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

ALAERIC TEVON BIRGE, a minor, by mother and next friend, PHENIQUESKI S. MICKENS	)	
Plaintiff,	)	**No. 04-2531 B/P**
vs.	)	
DOLLAR GENERAL CORPORATION, DOLGENCORP, INC., TOMMY LEE TURLEY, JEREMY GARRETT, COREY RICHMOND,	)	
Defendants.	)	

ORDER GRANTING DEFENDANTS' MOTION TO EXCLUDE THE EXPERT TESTIMONY OF E. DWAYNE TATALOVICH AND GRANTING PLAINTIFFS' MOTIONS TO EXCLUDE THE EXPERT TESTIMONY OF MERLYN MOORE AND PETER SMERICK

Before the court are defendants Dollar General Corporation and Dolgencorp, Inc.'s (collectively "Dollar General") Motion to Exclude the Expert Opinion and Testimony of E. Dwayne Tatalovich (D.E. 33), plaintiff Alaeric Tevon Birge's Motion to Exclude the Opinion and Testimony of Defendant's Expert Peter Smerick (D.E. 102), and plaintiff's Motion to Exclude the Opinion and Testimony of Defendant's Expert Merlyn Moore (D.E. 104). These motions were referred to the Magistrate Judge for determination.

The court held evidentiary hearings on all three motions. Counsel for all parties were present and heard. At these hearings,

each of the proposed experts testified, and numerous exhibits were admitted.[1] The court has considered the arguments of counsel, briefs submitted in support of and in opposition to the motions and their attached exhibits, exhibits to the evidentiary hearings, the experts' reports and curriculum vitae, and the experts' testimony at their depositions and evidentiary hearings.[2] For the reasons below, the motions to exclude are granted.

I. BACKGROUND

On March 29, 2004, at approximately 6:30 p.m., Dexter Birge parked his sports utility vehicle ("SUV") in the parking lot outside of a Dollar General store located at 7110 East Shelby Drive, Memphis, Tennessee ("the Dollar General store"), and went inside the store to make some purchases. Moments later, as he was leaving the store, Birge was confronted by three men who demanded that Birge give them his keys so that they could take the SUV's rims and tires.[3] During this confrontation with his assailants, Birge was shot and killed, and the assailants drove off with his

[1] See Exhibit and Witness List to Tatalovich Hearing (D.E. 83); Exhibit and Witness List to Moore Hearing (D.E. 198); and Exhibit and Witness List to Smerick Hearing (D.E. 200).

[2] Tatalovich was deposed on September 16, 2005, and his deposition transcript is attached as an exhibit to Dollar General's Motion for Summary Judgment. Moore and Smerick were not deposed.

[3] The assailants had initially followed Birge to a Mapco gas station, and then continued to follow him as he drove to the Dollar General store, which was located down the street from the Mapco.

vehicle. Shortly thereafter, the Memphis Police Department arrested Tommy Lee Turley, Jeremy Garrett, and Corey Richmond (collectively the "criminal defendants") in connection with Birge's murder. All three criminal defendants have been indicted and await trial in Shelby County Criminal Court on charges of assault, robbery, and murder. On July 14, 2004, Alaeric Tevon Birge, a minor, by and through his mother Pheniqueski S. Mickens, filed a complaint against Dollar General alleging that it was negligent in failing to prevent Birge's death on its premises.[4]

In support of his case, plaintiff retained E. Dwayne Tatalovich as a premises security expert. Through Tatalovich, plaintiff seeks to offer, and Dollar General in its present motion seeks to exclude, the following expert opinions at trial: (1) the attack on Dexter Birge was foreseeable because there was a prior "pattern of crime" at the Dollar General store; (2) Dollar General's security measures and store design fell below the generally accepted standard of care, including for example failing to employ a full-time uniformed security guard, failing to install a monitored closed-circuit television ("CCTV") overlooking the parking area along with security signage, failing to provide adequate lighting, failing to provide more window area on the front of the store to allow employees to have greater visual surveillance

[4]On March 11, 2005, plaintiff amended his complaint to add defendants Turley, Garrett, and Richmond.

of the parking area, and failing to remove the row of hedges next to the store so that the criminal defendants would not have a place to hide before the attack; and (3) the criminal defendants were "deterrable opportunist type offenders," and thus the murder of Dexter Birge would have been prevented had Dollar General implemented the above-described security measures. Dollar General contends that these opinions should be excluded because Tatalovich is not qualified by knowledge, skill, experience, training, or education, he did not utilize a reliable methodology to form his opinions, and his opinions will not assist the trier of fact.

In response to Tatalovich's expert report, Dollar General hired its own premises security expert, Dr. Merlyn Moore. In his motion to exclude, plaintiff challenges the following opinions offered by Moore: (1) Dollar General provided a reasonably safe environment and used ordinary care; (2) there was no empirical evidence that indicated an unreasonably dangerous condition existed at the store; (3) the attack on Birge was not reasonably foreseeable; (4) there was no pattern of crime at the store; (5) the area surrounding the store was not a high crime area; and (6) given the predatory nature of the criminal defendants, the crime was not preventable by Dollar General using reasonable security measures.

In addition to Moore's testimony, the plaintiff also seeks to exclude the opinion and testimony of Dollar General's violent crime

analysis expert, Peter Smerick, including his testimony that (1) the criminal defendants could not have been deterred by unarmed security guards, lights, cameras, or other physical security measures; (2) Dollar General had no reason to believe that the offenders would specifically choose the store's parking lot to commit this crime; and (3) there was no pattern of violent criminal behavior for the twenty-month period prior to the attack. Like Dollar General, plaintiff contends that Moore's and Smerick's opinions should be excluded because they are not qualified, do not utilize a reliable methodology, and their opinions will not assist the trier of fact.

II. ANALYSIS

A. *Daubert* and Rule 702

In Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), the United States Supreme Court held that the Federal Rules of Evidence had superseded the "general acceptance" test of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), and 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:

> 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 (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.

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 testimony is scientifically valid. Id. The expert's testimony must be grounded in the methods and procedures of science and must be more than unsupported speculation or subjective belief. Id. The proponent of the testimony does not have the burden of establishing that it is scientifically correct, but that by a preponderance of the evidence, it is reliable. In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 744 (3d Cir. 1994).

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 First Tennessee Bank Nat. Ass'n v. Barreto, 268 F.3d 319, 334 (6th Cir. 2001). In addition, the court may consider "whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying" because the former "provides important, objective proof that the research comports with the dictates of good science." Smelser v. Norfolk Southern Railway, 105 F.3d 299, 303 (6th Cir. 1997).

The Supreme Court in Kumho Tire 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). The particular factors will depend upon the unique circumstances of the expert testimony at issue. See Kumho Tire, 526 U.S. at 151-52. As the Advisory Committee observed,

> [s]ome types of expert testimony will not rely on anything like a scientific method, and so will have to be evaluated by reference to other standard principles attendant to the particular area of expertise. The trial

> judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted. The expert's testimony must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so . . . .
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> Nothing in [the Rule] is intended to suggest that experience alone – or experience in conjunction with other knowledge, skill, training or education – may not provide a sufficient foundation for expert testimony. To the contrary, the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience. In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony. . . .
>
> If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply "taking the expert's word for it." . . . The more subjective and controversial the expert's inquiry, the more likely the testimony should be excluded as unreliable.

