

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MARK ROBARGE,

Plaintiff,

v.

ERIC D. SWAN, CITY OF AMERY and
HEALTHPARTNERS ADMINISTRATORS, INC.,

Defendants.

ORDER

11-cv-595-bbc

Plaintiff Mark Robarge is suing defendant Eric D. Swan for using excessive force against him in the context of an arrest. Now before the court are dueling motions to “strike” the other side’s expert on liability. I am denying both motions.

Because neither side filed a motion for summary judgment and trial is not scheduled until November 13, 2012, there is no pending issue before the court that could be resolved by deciding these motions, so they are arguably premature. However, even if I treat the parties’ filings as early motions in limine, neither side has shown that the other’s expert should be precluded from testifying.

Plaintiff’s sole ground for barring defendant’s expert is that his report was untimely. However, plaintiff does not identify any way that he was prejudiced by the delay. Because plaintiff received the report more than five months before trial, I agree with defendant that it is unreasonable to infer any prejudice in the absence of an explanation from plaintiff. Fed.

R. Civ. P. 37(c) (discovery violation does not require exclusion of evidence if violation was justified or harmless).

Defendant says that he hired a liability expert only because plaintiff did and he argues that, under Thompson v. City of Chicago, 472 F.3d 444 (7th Cir. 2006), expert testimony is inappropriate in an excessive force case. However, the court of appeals did not issue a blanket ruling in Thompson that expert testimony during the liability phase was inappropriate for any purpose. Rather, the court upheld the district court's ruling under Fed. R. Evid. 403 to exclude the police department's own policies regarding the appropriate use of force under the facts of that case. Defendant does not develop any argument regarding why plaintiff's expert's testimony should be excluded under the facts of this case; he relies entirely on his overly broad interpretation of Thompson. Accordingly, I conclude that it would be premature to rule now that the testimony should be categorically excluded.

ORDER

IT IS ORDERED that the motions to exclude expert testimony filed by plaintiff Mark Robarge, dkt. #33, and defendant Eric Swan, dkt. #38, are DENIED.

Entered this 20th day of August, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge