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IN THE

Supreme Court

OF THE

Commonwealth of the Northern Mariana Islands

HERMAN INDALECIO,
Plaintiff-Appellee,

v.

MOBIL OIL MARIANAS, INC.,
Defendant-Appellant.

Supreme Court No. 2017-SCC-0035-CIV

OPINION

Cite as: 2020 MP 1

Decided January 10, 2020

CHIEF JUSTICE ALEXANDRO C. CASTRO
ASSOCIATE JUSTICE JOHN A. MANGLOÑA
ASSOCIATE JUSTICE PERRY B. INOS

Superior Court Civil Action No. 14-0065
Appeal from Presiding Judge Roberto C. Naraja,

CASTRO, C.J.:

¶ 1 Defendant-Appellant Mobil Oil Marianas, Inc. ("Mobil Oil") appeals the trial court's Order Regarding Present Cash Value and Remittitur ("Order"). It argues: (1) there was insufficient evidence to compute the reduction of future medical costs to present cash value; (2) the court abused its discretion in admitting a certified public accountant as an expert witness; and (3) the court abused its discretion in permitting a life care planner's testimony to exceed the scope of her expertise in enumerating medical costs in a life care plan. For the following reasons, we AFFIRM the Order.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 In December 2013, Herman Indalecio ("Indalecio") sustained injuries while working as a security guard assigned to Mobil Oil's facility. While walking a route, Indalecio stepped on a drainage ditch grating which had a broken support bracket. He fell through a two-and-a-half foot concrete ditch, sustaining a laceration to his lower left leg. Subsequent medical examinations revealed degenerative disc disease. In February 2014, Indalecio sued Mobil Oil alleging he sustained personal injuries.

¶ 3 Indalecio designated Bruce M. MacMillan ("MacMillan") as an expert in accounting to present testimony on lost future earnings. He designated Doris J. Shriver ("Shriver") as a life care planning expert, vocational expert, and occupational therapy expert to present testimony on Indalecio's life care plan and the accompanying costs. Mobil Oil moved to exclude both Shriver and MacMillan as experts based on Commonwealth Rule of Evidence 702 ("Rule 702").[1]

¶ 4 The court did not exclude Shriver and MacMillan as expert witnesses. It found MacMillan met the threshold requirements of Rule 702 to be "qualified as an expert" and give testimony which is the "product of reliable principles and methods." NMI R. EVID. 702. In particular, it found: (1) MacMillan is "a qualified expert as a certified public accountant consultant"; and (2) MacMillan's "methodology . . . to determine loss of earning capacity, based on the conservative assumption that [Indalecio] has the potential to earn a minimum wage income for his remaining work life, is sufficiently sound under Rule 702."

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[1] Rule 702 states:

> 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.

Indalecio v. Mobil Oil Mariana Islands, Inc., Civ. Case No. 14-0065 (Sup. Ct. Oct. 28, 2015) (Order Denying Defendant's Motion to Exclude Expert Testimony of Bruce M. MacMillan 3). The court found MacMillan's expert testimony admissible.

¶ 5 The court found Shriver's testimony admissible for the purposes of Rule 702 but simultaneously concluded that "Shriver is not qualified to provide medical diagnoses." *Indalecio*, Civ. Case No. 14-0065 (Sup. Ct. Oct. 29, 2015) (Order Denying Defendant's Motion to Exclude Expert Testimony of Doris J. Shriver at 3-4). "To the extent that [Shriver's] expert testimony amounts to crafting medical diagnoses—identifying the causes for medical treatment that exceed the scope of the compiled reports and recommendations of physicians—she is not qualified to give that testimony." *Id*. at 4. Thus, any testimony as it relates to medical diagnoses "fall[s] outside the scope of [Shriver's] expertise." *Id*. at 3. Even still, the court found Shriver "sufficiently qualified" as an expert in the areas of occupational therapy, vocational evaluation, and life care planning, allowing her to testify as to Indalecio's "ability to tolerate work and his possibly diminished earning capacity." *Id*. at 4. The court found Shriver's testimony reliable since her report relied on medical records from health professionals, including doctors, and because she conducted "an extensive analysis of [Indalecio's] social, educational, and vocational history." *Id*. Lastly, Shriver's testimony met Rule 702(d)'s fit requirement to "reliably appl[y] the principles and methods to the facts of the case" insofar as she "evaluated [Indalecio's] measure for damages by reviewing his personal and medical history, by consulting other professional opinions, and applying her own professional experience." *Id*.

