their determination of whether an expert's testimony is reliable, the Supreme Court in Daubert set forth four non-exclusive factors for the courts to consider: (1) whether the theory or technique has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error of the method used and the existence and maintenance of standards controlling the technique's operation; and (4) whether the theory or method has been generally accepted by the scientific community. Daubert, 509 U.S. at 593-94; see also Siegel v. Dynamic Cooking Sys., Inc., 501 F. App'x 397, 403 (6th Cir. 2012). In addition, the court may consider "whether the proposed testimony grows [out] of independent research or if the opinions were developed 'expressly for the purposes of testifying.'" Siegel, 501 F. App'x at 403 (quoting Smelser v. Norfolk S. Ry. Co., 105 F.3d 299, 303 (6th Cir. 1997) (abrogated on other grounds by Morales v. Am. Honda Motor Co., 151 F.3d 500 (6th Cir. 1998))).

The Supreme Court has emphasized that in assessing the reliability of expert testimony, whether scientific or otherwise, the trial court may consider one or more of the Daubert factors when doing so will help determine that expert's reliability. Kumho Tire, 526 U.S. at 150. The test of

reliability is a "flexible" one, however, and the Daubert factors do not constitute a "definitive checklist or test," but must be tailored to the facts of the particular case. Id. (quoting Daubert, 509 U.S. at 593); see also Ellis v. Gallatin Steel Co., 390 F.3d 461, 470 (6th Cir. 2004). Moreover, the Sixth Circuit has explained that the Daubert factors "'are not dispositive in every case' and should be applied only 'where they are reasonable measures of the reliability of expert testimony.'" In re Scrap Metal Antitrust Litig., 527 F.3d 517, 529 (6th Cir. 2008) (quoting Gross v. Comm'r of Internal Revenue, 272 F.3d 333, 339 (6th Cir. 2001)). When non-scientific expert testimony is involved, the court's analysis may focus upon the expert's personal knowledge or experience, because "the factors enumerated in Daubert cannot readily be applied to measure the reliability of such testimony." Surles ex rel. Johnson v. Greyhound Lines, Inc., 474 F.3d 288, 295 (6th Cir. 2007) (citing Kumho Tire, 526 U.S. at 150 & First Tenn. Bank Nat'l Ass'n v. Barreto, 268 F.3d 319, 333 (6th Cir. 2001)); see also United States v. Jones, 107 F.3d 1147, 1155 (6th Cir. 1997) (reasoning that "a non-scientific expert's experience and training bear a strong correlation to the reliability of the expert's testimony").

The second prong of the gate-keeping role requires an analysis of whether the expert's reasoning or methodology can be properly applied to the facts at issue; in other words, the court must determine whether the opinion is relevant. See Daubert, 509 U.S. at 591-93. This relevance requirement ensures that there is a "fit" between the proferred testimony and the issues to be resolved at trial. See United States v. Bonds, 12 F.3d 540, 555 (6th Cir. 1993); Brock v. Positive Changes Hypnosis, LLC, 589 F. Supp. 2d 974, 980 (W.D. Tenn. 2008). Thus, an expert's testimony is admissible under Rule 702 if it is predicated upon a reliable foundation and is relevant. The rejection of expert testimony, however, is the exception rather than the rule, and "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." Burgett v. Troy-Bilt LLC, 579 F. App'x 372, 376 (6th Cir. 2014) (quoting Fed. R. Evid. 702 advisory committee's note (2000)) (quotation marks omitted). "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." Daubert, 509 U.S. at 596.

C. Facts Supporting Dr. Ciscel's Original Report

In order for expert testimony to be admissible, Rule 702 requires that the opinion be based on "sufficient facts or data." The City does not challenge Dr. Ciscel's qualifications as an expert or his methodology. Rather, the City argues that his testimony should be excluded as unreliable because his opinions regarding Askew's future lost earning capacity are "without factual support" and "wild speculation." Specifically, the City takes issue with Dr. Ciscel's assumption that Askew would have entered the aircraft mechanic profession in February 2013. In response, Plaintiffs contend that some degree of speculation is permissible in computing lost future earning capacity, and that the materials and information relied upon by Dr. Ciscel in reaching his opinion are of the type and nature traditionally relied upon by experts in the field of forensic economics.

"Estimates of a deceased person's future earning capacity are inherently speculative to some degree." Sinkov v. Americor, Inc., 419 F. App'x 86, 90 (2d Cir. 2011); see also Andler v. Clear Channel Broad., Inc., 670 F.3d 717, 726 (6th Cir. 2012) (noting that "predictions about future earning potential are necessarily somewhat speculative"). The court's role "in deciding whether an expert's opinion is reliable is not to determine whether it is correct, but rather to determine whether

it rests upon a reliable foundation, as opposed to, say, unsupported speculation." In re Scrap Metal, 527 F.3d at 529-30. "An expert's opinion, where based on assumed facts, must find some support for those assumptions in the record." McLean v. 988011 Ontario, Ltd., 224 F.3d 797, 801 (6th Cir. 2000). "However, mere 'weaknesses in the factual basis of an expert witness' opinion . . . bear on the weight of the evidence rather than on its admissibility.'" Id. (quoting United States v. L.E. Cooke Co., 991 F.2d 336, 342 (6th Cir. 1993)).

