[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

____

No. 21-13813

Non-Argument Calendar

____

DAVID T. DOBBS,

Plaintiff-Appellant,

RICHARD R. DOBBS, et al.,

Plaintiffs,

versus

ALLSTATE INDEMNITY COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia
D.C. Docket No. 5:18-cv-00309-TES

Before WILSON, ROSENBAUM, and GRANT, Circuit Judges.

PER CURIAM:

In this insurance dispute, Appellant David Dobbs appeals the district court's grant of judgment in favor of Appellee Allstate Indemnity Company (Allstate) and denial of Dobbs' motion to voluntarily dismiss without prejudice. Dobbs sued for breach of contract after Allstate refused to pay an insurance claim he filed for fire damage to his home. The district court found that Dobbs failed to prove damages for the contents of his home and the structure of his home. Therefore, it granted judgment in favor of Allstate. On appeal, Dobbs argues that the district court erred in (1) excluding his expert testimony as to the structural damage of the home, (2) concluding that Dobbs did not sufficiently prove damages, and (3) denying his motion to voluntarily dismiss his case. For the reasons stated below, we affirm the district court's judgment in part and reverse and remand in part.

I.

Dobbs was insured under a homeowner's policy with Allstate. Following a fire that damaged his home in 2016, Dobbs filed

a claim under the policy. Allstate denied the claim because it believed (1) the fire was intentionally set and (2) Dobbs did not have an insurable interest in the home because of a mortgage. Dobbs then sued Allstate for breach of contract in Georgia state court in August 2018. Allstate removed the case to the Middle District of Georgia.

The parties agreed to a bench trial, which was set for April 15, 2021, but only lasted one day after the district court determined that it was unclear whether Dobbs had an insurable interest in the property. The district court paused the proceedings to resolve this issue and the trial did not resume until August 30, 2021. After Dobbs presented his case, Allstate moved under Federal Rule of Civil Procedure 52(c) for judgment on partial findings. While the district court determined that Dobbs had an insurable interest in the home, it concluded that Dobbs failed to prove damages. Regarding his personal property inside the home, the district court concluded that Dobbs failed to prove the actual cash value of personal property lost during the fire. Regarding structural damage to the home, the district court concluded that the only evidence regarding the amount of damages was inadmissible as it came in the form of expert testimony, which Dobbs did not disclose in his Rule 26 report. The district court did not reach the issue of whether Dobbs intentionally started the fire because the issue of damages was dispositive.

Since Dobbs failed to establish damages, the district court granted Allstate's Rule 52 motion and entered judgment in its

favor. Prior to the court's judgment and after Dobbs presented his case, Dobbs moved to voluntarily dismiss his case without prejudice. In denying Dobbs' motion for voluntary dismissal, the district court concluded that it would be improper to dismiss the case halfway through trial after Dobbs had already rested his case. This appeal followed.

II.

"A judgment on partial findings must be supported by findings of fact and conclusions of law[.]" Fed. R. Civ. P. 52(c). We review conclusions of law de novo and findings of fact for clear error. *Veale v. Citibank, F.S.B.*, 85 F.3d 577, 579 (11th Cir. 1996). We review a district court's exclusion of expert testimony for abuse of discretion. *Seamon v. Remington Arms Co.*, 813 F.3d 983, 987 (11th Cir. 2016). A district court abuses its discretion if it "applies an incorrect legal standard, follows improper procedures in making the determination, or makes findings of fact that are clearly erroneous." *Id.* We review a district court's ruling on a plaintiff's motion to voluntarily dismiss his or her case only for an abuse of discretion. *McCants v. Ford Motor Co.*, 781 F.2d 855, 857 (11th Cir. 1986).

III.

Our discussion proceeds in three parts. First, we address the district court's ruling to exclude Turner's expert testimony about damages. Second, we turn to the district court's determination that

Dobbs failed to prove damages. Lastly, we discuss the district's court denial of Dobbs' motion to voluntarily dismiss.

A.

Pursuant to Federal Rule of Civil Procedure 26(a)(2)(B)(i), a party seeking to offer expert testimony must provide a written report containing "a complete statement of all opinions the witness will express and the basis and reasons for them[.]" Dobbs' Rule 26 report did not disclose that Turner would be offering his opinion on the cost of repairing the home. Instead, the Rule 26 report indicated that Turner was only offering his opinion as to the cause of the fire. Notwithstanding this lack of disclosure, Turner proceeded to offer his opinion that the damage done to the home constituted a "total loss" because it would cost more to repair the home than to replace it. Under Federal Rule of Civil Procedure 37(c), "[i]f a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or harmless." Because Dobbs failed to disclose Turner's opinions pursuant to Rule 26(a), the district court excluded his opinion.

On appeal, Dobbs argues that the district court abused its discretion in excluding Turner's opinion despite Dobbs' failure to disclose that opinion. First, Dobbs contends that there was no Rule 26(a) violation because Turner offered his opinion that the damage constituted a total loss at both the *Daubert* hearing and during his deposition. This argument lacks merit because these passing

references made by Turner at the *Daubert* hearing and his deposition do not correct Dobbs' failure to disclose Turner's opinions in the Rule 26(a) report. Rule 26(a)(2)(A) states that "a *party* must disclose" the expert's opinions. Fed. R. Civ. P. 26(a)(2)(A) (emphasis added). Thus, Turner's own statements during a hearing or deposition would not satisfy the Rule 26(a) requirements of disclosure. Further, Dobbs cites to no precedent where we have held that an expert's own statements during hearings or depositions can satisfy the written report requirement of Rule 26(a).

Next, Dobbs contends that the Rule 26(a) omission was substantially justified and harmless. "Substantially justified means that reasonable people could differ as to the appropriateness of the contested action." *Knight ex rel. Kerr v. Miami-Dade Cnty.*, 856 F.3d 795, 812 (11th Cir. 2017). We find that no reasonable person could find Dobbs' actions appropriate here. His offered explanation for failure to timely disclose was that (1) he did not know Turner was qualified to testify on damages when he was first identified and (2) he wanted to limit his costs in retaining experts. His first explanation falls well below the standard for substantially justified. And his second explanation is rebutted by the fact that Dobbs attempted to introduce two other experts to testify on damages, but the district court excluded those experts because Dobbs failed to timely disclose them. The failure to disclose was also not harmless because Allstate could not effectively prepare to rebut Turner's opinions about damages at trial. *See Reese v. Herbert*, 527 F.3d 1253, 1266 (11th Cir. 2008) ("Because the expert witness discovery rules

are designed to allow both sides in a case to prepare their cases adequately and to prevent surprise, compliance with the requirement of Rule 26 is not merely aspirational.")

The district court did not abuse its discretion in excluding Turner's opinion testimony on damages. That opinion was not disclosed to Allstate, as required by the rules of discovery. And Dobbs fails to show that that omission was substantially justified and that admitting Turner's opinion would have been harmless to Allstate. Accordingly, we affirm the district court's ruling on this issue.

B.

Next, Dobbs argues that the district court erred in entering judgment in favor of Allstate because Dobbs failed to prove damages. The damages issue, as noted by the district court, concerns two components, which involve different analysis. First, we address whether Dobbs sufficiently proved damages to his personal property within the home. Second, we address whether Dobbs sufficiently proved damages to the structure of the home. Dobbs' insurance policy covered both the personal property and structure of his home.

Dobbs submitted an extensive list of his personal property that was damaged by the fire. Dobbs testified that the list was provided to him by an Allstate claims adjuster who told Dobbs to complete the form. He further testified that he provided the cost of his personal items either by looking up the cost or writing down what

he paid when he bought the items. Dobbs' insurance policy provides that if the insured party does not repair or replace damaged personal property, then the amount paid for that damage is based on the "actual cash value" of the personal property—effectively, the fair market value of the property at the time of loss. If the insured party does repair or replace the damaged personal property, then Allstate will reimburse the insured party for the cost in excess of the actual cash value.

Dobbs contends that the district court erred in requiring him to prove the actual cash value of his personal property. He argues that the policy provides for replacement cost value of lost personal property. This argument lacks merit because the replacement cost only applies when the insured party repairs or replaces damaged property. Then, the amount of reimbursement is determined by the cost of repairing or replacing that item. At trial, Dobbs' counsel conceded that Dobbs did not have any receipts for replacing or repairing his property. Thus, there would be no way to establish the replacement cost without documentation as to what Dobbs paid to replace or repair his damaged belongings. Instead, Dobbs could only recover the actual cash value for his belongings, as provided under the policy.

Under Georgia law, "[w]here tangible personal property has been damaged or destroyed, the plaintiff has the burden of furnishing evidence sufficient to enable the jury to calculate the amount of damages with reasonable certainty without speculation." *Champion v. Dodson*, 587 S.E.2d 402, 404 (Ga. Ct. App. 2003). The

district court concluded that the list of damaged personal property was insufficient to prove damages with "reasonable certainty." *See id.* The district court relied on *Champion*, where the Court of Appeals of Georgia stated:

> Evidence of the retail purchase price of property alone is not sufficient to establish the fair market value of the property at the time of the loss, because the age and condition of the property, the fair market value at the time of loss, the condition immediately after the loss, and the fair market value immediately after the loss must be proven to establish the damages.

Id. The district court found that because the list failed to state the condition, as well as age for some of the items, it was "wholly inadequate to prove actual cash value under Georgia law."

For example, the district court explained that for one of the damaged items, Dobbs "listed the age and purchase price of the silverware set, but he failed to include any description of its condition at the time of the fire or any evidence that would allow for a determination of its actual cash value." On appeal, Dobbs argues that this was error because Georgia law does not require the insured party to prove the condition of personal property immediately before its destruction. We agree with Dobbs.

While the Court of Appeals in *Champion* suggested that the condition of the property is necessary to establish damages with

reasonable certainty, the Supreme Court of Georgia adopted a different rule in *Braner v. Southern Trust Insurance Co.*, 335 S.E.2d 547 (Ga. 1985). There, the court expressly rejected the requirement that the insured party provide evidence as to the condition of the property immediately before its destruction, calling it "too stringent" due to the practical difficulties and time-consuming nature of this inquiry. *Id.* at 551. For those reasons, the court adopted the following rule:

> Where a homeowner or homeowner's spouse testifies as to either the *purchase price* or replacement cost of household furnishing, items of personal clothing and other commonly used personal property destroyed by fire, and as to *the approximate date of purchase* or acquisition of each such item, the evidence is sufficient for the jury to find the actual cash values of such common and familiar property.

Id. at 552 (emphasis added). Thus, purchase price or replacement cost and date of purchase are sufficient to prove actual cash value for household items destroyed by fire.

True, the list provided by Dobbs is not perfect and does not provide the date of purchase for all of the items. But for several items, for example their microwave, Dobbs provided the brand, age of the item, original cost, and place of purchase. Interestingly, Dobbs testified that the form on which he completed the list was provided by an Allstate claims adjuster. And the form does not provide a designated space for the condition of the item as it does

for other information like item age and original cost. Dobbs further testified that the claims adjuster did not dispute what he was writing on the form and that he did not overstate anything. On recross examination, counsel for Allstate did not question Dobbs "as to any particular item which might be suspect," *id.*, but only asked a single question about whether Dobbs was actually in the presence of the claims adjuster when he completed the form. Following this exchange, Dobbs rested his case and Allstate moved for a Rule 52(c) judgment on partial findings. This mirrors the situation that troubled the court in *Braner* and we find it equally troubling here.

While the rule statement in *Champion* provides that the plaintiff must prove things like condition and fair market value at the time of the loss, the court there found that these facts could be inferred by a jury. For example, the insured party in *Champion* was attempting to recover for her business inventory that was destroyed during a fire. 587 S.E.2d at 407. While the insured party provided the purchase price of the inventory and how it had been kept, "she *did not specifically prove the dates of purchase* or individually *specify the condition immediately prior to the fire* other than it had been kept in the ordinary course of business." *Id.* (emphasis added). However, the court reasoned that the jury could infer the fair market value and the condition of the inventory based on the insured party's testimony about how the inventory was kept and that none of the inventory could be salvaged. *Id.* at 408–08. Thus, the court concluded that the trial court did not err in denying

the defendant's motion for a directed verdict. *Id.* at 408. In addition, while the court found that other business items, the insured party's office furniture and equipment, lacked adequate proof because she only listed the purchase price or replacement cost, this did not preclude her from recovering for damage done to her business inventory. *Id.*

Champion is also distinguishable from this case because it concerned office equipment and business inventory, while the present case only concerns household items. A more analogous case is *Allstate Indemnity Co. v. Payton*, 656 S.E.2d 554 (Ga. Ct. App. 2008). There, Allstate appealed the trial court's denial of Allstate's motion for a directed verdict because the insured party failed to prove damages. *Payton*, 656 S.E.2d at 555. The insured party in *Payton* prepared an inventory of damaged personal, household property on a form provided by Allstate. *Id.* The insured party provided an estimate of the original cost of the items and an actual cash value based on a discounted percentage of the original cost. *Id.* Allstate challenged that the evidence was insufficient "because there was no testimony as to the age, purchase price, or condition of the items listed on the inventory." *Id.*

The court in *Payton* relied on *Braner*, which it noted "relaxed the rule concerning proof of damage to personal property destroyed in a fire," and concluded that the case was properly sent to a jury. *Id.* Although the insured party did not list the approximate date of purchase, as required under *Braner*, the court concluded that the submission of the actual cash value based on the

discounted percentage of the original cost was sufficient. *Id.* at 555–56. The court did not require the insured party to prove condition of the items immediately before their destruction and noted that "[q]uestions of value are peculiarly for the determination of the jury, where there is any data in the evidence upon which the jury may legitimately exercise their own knowledge and ideas." *Id.* at 556.

What *Champion* and *Payton* show is that the condition of the items is not a necessary requirement to prove damages. The court in *Champion* allowed the jury to infer the condition of the items although the insured party did not specify their condition, and the court in *Payton* did not discuss the condition of the items at all. Instead, as announced by the Supreme Court of Georgia in *Braner*, all that is needed to prove damages for personal, household property damaged by fire is purchase price or replacement cost and date of purchase. Therefore, the district court erred as a matter of law when it determined that age and purchase price alone were insufficient, and that Dobbs was required to prove the condition of the items at the time of the fire.