¶ 6 Mobil Oil again attempted to exclude the testimonies in motions in limine. In particular, Mobil Oil sought to exclude Shriver's report and limit her testimony. Mobil Oil additionally moved to exclude MacMillan's lost income analysis and report. The court denied both motions.

¶ 7 At trial, Shriver testified that she prepared Indalecio's personal injury evaluation and life care plan to determine a course of care for his injuries. Tr. 814, 873. To prepare her report, she reviewed a number of Indalecio's medical records. Tr. 816, 874. She testified on projected costs of treatments in the proposed course of care. Shriver stated she did not calculate the costs for unanticipated treatments because "lifetime and medical costs increase as much as 18% per annum or per year." Tr. 880. At trial, Dr. Grant E. Walker ("Dr. Walker"), an orthopedic surgeon, also testified on Shriver's life care plan. He was asked: "you said that in summary the history and objective findings of the examiners all make sense. Does that include [] Shriver's report?" Tr. 946. Dr. Walker responded: "Yes, sir." Tr. 946.[2]

[2] Dr. Walker provided a declaration in June 2016. *See Indalecio*, Civ. Case No. 14-0065 (Super. Ct. June 10, 2016) (Declaration of Grant E. Walker). He stated that the only medical diagnosis listed by Shriver is PTSD. To this, Dr. Walker stated:

¶ 8 Indalecio sought MacMillan's testimony to present calculations on Indalecio's lost future earning capacity based on "the date of birth, date of injury, remaining work life and life expectancy," and "the current minimum wage" rate. Tr. 1025–26. Indalecio's work expectancy was based on Social Security Life Expectancy tables, and his retirement age was established at 67 years old. Tr. 1025, 1027. MacMillan explicitly indicated he did not know whether Indalecio could or would work; rather, he assessed the lost future earning capacity based on "a normal year without overtime based on the minimum wage" for 18 years. Tr. 1032. He further explained that he assumed Indalecio to be disabled and "that he wasn't going to be able to work at all." Tr. 1036. During cross-examination, MacMillan admitted he did not: receive tax returns; look at Indalecio's bank accounts, paychecks, or work schedule; investigate Indalecio's job history; have any extensive conversation with Indalecio; and examine any medical records. Tr. 1037-1038.

¶ 9 During direct examination, MacMillan also testified on the present value of Indalecio's lost future damages. This present value was based on the idea that "looking at income straightly going out 18 years . . . those dollars become less valuable as they go—as you farther go out in time." Tr. 1029. To calculate this, he provided a discounted value of Indalecio's potential income using the 10-year Treasury bond, "assumed to be-it's a risk free rate of return, no risk and as a basis for capitalization rate." Tr. 1029. The discounted rate, according to MacMillan, is a "low risk safety rate" where the investor (Indalecio) would get paid the rate of 2.1 percent. Tr. 1029. This discounted value was attributed to the present value of Indalecio's lost future earnings. Tr. 1030. ("[I]f his claim was that he didn't g[e]t paid a lumps sum at the date of the claim of the injury, the present value would be the dollars he has received in his hand and he would have the opportunity to turn around [and] have the opportunity to invest that money. . . . [H]e most likely would want to invest in relatively low risk investments to protect that money.").

¶ 10 At the close of trial, the court provided Jury Instruction No. 30 without objection from either party. Concerning future economic damages, Jury Instruction No. 30 stated: "[a]ny award for future economic damages must be for the present cash value of those damages." Tr. 2326. The instructions defined present cash value as "the sum of money needed now which when invested at a reasonable rate of return will pay future damages at the times and in the amounts that you find the damages would be incurred or would have been received." Tr.

> Shriver's report is not diagnosing [] Indalecio with PTSD, but rather is anticipating psychiatric evaluations, including that of PTSD. [] Shriver was able to make a recommendation on future care and medications consistent with her education, training, and experience. After I examined the patient, I find no inconsistency between [] Shriver's treatment plan and my own." *Id.* at 2.

As to the cost of surgery, Dr. Walker declared: "Shriver's opinion is more conservative than my opinion . . . ." *Id.* at 3.

2326. The jury instructions continued: "[t]he rate of return to be applied in determining present cash value should be the interest that can be reasonably expected from safe investment that can be made by a person of ordinary prudence who has ordinary financial experience and skill." Tr. 2326-2327. Finally, Jury Instruction No. 30 informed the jurors that future inflation should be considered: "[y]ou should also consider decreases in the value of money that may be caused by future inflation." Tr. 2327.