Fed. R. Evid. 702 advisory committee's note (2000 amendment) (citations omitted).

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, that is, whether the opinion is relevant. See Daubert, 509 U.S. at 591-93. This relevance requirement ensures that there is a "fit" between the testimony and the issue to be resolved by the trial. See United States v. Bonds, 12 F.3d 540, 555 (6th Cir. 1993). Thus, an expert's testimony is admissible under Rule 702 if it is predicated upon a reliable

foundation and is relevant.

Although a witness may be qualified as an expert in one area of expertise, the expert may be precluded from offering opinions beyond that area of expertise or which are not founded on a reliable methodology. See, e.g., Kumho Tire, 526 U.S. at 154-55; Allison v. McGhan Medical Corp., 184 F.3d 1300, 1317-19 (11th Cir. 1999); Weisgram v. Marley Company, 169 F.3d 514, 518 (8th Cir. 1999); ; Cummins v. Lyle Indus., 93 F.3d 362, 371 (7th Cir. 1996).

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." Fed. R. Evid. 702 advisory committee's notes (2000 amendment) (quoting United States v. 14.38 Acres of Land, 80 F.3d 1074, 1078 (5th Cir. 1996)). "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. Finally, the proponent of the evidence has the burden of establishing that all of the pertinent admissibility requirements are met by a preponderance of the evidence. See Fed. R. Evid. 104(a); see also Bourjaily v. United States, 483 U.S. 171, 175-76 (1987); Smelser, 105 F.3d at 303; West Tenn. Chapter of Associated Builders and Contractors, Inc. v. City of Memphis, 300 F. Supp. 2d 600, 602-03 (W.D. Tenn. 2004).

B. Cases Involving *Daubert* Challenges to Security Experts

The parties have cited, and the court in conducting its own research has found, a relatively limited number of cases which involve challenges to the testimony of premises security experts under Daubert and Fed. R. Evid. 702. Of these cases, the court finds particularly persuasive the analysis in Bethea v. Bristol Lodge Corp., No. CIV.A. 01-612, 2002 WL 31859434 (E.D. Pa. Dec. 18, 2002) ("Bethea I"); Bethea v. Bristol Lodge Corp., No. Civ.A. 01-612, 2003 WL 21146146 (E.D. Pa. May 19, 2003) ("Bethea II"); Maguire v. National Railroad Passenger Corp., No. 99 C 3240, 2002 WL 472275 (N.D. Ill. March 28, 2002); and Starnes v. Sears Roebuck & Co., No. 01-2804, 2005 WL 3434637 (W.D. Tenn. Dec. 14, 2005) (Breen, J.).[5]

In Bethea I, the decedent Charles Bethea was followed by his attacker to several different locations, and was fatally shot and robbed while he was entering a nightclub. Id. at *1. Plaintiffs filed a wrongful death action against the nightclub and its owners

[5]The court has also considered Patterson-Khoury v. Wilson World Hotel-Cherry Road, Inc., 139 S.W.3d 281 (Tenn. Ct. App. 2004), which involved an expert who testified at trial that the attack on the plaintiff was a random act of violence that "in no way could have been deterred or prevented," and also testified about industry standards and the foreseeability of the crime. Id. at 288-89. The issue raised on appeal was whether the court erred in allowing the jury to hear evidence from the expert about standard industry practices in light of McClung v. Delta Square Ltd., 937 S.W.2d 891, 905 (Tenn. 1996). Id. at 289. The Patterson-Khoury court, however, did not consider issues such as reliability of the expert's opinion, which this court must address.

and operators, alleging that they were negligent in failing to provide lighting and security sufficient to maintain a reasonable and safe premises. Bethea I, 2002 WL 31859434, at *1. The plaintiffs and defendants both retained premises security experts, which resulted in the parties filing cross-motions to exclude expert witnesses.

The plaintiffs' expert, Robert Peloquin, was of the opinion that the following deficiencies in the defendants' security were contributing factors to defendants' failure to deter the murder: (1) failure to position a security host at the security desk in the entrance of the club; (2) provision of insufficient lighting in the parking area; and (3) failure to have sufficient security in the parking lot, either by retaining open surveillance camera coverage, circulating security guards to survey the parking area, or providing valet service. Id. at *5. Defendants' expert, Frederick Bornhofen, testified at his deposition that there was no scientifically supported data on the deterrent effects of any of the security measures suggested by Peloquin. Bornhofen cited various studies and industry manuals that he believed demonstrated the questionable deterrent effect of lighting, surveillance cameras, and security personnel presence. Id. at *6.

Initially, the court found that both experts were qualified to testify on the subject of what security measures would make the activities of patrons at bars, restaurants, nightclubs and casinos

safe during their intended visit. Id. at *4, 6. The court, however, applying the standards articulated in Daubert and Kumho Tire, concluded that both experts' opinions failed to meet those standards:

> Because the proffered testimony is not scientific in nature, the methodology need not be subjected to rigorous testing for scientific foundation or peer review. Nevertheless, the expert must still provide a methodology that can be proven to be reliable. . . . The expert must explain the means by which he reached his conclusions, and such means must satisfy at least one of the Daubert factors of reliability. In light of Mr. Peloquin's responses and statements, his analysis appears to be no more than his instinctive reaction to the materials provided. He cites to no industry standard for his opinions on the requisite necessities for adequate security, nor does he provide any explanation that could be tested or subjected to peer review as to how he has reached these opinions. "An 'expert's opinion must be based on the methods and procedures of science rather than on subjective belief or unsupported speculation.'" . . . Indeed, in light of Mr. Peloquin's statements that such conclusions were "common sense," the Court determines that the proffered opinion poses no benefit in assisting "the trier of fact to understand or determine a fact in issue" as required under Rule 104(a) and Daubert. The jury here can use its own common sense as juries do daily in deciding whether defendants were negligent. . . .
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> Mr. Bornhofen does render an opinion that [defendant] "was not negligent or unreasonable in their operation of their business on the day in question." . . . Nevertheless, Mr. Bornhofen provides no basis for this conclusion, other than a conclusory statement citing to his career, training, reading seminar attendance and experience. . . . Despite his statement that "the security efforts [of defendant] were consistent with the perceived threats and the type of business that was operated," Mr. Bornhofen does not explain what would constitute sufficient security measures for Divas given the nature of its business and history, nor does he describe what measures taken by Divas upon which he based his analysis and how they were sufficient. . . . He thus

> does not indicate and support an argument of what would constitute reasonable and sufficient security measures for [defendant]. In the absence of a reliable methodology, Mr. Bornhofen's attempt to disprove Mr. Peloquin's opinion, by arguing that there is no evidence to support it, does not provide a reliable methodology for an independent opinion that defendants were not negligent. I find that Mr. Bornhofen's conclusions, like Mr. Peloquin's pose inadmissible "ipse dixit." . . .
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> . . . It appears from the deposition testimony that there is no scientifically accepted methodology. Mr. Peloquin testified that he was not aware of any studies that were done on the effectiveness of camera surveillance or lighting. . . . When asked whether he was "aware of any standards that have been promulgated anywhere in this country which specified the type of lighting, patrolling or surveillance in a parking lot of a retail establishment such as [defendant's]," he responded, "No, I think it's up to the management to determine what they should do to properly protect their people." . . . Similarly, Mr. Bornhofen testified that he wasn't familiar with any particular studies on the prevention of violent crime at restaurants or nightclub establishments, and that he did not know "of any studies specifically designed to study violence in restaurants or those kind of institutions." . . .