Here, Dr. Ciscel's original opinion regarding Askew's future earning capacity was based on Dr. Cates's recommendation that Askew would have spent the rest of his life working as an aircraft mechanic, beginning as an assistant aircraft mechanic in February 2013. However, as Dr. Ciscel testified at his deposition, evidence was revealed to him after his original report was produced that tended to discredit Dr. Cates's recommendation regarding Askew's projected career path. As Dr. Ciscel acknowledged in his deposition, the evidence is uncontroverted that at the time of his death, Askew had not obtained an aircraft mechanic diploma and had never worked in the aircraft mechanic field. Additionally, Askew had not met other requirements of obtaining employment as an aircraft mechanic, including passing two qualifying tests to be eligible

to take the required FAA exam, taking and passing the FAA exam, and obtaining an FAA license. (ECF No. 166-1, pp. 73-77, 81, 85-86.) Moreover, as Wilkerson testified in her deposition, Askew actually attempted and failed one of the qualifying tests, and TTC had no record of Askew attempting to re-enroll in aircraft mechanic courses at any time since 2008. (ECF No. 164-1, pp. 21-22, 26-27.) Ultimately, Dr. Ciscel conceded during his deposition that "the assumption that [Askew] would become an assistant aircraft mechanic was a low probability assumption." (ECF No. 166-1, p. 87.)

Despite these acknowledged weaknesses in the bases for his opinion, Dr. Ciscel testified that the viability of his opinion nevertheless remained "fairly strong" based on the deposition testimony of Plaintiffs and Askew's girlfriend, Lorri Latrice Wilson. (ECF No. 166-1, pp. 83-84.) For example, in Sylvia Askew's deposition, she testified that Askew was trying to leave Memphis to pursue a job in the field of aircraft mechanics, and that he had applied for aircraft mechanic jobs. (ECF No. 214-1, pp. 15-16, 64.) She also testified that Askew had saved up money to take one of the necessary tests, and that he was making plans to take the test before he was killed. (Id., p. 61-62.) Similarly, Sterling Askew testified at his deposition that Askew talked about leaving Memphis to get a job in aircraft mechanics,

and that Askew stayed in touch with counselors at TTC regarding his desire to pursue employment in the field. (ECF No. 213-1, pp. 110, 146-48.) Additionally, Wilson testified as follows at her deposition:

> Q: Did Steven ever tell you about what his long term employment plans were?
>
> A: Yes. He wanted to be an aviation mechanic or either do more auto body work with his dad or eventually own his own auto body because he knew how to paint and just do good auto body work.
>
> Q: Did he ever discuss with you what he planned to do in order to be able to become an aircraft mechanic?
>
> A: He had some more classes. He was showing me some books and everything. He told me about a school that he went to . . . and he was going to go back and try to get his license, but I didn't know when.

(ECF No. 166-2, p. 234.) When asked to elaborate on the conversations she had with Askew about his desire to return to school, Wilson offered the following testimony:

> A: Just every blue moon he would talk about how he liked working with his dad, but he wanted to eventually branch off because he thinks his daddy is showing him a lot of things and he wanted to start making his own money one day. He would show me some books of the aviation where he did go to school, but I'm not sure when he was going to start back, but he did talk about that's what he wanted to do also if the auto body didn't work out for him, or whatever.
>
> Q: I want to focus on the aviation mechanics opportunity for a second. When you talked about that, did he tell you that there were things he still had to do to get that done?

A: Yes, sir. I know he went to school, but I don't think he finished. I don't know if he had to take a certification class or whatever. I'm not sure, but I know he wanted to finish.

Q: And that was something you and he talked about?

A: Yes, sir.

Q: And that was something he was planning on doing in the future?

A: Yes, sir . . .

. . .

Q: Okay. You've mentioned that he brought over some books or showed you some books.

A: (Witness nods head).

Q: Tell me about those.

A: Well, it just said aircraft books, and I would see those at his house. He wouldn't bring them over.

Q: Was he studying?

A: Yes.

Q: Okay. So he would be working with them reading them and so forth?

A: Yes, sir.

Q: He wouldn't just say, hey, here's the book?

A: No, he would be reading and studying them . . .

(Id., p. 250.) Moreover, Wilkerson testified at her deposition that although Askew had not satisfactorily completed the aircraft mechanic coursework, he had completed 2,042.5 hours of

classes towards his degree while at TTC. (ECF No. 164-1, p. 20.)

Based on this evidence, the court cannot say that the assumption underlying Dr. Ciscel's opinion - that Askew would have become an aircraft mechanic - is so unsupported so as to require exclusion of his opinion. Rather, the weaknesses in the bases of Dr. Ciscel's opinion, including his assumptions regarding Askew's line of work and when he would start that career path, bear on the weight of his testimony and can be challenged at trial through cross-examination. Given the inherently speculative nature of estimates of a deceased person's future earning capacity, coupled with the court's finding that there is at least some evidentiary support for Dr. Ciscel's assumptions, the court finds that Dr. Ciscel's original opinion is admissible under Rule 702 and Daubert.

III. CONCLUSION

For the above reasons, the City's motion to exclude is GRANTED in part and DENIED in part.

IT IS SO ORDERED.

s/ Tu M. Pham
TU M. PHAM
United States Magistrate Judge

March 15, 2016
Date