¶ 11 The jury rendered a unanimous verdict in favor of Indalecio. They awarded Indalecio $681,000 in economic damages, and $600,000 in non-economic damages. Pursuant to 7 CMC § 2922,[3] the court reduced the non-economic damages to $300,000 for a total award of $981,000.

¶ 12 Mobil Oil subsequently filed an omnibus motion for a directed verdict, or in the alternative, a new trial and remittitur in the jury's award for compensatory damages. The court denied the motion but proposed several remedies for remittitur with respect to Shriver's estimated costs of treatment. It instructed the parties to submit briefs "on the issue of reducing future medical costs to present cash value, accounting for a reduction in $62,071.51 in future medical costs, pursuant to Jury Instruction No. 30." *Indalecio,* Civ. Case No. 14-0065 (Super. Ct. Nov. 28, 2016) (Order Denying Defendant's Omnibus Motion as to Motion for Directed Verdict and Motion for New Trial, and Order for Additional Briefs on the Remedy of Remittitur at 27).

¶ 13 The briefs were intended to assist the court in ascertaining "whether there is a sufficient evidentiary basis indicating that the jury complied with Jury Instruction No. 30's mandate that future economic damages be reduced to their present cash value." *Indalecio,* Civ. Case No. 14-0065 (Super. Ct. Nov. 27, 2017) (Order Regarding Present Cash Value and Remittitur at 3). It addressed "four interlocking questions." *Id.* at 4. Namely, whether there is substantial evidence that: (1) "the $220,000.00 for future lost income represents the present cash value"; (2) "the $150,000.00 for surgery represents the present cash value"; (3) "the $311,000.00 for [] Indalecio's life care plan represents the present cash value"; and (4) whether the disposition of the prior questions affects the proposed reduction of economic damages by $62,071.51. *Id.*

¶ 14 The court concluded that further reduction to present cash value was not warranted for future lost income, the surgery, or the life care plan. The court did determine that damages should be reduced by $62,071.51. This appeal followed.

II. JURISDICTION

¶ 15 We have jurisdiction over final judgments and orders of the Commonwealth Superior Court. NMI CONST. Art. IV, § 3.

III. STANDARD OF REVIEW

¶ 16 There are three issues on appeal. First, we review whether there was

[3] 7 CMC § 2922 states that awards for non-economic damages may not exceed $300,000.

sufficient evidence to establish the present value of future damages de novo. *Ishimatsu v. Royal Crown Ins. Corp.*, 2010 MP 8 ¶ 12; *see also In re Estate of Deleon Castro*, 4 NMI 102, 105 (1994) ("Whether sufficient evidence supports a court's finding is a legal conclusion reviewable de novo."). On whether MacMillan was properly admitted as an expert and whether Shriver exceeded the scope of her testimony, we review for abuse of discretion. *Commonwealth v. Crisostomo*, 2018 MP 5 ¶ 19.

IV. DISCUSSION

A. Present Cash Value

¶ 17 Mobil Oil argues that Indalecio, as the party seeking future damages, has the burden "to present expert testimony as to an appropriate discount rate over time, an appropriate inflation rate over time, and the interplay between the two." Reply Br. 3–4. It notes that while some courts suggest adjusting for present value is a matter of common knowledge, other courts require expert testimony to guide the jury. It maintains the latter practice is the superior one. Consequently, because no testimony was presented as to future damages, these damages were speculative and unsupported by evidence. We review sufficiency of the evidence claims de novo. *Ishimatu*, 2010 MP 8 ¶ 12.

¶ 18 We have not yet determined whether expert testimony is necessary for jurors to evaluate the present cash value of future lost income. *See Bisom v. Commonwealth*, 2002 MP 19 ¶¶ 10–23 (focusing on whether expert testimony is needed to establish the amount of future lost income rather than to compute the reduction to present cash value of future lost income). Court practices vary concerning expert testimony and present value.[4] We do not reach that question

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[4] Some courts have implicitly held that expert testimony may be required for establishing present value. *See Schleier v. Kaiser Foundation Health Plan of Mid-Atlantic States, Inc.*, 876 F.2d 174, 179 (D.C. Cir. 1989.) ("The formula for discounting lost future income to present value is complicated and not one that a jury would be likely to intuit. . . . We believe that discounting to present value falls within the class of tasks which 'lend [themselves] to clarification by expert testimony because [they] involve[] the use of statistical techniques and require[] a broad knowledge of economics").