Bethea I, 2002 WL 31859434, at *5-7 (internal citations omitted).

After the court in Bethea I issued its opinion excluding both experts, the defendants proposed another (and even more qualified) expert, Francis P. Friel, to replace Bornhofen as their security expert.[6] Bethea II, 2003 WL 21146146, at *2. Again, the plaintiff filed a motion under Rule 702 to exclude Friel's expert testimony. As it had done in Bethea I, the court concluded that Friel was preliminarily qualified to testify as an expert on premises

[6]Bethea I was decided by Senior District Judge Lowell A. Reed, Jr. Bethea II was decided by District Judge Michael M. Baylson.

security. In discussing Friel's qualifications, the court highlighted his extensive education, training, and experience. Friel graduated from the Federal Bureau of Investigation National Academy, where he specialized in investigating violent crimes, and was also a graduate of the Senior Management Institute for Police. Id. at *4. He attended a masters program in criminal justice and safety at St. Joseph's University, and worked as a police officer and later captain of the Philadelphia Police Department. Id. Friel was director of public safety for a municipality with over 60,000 people in Pennsylvania, where he was responsible for planning and supervising the enforcement of crime prevention, detection, and investigation programs. Id. He received numerous official commendations, including from the FBI, United States Marshals Service, and the United States Strike Force on Organized Crime. Id. He testified as an expert witness before the United States Senate Committee on the Constitution regarding the Handgun Violence Prevention Act of 1987. Id. Finally, Friel served as president of Atlantic Security International Investigations, Inc., served as a consultant on premises security for Lehigh University, and consulted on site and personnel security matters for Major League Baseball. Id.

In terms of his expert opinion, Friel concluded that the murder of Bethea was neither foreseeable or deterrable. Id. at *5-7. In reaching this conclusion, Friel analyzed the incidents and

reports of crime for a three-year period preceding Bethea's shooting. Id. He found that the history of incidents at the establishment, which included incidents involving vandalizing cars, a shooting death in the parking lot, and various physical altercations between patrons, "did not indicate that Bethea's murder or the murder of anyone else was foreseeable." Id. Regarding whether Bethea's killer would have been deterred, Friel opined that

> His violent past, and his willingness to employ violence; his total disregard for other human beings or their suffering resulted in the young man being almost impossible to defend against. To suggest that the placement of surveillance cameras, closed circuit cameras, or similar cosmetic security features would serve as a deterrent to this type of individual is an egregious mistake. . . .
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> It is therefore my opinion, expressed with a reasonable degree of professional certainty, and based upon my examination of the material provided for my review, my experience, training, and education that this crime was not foreseeable, there existed no notice that a robbery murder was likely to take place at Diva's on February 8, 1999 and that those who owned or controlled the property acted reasonably to provide adequate security at 6201 Bristol Pike prior to and at the time of the murder of Charles Bethea.

Id. at *6. Despite Friel's qualifications, Judge Baylson nevertheless excluded the testimony. The court, quoting extensively from Bethea I, concluded that Friel's opinion simply did not meet the admissibility standards of Rule 702. Id. at *8.

In Maguire, the plaintiff was a train conductor who sued the National Railroad Passenger Corporation ("Amtrak") as a result of

injuries she received from being assaulted by a passenger. As Maguire was talking with other passengers, Inez Stevens hit Maguire with a luggage cart out of frustration because Maguire was assisting other passengers instead of her. Defendant filed a motion to exclude the testimony of plaintiff's industrial and premises security expert John Kennish, who was going to testify that Amtrak was negligent in a number of ways, including failing to implement and enforce proper safety procedures. Id. at *1. Specifically, Kennish testified at his deposition that Amtrak failed to provide adequate security in numerous ways, any one of which could have prevented the assault on plaintiff: (1) failure to develop and implement an effective boarding procedure that would limit the number of passengers on the platform to twenty-five or less; (2) failure to properly hire, train, and supervise gate personnel on safety procedures; (3) failure to deploy uniformed personnel on the train platforms while trains were being loaded and deboarded; (4) failure to have adequate warning signage on the platforms; (5) failure to hire a sufficient number of personnel to work on the platforms; (6) failure to have an efficient radio communications system; and (7) failure to have physical crowd control measures, such as barriers or stanchions. Id. at *3.

The Maguire court discussed Kennish's background, training, and experience, but concluded that it did not have to decide whether or not he qualified as an expert in the field of premises

security because, even if he qualified as such an expert, his testimony was nevertheless inadmissible because he failed to utilize an accepted methodology in forming his opinions. Id. at *2-3. For example, the court noted that although Kennish testified that the presence of uniformed security personnel and closed circuit cameras would have helped to deter the assault on Maguire, he could not reference any particular studies to support his opinions. The court also expressed concern regarding Kennish's failure to review all of the factual evidence available to him, as well as his failure to give any thought to the feasibility or cost of his proposed security measures. Id. at *5. Finally, the court stated that even if Kennish's conclusions were found to be reliable under Rule 702, "[i]t is within an average juror's comprehension that security personnel and cameras generally improve safety and that a greater number of people in a given area may cause more frustration and security problems than would a smaller number of people." Id. at *6.

Recently, this court analyzed the admissibility of a premises security expert in Starnes. In that case, the plaintiff was assaulted in the parking lot of a shopping mall in Memphis, Tennessee. Starnes, 2005 WL 3434637 at *1. Plaintiff alleged that the defendants were responsible for providing security for the shopping area and that the precautions taken by the defendants were not reasonable. Id. Plaintiff's expert, William E. Hudson,

offered the following opinion regarding the inadequacy of the security measures at the mall on the day of the attack:

> There was no monitored closed circuit security camera (CCTV) coverage of the Sears parking lot where this incident took place. . . . Due to the incident history at the mall as well as the criminal profile of the area, it is my opinion that the lack of monitored security cameras made the parking area extremely vulnerable to criminal activity. . . .
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> Only one (1) of the security vehicular patrol units responsible for parking lot security was operational at the time of the incident. Normally, two (2) security vehicles are utilized for perimeter parking lot coverage on a daily basis from 11:00 a.m. - 10:00 p.m. . . . The fact that only one security vehicle was on patrol during the incident time frame appears to be a breakdown of operational procedure. Since the roving security vehicles are the only apparent deterrent to criminal activity in the parking areas, this security measure was effectively reduced fifty (50) percent thereby creating vulnerability gaps in assigned coverage. In my opinion, a minimum of two security vehicles should have been operational at all times. Additionally, there should have been a security procedure in place which allowed for a response unit in the event of any incident in the parking lot; the purpose of this response unit would have been to preclude any gaps in parking lot coverage.

Id. at *4.

