

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

WILL MCLEMORE, et al.,)	
)	
Plaintiffs,)	Case No. 3:19-cv-00530
)	
v.)	JUDGE RICHARDSON
)	
ROXANA GUMUCIO, et al.,)	MAGISTRATE JUDGE FRENSELY
)	
Defendants.)	

**DEFENDANTS’ RESPONSE IN OPPOSITION TO PLAINTIFFS’ MOTION TO
EXCLUDE DEFENDANTS’ EXPERT WITNESS**

For the following reasons, Plaintiffs’ motion (DE #89) to exclude Defendants’ expert witness, Justin Ochs, should be denied:

In 2000, F.R.E. 702 was “amended in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and to the many cases applying *Daubert*, including *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167 (1999).” F.R.E. 702 Advisory Comm. Note (2000). The *Daubert* factors are “neither exclusive nor dispositive.” *Id.* “[C]ourts have flexibility in the application of the factors, because it may not make sense to apply some of the *Daubert* factors, such as the rate of error analysis, to non-scientific testimony.” *Thomas v. City of Chattanooga*, 398 F.3d 426, 431-322 (6th Cir. 2005). “[T]he rejection of expert testimony is the exception rather than the rule.” F.R.E. 702 Advisory Comm. Note (2000).

Mr. Ochs “is qualified as an expert by knowledge, skill, experience, training, or education.” F.R.E. 702. Mr. Ochs has been a licensed auctioneer in Tennessee since 2007. He has also been licensed by the states of Alabama, Arizona, Georgia, Indiana, Kentucky, Ohio, Pennsylvania, South Carolina, Texas, and Wisconsin. (Ochs Dep. Ex. 3). He has served as an

instructor at the Nashville Auction School since 2009. (*Id.*). He has served as President of the Tennessee Auctioneers Association. (Ochs Dep. at 56:7-9). His knowledge, skill, experience, training, and education qualify him as an expert on the auctioneering profession, including similarities between online auctions and in-person auctions, risks posed by both types of auctions, and the benefits of requiring education and regulation for auctioneers.

Mr. Ochs has “specialized knowledge [that] will help the trier of fact to understand the evidence or to determine a fact in issue.” F.R.E. 702(a). This entire case turns on whether the State has a rational basis for regulating online auctions. Mr. Ochs’s specialized knowledge regarding the auctioneering profession and auctioneering education and regulation will help the Court understand the similarities between online auctions and in-person auctions, the risks posed by both types of auctions, and the benefits of requiring education and regulation for auctioneers.

Mr. Ochs’s testimony “is based on sufficient facts or data” and “is the product of reliable principles and methods,” and he has “reliably applied the principles and methods” to the matters at issue in this case. F.R.E. 702(b)-(d). Although the *Daubert* and F.R.E. 702 factors do not precisely apply to Mr. Ochs’s non-scientific testimony, it is appropriate for Mr. Ochs’s testimony to be based on his extensive experience as a practicing auctioneer and auctioneer instructor. *See Thomas v. City of Chattanooga*, 398 F.3d at 432 (“An expert may certainly rely on his experience in making conclusions.”); F.R.E. 702 Advisory Comm. Note (2000) (“In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony.”). Mr. Ochs has conducted more than 2,000 auctions in his career. (Ochs Dep. at 15:5-12). He has experience conducting both online auctions and in-person auctions. (Ochs Dep. Ex. 2 at 1). As an auctioneer instructor, he is responsible for educating prospective auctioneers regarding how to properly practice their profession. Mr. Ochs’s significant

knowledge, experience, and observations over his extensive career as a practicing auctioneer and auctioneer instructor are more than sufficient to support his testimony and opinions regarding the similarities between online auctions and in-person auctions, the risks posed by both, and the benefits of education and regulation. The fact that Mr. Ochs has participated in, observed, and taught the matters about which he opines “explains[s] how [his] experience leads to the conclusion[s] reached” and “why [his] experience is a sufficient basis for [his] opinion[s].” F.R.E. 702 Advisory Comm. Note (2000). Mr. Ochs’s extensive experience conducting both types of auctions and as an auctioneer instructor demonstrates that his experience can be “reliably applied” to the matters at issue in this case. *Id.*

Mr. Ochs’s expertise “fits” his opinions. *Smelser v. Norfolk S. Ry.*, 105 F.3d 299, 303 (6th Cir. 1997). Mr. Ochs has conducted both types of auctions and teaches auctioneering at an auctioneering school. His testimony concerns the auctioneering profession, the auction process, and the benefits of education and regulation for auctioneers. Who is better qualified to opine on the auctioneering profession and the auction process than a practicing auctioneer? Who is better qualified to opine on the benefits of education and regulation than an auctioneer instructor who teaches the auctioneering profession to prospective auctioneers?

