

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

15 CVS 9995

INTERSAL, INC.,

Plaintiff,

v.

D. REID WILSON, Secretary, North  
Carolina Department of Natural and  
Cultural Resources; NORTH CAROLINA  
DEPARTMENT OF NATURAL AND  
CULTURAL RESOURCES; THE STATE  
OF NORTH CAROLINA; and FRIENDS  
OF QUEEN ANNE'S REVENGE, a Non-  
Profit Corporation,

Defendants.

**ORDER ON PLAINTIFF'S MOTION TO  
EXCLUDE EXPERT OPINIONS FROM  
DEBORAH R. GERHARDT**

1. **THIS MATTER** is before the Court on Plaintiff's Motion to Exclude Expert Opinions from Deborah R. Gerhardt (the "Motion"), (ECF No. 155).
2. Having considered the Motion, the related briefing, and the arguments of counsel at a hearing on the Motion, the Motion is hereby **GRANTED**.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

3. The facts surrounding this case have been recounted at length in the Court's previous orders. *See, e.g., Intersal, Inc. v. Wilson*, 2023 NCBC LEXIS 29, at \*\*2-21 (N.C. Super. Ct. Feb. 23, 2023).

4. Among other things, Plaintiff seeks damages for the Defendants' alleged breaches of Section 16(b) of the 2013 Settlement Agreement.<sup>1</sup> In support of their damages calculation, Plaintiff intends to offer the testimony of Professor Jeffrey Sedlik, who uses a "hypothetical licensing model." (*See generally* Expert Report of Professor Jeffrey Sedlik ["Sedlik Report"], ECF No. 219.2; Supp. Report of Professor Jeffrey Sedlik, ECF No. 219.4.)

5. In turn, Defendants retained Deborah Gerhardt, a professor of intellectual property law at the University of North Carolina—Chapel Hill School of Law. Professor Gerhardt is a licensed attorney who has taught law for over a decade. She admits that she has no formal training in archaeology, photography, or digital media, outside of a brief stint as a part-time professional photographer. (Expert Report of Deborah R. Gerhardt ["Gerhardt Report"] 1, ECF No. 156.1; Excerpts from Dep. of Deborah R. Gerhardt ["Gerhardt Dep."] 11:19-25, 16:17-19, 17:17-20:14, 23:12-24:20, 26:24-27:2, ECF No. 156.2.)

6. Professor Gerhardt produced a report in which she offers answers to four questions posed by Defendants' counsel:

1. Does the law permit someone to own rights in a narrative, such as the story about salvaging Blackbeard's ship? If so, does intellectual property law give

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<sup>1</sup> Section 16(b) states in part:

All non-commercial digital media, regardless of producing entity, shall bear a time code stamp, and watermark (or bug) of Nautilus and/or D[N]CR, as well as a link to D[N]CR, Intersal, and Nautilus websites, to be clearly and visibly displayed at the bottom of any web page on which the digital media is being displayed.

(2013 Settlement Agreement, ECF No. 219.9.)

Intersal the exclusive right to commercial or noncommercial narratives about the QAR project even if such narratives are created by independent third parties?

2. Does the 2013 Agreement give Intersal the exclusive right to commercial or noncommercial narratives about the QAR project? Specifically, does the 2013 Agreement prevent third parties from publishing content they create or obtain from lawful sources?
3. Did the DNCR place Intersal's intellectual property in the public domain?
4. Does Intersal have an ownership interest in QAR photos taken by DNCR?

(Gerhardt Report 2.)

7. In her thirteen-page report, Professor Gerhardt opined that (1) intellectual property law does not provide any foundation for Intersal to claim exclusive rights in the narrative (commercial or not) of salvaging the *Queen Anne's Revenge* ("QAR"); (2) the Court should not enforce any provision in a way that gives Intersal the exclusive right to telling the story of the QAR salvage as such an interpretation would violate constitutional and federal public policy; (3) DNCR did not place any of Intersal's intellectual property in the public domain because Intersal has failed to identify any protectable intellectual property; and (4) Intersal does not have an ownership interest in QAR photos taken by DNCR because no express written copyright assignment existed. (Gerhardt Report 5-12.)

8. When questioned about her report, Professor Gerhardt admitted that it reflects her legal opinions and conclusions regarding intellectual property law and her interpretation of the 2013 Agreement. (Gerhardt Dep. 14:24-15:2, 66:13-67:10, 102:3-13.)

9. Plaintiff filed the Motion on 6 August 2021, (ECF No. 155). Defendants filed their response on 26 August 2021. (Defs.’ Memo. Resp. Pl.’s Mot. Exclude Expert Ops. Professor Deborah R. Gerhardt [“Defs.’ Resp.”], ECF No. 170.) Plaintiffs filed their reply on 2 September 2021. (Pl.’s Reply Supp. Mot. Exclude Expert Ops. Professor Deborah R. Gerhardt [“Pl.’s Reply”], ECF No. 172.)

