

2008 WL 2781149

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United States District Court, N.D. Florida,
Tallahassee Division.

Laura L. SMITH, Plaintiff,

v.

JACOBS ENGINEERING GROUP, INC., Defendant.

No. 4:06cv496-WS.

|
April 18, 2008.

Named Expert: David Lastinger

Attorneys and Law Firms

Steven R. Andrews, Walter Scott Newbern, III, Andrews Moye LLC, David Michael Frank, David M. Frank PA, Tallahassee, FL, for Plaintiff.

Allen C. Winsor, Michael E. Riley, Grayrobinson PA, Tallahassee, FL, for Defendant.

ORDER DENYING PLAINTIFF'S SECOND MOTION IN LIMINE TO EXCLUDE TESTIMONY OF DAVID LASTINGER

WILLIAM STAFFORD, Senior District Judge.

*1 Before the court is the magistrate judge's report and recommendation (doc. 101) docketed March 6, 2008. The magistrate judge recommends that the plaintiff's second motion in limine (doc. 66) (to exclude the expert testimony of David Lastinger ("Lastinger") be denied. The plaintiff has filed objections (doc. 126) to the report and recommendation, and the defendant has responded (doc. 139) to those objections.

Six days after the plaintiff's vehicle was rear-ended by one of the defendant's employees, Lastinger appraised the damage to the plaintiff's vehicle. The defendant, who is self-insured, had contracted with ACE/ESIS for claims adjustment services, and ACE/ESIS in turn hired Lastinger-an independent appraiser with nineteen years of experience-to assess the damage to plaintiff's vehicle. Lastinger examined the vehicle at the plaintiff's residence and, using a computer

software program known as UltraMate,¹ estimated the total damage to be \$676.98.

Lastinger prepared an appraisal report dated July 28, 2006, in which he itemized his preliminary damage estimates. Included in his report was the following note:

There was a note on the assignment that the owner was injured. If so, she did not show any signs. In fact, she toted a box of books from her residence to her vehicle while I was there and did not appear to have any problems doing so.

After this lawsuit was filed, the defendant named Lastinger as one of its fact witnesses, and Lastinger was thereafter deposed by the plaintiff's counsel. The plaintiff now seeks to exclude Lastinger's testimony concerning his damage estimates, in part based on the defendant's failure to provide an expert report pursuant to Rule 26(a)(2).

Rule 26(a)(2) provides that a party must provide to other parties "a written report-prepared and signed by the witness-if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony." Fed.R.Civ.P. 26(a) (2)(B) (emphasis added). The defendant maintains that an expert report under Rule 26(a)(2) was not required because Lastinger, an independent appraiser, was neither retained by nor specially employed by the defendant to provide expert testimony in this case. The plaintiff argues otherwise, relying in large part on Lastinger's answers to her counsel's deposition questions, including the following:

Q: When you are retained to give an appraisal for a car do you assume that when ACE-ESIS retains you that it would include your testifying at the trial of the case if it goes to trial?

A: There's always that possibility.

Q: So when you're retained you would anticipate that if there's a lawsuit and it goes to trial you would give testimony concerning your appraisal, correct?

A: That's ... correct.²

Relying on such testimony, the plaintiff contends that Lastinger “was retained at the time of his appraisal to testify if the case went to trial.” The court, however, is not persuaded. That Lastinger may have anticipated that he could possibly be called as a witness does not in any way establish that the defendant retained him or specially employed him as an expert.³ Indeed, the record establishes that ACE/ESIS, not Jacobs, retained him, and he was retained for one purpose only—to appraise the damage to the plaintiff’s car for insurance purposes. Because Lastinger was not “retained or specially employed [by a party] to provide expert testimony,” the defendant was not required to produce an expert report under Rule 26(a)(2)(B). The plaintiff’s request to exclude Lastinger’s testimony on that basis must be denied.