Other courts find no expert testimony is needed to establish present value. *See Castro v. County of Los Angeles*, 797 F.3d 654, 676 (9th Cir. 2015) (noting that despite the common use of experts "no California court has ever held that expert testimony is an absolute requirement in order to establish the present value of a future-damages award."); *Brough v. Imperial Sterling Ltd.*, 297 F.3d 1172, 1180 (11th Cir. 2002) (finding no error where the trial court "allow[ed] the jury to calculate damages without the testimony of an expert on present value" since "[t]here is no requirement . . . that a party introduce expert testimony" to establish present value); *McKeown v. Woods Hole*, 9 F. Supp. 2d 32, 48 n. 16 (D. Mass. 1998) ("The majority of courts also do not require evidence, whether by expert testimony and/or annuity tables, suggesting to the jury a method to reduce future loss of earnings to its present value."); *Sahrbacker v. Lucerne Products, Inc.*, 556 N.E.2d 497, 498 (Ohio 1990) ("It is settled that reduction to present value lies within the province of the jury. Expert testimony is not required to entitle a plaintiff to recover future earnings. Either party is, of course, free to present proper

here because we determine it was Mobil Oil's burden, not Indalecio's, to provide evidence to reduce Indalecio's damages.

¶ 19 In *CSX Transp. v. Casale*, 441 S.E.2d 212 (Va. 1994), the Virginia Supreme Court addressed "whether the court erred in instructing the jury on loss of future wages." *Id*. at 213. There, the plaintiff presented evidence to establish future lost wages. The court then instructed the jury to consider "any loss of earnings, fringe benefits, and lessening of earning capacity, or either, that [the plaintiff] may reasonably be expected to sustain in the future." *Id*. at 214. The defendant argued that since the plaintiff did not offer evidence (such as future interest rates) for the jury to reduce future damages to present cash value, the trial court erred in its instructions to the jury. *Id. Casale* received guidance from the U.S. Supreme Court's decision in *Chesapeake & Ohio Ry. Co. v. Kelly*, which posited that given the investment power of money over time, a plaintiff would be overcompensated if awarded a lump sum now for future damages without discounting the rate of return on investment. *Id.* at 215 (*see* 241 U.S. 485, 489 (1916). Having this guidance, the court explicitly reiterated *Kelly*'s proposition that "[o]rdinarily a person seeking to recover damages for the wrongful act of another must do that which a reasonable man would do under the circumstances to limit the amount of the damages." *Id*. at 216 (quoting *Kelly*, 241 U.S. at 489). "Likewise, [the Virginia Supreme Court] has treated the reduction in a claim for damages in an analogous situation as being in the nature of mitigation." *Id*. at 215. *Casale* held that while the plaintiff has the "ultimate burden of proof upon the quantum of damages . . . a defendant seeking reduction to present value of a sum awarded for future lost wages has the burden of going forward with evidence to enable the fact finder to make a rational determination on the issue." *Id*. at 216. Because the defendant did not introduce expert evidence to reduce damages to present cash value, "the trial court correctly rejected defendant's effort to eliminate the plaintiff's future lost wage claim." *Id*.

¶ 20 In a similar vein, the defendant in *Better Building Maintenance of the Virgin Islands, Inc. v. Lee*, 60 V.I. 740, 747-748 (V.I. 2014), argued that "the Superior Court erred in instructing the jury to reduce [the plaintiff's] future damages to present value without any evidence that would allow the jury to make that calculation." There, the Virgin Islands Supreme Court noted "the inherent absurdity in requiring a plaintiff to actively assist the jury in reducing her own award. . . . [I]t is unjust to require a party to introduce evidence benefitting her opponent, and instead [a court should] allocate the burden of proof according to the parties' interests." *Id*. at 759. Where a defendant seeks to reduce the plaintiff's award, it must bear the burden to provide the appropriate discount rate; where the plaintiff seeks an upward adjustment, such as to account for inflation, the burden falls on the plaintiff. *Id.* This, the court determined, was the "sounder

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expert testimony to assist the jury in performing the task of reducing future earnings to present value."); *see also Kovacs v. Chesapeake & O.R. Co.*, 397 N.W.2d 169, 170–71 (Mich. 1986) (holding that plaintiffs are not required to introduce evidence on inflation).

rule." *Id*. at 760. Where "the defendant seeks the benefit of a reduction of future damages to present value, it bears the burden of raising and proving this issue—just as it has the burden to raise any other matter reducing a plaintiff's recovery." *Id*. at 760–61.

