

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

REGINALD MARTIN AGENCY, INC.,)
COMPREHENSIVE INSURANCE)
MARKETING, INC.,)
DESIGN BENEFITS, INC.,)
JIM JASNOSKI,)
DESIGN BENEFITS, INC.,)
KENNY FROUG,)
ATLANTA BROKERAGE OFFICE,)
BROKERAGE ONE AGENCY, INC.,)
TRI-STATE BROKERAGE, INC.,)
DON SEPULVEDA,)
SEPULVEDA INSURANCE GROUP,)
WHITEWATER BROKERAGE, INC.,)
PROFESSIONAL INSURANCE)
BROKERAGE, INC.,)

Plaintiffs,)

vs.)

CONSECO MEDICAL INSURANCE)
COMPANY,)
Washington National Insurance)
Company,)

Defendants.)

NO. 1:04-cv-01587-TAB-RLY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

REGINALD MARTIN AGENCY, INC., et al.,)
)
 Plaintiffs,)
)
 vs.) 1:04-cv-1587-TAB-RLY
)
 CONSECO MEDICAL INSURANCE)
 COMPANY, et al.,)
)
 Defendants.)

ENTRY ON MOTIONS TO EXCLUDE EXPERT WITNESSES

I. Introduction.

This matter comes before the Court on motions to exclude expert witnesses. Defendants Conesco Medical Insurance Company and Washington National Insurance Company¹ seek to exclude Plaintiffs' damages expert Jeffrey Coulter. [Docket No. 162.] Alternatively, CMIC moves the Court to reconsider its July 12, 2006 entry denying CMIC leave to depose Plaintiffs' accountants. [*Id.*] Plaintiffs move to exclude CMIC's experts Jack Taylor and Robert McLeod. [Docket No. 165.] For the reasons below, the Court denies CMIC's motion [Docket No. 162] and grants in part and denies in part Plaintiffs' motion [Docket No. 165].

II. Discussion.

A. CMIC's motion to exclude Jeffrey Coulter.

In its opening brief, CMIC asserted that three issues require the Court to exclude Coulter or at least reconsider its July 12, 2006 entry rejecting CMIC's request to depose Plaintiffs'

¹ The Court refers to these Defendants collectively as "CMIC."

accountants. [Docket Nos. 162, 163.] Initially, CMIC alleged that at a June 28, 2006 hearing Plaintiffs' counsel misrepresented to the Court what information its expert would rely upon in formulating his report. However, after Plaintiffs submitted the June 28 hearing transcript in opposition to CMIC's motion, CMIC backed off its contention that Plaintiffs' counsel made misrepresentations to the Court. [Docket No. 169 at p. 8.] CMIC continues to assert, however, that deficiencies in Coulter's report and Plaintiffs' discovery missteps justify excluding Coulter's testimony.

Plaintiffs respond that neither of the remaining two asserted bases for striking Coulter's report passes legal muster. [Docket No. 167.] With respect to alleged deficiencies in Coulter's report, Plaintiffs argue this goes to weight rather than admissibility of this evidence. Plaintiffs assert that any "weaknesses and criticisms are better addressed through the adversarial process of trial." [*Id.* at p. 6.] As for any alleged discovery missteps, Plaintiffs argue that there were none. [*Id.*]

No viable grounds exist for the Court to strike Plaintiffs' expert report. CMIC has retained its own rebuttal experts and will have ample opportunity to test the veracity of Plaintiffs' expert through cross-examination. As Plaintiffs aptly pointed out, "[i]t is not the trial court's role to decide whether an expert's opinion is correct" *Smith v. Ford Motor Company*, 215 F.3d 713, 719 (7th Cir. 2000). Accordingly, the Court need not probe any of the alleged deficiencies in Coulter's report.

Moreover, the Court is unpersuaded that any alleged discovery transgressions warrant striking Plaintiffs' expert. Federal Rule of Civil Procedure 37(c) mandates exclusion of certain information required to be disclosed pursuant to Rule 26(a) or Rule 26(e)(1) unless the non-

disclosure is substantially justified or harmless. *Musser v. Gentiva Health Services*, 356 F.3d 751, 755-60 (7th Cir. 2004). CMIC alleges that Plaintiffs failed to produce certain documents that they produced to their expert. [Docket No. 169 at p. 3.] Yet, Plaintiffs have demonstrated to the Court that any documents that they did not initially produce to CMIC were produced upon CMIC's notice of omitted documents. CMIC does not point to documents that Plaintiffs continue to withhold nor does it show it was prejudiced by any delay in Plaintiffs' production.² Accordingly, the Court declines to strike Plaintiffs' expert as a sanction for any alleged discovery missteps.

The Court can make short work of CMIC's alternative motion to reconsider. The Court heard argument on CMIC's contention that it was entitled to depose Plaintiffs' accountants in June 2006 and found otherwise. [See Docket No. 109.] But CMIC now contends that new evidence that Plaintiffs' expert's associate had one short, nonsubstantive telephone call with Plaintiff Steve Smith's accountant requires the Court to reconsider and overrule its previous decision.

