



By order of the Court, GRANTED. Presiding Judge Robert C. Naraja

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IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

CAIYUN MU,) CIVIL ACTION NO. 11-0352
Plaintiff,)
v.)
HYOUN MIN OH,) ORDER GRANTING DEFENDANT’S
Defendant.) MOTIONS IN LIMINE

I. INTRODUCTION

THIS MATTER came before the Court on defendant’s two motions in limine on March 27, 2013 at 9:00 a.m. in Courtroom 202A. Caiyun Mu (“Plaintiff”) was represented by Victorino DLG. Torres, Esq. Hyoun Min Oh (“Defendant”) was represented by Mark A. Scoggins, Esq.

Based on the papers submitted and arguments of counsel, the Court hereby GRANTS Defendant’s two motions in limine.

II. BACKGROUND

This is a personal injury case involving a vehicle-pedestrian accident. On February 4, 2010, Plaintiff was injured while standing on the road when Defendant hit her while driving a motor vehicle. Plaintiff filed a complaint, alleging that Defendant’s negligent, careless and reckless driving caused the accident and Plaintiff’s resulting injuries.

On December 13, 2012, the Court filed a pretrial order that set the jury trial date on April 22, 2013, which is still in effect. On January 24, 2013, the Court filed an amended pretrial order (“Amended Pretrial Order”) providing that “[b]oth parties shall designate expert

1 witnesses, produce the expert's credentials (i.e., curriculum vitae) and identify areas of
2 expertise, submit expert reports, and complete expert discovery by March 6, 2013." (Amended
3 Pretrial Order at 1 ¶ 4.) The Court previously warned the parties that failure to comply with
4 Federal Rule 26 and the Court's scheduling order with regard to expert testimony "will result
5 in a party's expert not being allowed to testify at trial." (Pretrial Order at 4 ¶ 7(d)(vii).)¹

6 On March 6, 2013, Plaintiff submitted her expert witness disclosure, designating the
7 following individuals as expert witnesses: Bruce M. MacMillan (Certified Public Accountant),
8 six treating physicians, Maria Cecilia M. Adriano (Registered Physical Therapist), and Dr.
9 Tony Stearns. Plaintiff attached Mr. MacMillan's curriculum vitae and expert report to the
10 submission, and stated that the other designated expert witnesses will rely on the medical
11 records.

12 On March 6, 2013, Defendant submitted her expert witness disclosure, designating
13 Sergeant Thomas Aguon Blas, Jr., CNMI Department of Public Safety as a Traffic
14 Investigation Expert. Plaintiff noted that she has disclosed Sergeant Blas's investigation report
15 previously with regular discovery, and she attached his curriculum vitae along with other
16 documentation relating to his qualifications.

17 On March 8, 2013, Defendant filed a motion in limine with regard to Plaintiff's expert
18 witnesses for failure to comply with the Court's Amended Pretrial Order regarding expert
19 witness disclosures. Defendant also filed a motion in limine to exclude three general types of
20 evidence from being admitted into evidence at trial.

21 **III. LEGAL STANDARD**

22 It is within the Court's broad discretion to fashion discovery orders. *Campbell*
23 *Industries v. M/V Gemini*, 619 F.2d 24, 27 (9th Cir. 1980). "A party charged with the failure to
24 comply with a pretrial discovery order requiring the submission of evidentiary material before
25 trial has the burden of showing that it has in fact met its obligations under the order." *White*

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27 ¹ The Amended Pretrial Order expressly preserved "[a]ll remaining . . . instructions . . . as set forth in the Court's
28 Pre-trial Order of January 7, 2013," including the instruction that the parties shall comply with Federal Rule 26
with regard to expert testimony, and failure to comply will result in a party's expert not being allowed to testify at
trial. (Amended Pretrial Order at 2 ¶ 6.)