¶ 21 We agree with *Casale* and *Lee*: the defendant has the burden to provide expert testimony to reduce future damages to present cash value—not the plaintiffs. Mobil Oil asserts Indalecio should have provided expert testimony to reduce his own damages. This argument is misplaced precisely because of the holdings in *Casale* and *Lee*. With respect to Shriver's testimony on future damages, it was Mobil Oil's burden to provide expert guidance on the present value of those future damages—not Indalecio's. To the extent that Mobil Oil argues there was insufficient evidence for the jury to reduce damages to present value, we find such argument lacking. Again, it was not Indalecio's burden to present evidence as to the reduction of future damages to present value. But even if it were, MacMillan testified as to a discount rate, using the Treasury bond rate of approximately 2.1 percent. This rate represented a rate of return based on conservative and low risk investments. Thus, the discounted value was a considerably conservative estimate of the present value of lost future damages. Furthermore, although MacMillan did not adjust for inflation, he based the lost earnings only on the current minimum wage despite noting the likelihood of future increase in the minimum wage. Bracketing the question of the soundness of MacMillan's methodology for determining the actual gross amount of future damages, *see infra* Part IV. B., his testimony as to a discount rate provided an evidentiary basis for the jury to calculate reduction to present value. Here, sufficient evidence to conduct a calculation was provided to the jurors in the form of expert testimony, enabling them to reduce future damages to present value.[5]

B. Expert Testimony

¶ 22 Mobil Oil argues the court abused its discretion in admitting MacMillan as an expert witness under Rule 702 because his findings on lost income did not meet the requisite *Daubert* standard. In particular, Mobil Oil claims that MacMillan failed to account for actual historical hours and earnings in 2014 and 2015 following the injury, and MacMillan assumed Indalecio would never work again. Accordingly, "[t]here was simply no factual foundation for the MacMillan analysis." Opening Br. 18. We review whether the court properly admitted expert testimony under Rule 702 for an abuse of discretion. *Crisostomo*, 2018 MP 5

[5] Mobil Oil touches on an additional issue; namely, because it is uncertain whether certain medical treatments would be needed immediately, the costs could not be reduced to present value. *See* Opening Br. 9 ("Without a time component to these damages, it was impossible for the jury to calculate the present cash value in accordance with Jury Instruction No. 30."). However, since Dr. Walker's testimony suggested Indalecio might need surgery immediately, a reasonable jury could have concluded costs might be incurred immediately and would not need to be reduced to present value.

¶ 19. An abuse of discretion exists when a court "based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Id*.[6]

¶ 23 Rule 702 governs the admissibility of expert testimony. Under Rule 702, an expert witness may provide opinion testimony if four requirements are satisfied:

> (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.

NMI R. EVID. 702. We elaborated on the Rule 702 standards in *Crisostomo*, 2018 MP 5, and *Commonwealth v. Taitano*, 2018 MP 12.

¶ 24 In *Crisostomo*, we analyzed Rule 702 under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Acknowledging the flexible approach articulated in subsequent U.S. Supreme Court case law, *see generally Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), we still stated "[t]his flexibility, however, has limitations: a court has broad discretion in fulfilling its gatekeeping function, but it must not abandon this function or perform it inadequately." *Crisostomo*, 2018 MP 5 ¶ 20 (citing *Kumho Tire*, 526 U.S. at 159) (Scalia, J., concurring). To avoid "abandoning [the court's] gatekeeping function, courts must allow presentation of evidence as to the relevance and reliability of the expert's proffered testimony." *Id.* ¶ 21. This means allowing parties "to explore the proposed testimony's relevance and reliability." *Id*. Further, "after a proper inquiry into relevance and reliability, the court must make specific findings regarding its evaluation of the expert." *Id*. ¶ 23. This ensures the court performs its duties adequately. *Id.* A court must assess the reliability and provide "'*some* kind of reliability determination' to be made on the record." *Id*. (quoting *United States v. Velarde*, 214 F.3d 1204, 1209 (6th Cir. 2000)). "[S]ummarily admitting or excluding testimony without assessing reliability is inadequate," *id*., and "conclusory findings are [insufficient]." *Id*. ¶ 40. Without specific determinations, the record is incomplete and we may find an abuse of discretion. *See id*. ¶ 23.

