2008 WL 8715813
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United States District Court,
M.D. Louisiana.

Randolph PENDARVIS, et al
v.
AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA.

Civil Action No. 06–772–DLD.
|
Jan. 24, 2008.

Named Expert: Leroy Young.

Attorneys and Law Firms

Phillip T. Hager, Phillip T. Hager, Attorney at Law, Metairie, LA, for Plaintiff.

Gordon P. Serou, Jr., Law Offices of Gordon P. Serou, Jr., New Orleans, LA, for Defendant.

CONSENT CASE

RULING

DOCIA L. DALBY, United States Magistrate Judge.

***1** This consent case is before the Court on a motion in limine filed by defendant, American Bankers Insurance Company of Florida(rec.doc.33). Defendant's motion seeks to exclude the testimony of plaintiffs' witness, Leroy Young, at the trial scheduled for Tuesday, February 26, 2008. Defendant anticipates that Mr. Young's testimony will qualify as "expert" testimony, and argues that plaintiffs' failure to submit an expert report on behalf of Mr. Young pursuant to Fed.R.Civ.P. 26(a)(2)(B), should result in the exclusion of his testimony at trial.

Background

Plaintiffs, Randolph and Tammy Pendarvis, are the co-owners of a mobile home located at 45342 Myers Estate Road, Prairieville, Louisiana (rec. docs. 30 and 32). On August 29, 2005, plaintiffs' mobile home was allegedly damaged by Hurricane Katrina (rec.doc.30). On April 24, 2006, plaintiffs obtained an inspection of their mobile home and an estimate of the cost to repair the damage by L & R Builders, LLC (rec.doc.33–4). L & R Builders estimated the cost to repair the mobile home to be $71,500.00 and indicated that mold and mildew were present in the home. *Id.* L & R Builders, LLC gave a previous estimate to plaintiffs for "water damage repairs" on February 1, 2005 (rec.doc.33–5).

Apparently, defendant either paid or offered to pay some amount in satisfaction of the damage to plaintiffs' mobile home, but in amounts less than $71,500.00(rec.doc.30). Dissatisfied with defendant's efforts to satisfy the property damage claims, Mr. Pendarvis timely filed a petition for insurance benefits, penalties, and attorney fees on August 28, 2006, in the 23rd Judicial District Court asserting a claim for damage to his property and for penalties and attorneys' fees for defendant's failure to timely pay his claim (rec.doc.1). Mr. Pendarvis' petition was removed to this Court on October 6, 2006, on the basis of diversity jurisdiction. *Id.*

Pursuant to the deadlines established in the scheduling order, on July 25, 2007, plaintiffs timely filed their expert witness list with the Court, which identified Leroy Young and Susan Giroir as potential expert witnesses (rec.doc.14). Plaintiffs stated that their reports, in the form of estimate of damage and appraisal, were submitted to counsel for defendant. *Id.* Defendant timely identified its expert witnesses on August 23,2007 as Phillip Pierce, Jason Speer/Keith Foundation/ Paul Skull/or another representative of the Foundation Group, Inc., and Daron McKnight (rec.doc.21). The scheduling order required plaintiffs to submit expert reports by July 25, 2007, but plaintiffs failed to submit an expert report on behalf of Leroy Young to defendant prior to that date. Because plaintiffs failed to submit an expert report on behalf of Mr. Young, defendant seeks to exclude his testimony at trial.