1 *Mountain Apache Tribe v. United States*, 4 Cl. Ct. 575, 584 (Cl. Ct. 1984) (citing 6 C. Wright
2 & A. Miller, *Federal Practice and Procedure* § 1526, at 596 (1971)). The court has broad
3 discretion to impose a variety of sanctions against a party who violates a discovery order, such
4 as “prohibiting that party from introducing designated matters in evidence.” NMI R. Civ. P.
5 37(b)(2); *see also Sadowski v. Bombardier, Ltd.*, 539 F.2d 615, 621 (7th Cir. 1976) (“The
6 determination as to whether or not parties should be held to pretrial orders is a matter for the
7 discretion of district court judges.”).

8 **IV. DISCUSSION**

9 **A. DEFENDANT’S MOTION IN LIMINE REGARDING PLAINTIFF’S EXPERT WITNESSES**

10 Defendant contends that Plaintiff violated the Court’s Amended Pretrial Order by
11 failing to produce expert reports and curriculum vitae for eight out of the nine expert witnesses
12 designated by Plaintiff. Thus, in compliance with the Amended Pretrial Order, Defendant
13 argues the witnesses shall be prohibited from offering expert testimony, or their testimony
14 should be limited.

15 Plaintiff argues that she did comply with the Amended Pretrial Order because she noted
16 that her experts will be relying on the disclosed medical reports. Also, Plaintiff argues that
17 treating physicians are not required to submit expert reports because they are not “retained”
18 expert witnesses. Lastly, Plaintiff argues that even if she violated the expert disclosure
19 requirements, exclusion would be improper because Defendant has not been prejudiced by the
20 violation.

21 **(1) Maria Cecilia M. Adriano, Registered Physical Therapist, and Dr. Tony Stearns**

22 Maria Cecilia M. Adriano (“Ms. Adriano”) and Dr. Tony Stearns (“Dr. Stearns”) were
23 retained by Plaintiff to provide expert testimony in this case. Thus, they are subject to the
24 Amended Pretrial Order requiring expert witness disclosure requirements in compliance with
25 Federal Rule of Civil Procedure 26(a)(2)(B). Under Federal Rule 26(a)(2)(B), an expert
26 witness report must contain:

- 27 (i) a complete statement of all opinions the witness will
28 express and the basis and reasons for them;

- 1 (ii) the facts or data considered by the witness in forming
- 2 them;
- 3 (iii) any exhibits that will be used to summarize or support
- 4 them;
- 5 (iv) the witness's qualifications, including a list of all
- 6 publications authored in the previous 10 years;
- 7 (v) A list of all other cases in which, during the previous 4
- 8 years, the witness testified as an expert at trial or by
- 9 deposition; and
- 10 (vi) a statement of the compensation to be paid for the study
- 11 and testimony in the case.

12 In more simple terminology, Federal Rule 26(a)(2)(B)(i) "means 'how' and 'why' the
13 expert reached the conclusions and opinions to be expressed." *Reed v. Binder*, 165 F.R.D. 424,
14 429, n. 5 (D. N.J. 1996); *see also* NMI R. Civ. P. 26(b)(4)(A) (An expert report should "state
15 the subject matter on which the expert is expected to testify, and to state the substance of the
16 facts and opinions to which the expert is expected to testify and a summary of the grounds for
17 each opinion."). The purpose for requiring expert reports is "to set forth the substance of the
18 direct examination," Fed. R. Civ. P. 26 advisory committee's note, and "the elimination of
19 unfair surprise to the opposing party and the conservation of resources." *Reed*, 165 F.R.D. at
20 429 (citing cases). "A party is barred from using at trial evidence that it failed to disclose
21 'without substantial justification' as required by Rule 26(a), unless that failure was harmless."
22 *Jenkins v. Bartlett*, 487 F.3d 482, 488 (7th Cir. 2007) (citing Fed. R. Civ. P. 37(c)(1) &
23 advisory committee's note).