Plaintiffs’ opposition to Mr. Ochs’s expert report and testimony is largely based on Plaintiffs’ erroneous presumption that the level of scrutiny for this case should be strict scrutiny (DE #91 at 3) or intermediate scrutiny (DE #89-1 at 13). This is not a free speech case. Because Tennessee’s auctioneering statutes regulate business conduct and economic activity, not speech, the appropriate level of scrutiny is the rational basis test. *See Bevan & Assocs., LPA, Inc. v. Yost*, 929 F.3d 366, 374-75 (6th Cir. 2019); *Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 692-94 (6th Cir. 2014), *cert. denied*, 135 S.Ct. 950 (2015). Hence, Defendants are not required to show that

2019 Tenn. Pub. Acts Ch. 471 (“PC 471”) is narrowly tailored to further a substantial government interest. (DE #89-1 at 13). Rather, Defendants are required to show only that PC 471 “is rationally related to a legitimate government purpose. There is a strong presumption of constitutionality and the regulation will be upheld so long as its goal is permissible and the means by which it is designed to achieve that goal are rational.” *Liberty Coins*, 748 F.3d at 694. Mr. Ochs’s opinions are relevant to the State’s legitimate government purpose and the rationality of PC 471.

Plaintiffs’ opposition to Mr. Ochs is also largely based on the flawed presumption that he should have compared complaint data regarding online auctions (including online auctions conducted during COVID-19) to complaint data regarding in-person auctions. (DE #89-1 at 11, 13-15). A comparison between complaints about online auctions and complaints about in-person auctions would be practically worthless because the Tennessee Auctioneer Commission has not had jurisdiction to regulate online auctions since August 2, 2016—the date of the agreed final order in Mr. McLemore’s administrative complaint proceeding. *See* Agreed Final Order, *Tenn. Dep’t of Commerce & Ins., Div. of Regulatory Bds. v. McLemore Auction Co., LLC*, Tenn. Auctioneer Comm’n, Docket No. 12.15-138591A, at 1 (Aug. 2, 2016) (copy attached). Any complaints regarding online auctions that were nevertheless submitted to the Commission after that date were not adjudicated because of lack of jurisdiction. There is thus no way to evaluate the veracity or severity of the complaints or determine whether the volume or severity of complaints accurately reflects consumer harm from online auctions. Moreover, during COVID-19, the Commission was “enjoined and restrained from applying Tennessee’s auctioneering laws and licenses to ‘electronic’ exchanges, or online auction websites.” (DE #30 at 2). It is preposterous for Plaintiffs to assert that the number or severity of online auction complaints

during a period in which enforcement of PC 471 against online auctions was enjoined would be probative of anything.

Plaintiffs also erroneously assert that Mr. Ochs should have compared online auctions to timed listings, rather than in-person auctions. (DE #89-1 at 14). For determining whether online auctions should be regulated by the *Tennessee Auctioneer Commission*, a comparison between online auctions and timed listings would be as valuable as a comparison between online auctions and fixed price listings. Neither a timed listing nor a fixed price listing is an auction. *See* Tenn. Code Ann. §§ 62-19-101(2) & -103(9); Op. Tenn. Att’y Gen. 06-053 at 4 (Mar. 27, 2006). Indeed, the testimony of Plaintiffs’ witnesses confirms that the appropriate comparison is between online auctions and in-person auctions, because timed listings are not auctions. Plaintiffs choose to use the online auction format, rather than the timed listing format, precisely because the online auction format results in the highest or most favorable offer for the item being sold, while the timed listing format does not. (Am. Compl. ¶ 33; McLemore Auction Dep. at 82:8-83:4); Tenn. Code Ann. § 62-19-101(2) (An auction “culminat[es] in the acceptance by the auctioneer of the highest or most favorable offer made by a member of the participating audience.”). Another of Plaintiffs’ witnesses, David Allen, likewise testified that an online auction mimics the behavior of an auctioneer at an in-person auction, while a timed listing does not. (Allen Dep. at 138:9-140:7 & Ex. 8 at 30:1-3, 33:17-25). Mr. Ochs thus makes the appropriate comparison when he compares online auctions to in-person auctions, which have been within the Commission’s jurisdiction for more than fifty years.

CONCLUSION

For the foregoing reasons, the plaintiffs’ motion to exclude the expert report and expert testimony of Justin Ochs should be denied.

Respectfully Submitted,

HERBERT H. SLATERY III
Attorney General and Reporter

s/R. Mitchell Porcello
R. MITCHELL PORCELLO (#25055)
Senior Assistant Attorney General
Attorney General's Office
P.O. Box 20207
Nashville, TN 37202-0207
(615) 532-2547 *telephone*
(615) 532-2571 *fax*
Mitch.Porcello@ag.tn.gov
Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response has been served on the following
via the court's electronic filing system on May 14, 2021:

Braden H. Boucek
Southeastern Legal Foundation
560 West Crossville Rd. Suite 104
Roswell, GA 30075
(770) 977-2131
Fax: (770) 977-2134
bboucek@southeasternlegal.org

David L. Harbin (da.harbin@comcast.net)
Meggan S. DeWitt (Meggan@beaconTN.org)
Beacon Center of Tennessee
201 4th Ave. N.
Suite 1820
P O Box 198646
Nashville, TN 37219
(615) 383-6431
Fax: (615) 383-6432

Counsel for Plaintiffs

s/R. Mitchell Porcello