UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

WINERIES OF THE OLD MISSION PENINSULA (WOMP) ASSOC., a Michigan Nonprofit Corporation, et al.,

Plaintiffs,

v

PENINSULA TOWNSHIP, Michigan Municipal Corporation,

Defendant.

PROTECT THE PENINSULA,

Intervenor-Defendant.

Case No: 1:20-cv-01008

Honorable Paul L. Maloney
Magistrate Ray S. Kent

PLAINTIFFS' RESPONSE IN OPPOSITION TO PTP'S MOTION IN LIMINE TO EXCLUDE PLAINTIFFS' DAMAGES EXPERT [563]

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I. INTRODUCTION

This is the third time Peninsula Township has tried to exclude Eric Larson's testimony under Federal Rule of Evidence 702. In the two prior motions, both Magistrate Judge Kent and this Court ruled that Peninsula Township's objections were irrelevant because this is a bench trial. That same reason is again a basis to deny the Township's motion.

This Court should also deny the Township's motion to exclude Mr. Larson's testimony because it is a motion for summary judgment masquerading as a motion in limine. The Township is really asking this Court to rule that the Wineries are not entitled to recover any damages for the Township's unlawful restrictions on the Wineries' hours of operation, restaurant sales, and ability to host events.[1] The Township asks this Court to exclude evidence of damages on those issues even though it has not ruled that the Wineries cannot recover them. The better practice would be to deny the motion and admit the evidence for this Court to weigh.

II. BACKGROUND

A. This Court has already ruled that 53 sections of the Peninsula Township Zoning Ordinance are unconstitutional and contrary to law.

Through various opinions, this Court has ruled that 53 sections of the Peninsula Township Zoning Ordinance violate the Dormant Commerce Clause, are unconstitutionally vague in violation of the Due Process clause, operate as a prior restraint on the Wineries' speech, unconstitutionally compel the Wineries to speak, and/or are preempted by the Michigan Liquor Control Code.[2] Following those rulings, this case is going to trial on three primary issues.

[1] The Township also seeks to prohibit the Wineries from seeking damages for the Township's unlawful restriction on the Wineries' ability to cater and operate restaurants. Based on this Court's recent rulings, however, the Wineries will not present evidence of damages related to catering or restaurants at trial.

[2] The Wineries fully outlined each of these sections in their trial brief.

First, following summary judgment briefing, there are outstanding commercial speech issues in the *Central Hudson* analysis. *See* ECF No. 559, PageID.21915-21921. These include the questions of whether certain provisions implicate speech, and for the sections that do implicate speech, whether Peninsula Township has met its burden under *Central Hudson*. *See id.*

Second, the question of injunctive relief remains. This Court has already stated, however, that it "will enjoin the Township from enforcing all of the sections of the Township Ordinances that the Court has found unconstitutional or contrary to law." *Id.*, PageID.21922.

Finally, the Wineries will prove that the unconstitutional sections of the Peninsula Township Zoning Ordinance caused their damages. Under 42 U.S.C. § 1983, the Wineries may recover nominal, general, and/or compensatory damages from constitutional violations. *See, e.g.*, *Uzuegbunam v. Preczewski*, 592 U.S. 279 (2021) (nominal damages "are instead the damages awarded by default until the plaintiff establishes entitlement to some other form of damages, such as compensatory or statutory damages."). And while the Wineries acknowledge that this Court has ruled that they may not recover damages on a preemption theory due to the Michigan Government Tort Liability Act, see ECF No. 525, PageID.21136 ("The Wineries are unable to collect money damages from Count VIII."), and that their regulatory takings claim has been dismissed, see ECF No. 559, PageID.21915, there are still a host of constitutional violations from which damages flow, including Dormant Commerce Clause, the Due Process Clause, and the First Amendment.

The Wineries challenged some sections under multiple theories, so the Township's blanket statement that some theories have been resolved does not mean that the Wineries cannot recover damages under other theories. As PTP's counsel recognized nearly two years ago, this Court's analysis shows that "some are double bad, some are single bad, some are bad, some are invalid

under constitutional or preemption, some under both." ECF No. 239, PageID.8684. This Court has only ruled that the Wineries may not recover damages under the preemption and takings theories; it has not ruled that the Wineries may not recover damages under their other theories and the Wineries certainly intend to do so.