10. The Court held a hearing on the Motion on 4 January 2022 at the same time the Court heard cross motions for summary judgment. Ultimately, the Court decided to stay consideration of the Motion pending the filing of the parties’ other motions *in limine*. The Motion is now ripe for disposition.

## II. LEGAL STANDARD

11. The purpose of a motion *in limine* is to seek a “pretrial determination of the admissibility of evidence proposed to be introduced at trial[.]” *Evans v. Family Inns of Am., Inc.*, 141 N.C. App. 520, 523 (2000) (cleaned up). Motions *in limine* seek “to avoid injection into trial of matters which are irrelevant, inadmissible, and prejudicial.” *State v. Fearing*, 315 N.C. 167, 168 (1985) (emphasis in original) (quoting Black’s Law Dictionary 914 (5th ed. 1979)).

12. North Carolina Rule of Evidence 702 (“Rule 702”)<sup>2</sup> governs the admission of expert testimony, and “adopt[s] virtually the same language from” Federal Rule of

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<sup>2</sup> Rule 702 provides in pertinent part:

(a) 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 all of the following apply:

Evidence 702. *State v. McGrady*, 368 N.C. 880, 888 (2016). *See also Insight Health Corp. v. Marquis Diagnostic Imaging of N.C., LLC*, 2017 NCBC LEXIS 14, at \*39 (N.C. Super. Ct. Feb. 24, 2017). Accordingly, North Carolina follows the standard for expert testimony established by *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), and the Court may appropriately seek guidance from federal case law. *See McGrady*, 368 N.C. at 888.

13. *Daubert* established a three-pronged test for admission of expert testimony: (1) the area of proposed testimony must be based on specialized knowledge that will assist the trier of fact to understand the evidence or determine a factual issue; (2) the witness must be qualified as an expert by knowledge, skill, experience, training or education; and (3) the testimony must be reliable, through a foundation in sufficient facts or data, and the application of reliable principles and methods to the facts of the case. *See id.* at 889-90 (summarizing *Daubert* and its application under North Carolina law).

14. “The burden of satisfying Rule 702(a) rests on the proponent of the evidence[.]” *State v. Gray*, 259 N.C. App. 351, 355 (2018).

15. An expert does not testify on specialized knowledge “[w]hen the jury is in as good a position as the expert to determine an issue . . . because [the expert’s

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(1) The testimony is based upon sufficient facts or data.

(2) The testimony is the product of reliable principles and methods.

(3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. R. Evid. 702(a).

testimony] is not helpful to the jury.” *Braswell v. Braswell*, 330 N.C. 363, 377 (1991). See also *State v. Wilkerson*, 295 N.C. 559, 568-69 (1978) (framing expert admissibility as a question of “whether the witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact.”).

16. Thus, an expert’s legal conclusion may be excluded when it does not assist the jury. See e.g., *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 587 (1991) (“[A]n expert is in no better position to conclude whether a legal standard has been satisfied or a legal conclusion should be drawn than is a jury which has been properly instructed on the standard or conclusion.”); *Smith v. Childs*, 112 N.C. App. 672, 681 (1993) (excluding an attorney’s testimony on the proper interpretation of a purchase money deed trust); *Wagoner v. Elkin City Sch. Bd. of Educ.*, 113 N.C. App. 579, 585 (1994) (excluding an expert affidavit consisting entirely of legal conclusions); *Norris v. Zambito*, 135 N.C. App. 288, 292 (1999) (excluding an expert’s characterization of law enforcement’s behavior as “grossly negligent” and showing “reckless disregard for the safety of others); *Burrell v. Sparkkles Reconstruction Co.*, 189 N.C. App. 104, 113-14 (2008) (prohibiting an expert from testifying that the defendants violated statutory law).

17. Experts may testify to “the underlying factual premise, which the fact finder must consider in determining the legal conclusion to be drawn therefrom, but may not be offered as to whether the legal conclusion *should* be drawn.” *Norris*, 135 N.C. App. at 292. Stated differently, expert witnesses “may testify regarding factual issues facing the jury, [but they are] not allowed to either interpret the law or to testify as

to the legal effect of particular facts.” *Smith*, 112 N.C. App. at 680-81 (holding the trial court erred by allowing an attorney to give expert testimony on, among other things, his “individual interpretation of North Carolina law” on personal guaranties). Allowing expert testimony on these matters “would amount to a jury instruction on the applicable law, thereby improperly invading the province of the court.” *Smith*, 112 N.C. App. at 680 (citation omitted).