This evidence provides the Court no ground to reconsider its previous decision. *See, e.g., Oto v. Metropolitan Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000) ("To prevail on a motion to reconsider . . . the movant must present either newly discovered evidence or establish a manifest error of law or fact."), and *Johnny Blastoff, Inc. v. Los Angeles Rams Football Co.*, 188 F.3d 427, 439 (7th Cir. 1999) (newly discovered evidence presented in support of a motion to reconsider must be "material"). CMIC fails to demonstrate how this evidence should change the Court's reasoning or the outcome of its previous decision. Accordingly, the new evidence is not material,

² Additionally, it appears that Plaintiffs seasonably supplemented their discovery production in compliance with Rule 26(e), and the Court is not convinced that there was any suspicious delay of production in this matter.

and the Court declines to reconsider its July 12 decision denying CMIC leave to depose Plaintiffs' accountants.

B. Plaintiffs' motion regarding CMIC's experts.

1. Jack Taylor.

Plaintiffs oppose Jack Taylor's report and proposed testimony, arguing that such "almost exclusively deals with the interpretation of a contract, industry standards surrounding a contract and legal conclusions drawn from a contract" despite the fact that "there is no breach of contract claim pending" [Docket No. 166 at p. 1.] Plaintiffs argue that Fed. R. Civ. P. 702 precludes this evidence at trial because it "will not assist the trier of fact." [*Id.* at p. 2.] CMIC responds that Taylor will help the trier of fact, despite dismissal of Plaintiffs' breach of contract claim, because the contracts between the parties "are still of great importance in this case, as the relationship between the parties is contractual in nature" [Docket No. 168 at p. 2.] Even considering the inescapable role contracts play in this case, the Court is not persuaded that Taylor's testimony will help the trier of fact interpret and understand the evidence regarding the surviving breach of fiduciary duty and fraud-based claims.

Pursuant to Rule 702, and as the ultimate gatekeeper of expert testimony, it is essential that the Court, among other things, be satisfied that a proposed expert's testimony will assist a trier of fact "to understand the evidence or to determine a fact in issue." Fed. R. Civ. P. 702; *see also Naeem v. McKesson Drug Co.*, 444 F.3d 593, 607 (7th Cir. 2006) ("*Daubert*, as extended to all expert testimony including non-scientific expert testimony, requires the district court to perform the role of gatekeeper and to ensure the reliability and relevancy of expert testimony.") (*internal citation omitted*). It is axiomatic that a proposed expert's testimony is inadmissible if it

doesn't help the jury understand the evidence or determine a fact in issue. Nothing about Taylor's proposed testimony meets this threshold for admissibility.

Taylor's stated purpose in rendering his expert opinion is "to review the transactions related to Plaintiffs' Sales Representative Agreement with Conseco Marketing, L.L.C. in the Reginald Martin case." [Docket No. 166, Ex. A.] In fact, a majority of his eight conclusions merely state the obvious regarding the key provisions of the agreements. For instance, his second opinion states in part, "the Agreements . . . provided Plaintiffs with clear and adequate notice that Conseco Medical could withdraw its products from any market at any time." [*Id.*] His fourth opinion concludes, "the Agreements . . . provided Plaintiffs with clear and adequate notice that the company could terminate the Agreements at any time by giving 30 days notice." [*Id.*] Yet, neither of these contract provisions nor any other part of the agreements are disputed. Even if they were, the agreement terms are not ambiguous or beyond the understanding of a layperson. *See, e.g., Taylor v. Ill. Cent. R. Co.*, 8 F.3d 584, 586 (7th Cir. 1993) (district court may properly bar qualified expert's testimony where issue to be decided in the case was not beyond understanding of a lay juror).³

Moreover, the one opinion that goes beyond the parties' agreements -- opinion 8 -- blatantly states a legal conclusion that goes to the heart of Plaintiffs' breach of fiduciary duty and constructive fraud claims. Specifically, Taylor opines that the "relationship between the Plaintiffs and Conseco Marketing L.L.C. and or Conseco Medical was strictly that of an independent contractor. All transactions were at arm's length. There was no special circumstances that changed or heightened the relationship." [Docket No. 166, Ex. A.] The Court agrees that to

³ It is telling that all of the legal authority offered by CMIC to support the admissibility of Taylor's evidence involves contract disputes and/or disputes regarding insurance coverage.

allow such testimony would be tantamount to allowing Taylor to instruct the jury on a legal issue. This testimony exceeds the boundaries of admissibility imposed by Rule 702. *See Good Shepherd Manor Foundation, Inc. v. City of Mومence*, 323 F.3d 557, 564 (7th Cir. 2003) (“expert testimony as to legal conclusions that will determine the outcome of the case is inadmissible.”). Accordingly, the Court grants Plaintiffs’ motion to exclude the testimony and/or report of Dr. Jack A. Taylor.

2. Robert McLeod.

Plaintiffs’ quest to bar the testimony and/or report of CMIC’s damages rebuttal expert Robert McLeod is less successful. Plaintiffs largely contend that McLeod’s testimony and report is inadmissible because it comprises the testimony of an undisclosed “embedded” expert, Dr. Walt Robbins. [Docket No. 166 at pp. 18-23.] CMIC responds that Robbins’ involvement is no more than “peer review” for McLeod’s already formulated opinions. [Docket No. 168 at p. 18.] CMIC asserts that McLeod’s use of Robbins is proper pursuant to Rule 703. [*Id.* at 22.]

