

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

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LYNN BROOKS,  
d/b/a Renovation Plus Construction,

Plaintiff/Counter-Defendant,

v.

No. 1:17-cv-01213-JDB-jay

CLIFF BILBO and wife, MYRA BILBO,

Defendants/Counter-Plaintiffs.

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ORDER DENYING MOTION TO EXCLUDE EXPERT TESTIMONY

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Plaintiff/Counter-Defendant Lynn Brooks, d/b/a Renovation Plus Construction (“Brooks”), moves the court to exclude the expert testimony of Tom Brimm. (Docket Entry [“D.E.”] 35). Defendants-Counter Plaintiffs Cliff and Myra Bilbo (“the Bilbos”) have responded in opposition. (D.E. 37). This motion has been referred to the undersigned magistrate judge for determination. (D.E. 36). For the following reasons, Brooks’ motion to exclude the expert testimony of Tom Brimm is DENIED.

I. BACKGROUND

This breach of contract matter arises from a home renovation project. The parties entered into a written contract in which it was agreed that Brooks would construct a number of improvements to the Bilbos’ home. (*See generally* D.E. 1-1, Compl.). The parties are in dispute as to whether the Bilbos agreed to or authorized any change orders to the contract, as well as the costs associated with the change orders. (*See id.*; *see generally also* D.E. 6, Answer). The Bilbos

have paid Brooks a partial payment under the contract, and allege that the construction Brooks performed at the home was not done in a workmanlike manner. Brooks brought suit in the Chancery Court of Obion County to collect on the remaining unpaid balance of the contract, as well as the additional charges incurred through change orders. The Bilbos removed this action to this court on the basis of diversity jurisdiction and countersued for damages to their home that they allege Brooks caused. The Bilbos also assert claims against Brooks under the Fair Debt Collection Act, the Tennessee Consumer Protection Act, and misrepresentation.

During the course of discovery, the Bilbos disclosed Tom Brimm, a home inspector, as their expert witness. Brooks moves to exclude Mr. Brimm as an expert witness.

## II. ANALYSIS

As an initial matter, the parties did not submit the Bilbos' Rule 26(a)(2) disclosure, and the Court is thus not fully apprised of the scope of Mr. Brimm's opinions that the Bilbos intend to offer at trial. Based upon the Court's review of Mr. Brimm's inspection report and his deposition transcript, it appears that Mr. Brimm's opinion and testimony are limited to his visual observations and identification of alleged defects in the property at issue. Accordingly, the Court finds that Mr. Brimm's putative expert testimony and opinions to be offered are confined in scope to the identification of the alleged defects that he observed at the Bilbos' property during the course of the inspection he performed there. *See Ferris v. Tenn. Log Homes, Inc.*, 2009 U.S. Dist. LEXIS 44656, \*33-34, 2009 WL 1506724, \*11 (W.D. Ky. May 27, 2009) (finding that a log home inspector was qualified to offer opinion about defects in a log home but not on matters outside his expertise such as structural engineering).

Brooks seeks to exclude Brimm as an expert witness on the ground that Brimm's expert testimony, report, or opinions do not satisfy the standards of *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993) and FED. R. EVID. 702. "Federal Rule of Evidence 702 obligates judges to ensure that any scientific testimony or evidence admitted is relevant and reliable." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999) (quoting *Daubert*, 509 U.S. at 589 (1993)). Specifically, Rule 702 provides as follows:

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:

- (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;
- (b) the testimony is based on sufficient facts or data;
- (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.

In *Daubert*, the United States Supreme Court stated that a district court, when evaluating evidence proffered under Rule 702, must act as a gatekeeper, ensuring "that any and all scientific testimony or evidence admitted is not only relevant, but reliable." 509 U.S. at 589; *see also Mike's Train House, Inc. v. Lionel, L.L.C.*, 472 F.3d 398, 407 (6th Cir. 2006). The *Daubert* standard "attempts to strike a balance between a liberal admissibility standard for relevant evidence on the one hand and the need to exclude misleading 'junk science' on the other." *Best v. Lowe's Home Ctrs., Inc.*, 563 F.3d 171, 176-77 (6th Cir. 2009).

This gatekeeping role is not limited only to expert testimony based upon scientific knowledge, but, instead, extends to "all 'scientific,' 'technical,' or 'other specialized' matters within" the scope of Rule 702. *Kumho Tire*, 526 U.S. at 147-48. The Federal Rules of Evidence

Advisory Committee contemplated non-scientific knowledge based expert testimony such as that presented in this case and noted:

Some 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....

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).

First, the court must determine whether Mr. Brimm's experience as a home inspector testimony qualifies him as an expert in the field of home inspection within the meaning of Rule 702. Mr. Brimm is a licensed, registered, and accredited home inspector. He has performed home inspections for the last five years in the Jackson, Tennessee area. He has inspected approximately 220-230 properties during his career as a home inspector. Prior to becoming a home inspector, Mr. Brimm performed work for contractors, which included painting, sheet rock, making custom countertops, laying wood and tile floors, and light electrical work. The undersigned finds Mr. Brimm's experiences provide an adequate foundation to offer his expert testimony as a home

inspector, and to offer opinions on any construction defects he observed at the property at issue in this litigation.

Turning to the factors to consider set forth in Rule 702, the court finds that Mr. Brimm's testimony and opinions are relevant and reliable. As this controversy arises out of a home renovation construction project and allegations that the work performed was done in an unworkmanlike manner, Mr. Brimm's testimony will assist the trier of fact in understanding the evidence or determining a fact at issue. *See* FED.R.EVID. 702(a). Further, Mr. Brimm's on-site inspection of the property provided him with sufficient facts upon which to base his opinions. FED.R.EVID. 702(b). Finally, as noted above, Mr. Brimm's experience as a home inspector and in various aspects of construction is a reliable "method" for the formulation of his opinions and testimony, and his application of his experience as a home inspector to his observations satisfies the remaining factors of Rule 702. Accordingly, the court finds that Mr. Brimm's testimony and opinions concerning any alleged defects he observed in the Bilbos' property at issue in this litigation are both relevant and reliable.

Brooks offers several bases of why Mr. Brimm's testimony and opinions should be excluded. Among those reasons are that Mr. Brimm: has never worked as a licensed electrician, residential building contractor, or roofing contractor, and should therefore be prohibited from offering opinions concerning those areas of expertise; was not specifically advised as to what work Brooks undertook on the Bilbos' property; and that his report did not comply with the Rules of Tennessee Department of Commerce and Insurance Division of Regulatory Boards for Home Inspectors. While these bases may go to the credibility of Mr. Brimm's testimony and evidence, the court does not find that these reasons are sufficient to exclude Mr. Brimm as an expert in this matter. As this court has previously noted:

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.’ ‘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.’

*Barnett v. Am. Heritage Life Ins. Co.*, No. 06-2171 P, 2007 WL 7611185, at \*2–5 (W.D. Tenn. Nov. 19, 2007) (citations omitted). Brooks’ motion to exclude Tom Brimm as an expert witness is thus DENIED.

### III. Conclusion

For the reasons set forth above, Plaintiff/Counter-Defendant Lynn Brooks, d/b/a Renovation Plus Construction’s Motion to Exclude the Expert Testimony of Tom Brimm (D.E. 35) is DENIED.

IT IS SO ORDERED this the 11th day of April, 2019.

**s/ Jon A. York**  
UNITED STATES MAGISTRATE JUDGE