18. Additionally, experts may explain the meaning of technical terms in a legal document or a highly specialized or complex area of law. *See id* at 681 (“It is generally accepted that if technical terms are used in a contract, expert testimony is admissible to explain the meaning of such terms as an aid in interpreting the instrument.”); *see also United States v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1991) (“Particularly in complex cases . . . expert testimony may help a jury understand unfamiliar terms and concepts. Its use must be carefully circumscribed to assure that the expert does not usurp either the role of the trial judge in instructing the jury as to the applicable law or the role of the jury in applying that law to the facts before it.”)

19. Furthermore, pursuant to Rule 403 of the North Carolina Rules of Evidence, even relevant evidence may be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” N.C. R. Evid. 403.

20. Ultimately, “[t]he decision to either grant or deny a motion *in limine* is within the sound discretion of the trial court.” *State v. Fristsch*, 351 N.C. 373, 383

(2000). *See also LaVecchia v. N. Carolina Joint Stock Land Bank of Durham*, 218 N.C. 35, 41 (1940) (“The competency of a witness to testify as an expert is a question primarily addressed to the sound discretion of the court, and [its] discretion is ordinarily conclusive.”).

### III. ANALYSIS

#### A. Rule 702

21. Plaintiff argues that Professor Gerhardt’s opinions are inadmissible jury instructions and her own interpretation of the 2013 Agreement. (Pl.’s Br. Supp. Mot. Exclude Expert Ops. Deborah R. Gerhardt [“Pl.’s Br.”] 11-16, ECF No. 158.) Defendants disagree, contending that Professor Gerhardt’s testimony will assist the jury to understand the facts. Defendants further assert that Professor Gerhardt should be permitted to explain the difference between “commercial” and “non-commercial” because it is a technical term. Finally, Defendants argue that Professor Gerhardt’s testimony is admissible because it is being offered to rebut the expert opinion of Professor Sedlik. (Defs.’ Br. 9-18.)

22. The Court disagrees with Defendants. Professor Gerhardt’s report is tantamount to a well-written legal memorandum on intellectual property law. Even Professor Gerhardt admits that her testimony would assist the jury to understand the law, not the facts. (Gerhardt Dep. 14:24-15:2, 66:13-67:10, 102:3-13.) It is the Court’s duty, not the duty of either party’s expert, to ensure that the jury is appropriately instructed on the law with respect to the issues in this case.

23. As for the distinction between “commercial” and “non-commercial,” Professor Gerhardt is an expert in the law, but she has not established herself as an expert in the publication of digital images such that she would be qualified to define a term of art in that arena. Furthermore, nowhere in her report does Professor Gerhardt actually offer a definition of “commercial” or “non-commercial.” Instead, she opines that use of the word “commercial” in the 2013 Agreement is “atypical.” (Gerhardt Dep. 75:1-77:13.) And, as the Court has already found, (*see* Order and Opinion on Defs.’ Mot. in Limine Exclude Op. Testimony Jeffrey Sedlik ¶ 25, ECF No. 267), understanding these terms is not beyond the ken of the average juror.

24. As for whether Professor Gerhardt’s testimony is admissible to rebut Professor Sedlik’s opinion on damages, Professor Gerhardt does not directly address whether the hypothetical licensing model can be used in a contract action such as this one. Instead, Professor Gerhardt explains that because Intersal does not own the copyright to Defendants’ images, under copyright law, it would not be entitled to a licensing fee for their use.

25. But Professor Gerhardt misunderstands Intersal’s position. Intersal freely admits it does not own the copyright to Defendants’ images and does not seek a license fee on that basis. Among other things, Intersal’s claim is for the value it allegedly lost when Defendants made the images publicly accessible without watermarks, time stamps, and weblinks. Professor Sedlik, Intersal’s expert, uses a lost licensing fee as a proxy to calculate the damages Intersal claims to have suffered by not being able to publish its own images or to otherwise monetize third-party access to the site and its

artifacts. Professor Gerhardt's proposed testimony does not address whether this use of a license fee is acceptable in the field of media rights, nor can she, given that her expertise is in copyright law.

B. Rule 403

26. Plaintiff also argues that Professor Gerhardt's testimony should be excluded under Rule 403 because it will confuse and mislead the jury. (Pl.'s Br. 16-17.) The Court agrees. Professor Gerhardt's report is a treatise on copyright law, but this is a breach of contract case. Her detailed testimony would confuse and mislead, rather than assist, the jury.

27. **WHEREFORE**, the Court, in the exercise of its discretion, hereby **GRANTS** the Motion and **ORDERS** that the expert opinion testimony of Professor Deborah Gerhardt shall be excluded from the trial of this action.

**IT IS SO ORDERED**, this the 2nd of February, 2024.

/s/ Julianna Theall Earp

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Julianna Theall Earp  
Special Superior Court Judge  
for Complex Business Cases