Rule 703 allows an expert to base an opinion to some extent on facts or data gleaned from another expert’s expertise without the other expert’s testimony. *Dura Automotive Systems of Indiana, Inc. v. CTS Corp.*, 285 F.3d 609, 613 (7th Cir. 2002). What an expert may not do is act as a “mouthpiece” for another undisclosed expert. *Id.* at 614. Thus, the Court must discern to what extent McLeod’s opinions are really his own or merely those of Robbins.

McLeod’s deposition testimony is revealing. McLeod testified that he enlisted Robbins to review the “financial documents.” [McLeod Dep. at p. 50.] McLeod used Robbins “as a sounding board to make sure that any assumptions [he] made were correct.” [*Id.*] For instance, after McLeod formulated the opinion that lost profits or damages in this case could not be derived

solely from tax returns, as Plaintiffs' expert had done, McLeod consulted Robbins to test his opinion. [*Id.* at p. 51.] As it relates to McLeod's report, Robbins helped McLeod prepare his report, looked up citations used in the report, and reviewed McLeod's report. [*Id.* at pp. 160, 168, 170, 178.]

Plaintiffs emphasize that Robbins is a certified public accountant, which McLeod is not. However, the Court is not convinced this distinction carries any weight given McLeod's credentials, including an undergraduate degree in finance, an MBA, and a Ph.D in finance and economics. [McLeod Dep. at p. 59.] Plaintiffs further point to McLeod's inability to specifically recall or articulate exactly what Robbins did on any particular date and block of time. [Docket No. 171 at pp. 15-17.] Yet, McLeod's lack of detailed recall does not undermine his general recitation of what exactly Robbins did related to McLeod's report. The record fails to convince the Court that McLeod is impermissibly acting as Robbins' "mouthpiece." Accordingly, the Court declines to entirely bar McLeod's testimony and report at this juncture.

But this does not entirely end the Court's inquiry. Plaintiffs argue, alternatively, that the portions of McLeod's report and testimony on causation, use of taxable income, and pre-judgment interest should be excluded from trial. [Docket No. 166 at pp. 25-27.] With respect to causation, Plaintiffs contend that McLeod lacks a sufficient foundation to give an opinion because "he is unfamiliar with the standards in Indiana." [Docket No. 166 at p. 26.] Additionally, Plaintiffs point out that McLeod's "opinion on causation is based solely on the language of the Sales Representative Agreement." [*Id.*] Tellingly, CMIC does not meaningfully address this particular challenge. [Docket No. 168 at p. 27.] By failing to do so, CMIC tacitly concedes that McLeod advances no foundation for testifying as to causation of damages as presented in his

report, paragraphs 6-12. Regardless, for the same reasons the Court excluded Taylor's contract-based opinions -- they are anchored in contract provisions that require no expert opinion to assist a trier of fact -- the Court excludes McLeod's.

However, Plaintiffs' arguments concerning use of taxable income and pre-judgment interest falter. Plaintiffs' assertions regarding the exclusion of McLeod's opinions on the use of tax returns to calculate lost profits merely rehash arguments that McLeod is Robbins' mouthpiece. For the reasons detailed herein, the Court rejects this basis for excluding any of McLeod's opinions. Likewise, the Court cannot accept Plaintiffs' rationale for excluding McLeod's opinions on the pre-judgment interest rate selected by Coulter. McLeod is a rebuttal witness probing the veracity of Plaintiffs' own damages expert Jeffrey Coulter. In this capacity, he opines that Coulter fails to present any rationale for Coulter's use of an 8 percent pre-judgment interest rate for certain valuations in his damages report. [Docket No. 166, Ex. B, ¶ 30.] Plaintiffs premise their request to exclude this opinion on the grounds that McLeod lacks foundation or adequate qualifications. [*Id.* at pp. 27-28.] Yet, Plaintiffs' argument presupposes that McLeod takes issue with Coulter's actual number and perhaps implies that some other percentage is more accurate. As such, this contention is misguided. McLeod only opines on Coulter's own failure to qualify his 8 percent pre-judgment interest rate, not necessarily on the actual number assigned by Coulter. Thus, there are no grounds before the Court to exclude this particular rebuttal evidence.

III. Conclusion.

For the reasons stated above, CMIC's motion to exclude Plaintiffs' damages expert Jeffrey Coulter's testimony and/or report or in the alternative motion to reconsider [Docket No. 162] is denied. Plaintiffs' motion to bar the testimony and/or reports of CMIC's expert Jack

Taylor and damages rebuttal expert Robert McLeod [Docket No. 165] is granted in part and denied in part. The Court grants Plaintiffs' motion as it relates to Jack Taylor's testimony and/or report and Robert McLeod's causation testimony reflected in paragraphs 6-12 of McLeod's report. Plaintiffs' motion is denied in all other respects.

Dated:

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