B. Plaintiffs will present the testimony of Eric Larson to quantify their damages.

Plaintiffs have disclosed Eric Larson as an expert to quantify their damages. *See* ECF No. 573, PageID.22404. Larson's analysis and testimony is and will be structured to help this Court quantify the Wineries' damages across seven specific categories of damages. Larson will distill multiple categories of damages suffered by eleven separate Wineries, adjust for the impact of COVID-19, and present this Court with a digestible metric to aid in the decision of how much to award the Wineries. His job is not to say which sections of the PTZO caused the Wineries' damages—that is left for testimony from Winery owners and operators and for post-trial briefing once the evidence has been submitted.

C. Peninsula Township has tried twice—and failed twice—to get Eric Larson's testimony excluded from trial under Federal Rule of Evidence 702.

When this case was schedule to go to trial in 2022, Peninsula Township tried to get Larson's testimony excluded twice.

On July 1, 2022, Peninsula Township filed its first motion to strike Eric Larson's testimony. ECF No. 175. The Township argued that Larson's testimony should be stricken under Federal Rule of Evidence 702 because Larson (1) delegated the compilation of facts and data to Plaintiffs' counsel and (2) relied on inapplicable, general industry data. *Id.* Magistrate Judge Kent rejected the Township's argument because it was improper for a bench trial. "The proper course of action is for this Court to admit the evidence and then afford it whatever weight it deems appropriate. Accordingly, defendant's motion to strike plaintiff's expert witness (ECF No. 175) is DENIED."

ECF No. 228, PageID.8429.

On July 18, 2022, Peninsula Township filed a second motion to strike Larson's testimony. Its second attempt focused on Larson's supplemental report, issued July 6, 2022. ECF No. 199 (filed under seal). The Township argued that the July 6, 2022 supplemental report did not comply with Federal Rule of Civil Procedure 26 because it was issued 41 days before trial. Again, Magistrate Judge Kent rejected the Township's arguments. ECF No. 232. Magistrate Judge Kent first recognized that the Township had listed Larson's supplemental report in its Proposed Final Pretrial Order. *See id.*, PageID.8472 ("If defendant plans to introduce Mr. Larson's supplemental report, it does not appear to the Court that they are objecting to the admission of this exhibit."). Magistrate Judge Kent also ruled that Larson's supplemental report properly corrected errors from the original report as required by Federal Rule of Civil Procedure 26(e). *Id.* at PageID.8473-8474. Ultimately, Magistrate Judge Kent denied the Township's second motion. *Id.*, PageID.8474.

Peninsula Township objected to both rulings. ECF Nos. 241, 245. This Court overruled both objections. As to the initial motion (ECF No. 175), this Court ruled:

> [T]he Court finds that Judge Kent was correct in denying the motion to strike the Wineries' expert witness/hold a *Daubert* hearing. Although the Township argues that Mr. Larson's report contains several errors, the Township is free to address these alleged errors on cross examination. This case is set for a bench trial, and this Court is capable of affording the appropriate weight to Mr. Larson's testimony based on its credibility and reliability (meaning that a *Daubert* hearing is unnecessary). At this stage of this case, striking Mr. Larson's report or prohibiting him from testifying would be premature.

ECF No. 284, PageID.10192. As for Larson's supplemental report, this Court explained that the Township was lodging improper objections that it could have raised previously:

> The Township's first objection argues that Judge Kent failed to analyze Mr. Larson's *original* report, to ensure that it complies with Fed. R. Civ. P. 26, in determining that the supplemental report should not be stricken. In the Court's judgment, this objection is completely irrelevant to the order at issue. The Township already attempted to strike Mr. Larson's *original* report (*see* ECF No. 175) by challenging its credibility, and in that motion—which Judge Kent denied—