The Magistrate Judge granted the defendants' motion to exclude, determining that Hudson was not qualified as an expert, and that in any event, his opinion was not reliable because, among other things, the expert failed to provide support for his opinions:

> Hudson purports to testify that there were no monitored closed circuit security cameras in place in the parking lot where the incident occurred, and that in his opinion, the lack of cameras made the parking lot "extremely vulnerable to criminal activity" when

considered in conjunction with the incident history at the mall as well as the criminal profile of the area. He was unable, however, to cite to any tests or methodology he employed to reach this conclusion and could not point to any statistical data or empirical studies that would support this position. In fact, Hudson stated that his opinion that closed circuit security cameras may have prevented Plaintiff's assault was based upon his "general experience" and nothing else, . . .

On page 9 of Exhibit B of Plaintiff's Response, Hudson states that a comparison of the five (5) precincts in Memphis reveals that the South Precinct had a particular ranking in certain categories for the time period. Hudson does not, however, attach or refer to any supporting information or statistics to support his conclusion. Similarly, on page 10 of Exhibit B, he states that the "crime risk" at Southland Mall is five (5) times the national average, six (6)times the state average, and two point six (2.6) times the county average. Pl.'s Resp. Ex. B, p.10. As such, he concludes that the threat of crimes against both property and persons in and around Southland Mall is at high risk. Again, Hudson does not offer any supporting documentation to support his conclusions, nor does he even identify the source of these statistics. While it is possible Hudson's conclusion that the Southland Mall area is a high risk area is correct, he fails to provide the court with any information from which the reliability of his conclusion can be ascertained.

Hudson's opinions as to security needs at Southland Mall appear to be based upon his "general experience" and "common sense." Hudson Depo. P. 30, 80. He cannot identify any publications, studies or other empirical data to support his opinion that security cameras and additional patrols reduce the incidents of crime in mall parking lots. It seems to make common sense that such extra security measures would, but Hudson wants to testify as an expert and he should be able to identify some data to support his conclusions. Additionally, an opinion that is based entirely upon Hudson's general experience and common sense is incapable of testing and thus the known or potential rate of error cannot be determined.

(See Oct. 26, 2005 Order Granting Defendant's Motion to Exclude

Testimony of Plaintiff's Expert, D.E. 158).

The plaintiff subsequently filed objections with the District Judge to the order excluding Hudson's testimony. Although the court found that Hudson was qualified to testify as an expert on security at a shopping mall, the court agreed with the Magistrate Judge's determination that the expert's proffered opinion offered no basis, other than his experience, for his opinions:

> [Like Bethea II], the opinions offered by Hudson are completely unsupported. The Court's gatekeeping function under Daubert requires more than simply "taking the expert's word for it." Fed. R. Evid. 702 advisory committee's note (2000 amendment); see also McClain v. Metabolife Int'l, Inc., 401 F.3d 1233, 1244 (11th Cir. 2005), reh'g and reh'g en banc denied (July 15, 2005). In addition, the Court finds that his "expert opinion" will not assist the trier of fact. See Ancho v. Pentek Corp., 157 F.3d 512, 517 (7th Cir. 1998) (an expert "must testify to something more than what is obvious to the layperson"); Lovato, 2002 WL 1424599 at *12 (expert's opinion that railroad company could reduce the probability of worker injury by adding more employees of no assistance, as jurors could figure that out on their own).

Starnes, 2005 WL 3434637 at *5. The court therefore excluded Hudson's expert testimony.

The court now turns to the motions to exclude filed by the plaintiff and Dollar General.

C. Defendants' Motion to Exclude E. Dwayne Tatalovich

1. Tatalovich's Qualifications

Tatalovich studied business administration and law enforcement at Glendale Community College from 1967 to 1969 before leaving "a few credits short of an associate's degree." (Tatalovich Dep. at

20.) Tatalovich later attended Arizona State University's executive development program in 1979, but did not receive a degree from that institution. (Id. at 22-23.) In 1968, Tatalovich founded the Tatt Investigating Firm, which provided security services in nine states and employed approximately 1,500 security personnel. (Tatalovich Rep. at 1.) Tatt's services included providing security, patrol, and loss prevention encompassing risk analysis, threat assessment, executive protection, and workplace violence; electronic protective systems, CCTV, and barrier design; nuclear security services; and consulting services including surveys, audits, and staffing analysis. (Id.)

In 1984, Tatt merged with Pedus Services, a German-based security firm. Tatalovich served as chairman of Tatt/Pedus in 1984 and as a consultant for Tatt/Pedus through 1987. (Id.) Tatalovich describes Tatt/Pedus as "one of the largest security firms in the Western United States, employing approximately three-thousand security personnel with services ranging from the multi-housing industry to . . . security guard and patrol services, electronic alarm systems, access controls, [and] barrier design . . . ." (Id.) In 1983, Tatalovich founded Tatalovich & Associates, a security consulting firm for which he currently serves as chairman. During this time, Tatalovich has performed consulting services for private companies in the resort, hotel, restaurant, and banking industries. (Id. at 4-6.) In addition, he was the former chairman

and managing partner of the Phoenix Law Enforcement Association, a joint venture providing off-duty police officers to the private sector throughout Arizona for convenience stores, hotels, retail shopping centers, and restaurants. (Id. at 4-5). Tatalovich is the Chief Security Consultant to ILX Resorts, an international resort company publicly traded on the American Stock Exchange with its corporate headquarters located in Arizona. (Id. at 5). He has been retained as a security expert in numerous premises security cases in Arizona, Florida, Iowa, Nevada, Texas, and Tennessee.[7] (Id. at 16).

Based on his background and experience, the court finds that Tatalovich possesses specialized knowledge beyond the ken of the average layman in the area of premises security, and thus is preliminarily and generally qualified to testify as an expert witness on this subject. Although Tatalovich did not receive a college degree in law enforcement, "Rule 702 specifically contemplates the admission of testimony by experts whose knowledge is based on experience." Walker v. Soo Line R. R. Co., 208 F.3d 581, 591 (7th Cir. 2000). Tatalovich has performed over 2,500 security surveys and audits, has received security or investigation licenses in several states, and has served as chairman for one of

[7]At his deposition, Tatalovich testified that he has been deposed as an expert witness in some of those cases, but because all of those cases settled prior to trial, he has not testified as an expert at trial. (Tatalovich dep. at 23-24).

the country's largest private security firms. (Tatalovich Rep., Ex. 1, at 1, 16.) The court finds that Tatalovich's thirty-seven years of experience in providing security in both the private and public sectors is sufficient to qualify him as an expert.