24 Here, Plaintiff failed to disclose the curriculum vitae and **any** expert report for Ms.
25 Adriano and Dr. Stearns. Plaintiff's expert witness disclosure provided merely that Ms.
26 Adriano and Dr. Stearns "will testify and rely on the medical records." (Pl.'s Expert Witness
27 Disclosure at 2.) This expert disclosure is severely deficient as it lacks at least four out of the
28 six required items for an expert report under Federal Rule 26(a)(2)(B). Plaintiff's statement
that the experts will rely on the disclosed medical records provides the basis for the testimony
but does not indicate the substance or reasons for the expected testimony as required by
Federal Rule 26(a)(2)(B). *Reed*, 165 F.R.D. at 429 (finding an expert report insufficient that
"merely refer[red] to the data [it] relied on."). Additionally, Plaintiff violated the Amended

1 Pretrial Order by failing to provide curriculum vitae for her designated expert witnesses, which
2 will greatly hinder Defendant's ability to challenge the witnesses' qualifications on voir dire or
3 cross-examination.

4 Notwithstanding Plaintiff's inadequate expert disclosures, the Court has the discretion
5 to permit Plaintiff's designated expert witnesses to testify upon finding either (1) substantial
6 justification for the Amended Pretrial Order violation or (2) an absence of prejudice against
7 Defendant. The Court finds neither. First, the Amended Pretrial Order, requiring the expert
8 witness disclosures, is very clear, and the law regarding the requirements for expert reports is
9 well-established. Furthermore, the Court expressly warned the parties of the consequences for
10 failing to comply with the expert disclosure requirements, which is also rooted in the Court's
11 statutory authority. Plaintiff never requested the Court for an extension of time to comply with
12 the Amended Pretrial Order, nor made any suggestion that she was having difficulty
13 complying with the Amended Pretrial Order until after the deadline for expert discovery
14 passed.

15 Second, the jury trial is scheduled less than twenty days from the date of this order.
16 Defendant does not have enough time to prepare an adequate voir dire or cross examination for
17 Ms. Adriano or Dr. Stearns even if their curriculum vitae and expert reports were immediately
18 produced. Defendant does not have their qualifications, testimony provided in other cases, or
19 even what opinions they intend to express at trial. "The omission in most reports of the basis
20 and reasons for the opinions is hardly harmless. Nothing causes greater prejudice than to have
21 to guess how and why an adversarial expert reached his or her conclusion." *Reed*, 165 F.R.D.
22 at 430. Prejudice can be easily inferred because Defendant will have to guess what opinion the
23 experts will give and why they reached that opinion based on the medical reports. In
24 conclusion, Plaintiff is barred from calling Ms. Adriano and Dr. Stearns to testify at trial due to
25 Plaintiff's severely deficient expert disclosures for these witnesses.

26 **(2) Treating Physicians**

27 Plaintiff designated six named treating physicians ("the Treating Physicians") as expert
28 witnesses "who will testify and rely on the Medical Records." (Pl.'s Expert Witness

1 Disclosure at 1.) Plaintiff provided no further information regarding the Treating Physicians.
2 Due to Plaintiff's failure to submit any expert reports for any of the Treating Physicians,
3 Defendant seeks to prohibit the Treating Physicians from offering into evidence expert
4 testimony of facts or opinions acquired outside the scope of treatment.

5 In opposition, Plaintiff contends she is not required to submit expert reports for the
6 Treating Physicians in compliance with Federal Rule 26 since "treating physicians" are not
7 "retained" witnesses. However, "the triggering mechanism for application of Rule 26's expert
8 witness requirements is not the status of the witness, but rather the essence of the proffered
9 testimony." 11-1 Bender's Forms of Discovery Treatise § 1.24[2][a] (2012). The mere fact
10 that an expert witness is a treating physician does not automatically exempt that witness from
11 expert disclosure requirements. See *Gubbins v. Hurson*, 885 A.2d 269, 278 (D.C. Ct. App.
12 2005) ("[T]he defendant in this case did not lay the necessary foundation to establish that Dr.
13 Kelly's expert opinion testimony was exempt from the pretrial disclosure requirements of Rule
14 26(b)(4). It was not enough to show that Dr. Kelly was a treating physician.").