> the Township did not raise any argument under Rule 26. The Township is essentially attempting to improperly attack Mr. Larson's original report again, for a different reason, in objections to a different order. The present order concerns Mr. Larson's *supplemental* report and whether that report complied with Rule 26. Judge Kent determined that Mr. Larson's supplemental report complied with Rule 26 and was entirely proper due to Mr. Larson's duty to correct the inaccuracies in his original report. Therefore, the Township's first objection is overruled.
>
> Second, the Township objects to Judge Kent's finding that the supplemental report was timely. . . . Essentially, the Township was not arguing that the supplemental report was untimely disclosed pursuant to the Federal Rules, but rather, that Mr. Larson should have supplemented his report sooner because he knew of the errors before he provided the supplemental report. However, the record reflects that Mr. Larson did not discover the errors in his original report until he was deposed on June 28, 2022—a date that was selected by the Township—and he promptly provided his supplemental report eight days later on July 6. If the Township wanted to attack Mr. Larson's original report sooner, it should have deposed him sooner. This objection is also overruled.

ECF No. 284, PageID.10196–10197 (internal record citation omitted).

D. This motion is Peninsula Township's third attempt to make the same argument under Federal Rule of Evidence 702.

Here, Peninsula Township takes a third shot at Eric Larson's testimony. Its new argument is primarily that this Court has ruled against the Wineries on *some* of their claims, so Larson should not be able to testify on *any* of the Wineries' claimed damages. *See* ECF No. 564, PageID.21974 (requesting that this Court "enter an order *in limine* precluding Plaintiffs' from relying on the report of testimony of their damages expert, Eric Larson as his testimony is no longer relevant on issues resolved via summary judgment under Fed. R. Evid. 401, 402, and 702"). The Wineries oppose the motion for the same reasons articulated in the prior orders denying the Township's first and second attempts to bar Larson's testimony. The Wineries also oppose the motion because both Peninsula Township and PTP have designated Larson's supplemental report as a trial exhibit, so their requested relief is inconsistent with their proposed evidence. *See* ECF No. 573, PageID.22358, Exhibit WWWWWWWWWW.

III. ANALYSIS

"A motion in limine is 'any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered.'" *Louzon v. Ford Motor Co.*, 718 F.3d 556, 561 (6th Cir. 2013) (quoting *Luce v. United States*, 469 U.S. 38, 40 n. 21984)). However, a motion in limine should not be used as a vehicle to make summary judgment arguments after the deadline for dispositive motions has passed. *See id.* at 562-63.

The Township is not trying to exclude prejudicial evidence before trial. Instead, it asserts that Larson's report and testimony are inadmissible because they are not relevant. The Township does not challenge the reliability of Larson's calculations and has not made a *Daubert* motion.

Expert testimony is admissible to "help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a). Thus, expert testimony is relevant when it is helpful to the trier of fact. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591 (1993). This bar is "low" and requires "only that the evidence 'logically advances a material aspect of the proposing party's case.'" *United States v. LaVictor*, 848 F.3d 428, 442 (6th Cir. 2017) (quoting *Messick v. Novartis Pharm. Corp.*, 747 F.3d 1193, 1196–97 (9th Cir. 2014)). The "rejection of expert testimony is the exception, rather than the rule." *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 529–30 (6th Cir. 2008). Ultimately, this Court has the discretion to admit the testimony, see *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999), and can assign Larson's testimony whatever weight it deems necessary.

A. Larson's testimony is relevant to help this Court quantify damages.

The Wineries are seeking compensatory damages at trial. "[A] plaintiff who establishes the violation of her constitutional rights is entitled to recover nominal damages, as well as compensatory damages for any 'actual injury.'" *Taylor v. City of Saginaw*, 620 F. Supp. 3d 655, 671 (E.D. Mich. 2022) (citing *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 800 (2021)). The

Wineries will present evidence at trial linking those constitutional violations to their damages.

For example, some of the Wineries will present testimony that they were damaged by the Township's grape source requirements which caused them to pay higher prices than they would have on the open market. They will also present testimony that the Township's overregulation of merchandise sales has caused them to lose profit by missing out on sales. The Township acknowledges that, at a minimum, the Wineries' damages for "increased grape costs and lost merchandise sales" are still at issue. ECF No. 564, PageID.21969. It is unclear from the Township's motion why Larson's report and testimony should be excluded wholesale when all parties agree that those issues are still relevant.