Dobbs also argues that the district court erred in finding that he did not sufficiently prove damages as to the structure of his home. As noted above, due to Dobbs' failure to properly disclose his experts, he was unable to provide an expert opinion as to the cost of repairs. However, he contends that where a homeowner alleges that his home was "wholly destroyed" by a fire, the

homeowner need not prove exact damages and photographs of the home are sufficient to prove damages.

Under Georgia's Valued Policy Statute, if an insured party's "building or structure is wholly destroyed by fire . . . the amount of insurance set forth in the policy relative to the building or structure shall be taken conclusively to be the value of the property." O.C.G.A. § 33-32-5(a). Thus, if the structure of the home is wholly destroyed by fire, then the amount of damages is simply the value of the home. And the Court of Appeals of Georgia has held that "evidence showing that it would cost more to repair the house than to replace it and photographs submitted into evidence . . . showing that the house was substantially gutted by the fire was sufficient to" support a jury's finding that the house was "wholly destroyed by fire." *Ga. Farm Bureau Mut. Ins. v. Brown*, 385 S.E.2d 87, 90 (Ga. Ct. App. 1989).

Here, Dobbs had no admissible evidence showing that it would cost more to repair his home than to replace it. Thus, the only evidence he could rely upon was photographs of the damage to his home. The district court considered the photographs but, determining that the home was "still intact," concluded that they did not definitively show that the home was "wholly destroyed by fire." Dobbs cites to no case where a court has held that photographs alone are sufficient to establish that a home has been wholly destroyed by fire, and we decline to hold such here. Without any admissible evidence as to a dollar amount for the cost of repairs compared to the cost to replace the home, we conclude that the

district court did not err in finding that Dobbs failed to sufficiently prove damages to the structure of his home.

C.

Lastly, Dobbs argues that the district court erred in denying his motion to voluntarily dismiss his case without prejudice under Federal Rule of Civil Procedure 41(a). Under Rule 41(a), the plaintiff can dismiss an action without leave of court, "as long as the defendant has not yet filed an answer or a motion for summary judgment." *Arias v. Cameron*, 776 F.3d 1262, 1268 (11th Cir. 2015). If the defendant has filed an answer or a motion for summary judgment, then the plaintiff may only dismiss his case "by court order, on terms that the court considers proper." Fed. R. Civ. P. 41(a)(2). "Generally speaking, a motion for voluntary dismissal should be granted unless the defendant will suffer clear legal prejudice other than the mere prospect of a second lawsuit." *Arias*, 776 F.3d at 1268. The "crucial question" is "whether 'the defendant would lose any substantial right by the dismissal.'" *Id.* at 1268–69 (alteration adopted).

The district court did not abuse its discretion in denying Dobbs' motion to voluntarily dismiss. As the district court noted, it was "indisputably clear" that Dobbs' true reason for wanting to dismiss his case was because he disagreed with the district court's adverse ruling on his expert testimony. The court further reasoned that to allow Dobbs to dismiss his case *after* he had presented his case, would allow a plaintiff to "simply dismiss his case any time he disagreed with a court's ruling or committed some strategic or

tactical error during the presentation of his case." The district court concluded that "[w]iggling out of adverse evidentiary rulings . . . upon a motion for partial findings because a party patently failed to comply with the Federal Rules of Civil Procedure just doesn't strike the Court as either fair or just."

We agree with the district court's conclusion that voluntary dismissal would not have been proper. While the crucial question is whether the defendant will suffer legal prejudice, the district court has "broad discretion" when ruling on a Rule 42(a) motion and "should also weigh the relevant equities and do justice between the parties in each case." *Arias*, 776 F.3d at 1268. The district court properly weighed the equities in this case and deemed Dobbs' tactics unfair at this stage in the litigation. Accordingly, we affirm the district court's denial of Dobb's motion to voluntarily dismiss his case.

IV.

In conclusion, we hold that the district court did not abuse its discretion in excluding the opinion of Dobbs' expert about damages because Dobbs' failure to disclose that opinion in his Rule 26(a) report was neither substantially justified nor harmless. We also affirm the district court's judgment in favor of Allstate as to structural damage of Dobbs' home. However, we reverse the district court's judgment as to Dobbs' personal property because the district court incorrectly held that Dobbs was required to prove the condition of his property prior to the fire. The district court erred as a matter of law in this respect because the Supreme Court of

Georgia in *Braner* held that the insured party need not prove the property's condition to sufficiently establish damages. Lastly, we hold that the district court did not abuse its discretion in denying Dobb's motion for voluntary dismissal.

Accordingly, we remand to the district court for further proceedings consistent with this opinion.

AFFIRMED in part, and **REVERSED** and **REMANDED** in part.