*2 While Rule 26(a)(2)(B) focuses on experts who must file an expert report, by exclusion it contemplates that some experts may testify without filing reports. A treating physician is the quintessential example of an expert witness for whom no Rule 26(a)(2)(B) expert report is required. Indeed, an advisory committee note to Rule 26(a)(2)(B) states that “[a] treating physician ... can be deposed or called to testify at trial without any requirement for a written report.” Courts, moreover, have long recognized that treating physicians may testify at trial without producing a written report. *See, e.g., Fielden v. CSX Transp., Inc.*, 482 F.3d 866, 869 (6th Cir.2007) (holding that a treating physician was not required to produce an expert’s report before testifying about the causation of a worker’s injury, where the physician formed his opinions as to causation during the course of treatment); *Oakberg v. Zimmer, Inc.*, 211 Fed. Appx. 578, 580 (9th Cir.2006) (holding that an orthopedic surgeon could testify regarding the basis of his treatment, diagnosis, and prognosis without producing an expert report); *Davoll v. Webb*, 194 F.3d 1116, 1138 (10th Cir.1999) (explaining that “[a] treating physician is not considered an expert witness if he or she testifies about observations based on personal knowledge, including the treatment of the party”).

A damages assessment completed by an insurance adjuster days after an accident is not unlike the diagnosis of a

physician treating an injured person. Indeed, in *St. Paul Mercury Ins. Co. v. Capitol Sprinkler Inspection, Inc.*, No. 05-2115, 2007 WL 1589495, *12-13 (D.D.C.2007), the court relied on the treating-physician cases when it held that an insurance adjuster was not required to produce an expert report before testifying “as a fact witness as to his role in performing the damages calculation that was part of his job as an insurance adjuster.”⁴ *Id.* at *13; *see also Compagnie Des Bauxites De Guinee v. Three Rivers Ins. Co.*, No. 2:04CV393, 2007 WL 403915, *3 (W.D.Pa.2007) (explaining that an independent insurance adjuster could testify without producing an expert report as long as the adjuster was a participant in the events underlying the case and his testimony was limited to his personal role in those historical events).

Here, the defendant maintains that Lastinger will testify about his pre-litigation examination of the plaintiff’s vehicle and his contemporaneous assessment of the damage that was done to that vehicle.⁵ Lastinger prepared a report detailing the results of his historical examination/assessment, and that report was produced to the plaintiff. The plaintiff deposed Lastinger and had the opportunity to question the witness about his report, his examination, and his damages assessment. The plaintiff does not contend that Lastinger was unqualified as a damage appraiser, and she does not suggest that the computer program that he used to help him quantify the damages was unreliable. Under the circumstances, the court finds no basis for granting the plaintiff’s motion in limine to exclude the testimony of Lastinger.

*3 Accordingly, it is ORDERED:

The plaintiff’s second motion in limine to exclude testimony of D. Lastinger (doc. 66) is DENIED.

DONE AND ORDERED.

All Citations

Not Reported in F.Supp.2d, 2008 WL 2781149

Footnotes

- 1 UltraMate is a damage estimating system that has been marketed to body shops, insurance appraisers, and insurance companies for some time. Lastinger has been using UltraMate in his appraisal business since 2000.
- 2 At his deposition, Lastinger also stated that (1) he had done 1,869 appraisals, none of which required him to testify at a trial; (2) it was very uncommon for him to be deposed; and (3) since he moved to Tallahassee in 2001, he had been deposed only in this case, the *Smith v. Jacobs* case.
- 3 Based on what Lastinger saw six days after the accident, it would be surprising if he, or the defendant, or anyone at ACE/ESIS would have then expected the matter to result in litigation.
- 4 The court noted that the adjuster's testimony could include "information he learned from his pre-litigation inquiries and receipt of information and materials, including typical insurance adjuster inquiries made of third-parties to secure damages assessments relevant to the insurance claim." *Id.* The court also noted that "counsel must be prepared to obtain information about the opinions and bases of their testimony by interrogatories and/or depositions. *Id.* at *12 (quoting [Sullivan v. Glock, Inc.](#), 175 F.R.D. 497, 506 (D.Md.1997))
- 5 In her objections to the magistrate judge's report and recommendation, the plaintiff suggests that Lastinger should not be permitted to testify that, when he saw the plaintiff six days after the accident, she did not appear to be hurt. The court finds no basis, however, for excluding such eye-witness testimony.