The Wineries will also present testimony to prove that the Township's grape source requirements, unconstitutionally vague definition of "Guest Activity Uses," and commercial speech restrictions prevented them from engaging in accessory uses designed to help their businesses sell more wine. Similarly, the Wineries will present evidence that the prior restraints to offer Grand Traverse County 501(c)(3) and agriculturally related group meetings also prevented them from engaging in accessory uses like events to help their businesses sell more wine.

The Wineries will also present testimony regarding the ways the Township enforced a 9:30 p.m. closing time and prove the link to their damages. The Winery-Chateau witnesses will testify that the 9:30 p.m. closing time found in the "Guest Activity Uses" language was enforced against them as a blanket ban over all of their operations. The remaining Winery witnesses will testify that although their ordinance sections do not contain a closing time, the Township enforced one against them anyway.

After the Wineries establish those causal links, Larson will quantify damages from these categories. Therefore, the Township's concerns are putting the cart before the horse.

B. The Township's motion is an improper summary judgment motion disguised as a motion in limine.

The Township's motion is really a motion for summary judgment in disguise. Its motion presumes that the Wineries will not be able to prove the requisite causation to pursue their damages at trial. In turn, the Township seeks to exclude the evidence before the Wineries can even present their case. A motion in limine "is not a means to dispose of an entire claim or element of damages." *Wheeler v. Motorist Mut. Ins. Co.*, No. CIV.A. 5: 13-319-DCR, 2015 WL 893535, at *1 (E.D. Ky. Mar. 2, 2015). As other case law suggests, the Township's motion is improper.

Louzon is similar to this case. There, Ford Motor Company filed a motion in limine in an age and national-orientation discrimination action to prevent the plaintiff from presenting "evidence of comparable employees on the basis that none were similarly situated as a matter of law." 718 F.3d at 558. After the district court granted the motion, the Sixth Circuit reversed. *Id.* The Sixth Circuit saw through Ford's argument, which "rests entirely on the presumption that [the plaintiff] would not be able to make out a prima facie case of discrimination, which if true would render null the need for any evidentiary rulings." *Id.* at 563. The Sixth Circuit explained that "[r]esolution of this issue—whether [the plaintiff's] evidence is insufficient as a matter of law—requires a summary judgment analysis." *Id.* at 562. That was improper in a motion in limine. "[I]f these tactics were sufficient, a litigant could raise any matter in limine, as long as he included the duplicative argument that the evidence relating to the matter at issue is irrelevant." *Id.*

Similarly, in *Koger v. Mohr*, No. 4:17CV2409, 2021 WL 4477821, *2 (N.D. Ohio Sept. 30, 2021), the defendants filed a motion in limine and asked the court to bar "Plaintiff from making claims for money damages" on one of his theories. The court denied the motion because "such a request is no more than a rephrased summary judgment motion and the Court may rely on its broad discretion to deny such a motion." *Id.*

Here, Peninsula Township's tactic is the same as in *Louzon* and *Koger*. The Township is using a motion in limine disguised as a motion for summary judgment to ask the Court to rule that there is insufficient evidence as a matter of law for the Wineries to prove a causal link between the established Dormant Commerce Clause, vagueness, prior restraint, and compelled speech violations and the potential commercial speech violations. If the Township truly thought the Wineries were not entitled to any damages flowing from their constitutional victories, it should have filed a motion for summary judgment before the dispositive motion deadline passed. The Township did not, so its motion should be denied. *Louzon*, 718 F.3d at 562; *Koger*, 2021 WL 4477821, at *2.

C. The Township's claimed prejudice is its own fault.

Peninsula Township makes a passing argument that, following the summary judgment opinions, "Mr. Larson's trial testimony is now essentially an unknown quantity and preparing for cross examination is virtually impossible." ECF No. 564, PageID.21968. The Township continues that it "will essentially be forced to conduct a live discovery deposition given that there is essentially no relationship between Mr. Larson's report, anticipated testimony, and the remaining damages claims at trial. Peninsula Township would be unfairly prejudiced by this." *Id.*, PageID.21968–21969. That argument is meritless for four reasons.