Argument of Parties

Defendant seeks to exclude the testimony of plaintiffs' witness, Leroy Young, whether his testimony be in the form of expert testimony or lay testimony (rec.doc.33). Based on the repair estimate previously produced by Mr. Young, defendant anticipates that plaintiffs will elicit testimony from Mr. Young regarding the cost to repair the hurricane related damage to plaintiffs' home (rec. doc. 33–2, Exhibit "B"). Defendant argues that in order for Mr. Young to offer testimony regarding the cost to repair plaintiffs' home, he will

have to (1) assess the scope of hurricane related damage to the insured property, (2) distinguish new damage from damage that existed prior to Hurricane Katrina, (3) estimate the scope of construction necessary to repair the new damage, and (4) estimate the material and labor costs involved in repairing that damage. *Id.* Defendant claims that Mr. Young's testimony will require "specialized" knowledge, which will make his testimony expert testimony. Defendant further argues that Mr. Young is "retained or specially employed to provide expert testimony" and, therefore, plaintiffs had an obligation to produce expert disclosures, including an expert report pursuant to Fed.R.Civ.P. 26(a)(2)(B), prior to Mr. Young's testimony. Because plaintiffs' failed to timely submit an expert report on behalf of Mr. Young, defendant moves the Court for an order striking his testimony at trial.

***2** Plaintiffs acknowledge that they did not comply with the requirements of Fed.R.Civ.P. 26(a)(2)(B) in producing a formal expert report with respect to Mr. Young (rec.doc.34). Although plaintiffs originally intended to use Mr. Young as an expert, they do not anticipate that he will testify as an expert at trial; therefore, he was not identified as an expert in the pretrial order. Plaintiffs claim that they contacted Mr. Young prior to filing suit, during the time their storm damage was being adjusted by defendant, to obtain an estimate of repairs of storm damage, and the estimate was sent to the defendant.

Plaintiffs claim that they were not required to comply with Fed.R.Civ.P. 26(a)(2)(B) because Mr. Young's testimony at trial will be factual and not opinion testimony. Mr. Young's testimony will consist of his estimate of repairs and how much he will charge to make the repairs, item by item, supported by photographs of the house, which have been provided to opposing counsel. Plaintiffs argue that this will not require prohibited opinion testimony.

Plaintiffs also note that Mr. Young has not been retained or specially employed by either plaintiffs or plaintiffs' counsel to provide testimony at trial, he is not receiving an expert fee, nor with he be subpoenaed for trial or compensated by plaintiffs pursuant to a subpoena.

In the event that the Court finds that Mr. Young's testimony constitutes expert testimony and plaintiffs' failure to comply with Fed.R.Civ.P. 26(a)(2)(B) will be fatal to the use of Mr. Young at trial, plaintiffs request a continuance of the trial date in order to retain Mr. Young and produce an expert report in compliance with Fed.R.Civ.P. 26(a)(2)(B).

Substantive Law and Discussion

A testifying witness may provide both factual or opinion testimony at trial depending on whether the witness is a lay or expert witness. The admissibility of opinion testimony by lay witnesses is governed by Fed.R.Evid. 701, which provides as follows:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Fed.R.Evid. 701.

The admissibility of a witnesses opinion, which rests on scientific, technical, or specialized knowledge must be determined based on Fed. R. Evid 702, which provides as follows:

> 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 (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

***3** Fed.R.Evid. 702.

"[T]he distinction between lay and expert witness testimony is that lay testimony 'results from a process of reasoning familiar in everyday life,' while expert testimony 'results from a process of reasoning which can be mastered only be specialists in the field." Fed.R.Evid. 701, Advisory Committee Notes, to 2000 Amendments (quoting *State v. Brown,* 836 S.W.2d 530, 549 (Tenn.1992)).

Pursuant to Fed.R.Civ.P. 26(a)(2)(A), a party must disclose to the other parties the identity of any witness that it may use at trial to present evidence under Fed.R.Evid. 702, 703, and 705. However, a party must produce a written expert report, as required by Fed.R.Civ.P. 26(a)(2)(B), "if the witness is one

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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." *See* Fed.R.Civ.P. 26(a)(2)(B). Thus, Fed.R.Civ.P. 26(a)(2) creates two distinct types of disclosures, which are often overlooked. *Sullivan v. Glock, Inc.,* 175 F.R.D. 497 (D .Md.1997)

After reviewing the memoranda submitted by both parties, it is difficult to predict how Mr. Young's testimony will develop at trial and whether it will take the form of mere factual testimony or opinion testimony based on specialized knowledge. Plaintiffs state that Mr. Young will testify to his estimate of repairs and what he would charge to make the repairs. In this instance, Mr. Young would—at most—be considered a hybrid fact/expert witness.