¶ 25 In *Taitano*, we reiterated the standards mandated in *Daubert* and its progeny when analyzing the admission or denial of expert testimony. Although we recognized the *Daubert* standard as a liberal one, we still reiterated the importance of the gatekeeping duty. In *Taitano*, the court found that the proferred expert testimony was based on sufficient facts or data because "[h]e received

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[6] In *Crisostomo*, we announced that a motion in limine preserves a party's *Daubert* objection. *See Crisostomo*, 2018 MP 5 ¶ 39 ("Although Crisostomo failed to assert a contemporaneous objection to the admission of [the expert's] testimony, his claim is preserved by his motion in limine, rendering our review for abuse of discretion.").

various samples." *Taitano*, 2018 MP 12 ¶ 16. Furthermore, "[o]ther case[s] have established that the principle in order to take the samples of the DNA are reliable. And then the expert has reliably applied those principles and methods to the facts of the case." *Id*. Where the court stated conclusively that the expert's methodology was reliable—without more—we determined "its cursory statements d[id] not fulfill the mandate required to make 'some' kind of determination . . . . The court provided mere conclusory statements, which without any meaningful analysis or explanation, manifest an inadequate performance of its gatekeeping duties." *Id*. ¶ 17; *see Pyramid Techs., Inc. v. Hartford Cas. Ins. Co.*, 752 F.3d 807, 814 (9th Cir. 2014) (finding an abuse of discretion where the court rendered "two conclusory sentences and without analysis or explanation" of an expert's admissibility). We thus found the court abused its discretion when it failed to provide some kind of reliability determination.

¶ 26 Here, the court acknowledged MacMillan's qualifications as a certified public accountant. However, it concluded in a single sentence that MacMillan's "methodology . . . to determine loss of earning capacity, based on the conservative assumption that [Indalecio] has the potential to earn a minimum wage income for his remaining work life, is sufficiently sound under Rule 702." *Indalecio,* Civ. Case No. 14-0065 (Sup. Ct. Oct. 28, 2015) (Order Denying Defendant's Motion to Exclude Expert Testimony of Bruce M. MacMillan at 3). The court was compelled to render "some kind of determination"; that is to say, the court should have provided reasoning such that we could review the record meaningfully on appeal. However, the court did not provide "some kind of determination" and instead rendered its finding in one conclusory statement. The parties were precluded from discerning the court's reasoning in admitting MacMillan's testimony, and so are we. Just as in *Crisostomo* and *Taitano*, the court abdicated its gatekeeping duty based on an erroneous view of the law and abused its discretion.

i. Sufficiency

¶ 27 Mobil Oil calls for further expanding our Rule 702 precedent by relying on two federal circuit court cases discussing sufficiency: *Boucher v. United States Suzuki Motor Corp.*, 73 F.3d 18 (2d Cir. 1996), and *Elcock v. Kmart Corp.*, 233 F.3d 734 (3d Cir. 2000). Both *Boucher* and *Elcock* discuss expert testimony based on assumptions unsupported in the record; in fact, both cases present facts concerning future damages. In *Boucher*, the Second Circuit confronted a plaintiff who maintained "a sporadic work history." *Boucher*, 73 F.3d at 20. Despite this, the expert rendered estimates based on full-time employment. The court determined that testimony based on "assumptions that are so unrealistic and contradictory as to suggest bad faith or to be in essence an apples and oranges comparison," is impermissible. *Id*. at 21. (citations omitted). "Where lost future earnings are at issue, an expert's testimony should be excluded as speculative if it is based on unrealistic assumptions regarding the plaintiff's future employment prospects." *Id*. The court ultimately found the expert's projections were not supported by the record. Similarly, in *Elcock*, the Third Circuit noted that

"although mathematical exactness is not required, [expert] testimony of post-injury earning capacity must be based upon the proper factual foundation. Put another way, an expert's testimony [regarding future earnings loss] must be accompanied by a sufficient factual foundation before it can be submitted to the jury." 233 F.3d at 754 (alteration in original). Despite reports that Elcock was 50 to 75 percent disabled, the expert economist based his findings of lost income on an assumption that Elcock was 100 percent disabled. *Id.* at 755. The court ultimately found the expert's assumptions lacked sufficient factual foundation, holding these sorts of assumptions are based in insufficiencies that render them a "castle made of sand." *Id*. (quoting *Benjamin v. Peter's Farm Condominium Owners Ass'n*, 820 F.2d 640, 643 (3d Cir. 1987)).