First, it presumes that the Wineries cannot prove causation on their claimed categories of damages. As explained above, trying to pass off a motion in limine as a motion for summary judgment is improper. The Wineries are entitled to put on proofs of causation at trial.

Second, the Township will not be "conducting a live discovery deposition." The Township already took Larson's deposition. Eric Conn, who took the deposition for Peninsula Township in

June 2022, has reappeared in this case to represent the Township.[3] If the attorneys from McGraw Morris—who filed this motion—have questions about what happened during Mr. Larson's deposition, they can read the deposition transcript or ask their co-counsel Mr. Conn why he did not ask about certain topics. But it is not the Wineries' fault that the Township feels it is not prepared, and that is certainly not a basis to exclude Mr. Larson's testimony completely. After all, Larson was under no obligation to volunteer information during his deposition. *See, e.g.*, *Good v. BioLife Plasma Servs., L.P.*, 834 F. App'x 188, 197 (6th Cir. 2020) ("And given that Good was never asked during her deposition whether any BioLife employees had inquired into her donation history, we cannot hold her failure to volunteer that information against her.") To paraphrase this Court's earlier ruling regarding Mr. Larson's testimony, if the Township wanted to question Mr. Larson about the causal links in his report, it should have asked him sooner. *See* ECF No. 284, PageID.10197.

Third, the Wineries are not pursuing damages for catering or restaurants, so the Township's motion is moot with respect to those categories.

Finally, the Township's claim of prejudice is misplaced. In the evidentiary context, unfair prejudice is an "undue tendency to suggest a decision based on improper considerations." *United States v. Hazelwood*, 979 F.3d 398, 412 (6th Cir. 2020). It has nothing to do with one party's claimed inability to cross examine a witness, and the Township cites no case law to support that argument. The Township's motion should be denied.

[3] Mr. Conn entered his appearance on January 18, 2024.

D. This Court should hear Larson's testimony and give it whatever weight it deems appropriate.

Ultimately, this Court should deny the Township's motion for the same reasons it denied the first two attempts to stop Larson from testifying—this is a bench trial and this Court may assign Larson's testimony whatever weight it deems appropriate. "The 'gatekeeper' doctrine [in *Daubert*] was designed to protect juries and **is largely irrelevant in the context of a bench trial**." *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 640, 852 (6th Cir. 2004) (emphasis added). The barriers under Rule 702 are "more relaxed in a bench trial situation, where the judge is serving as factfinder." *United States v. Brown*, 415 F.3d 1257, 1268–69 (11th Cir. 2005). Further, "rejection of expert testimony is the exception, rather than the rule," so the Court should "generally permit testimony based on allegedly erroneous facts when there is some support for those facts in the record." *In re Scrap Metal Antitrust Litigation*, 527 F.3d 517, 530 (6th Cir. 2008). The better practice is to allow the trial to run its course. "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.

IV. CONCLUSION

The Wineries request that this Court deny PTP's motion to exclude report and testimony from Eric Larson and award the Wineries their costs and fees incurred in responding to this motion.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By: /s/ Joseph M. Infante

Joseph M. Infante (P68719)
Stephen M. Ragatzki (P81952)
Christopher J. Gartman (P83286)
99 Monroe Avenue NW, Suite 1200
Grand Rapids, MI 49503
(616) 776-6333

Dated: April 23, 2024

CERTIFICATE OF COMPLIANCE WITH LOCAL CIVIL RULE 7.3(b)(ii)

1. This Brief complies with the type-volume limitation of L. Civ. R. 7.3(b)(ii) because this Brief contains 3,548 words.

/s/ Joseph M. Infante
Joseph M. Infante

CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2024, I filed the foregoing Response in Opposition to PTP's Motion in Limine to Exclude Plaintiffs' Damages Expert via the Court's CM/ECF System, which will automatically provide notice of the filing to all registered participants in this matter.

/s/ Joseph M. Infante
Joseph M. Infante