2. Reliability of Tatalovich's Opinions

a. Foreseeability of the Attack

To maintain his action for negligence, the plaintiff must prove "(1) a duty of care owed by defendant to plaintiff; (2) conduct falling below the applicable standard of care that amounts to a breach of that duty; (3) an injury or loss; (4) cause in fact; and (5) proximate, or legal, cause." McClung v. Delta Square Ltd., 937 S.W.2d 891, 894 (Tenn. 1996) (citing McCall v. Wilder, 913 S.W.2d 150, 153 (Tenn. 1995)).[8] The Tennessee Supreme Court's decision in McClung is controlling in cases involving the duty of care owed by premises owners to protect customers from the criminal acts of third parties committed on the premises. See Staples v. CBL & Assocs, Inc., 15 S.W.3d 83, 91 (Tenn. 2000). McClung provides that although businesses are not insurers of their customers' safety, they have a duty to take reasonable steps to protect their customers from foreseeable criminal attacks by third

[8]In this diversity case, neither party disputes that Tennessee law governs plaintiff's premises liability claims. See Ray Indus., Inc. v. Liberty Mut. Ins. Co., 974 F.2d 754, 758 (6th Cir. 1992); Z Gem Co. v. Dollar Rent-A-Car, No. 03-2983, 2005 U.S. Dist. LEXIS 38293 (Dec. 21, 2005).

parties.[9] McClung, 937 S.W.2d at 902; Patterson-Khoury, 139 S.W.3d at 286. The court in McClung emphasized that the primary inquiry in determining whether a business owes its customers a duty to protect against a criminal act by a third party is whether the criminal act was foreseeable. McClung, 937 S.W.2d at 899; Patterson-Khoury, 139 S.W.3d at 286. The foreseeability of criminal acts must, in the first instance, be considered by the court to determine, as a matter of law, whether the defendant owed a duty of care to the plaintiff. Patterson-Khoury, 139 S.W.3d at 286. Foreseeability is also a consideration for the jury in deciding whether the defendant breached its duty of care. Id. ("We agree with [plaintiff] that evidence of crime in the vicinity is an element which may establish foreseeability, which must be considered by the jury in determining whether the defendant has breached its duty of care.").

In his expert report, Tatalovich opines that "Dollar General had reason to know, or should have known, that criminal acts against its customers at its Shelby store were reasonably foreseeable. This conclusion is based on crimes and criminal incidents that had occurred at [the store] prior to the death of

[9]In so holding, the Tennessee Supreme Court overturned its prior decision in Cornpropst v. Sloan, 528 S.W.2d 188 (Tenn. 1975), which held that businesses have no duty to protect against criminal acts of a third party unless the business knew or had reason to know that criminal acts which pose an imminent probability of harm to a customer were occurring or about to occur on the premises. McClung, 937 S.W.2d at 896.

Mr. Birge." (Tatalovich Rep. at 72.) It is clear that Tatalovich's opinion is based primarily on his experience. When asked at his deposition how he determined that there was a pattern of crime, Tatalovich testified that he based his opinion on his prior experience and that the opinion was "Tatalovich on patterns":

> Q: Okay. How do you determine whether there is a pattern? I know you have expressed an opinion that these five incidents tell you that there is a pattern, but how – is there some recognized standard of defining what is a pattern and what isn't? Or is this just Tatalovich on patterns?
>
> A: I would say to a great extent this is Tatalovich on patterns. My training in the private sector was to look at crimes that occurred, and if the crimes are reoccurring, if they're similar type crimes, in the private sector we refer to those as a pattern of crimes. And, in my opinion, which I have given you, we have a pattern of ongoing reoccurring crimes that are similar in type, which put the employees and customers at risk and potential risk.

(Tatalovich Dep. at 113).

Tatalovich cites to no publications, studies, research, or other data that support his methodology in determining what constitutes a "pattern of crime," his opinion that there was a pattern of crime at the Dollar General store, or his opinion that the attack was foreseeable.[10] As such, his methods and opinions

[10]In his expert report, Tatalovich identified unnamed "industry studies," FBI annual UCR Part One Crimes, Morgan Quinto City Crime Rankings, and Crime Prevention Through Environmental Design ("CPTED") as support for his opinions. (Tatalovich Rep. at 72). However, at his deposition and hearing, Tatalovich did not explain in what way these studies or publications support his opinions. Although Tatalovich testified at his hearing that his methodology of considering crime reports for a five-year period

cannot be tested or subjected to peer review, there are no known rates of error for the method or controlling standards, and there is no evidence that his methods are generally accepted in the industry. Daubert, 509 U.S. at 593-94; Beathea I, 2001 WL 31859434, at *5; Maguire, 2002 WL 472275, at *5; Starnes, 2005 WL 3434637, at *5. Moreover, the proffered testimony was not developed from research independent of this litigation. Smelser, 105 F.3d at 303.

In addition, although Tatalovich's opinion is based on his experience, he has not explained how his experience leads to the conclusion reached, why that experience is a sufficient basis for his opinion, or how that experience is reliably applied to the facts. Fed. R. Evid. 702 advisory committee's note (2000 amendment). "While the relevant factors for determining reliability will vary from expertise to expertise, the [Rule] rejects the premise that an expert's testimony should be treated more permissively simply because it is outside the realm of science. An opinion from an expert who is not a scientist should receive the same degree of scrutiny for reliability as an opinion

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found support in Parking Structures (Anthony P. Chrest, et. al., Parking Structures, 3d Ed., Ex. 15), he did not contend that Parking Structures offers any standards for determining what constitutes a "pattern of crime." In his response brief in opposition to Dollar General's motion to exclude, plaintiff states only that Tatalovich's opinion regarding a pattern of crime and foreseeability is supported by his "35 years of experience in the premises security business." (Pla.'s Response at 23).

from an expert who purports to be a scientist." Id.

Tatalovich testified at his deposition that "I think that at a common sense level, pattern is multiple." (Tatalovich Dep. at 246). Thus, in addition to being based on an unreliable and untested methodology, his opinion regarding a "pattern of crime" and foreseeability will not assist the jury. See Bethea I, 2002 WL 31859434, at *5 ("Indeed, in light of Mr. Peloquin's statements that such conclusions were 'common sense,' the Court determines that the proffered opinion poses no benefit in assisting 'the trier of fact to understand or determine a fact in issue' as required under Rule 104(a) and Daubert."); Maguire, 2002 WL 472275, at *6 ("[i]t is within an average juror's comprehension that security personnel and cameras generally improve safety"); Starnes, 2005 WL 3434637, at *5 ("In addition, the Court finds that [Hudson's] 'expert opinion' will not assist the trier of fact."); see also Ortiz v. New York City Hous. Auth., 22 F. Supp. 2d 15, 24 (E.D.N.Y. 1998) (concluding that the consequences of the failure to maintain reasonable security in public housing complex, resulting in attack on resident, were within the understanding of the average juror and did not require expert testimony); aff'd 198 F.3d 234 (2d Cir. 1999); Fante v. Trump Taj Mahal Assoc., P'ship, Inc., 1996 WL 263652, at *5 (N.J. Super.App.Div. 1996) (claims by woman trampled in casino allegedly due to poor crowd control and security were "easily understood, and an understanding of dangers specific to a

crowded casino cannot be deemed an uncommon experience, especially for Atlantic County jurors"); Van Blargan v. Williams Hospitality Corp., 754 F. Supp. 246, 249 (D. Puerto Rico 1991) (concluding that "hotel security is not a subject which lends itself to expert testimony" because "it deals with common occurrences that the jurors have knowledge of through their experiences in everyday life"). Here, the proffered opinion will not assist the trier of fact in better understanding the evidence. The jury is capable of considering the prior history of crime and other incidents at Dollar General, and determining whether the attack was foreseeable and whether Dollar General breached a duty, if any, owed to Birge. Thus, Tatalovich's proffered opinion that there was a "pattern of crime" at the Dollar General store and that the attack was foreseeable to Dollar General is excluded.

b. Dollar General Breached the Standard of Care

Tatalovich opines in his expert report that "Dollar General fell below the generally accepted standards, practices or recommendations of the security industry and/or below a reasonable and ordinary standard of care" in that Dollar General failed to (1) employ a full-time unarmed security guard to patrol the front of the store; (2) install monitored CCTV cameras overlooking the parking area along with security signage; (3) maintain adequate lighting in the parking area, which did not meet the minimum recommendations of the International Engineering Society of North

America ("IESNA"); (4) remove the row of hedges that separates the store's parking lot from the adjacent First Tennessee Bank's property and replace it with a security fence, which was a "significant breach" of the CPTED; and (5) allow sufficient space for windows on the front of the store to allow employees to have visual surveillance of the parking area. (Tatalovich Rep. at 36, 38-40, 43, 45-46, 50, 52, 68, 69; Tatalovich Dep. at 175, 177, 234, 236, 262).