15 The applicable statutes and prevalent case law require treating physicians to submit
16 expert reports if they intend to testify about facts or opinions "acquired or developed in
17 anticipation of litigation or for trial." NMI R. Civ. P. 26(b)(4); *Goodman v. Staples the Office*
18 *Superstore, LLC*, 644 F.3d 817, 819-20 (9th Cir. 2011) (finding that several circuit courts
19 "hold that Rule 26 requires parties to disclose a treating physician's written report in the
20 absence of some evidence that the physician formed his opinion during the course of
21 treatment."). Since Plaintiff did not provide any expert reports for the Treating Physicians, the
22 Treating Physicians are barred from testifying about any facts or opinions acquired outside the
23 scope of treatment.

24 Furthermore, even treating physicians who intend to offer expert testimony regarding
25 facts and opinions acquired only during treatment are subject to certain expert disclosure
26 requirements. Fed. R. Civ. P. 26(a)(2)(C) (stating that expert witnesses not required to provide
27 a written report must disclose "a summary of the facts and opinions to which the witness is
28 expected to testify"); *Norris v. Fritz*, 270 P.3d 79, 84-85 (Mont. 2012) ("Non-retained experts,

1 in contrast [to retained experts], must provide only a summary of their expected testimony.”).
2 In *Norris*, the court found that the treating physician, Strizch, was a non-retained expert
3 required to provide a summary of his expected testimony because “Strizch developed his
4 opinion regarding standard of care in the context of patient treatment rather than in the context
5 of litigation.” *Id.* (“Strizch’s proffered testimony nevertheless required some disclosure to
6 prevent unfair surprise.”).

7 Although a summary of Strizch’s expected testimony was not disclosed, the court
8 permitted Strizch’s expert testimony because the adverse party could not reasonably claim
9 prejudice or unfair surprise as to the offered testimony. The court reasoned that “Strizch’s
10 standard of care [] likely would conform to his medical training, current medical literature, and
11 to national practice,” and the adverse party had access to the medical records that catalog
12 Strizch’s own treatment. *Id.* Strizch’s expert opinion was developed during the course of
13 treatment, and the adverse party could adequately anticipate the basic substance of Strizch’s
14 testimony.

15 Here, Plaintiff similarly did not disclose a summary of the Treating Physicians’
16 expected testimony. Plaintiff did, however, disclose the medical records that will purportedly
17 serve as the basis for the Treating Physicians’ expected testimony. As long as the substance of
18 the testimony stays within the scope of the treatment rendered and within the scope of the
19 medical records, Defendant could not reasonably claim unfair surprise, and the testimony may
20 be admitted into evidence. *Cf. Norris*, 270 P.3d at 85; *Gubbins*, 885 A.2d at 279 (noting that a
21 trial court must be guided by the primary purpose of the discovery rules to prevent unfair
22 surprise in determining whether to exclude expert testimony).

23 In conclusion, the Treating Physicians may testify about only “matters [that] are within
24 the scope of providing medical care to the patient” such as “the treatment [they] rendered,
25 whether it was reasonable and necessary as a result of the plaintiff’s condition, and whether the
26 charges for these services were reasonable.” *Scott v. DeFeo*, 46 Pa. D. & C.4h 353, 356 (Pa.
27 Commw. Ct. 2000). Furthermore, the expert testimony must be in agreement with the
28 disclosed medical records so as to prevent Defendant from incurring unfair surprise.

1 **3. Bruce M. MacMillan, Certified Public Accountant**

2 Plaintiff designated Bruce M. MacMillan (“Mr. MacMillan”) as an expert in accounting
3 who is expected to testify at trial as to the amount of Plaintiff’s estimated income for the
4 reminder of her working life based on the United States minimum wage. Plaintiff disclosed
5 Mr. MacMillan’s curriculum vitae and expert report.

6 Defendant seeks to exclude the expected testimony as irrelevant, unless Plaintiff can
7 establish that she is legally able to work in the CNMI or the United States for the duration of
8 time used by Mr. MacMillan in calculating Plaintiff’s lost past and future income. Plaintiff is
9 of Chinese descent. Defendant argues that discovery suggests Plaintiff is not legally able to
10 hold a job in the CNMI due to her immigration status. Furthermore, even if she is a lawful
11 nonresident worker, Defendant argues most of Mr. MacMillan’s expected testimony is
12 irrelevant because the current labor and immigration laws prevent all nonresident workers from
13 being lawfully employed in the CNMI past December 31, 2014.