¶ 28 Although *Crisostomo* and *Taitano* stood for the proposition that trial courts do in fact have gatekeeping responsibilities, we further elucidated in *Taitano* that expert testimony need not be "based on perfect, or even the best available, methodologies." *Taitano*, 2018 MP 12 ¶ 22 (quoting *Clark v. Edison*, 881 F. Supp. 2d 192, 215 (D. Mass. 2012)). *Daubert* "caution[s] against being 'overly pessimistic' of a jury's capabilities . . . . '[V]igorous 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.'" *Id*. ¶ 23 (quoting *Daubert*, 509 U.S. at 596); *see also Barnett v. Pa Consulting Group Inc.*, 35 F. Supp. 3d 11, 18 (D.D.C. 2014) ("Courts in this district routinely permit expert testimony based on assumptions of fact and 'shaky evidence,' so long as the underlying methodology used is valid."). It is the "soundness" of the expert's methodology, not the correctness of the expert's conclusions, that controls admissibility. *Taitano*, 2018 MP 12 ¶ 23. Once the methodology meets *Daubert*'s liberal threshold, "challenges going to the weight of the evidence" should be reserved for the jury. *Id*. "[G]aps or inconsistencies in the reasoning leading to [the expert's] opinion . . . go to the weight of the evidence, not to its admissibility." *Id*. (quoting *Restivo v. Hessemann*, 846 F.3d 547, 577 (2d Cir. 2017); *see also Maiz v. Virani*, 253 F.3d 641, 664 (11th Cir. 2001) ("Suffice it to say that while damages may not be determined by mere speculation or guess, it will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference." (quoting *G.M. Brod & Co., Inc. v. U.S. Home Corp.*, 759 F.2d 1526, 1539 (11th Cir. 1985)).

¶ 29 Although *Boucher* and *Elcock* are not unpersuasive, we find that any deficiencies in MacMillan's methodology ultimately go to the weight and not admissibility of his testimony, as they were curable by cross examination. Here, Mobil Oil extensively cross-examined MacMillan as to the sufficiency of his methodology. During cross-examination, MacMillan admitted he did not survey Indalecio's circumstances. He did not examine Indalecio's tax returns, bank accounts, paychecks, work schedule, job history, or anything of this nature. Mobil Oil's cross-examination thoroughly informed the jury of any and all deficiencies. That the jury still awarded Indalecio the fullest amount possible despite Mobil Oil's cross-examination revealing certain deficiencies is within the parameters of juror discretion. We do not find the court abused its discretion for

allowing the adversarial system to run its course.

ii. Harmless Error

¶ 30 We must still consider whether the court committed prejudicial error in failing to render some kind of determination as to the reliability of MacMillan's methodology. We will find harmless error "if it is more probable than not that the error did not materially affect the verdict." *Crisostomo*, 2018 MP 5 ¶ 35 (quoting *United States v. Cohen*, 510 F.3d 1114, 1127 (9th Cir. 2007) (quotation altered).

¶ 31 We do not find the abuse of discretion and error materially affected the verdict. Just as we found with any deficiencies in MacMillan's testimony, we hold that such deficiencies in the *Daubert* determinations were cured through cross-examination. Mobil Oil extensively cross-examined MacMillan, clarifying the various factors that went into his analysis and methodology. Even Indalecio thoroughly questioned MacMillan on his methodology, which worked to his detriment rather than to his benefit. The jury was armed with a broad swath of information, including testimony from Indalecio's own expert that yielded a conservative estimate of damages, and awarded Indalecio an amount not inconsistent with the evidence. Where the court misapprehended the law and impermissibly admitted an expert's testimony without sufficient reasoning, vigorous cross-examination and contrary evidence provided the jurors with the means to come to their decision. It cannot be said that it is more probable than not the error materially affected the verdict and therefore it was harmless error when the court admitted MacMillan as an expert witness.

C. Scope of Expertise

¶ 32 Although Mobil Oil concedes that Shriver testified within the scope of her expertise as to the cost of medical treatment, it maintains she did so on the basis of her own opinion of Indalecio's needed medical treatment rather than that of a medical professional. In other words, while Shriver as a life care planner could compile reports of physicians to estimate future projections, she must do so "based on facts and opinions received from physicians." Opening Br. 10 (quotation altered). Accordingly, "Shriver's testimony should have been limited to reflect her expertise as a life care planner and exclude other fields for which she lacked the requisite specialized expertise." *Id*. Additionally, Mobil Oil asserts any argument that Dr. Walker supported Shriver's estimates is unfounded. As stated by Mobil Oil, "[Dr.] Walker never testified that he had reviewed and supported Shriver's Life Care Plan. He never testified that he reviewed any of her proposed treatments and agreed with them." *Id*. at 13.