At his Daubert hearing, however, Tatalovich was not able to identify any recognized industry standards with respect to uniformed security guards, monitored CCTV, or any of the other "security measures." Indeed, Tatalovich testified at the hearing that there are no recognized security standards in private sector retail, and that none of Dollar General's alleged security deficiencies, standing alone, breached a standard of care.

Nevertheless, Tatalovich opines, without any support, that all of these security deficiencies in combination fell below the standard of care. His inability to cite to any standards in the retail security industry to support his opinion renders Tatalovich's testimony unreliable. See Bethea I, 2002 WL 31859434, at *5 (explaining that expert's opinion was unreliable because he "cites to no industry standard for his opinions on the requisite necessities for adequate security, nor does he provide any explanation that could be tested or subjected to peer review as to

how he has reached these opinions."); see also Sears, Roebuck & Co. v. Midcap, 893 A.2d 542, 554-55 (Del. 2006) (affirming trial court's order excluding expert's testimony on industry standards because "there was no evidence that [] program was a standard adopted by the gas supply industry as a whole."); Grdinich v. Bradlees, 187 F.R.D. 77, 81 (S.D.N.Y. 1999) (holding that expert's testimony was unreliable where nothing in expert's deposition or report showed an industry standard; "[w]ithout 'industry standards' to rely upon, Torphy seems to base his conclusions on his own authority. Because 'knowledge connotes more than subjective belief or unsupported speculation,' . . . there is no reliable foundation for Torphy's expert opinion.").

Tatalovich believes that the parking area lighting at the Dollar General store did not meet the minimum recommendations of the IESNA and that Dollar General's failure to remove the row of hedges that separates the store's parking lot from the adjacent property was a "significant breach" of the CPTED. However, Tatalovich does not identify which parts of the IESNA or CPTED apply specifically to retail stores such as Dollar General, or why a "violation" of the IESNA or CPTED falls below the standard of care. Tatalovich testified at the hearing that the IESNA and CPTED contain only guidelines and recommendations, and that security in the retail sector operates on "generally accepted practices" rather than "standards." In addition, it is undisputed that Tatalovich

never conducted any tests on the lights in question, and his opinion regarding the adequacy of lighting is based on his review of video footage from media news coverage of the murder. In sum, Tatalovich does not explain how any of these sources support his conclusion, nor does he explain how his experience is reliably applied to the facts of this case to support his opinion that Dollar General breached the standard of care. As Daubert and Rule 702 require more than the proffered expert's word to support his testimony, Tatalovich's opinion that Dollar General's lack of security measures fell below a reasonable standard of care is excluded.

c. Deterrability of the criminal defendants

In his report and at his deposition, Tatalovich testified that "if Dollar General had provided reasonable and adequate security measures and devices . . . the assault upon Mr. Birge would not have occurred and he would not have been shot and killed." (Tatalovich Rep. at 73.) Tatalovich's opinion is problematic on several grounds.

First, Tatalovich's opinion goes well beyond his area of expertise, as he is not qualified to give an opinion on what motivated the criminal defendants to attack Birge, and he certainly is not qualified to give the opinion that the murder would not have occurred under different circumstances. Tatalovich has no education, training, or experience in this area:

> Q: . . . apart from this Wal-Mart study that you have shown me, can you direct me to any other textbook, treatise, study that would indicate that where you have these gang members, two gang members, and according to Dr. Hutson, a gang wannabe on drugs, who have decided they are taking this man's car, that an unarmed security guard would have stopped them from doing that?
>
> A: No. . . .
>
> Q: Well, let me ask you this: Dr. Hutson said these guys valued the wheels on this car more than they did human life. Do you remember he said that? . . .
>
> A: I am not going to disagree with Dr. Hutson on that. Dr. Hutson is a forensic psychologist. I think I'm walking to an area that I ought not be in. He's the guy that is going to tell us what their mental state is. I am going to tell you what would have prevented the crime.
>
> Q: How can you opine on deterrability if you don't know their mental state?
>
> A: I have opined on deterrability based on the actions that they took, based on the known prior criminal history, and based on their statements. . . .

(Tatalovich Dep. at 223-225).

Second, he does not provide support for his methodology so as to make it reliable. Although he cites to a 1994 Wal-Mart study on roving patrol vehicles and to a book by Larry Siegel on criminology, Tatalovich does not explain with any specificity how those sources support his methodology. Third, his opinion that the attack would not have occurred if certain security measures had been in place amounts to pure speculation. Thus, Tatalovich's opinion on the deterrability of the criminal defendants is excluded.

D. Plaintiff's Motion to Exclude Merlyn Moore

1. Moore's Qualifications

Merlyn Moore received a bachelor's degree in Police Administration and Political Science from Indiana University in 1964. In 1965, he joined the Navy, where he worked as an Intelligence Officer and a Security Group Officer. Moore served on active duty until 1968 and in reserve until 1994, when he retired as a captain. During his military service, he worked with the Naval Investigative Service supervising law enforcement and security. After retiring from active duty, Moore enrolled in a graduate program at Michigan State University. While in school, he taught courses at the School of Criminal Justice and conducted research at the National Center of Police and Community Relations. He was a Doctoral Fellow at the National Institute of Law Enforcement and Criminal Justice. He received a masters degree in Criminal Justice in 1970 and a Ph.D. in Social Science in 1972.

From 1972 to 1978, Moore was an associate professor at Sam Houston State University where he taught Introduction to Security, an undergraduate course, and Security Management, a graduate course. In 1978, he left Sam Houston State to serve as a police commander in Eugene, Oregon. In this capacity, Moore conducted risk assessment and coordinated security services and countermeasures for the Eugene Police Department. This work included security assessments at retail establishments in the Eugene area. In 1980, Moore returned to Sam Houston State where,

as a Professor in the Criminal Justice Center, he designed a masters program in Security Studies. He retired as a full-time professor in 2004 but continues to consult and teach during part of the year. He is a member of the Academy of Criminal Justice Sciences, the American Society of Criminology, and the International Association of Chiefs of Police.

Throughout his career, Moore has worked as a security consultant. He has advised Exxon Mobil on gas station security, CBL on shopping mall security, and the navy on security for its European bases. He was a consultant to the Enforcement Division of the Law Enforcement Alliance of America, the National Crime Prevention Institute, the Texas Commission on Law Enforcement Officers Standards and Education, and the National Center for the Analysis of Violent Crime. He was a senior partner in Moore, Bieck, Heck, and Associates, a consulting firm specializing in police and security-related work, and he is currently the President of the consulting firm M.D. Moore & Associates. He has provided expert testimony in over two hundred cases as an expert on security issues.[11]

Based on his background and experience, the court finds that Moore possesses specialized knowledge beyond the ken of the average

[11]Moore testified as an expert in Timberwalk Apts. v. Cain, 972 S.W.2d 749 (Tex. 1998), one of the leading cases in Texas on premises liability. However, Moore testified at his hearing that to his knowledge his testimony has never been challenged under Daubert in any of his other cases.

layman in the area of premises security, and thus is preliminarily and generally qualified to testify as an expert witness on this subject.