14 This is a novel issue in the CNMI, and the closest the United States Supreme Court has
15 come to addressing this issue is in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137
16 (2002). There, the National Labor Relations Board (NLRB) awarded backpay to an
17 undocumented alien, finding that the alien employee was unlawfully terminated. *Id.* at 140-41.
18 The employer then petitioned the Court for review of the NLRB’s order. *Id.* at 142. The Court
19 held that awarding backpay to an undocumented alien is foreclosed by federal immigration
20 policy. *Id.* at 140. The Court reasoned that “awarding backpay in a case like this not only
21 trivializes the immigration laws, it also condones and encourages future violations.” *Id.* at 150.

22 Following *Hoffman Plastic*, courts have split on the issue whether an undocumented
23 alien is precluded from recovering in tort future lost United States wages. *Wielgus v. Ryobi*
24 *Techs., Inc.*, 875 F. Supp. 2d 854, 860-62 (N.D. Ill. 2012) (collecting cases). *Wielgus*
25 thoroughly analyzed the jurisdictional split on this issue and concluded that:

26 Wielgus’s status as an undocumented alien precludes the
27 recovery of damages based on the loss of future United
28 States earnings – to which he would not lawfully be entitled
because it would be based on compensation for future
impermissible work – but does not preclude the recovery of

1 damages for lost future earnings or earning capacity based
2 on what he could legitimately earn in his country of lawful
residence.

3 *Id.* at 862. The court adopted the rationale of *Hoffman Plastic* in that “[a]warding future
4 earnings at a United States pay rate necessarily assumes an undocumented alien’s future
5 employment in the United States, which is impermissible under federal immigration law.
6 *Wielgus*, 875 F. Supp. 2d at 862. (citation omitted). But, awarding an undocumented worker
7 the lost future earnings he could earn lawfully in his country of residence does not contravene
8 federal immigration law, and it serves the objective of a common law tort action to make an
9 injured party “whole.” *Id.*

10 This Court adopts the sound holding and analysis provided in *Wielgus*, which is also
11 followed by many jurisdictions. 2-10 Damages in Tort Actions § 10.04[10] (2012). Therefore,
12 Mr. MacMillan is barred from testifying about Plaintiff’s lost future income or earning
13 capacity based on the U.S. minimum wage unless and until Plaintiff establishes that she may
14 legally earn U.S. wages.

15 **B. DEFENDANT’S MOTION IN LIMINE REGARDING GENERAL TYPES OF EVIDENCE**

16 Defendant seeks to exclude evidence of: (1) Defendant’s ability to pay a judgment as
17 irrelevant, (2) prior traffic accidents and citations, and (3) offers made by Defendant to assist
18 or compensate Plaintiff at the time of the accident or shortly thereafter. In support thereof,
19 Defendant cited Commonwealth Rules of Evidence 402, 403, 408 and 409.

20 Plaintiff did not oppose the motion, but she did note that a court is not bound by an in
21 limine ruling and is free to alter its pretrial ruling and admit or deny the evidence at trial. The
22 Court agrees with both Defendant and Plaintiff. The evidence sought to be excluded is
23 normally not admissible under the Commonwealth Rules of Evidence. However, there may be
24 circumstances when such types of evidence are admissible such as for impeachment purposes.
25 Defendant’s motion in limine is hereby granted with the understanding that the Court may still
26 admit such evidence if it has a relevant purpose and is not otherwise inadmissible.

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28 ///

1 **V. CONCLUSION**

2 For the foregoing reasons, Defendant's two motions in limine are hereby **GRANTED**.

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4 **IT IS SO ORDERED** this 5th day of April, 2013.

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6 /s/

7 **ROBERT C. NARAJA, Presiding Judge**

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