A hybrid fact/expert witness is allowed to testify as to his opinion at trial, but is not subject to the comprehensive disclosures of the written report set forth in Rule 26(a)(2)(B). *Sullivan v. Glock, Inc.,* 175 F.R.D. at 500. The treating physician is the quintessential example of the hybrid/fact expert witness for whom no Rule 26(a)(2)(B) disclosures are required, but the focus is not on the status of the expert, but on the nature of the testimony which will be offered at trial. *Id.* To the extent that the source of facts which form the basis for the testifying witness's opinions are derived from information learned during a personal experience—an actual inspection or treatment of a patient-as opposed to being subsequently supplied by an attorney involved in litigating a case involving an injury—then no Rule 26(a)(2)(B) report should be required. *See Sullivan v. Glock, Inc .,* 175 F.R.D. at 501.

Mr. Young physically inspected the home and, based on his experience and the price of goods, estimated a cost of repairing the home. His estimate is not based on any information supplied to him from plaintiffs' counsel. Similarly, it is anticipated, based on the pretrial report, that defendant will introduce the testimony of its adjustor, Daron McKnight, at trial who also inspected the home and estimated a cost to repair the home (rec.doc.30). Courts have considered insurance adjustors hybrid fact/expert witnesses under Rule 26(a)(2)(A), who may provide opinion testimony at trial, without generating a signed, written report pursuant to Rule 26(a)(2)(B) because they were actual participants prior to litigation, they do not receiving additional compensation for their testimony at trial, their opinions regarding the costs of repair and replacement are part of the "normal insurance adjustment process" and were not given at the request of counsel, and "their opinions are not based upon any facts, information or documents generation by the subsequent litigation. *St. Paul Mercury Ins. Co. v. Capitol Sprinkler Inspection, Inc.,* 246 F.R.D. 56, 58 (D.D.C.2007); *St. Paul Mercury Ins. Co. v. Capitol Sprinkler Inspection, Inc.,* 2007 WL 1589495, *11 (D.D.C.2007).

***4** Based on the limited information provided by the plaintiffs and the Court's inability to predict the path of Mr. Young's testimony prior to trial, the scope of Mr. Young's testimony will be determined and limited at trial. Although it has not been suggested by plaintiffs, it is clear based on Mr. Young's qualifications and the absence of an expert report that he would not be qualified to give ultimate expert opinion testimony regarding causation, for example, but he certainly can testify as to what he saw and how and why he estimated certain repair costs. Since Mr. Young personally inspected plaintiffs' home and estimated the cost of repairs prior to the time plaintiffs' filed suit against defendants, and neither plaintiffs nor plaintiffs' counsel have retained or specially employed Mr. Young to provide expert testimony, paid him an expert fee, subpoenaed him for trial, or promised to compensate him pursuant to a subpoena, Mr. Young qualifies as a hybrid fact/expert witness, and plaintiffs were not required to produce an expert report on behalf of Mr. Young pursuant to Rule 26(a)(2)(B). Thus, plaintiffs' failure to produce an expert report on behalf of Mr. Young does not result in an automatic exclusion of his testimony at trial. [1]

Conclusion

For the foregoing reasons, defendant's motion in limine (rec.doc.33) is **DENIED.**

All Citations

Not Reported in F.Supp.2d, 2008 WL 8715813

Footnotes

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1 In the event plaintiffs seek to use the testimony beyond what has been outlined above, counsel should notify the court immediately to discuss whether a brief continuance is necessary in order to provide necessary expert reports.

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