2. Reliability of Moore's Opinions

Although the motion filed by plaintiff focused primarily on the facts relied upon and conclusions drawn by Moore as opposed to his methodology, in his reply brief and at the Daubert hearing, plaintiff also raised challenges to Moore's methodology. Moreover, the court in its gatekeeper role may consider a proffered expert's methodology *sua sponte* to ensure that the expert's opinion meets the requirements of Daubert. O'Conner v. Commonwealth Edison Co., 13 F.3d 1090, 1094 (7th Cir. 1994); Loeffel Steel Prod., Inc. v. Delta Brands, Inc., 387 F. Supp. 2d 794, 800 (N.D. Ill. 2005). The court will therefore consider the methodology employed by Moore to determine if his opinions meet the Daubert standards.

Moore intends to testify that (1) Dollar General provided a reasonably safe environment and used ordinary care by providing a conscientious management and staff, a well-maintained and aesthetically pleasing property, and adequate lighting; (2) there was no empirical evidence that indicated an unreasonably dangerous condition at the store; (3) the attack on Birge could not have been anticipated by Dollar General and thus was not reasonably foreseeable; (4) there was no pattern of crime at the store; (5) the area surrounding the store was not a high crime area; and (6)

given the predatory nature of the criminal defendants, the crime was not preventable by Dollar General using reasonable security measures.

For the reasons stated earlier regarding exclusion of Tatalovich's proffered testimony, the court likewise excludes Moore's expert testimony. Like Tatalovich, Moore cites to no publications, studies, research, or other data that support his methodology in determining what constitutes a "pattern of crime" at the Dollar General store or whether the attack was foreseeable or preventable.[12] Moore's methods and opinions cannot be tested or subjected to peer review, there are no known rates of error for the method or controlling standards, and there is no evidence that his methods are generally accepted in the industry.[13] Daubert, 509 U.S.

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[12]At Moore's hearing, Dollar General admitted various studies relating to crime classification and the effectiveness of police presence and security guards to deter crime (see Exhibits 5, 6, 7, 8, 9, and 10 to Moore's hearing). Although these studies may support various theories relied upon by Moore, they do not support the *methodology* he employed in this case.

[13]At Moore's hearing, Dollar General admitted an exhibit titled "International Association of Professional Security Consultants, Inc. – Best Practices Bulletin Number 2, Subject: Forensic Methodology (Released: June 9, 2000)." (Ex. 4). This bulletin purports to set forth certain standards that security experts should follow when they are hired as an expert for litigation. The bulletin recommends that the expert review discovery materials, crime reports, and media coverage; inspect the site where the incident occurred and interview witnesses; conduct a physical survey of the scene, including reviewing security guard staffing, security policies and procedures, and building site plans; and "[b]ased upon the analysis, reach a conclusion on the issues of foreseeability, preventability, and causation." The court finds that these "best practices" fall

at 593-94; Beathea I, 2001 WL 31859434, at *5; Maguire, 2002 WL 472275, at *5; Starnes, 2005 WL 3434637, at *5. Also, his opinion was not developed from research independent of this litigation. Smelser, 105 F.3d at 303.

Moore's opinion that Dollar General provided a reasonably safe environment and used ordinary care by providing a conscientious management and staff, a well-maintained and aesthetically pleasing property, and adequate lighting is not supported by any industry standards.[14] This opinion also does not assist the trier of fact. Likewise, the basis for Moore's opinions is substantially similar to Tatalovich in that both experts base their opinions primarily on their experience. Although Moore, in reaching his opinions, has a substantially stronger academic background and relies on more studies than Tatalovich, the end result is the same with both experts: neither provides opinions based on a reliable methodology, and neither have demonstrated how his experience in the security

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well short of any reliable methodology. Moreover, as Moore testified at the hearing, depending on the circumstances of a particular case, he may disregard some of these best practices and add others that are not identified in the bulletin. Allowing experts this flexibility in deciding which best practices to follow and which to ignore further highlights the unreliability of the methodology.

[14]Exhibit 8 to Moore's hearing, an article titled "Broken Windows" by James Q. Wilson and George L. Kelling, arguably supports the general proposition that an aesthetically pleasing environment reduces crime. However, from this broad principle, Moore opines that Dollar General provided a reasonably safe environment and used ordinary care. This conclusory opinion is not based on a reliable methodology.

field is reliably applied to the facts.[15] For these reasons, Moore's expert testimony is excluded.

E. Plaintiff's Motion to Exclude Peter Smerick

1. Smerick's Qualifications

Peter Smerick received a bachelor's degree in Political Science from Pennsylvania State University in 1965 and a Masters of Education degree in Instructional Technology from the University of Virginia in 1986. In 1970, Smerick began working as a special agent for the FBI, specializing in organized crime, foreign counter intelligence, and criminal investigations. From 1976 to 1985, Smerick worked as a document examiner/photographic evidence examiner at the FBI laboratory in Washington, D.C., specializing in the analysis of evidence in bank robbery, child pornography, kidnapping, extortion, and white collar crime investigations. Between 1985 and 1988, Smerick was an FBI laboratory instructor in crime scene management and forensic science, training evidence technicians, police officers, and special agents in crime scene preservation and processing techniques. From 1988 to 1994, Smerick was assigned to the FBI's National Center for the Analysis of Violent Crime (NCAVC) as a senior violent crime analyst and criminal profiler. During this period, Smerick provided personality assessments of unknown offenders and performed

[15]Dollar General admitted various excerpts from books and articles at Moore's hearing. (Exhibits 5, 6, 7, 8, 9, and 10).

behavioral analysis of violent crime scenes. Since 1994, Smerick has served as vice-president, and currently as president and CEO, of the Academy Group, Inc., a security consulting firm based in Manassas, Virginia. During this period, he has consulted in over 170 premises liability cases, and has testified thirteen times in federal, state, local, and military courts in civil and criminal cases as an expert witness. In one of those cases a court denied a motion to exclude Smerick's opinions. (Order Denying Plaintiff's Motion fo Preclude Testimony of Defense Experts, Moore v. 7-Eleven, No. 00-cv-3640 (E.D. Pa. July 20, 2001)). Smerick also participated in a ten-year project by the FBI's NCAVC which resulted in a book titled Crime Classification Manual: A Standard System for Investigating and Classifying Violent Crimes (Ex. 1 to Smerick Hearing).

The court finds that Smerick is generally and preliminarily qualified to provide expert testimony concerning violent crime analysis. The court finds that Smerick's background with the FBI, and in particular his experience with the NCAVC, renders him sufficiently qualified to offer expert testimony.