¶ 33 The implications of an expert who exceeds the scope of permitted testimony is discussed in *Wheeling Pittsburg Steel Corp. v. Beelman River Terminals, Inc.*, 254 F.3d 706 (8th Cir. 2001). Consistent with *Daubert* and its progeny, the Eighth Circuit maintained that a trial court "has a gatekeeping responsibility to 'ensure that an expert's testimony rests on a reliable foundation and is relevant[.]'" *Id*. at 714–15 (quoting *Kumho Tire*, 526 U.S. at 141). Critically, however, the court determined that once this is accomplished, the

court "must continue to perform its gatekeeping role by ensuring that the actual testimony does not exceed the scope of the expert's expertise[.]" *Id*. at 715. Otherwise, the testimony may be rendered unreliable. *Id.* In *Beelman*, the proffered expert's testimony should have been confined to flood risk management. However, despite being "eminently qualified to testify as an expert hydrologist regarding matters of flood risk management, [the expert] sorely lacked the education, employment, or other practical personal experiences to testify as an expert specifically regarding safe warehousing practices," which is what was at issue. *Id*. Where the court permitted the expert to testify on the latter, it permitted him "to testify beyond the scope of his expertise." *Id*. The court therefore found an abuse of discretion.

¶ 34 Whether a trial court abused its discretion in specifically permitting a life care planner to testify beyond the scope of her expertise insofar as she failed to seek the opinions of medical professionals was discussed in *Rivera v. Turabo Med. Ctr. P'ship*, 415 F.3d 162 (1st Cir. 2005). There, the plaintiff's life care planning expert offered testimony on the cost of projected life care. The life care planner reviewed "records from the agency providing [the plaintiff] with skilled nursing care, a letter from the [plaintiff's] physician, and an interview of [plaintiff's] family and caregiver." *Id*. at 171. The life care planner did not have a physician review her projections. Despite this, the First Circuit did not find an abuse of discretion: "[a]lthough [the life care planner's] report might have benefitted from a physician's review of the projections regarding [the plaintiff's] future needs, the court did not abuse its discretion in determining [the life care planner's] methodology was sufficiently reliable for admissibility." *Id*.; *see also M.D.P. v. Middleton*, 925 F. Supp. 2d 1272, 1275–76 (M.D. Ala. 2013) (relying on *Rivera* to find no abuse of discretion even where life care planner may make recommendations based on "recommendations from medical records").

¶ 35 Here, Shriver's testimony did not exceed the scope of her expertise because she relied on physicians' reports, and her own reports were approved by Dr. Walker. As discussed earlier, Dr. Walker provided a declaration prior to the commencement of the jury trial. In his declaration, Dr. Walker indicated that Shriver's findings are "consistent with the function of a life care planner such as Shriver in determining the future needs of a patient suffering from lower back pain like Herman Indalecio." *Indalecio*, Civ. Case No. 14-0065 (Super. Ct. June 13, 2016) (Declaration of Grant E. Walker). Mobil Oil attempts to downplay Dr. Walker's testimony that Shriver's report was consistent with the scope of her expertise by arguing that "future medical costs challenged in this appeal were not supported by a doctor's recommendation and should have been disallowed." Reply Br. 7. Dr. Walker stated that her report made sense, that her findings were consistent with a life care planner's role, and that there was no inconsistency between his treatment plan and Shriver's. Shriver's testimony remained well within the bounds of the trial court's finding that her expertise did not extend so far as to give medical diagnoses. She relied on physicians' reports in assessing the probable future needs of a patient to comport with her role as a life care

planner, and her reports were approved by a physician.[7] Dr. Walker explicitly affirmed as much. We find Shriver did not exceed the proper scope of her testimony as she was well within the parameters of *Daubert*'s liberal interpretation of Rule 702, and the court did not abuse its discretion in admitting Shriver's testimony.

V. CONCLUSION

¶ 36 For the foregoing reasons, we AFFIRM the court's Order.

SO ORDERED this 10th day of January, 2020.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOHN A. MANGLOÑA
Associate Justice

/s/
PERRY B. INOS
Associate Justice

Victorino DLG. Torres and Matthew J. Holley, Saipan, MP, for Plaintiff- Appellee.

Thomas C. Sterling and Thomas E. Clifford, Saipan, MP, for Defendant-Appellant.

[7] Shriver testified that she relied on medical documents in executing her report of Indalecio: "I started out reviewing the medical record and in this case I had Bernard Osborne from the Saipan Health Clinic, I had a CT scan and then I have something from Kimberly Hutchinson from the Pacific Sleep Center and Tony Stearns of the Marianas Medical Center and that's what I had to start with." Tr. 816.