2. Reliability of Smerick's Opinions

Smerick offers the following opinions: (1) the criminal defendants could not have been deterred by unarmed security guards, lights, cameras, or other physical security measures; (2) Dollar General had no reason to believe that the criminal defendants would

specifically choose the store's parking lot to commit this crime; and (3) there was no pattern of violent criminal behavior for the twenty-month period prior to the attack.[16]

Smerick's primary opinion, based on his violent crime analysis, is that the attack on Dexter Birge was "a 'high-risk' crime for the offenders to commit because it did not occur in a dark, isolated location but in a well-illuminated parking lot in the presence of potential eyewitnesses . . . ." (Smerick Rep. at 10.) Regarding the effectiveness of potential security measures on the criminal defendants, Smerick states:

> Tommy Turley, Jeremy Garrett, and Corey Richmond were not youthful "Opportunist Type Offenders" but were 24- to 25-year-old men, two of whom (Turley & Richmond) had criminal histories. They were not searching for any "Target of Opportunity" but a specific target – a vehicle with 20" rims. Mr. Birge was attacked by the offenders

[16]The motion to exclude also included the following specific alleged errors in Smerick's opinion: (1) the store's parking lot was well-illuminated; (2) Birge physically resisted the carjacking; (3) the criminal defendants did not loiter or behave suspiciously on the store's property for a measurable length of time and the attack was short in duration; (4) banks have multiple video cameras and yet bank robberies are on the increase; and (5) London, England employs a very sophisticated CCTV monitoring system and even its trained personnel could not detect the offenders prior to the detonation of bombs in London's transit system. As an initial matter, these points go to facts supporting Smerick's opinions, and are not expert opinions themselves. The court concludes that with respect to the first three points, the jury is capable of viewing the video footage and considering the evidence to draw its own conclusions on these points without the need for Smerick's opinion. With respect to points (4) and (5), in addition to being of questionable relevance, this anecdotal evidence falls far short of the studies or data necessary to render an opinion on the effectiveness of cameras reliable under Daubert.

> because of the vehicle he was driving not because Mr. Birge visited [the] Dollar General Store. The location of the crime was of no significance to the offenders. There is no evidence that they conducted a "security survey" to determine what security measures were in place at Dollar General prior to committing this crime. They were oblivious to physical security features. . . . Offenders who plan their crimes, arm themselves with handguns, have an escape plan, and most importantly, are willing to take another persons life while committing a crime, cannot be deterred by unarmed security guards, lights, cameras, and other physical security measures.

(Smerick Rep. at 11.) The court concludes that Smerick's opinion is not supported by a reliable methodology. In reaching this conclusion, the court finds instructive two state supreme court cases which rejected similar types of expert testimony.

In State v. Fortin, 162 N.J. 517 (N.J. 2000), a criminal capital murder case, the state sought to admit testimony of Robert R. Hazelwood as an expert in the analysis of a criminal's customary manner of operation (modus operandi or "M.O.") and ritualistic crimes. Hazelwood, like Smerick, worked for several years in the FBI's Behavioral Science Unit and later joined Smerick's consulting firm, the Academy Group. Id. at 511. Hazelwood compared the violent attacks on two victims and determined that the modus operandi of the crimes revealed fifteen points and five behavior traits common to both crimes. Hazelwood determined that the likelihood of different offenders committing two such extremely unique crimes was highly improbable, and concluded that the same perpetrator committed these crimes. Id. at 522-23. The New Jersey Supreme Court ruled that Hazelwood's opinion failed to meet the

standards for the admission of testimony that relates to scientific knowledge, and held that the testimony was inadmissible. Id. at 526. The court stated that "there are no peers to test his theories and no way in which to duplicate his results." Id. at 527. The court concluded its opinion by stating

> In all fairness, Hazelwood did not purport to cloak his testimony with a mantra of scientific reliability. He candidly acknowledged that linkage analysis is not a science, but rather is based on years of training, education, research, and experience in working on thousands of violent crimes over an extended period of time. Such methods have great value for purposes of criminal investigation. We therefore believe that one such as Hazelwood has a proper role in a criminal trial based on his experience as an expert in criminal investigative techniques. Such a witness is qualified to discuss similarities between crimes without drawing conclusions about the guilt or innocence of the defendant. Within that ambit, his testimony can be of assistance to the court and perhaps a jury on the issue of admission of other-crime evidence. Of course, Hazelwood would not be permitted to testify on the ultimate issue of whether the person that assaulted Trooper Gardner is the same person that murdered Melissa Padilla.

Id. at 515.

In State v. Stevens, 78 S.W.3d 817 (Tenn. 2002), another capital case, the defendant was charged with hiring Corey Milliken to murder defendant's wife and mother-in-law. Id. at 822. Defendant sought to offer expert testimony from Gregg McCrary to testify about the behavior and motivation of the offender based on his analysis of the physical evidence found at the crime scene. Id. at 829. The defendant offered McCrary's opinion to show that Milliken committed sexually motivated murders as a violent response

to a fight with his family just hours before the crime. Id. Like Smerick and Hazelwood, McCrary worked in the FBI's Behavioral Science Unit for several years, investigating cases and conducting research on violent criminal behavior, before managing his own consulting firm on behavioral criminology.[17] Id. at 829-30. McCrary described the crime scene as a "disorganized sexual homicide scene" and that criminals usually commit disorganized violent crimes as a result of some "stressful event" in the criminal's life. Id. at 830. The Supreme Court of Tennessee affirmed the trial court's refusal to admit McCrary's testimony to the extent it involved interpretation of criminal behavior, including his opinion regarding what motivated the killer. Id. at 831. Analyzing McCrary's opinion under Daubert and Kumho Tire, the Court concluded that the expert's behavioral analysis opinion did not "bear sufficient indicia of reliability to substantially assist the trier of fact." Id. at 836.

Similarly, in this case Smerick's opinion regarding the deterrability of the criminal defendants lacks sufficient indicia of reliability. Like the experts in Fortin and Stevens, Smerick's methods and opinions cannot be tested or subjected to peer review, there are no known rates of error for the method or controlling standards, and there is no evidence that his methods are generally

[17]Moore testified at the hearing that he worked with McCrary at the FBI and that they were involved in the same type of work in the Behavioral Science Unit.

accepted in the industry. Although Smerick testified at his hearing that he employed the same methodology in analyzing the crime in this case as he did in his years with the FBI and as described in the Crime Classification Manual, Smerick testified that the Manual contains "guidelines," not standards. Thus, Smerick's opinion regarding the deterrability of the criminal defendants is excluded.

Furthermore, Smerick opines that Dollar General had no reason to believe that the offenders would specifically choose the store's parking lot to attack Birge. Like Tatalovich and Moore's opinion on foreseeability, Smerick's opinion is not based on any reliable methodology. Finally, Smerick's opinion that there was no pattern of violent crime during the twenty-month period prior to the attack does not assist the trier of fact, as the jury is able to consider the crime data and make its own determination. Thus, this testimony is excluded.

III. CONCLUSION

For the reasons above, the motions to exclude the expert opinion and testimony of Tatalovich, Moore, and Smerick are GRANTED.[18]

IT IS SO ORDERED.

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[18]This order does not exclude other information gathered by the various experts relating to crimes and other incidents at or near the Dollar General store, such as crime reports, statistics, security measures employed by other businesses, and calculations derived from this information.

/s Tu M. Pham

TU M. PHAM
United States Magistrate Judge

September 28, 2006

Date