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

JAY J. SCHINDLER, M.D.,

Plaintiff,

v.

MARSHFIELD CLINIC,

Defendant.[1]

ORDER

05-C-705-C

The file in this case is littered with orders remonstrating plaintiff's attorney for his failure to meet the obligations imposed on him by the federal rules and this court's procedures. Here's another.

Today's topic is plaintiff's woefully inadequate initial expert report on economic losses prepared by Bruce A. Seaman, Ph.D. Defendant has moved to strike Seaman's initial and supplemental reports; plaintiff voices high dudgeon at what he views as a baseless motion designed to distract him from more pressing matters. Due to the propitious timing (for plaintiff) of two events, I am not striking Seaman's supplemental report, but I am striking his initial report and shifting costs in favor of plaintiff pursuant to F.R. Civ. Pro. 37(a)(4).

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[1] My reading of Judge Crabb's January 4, 2007 summary judgment order suggests that we are down to one defendant on one breach of contract claim. *See* dkt. 243.

Almost a year ago, at the telephonic preliminary pretrial conference on February 15, 2006, this court set expert disclosure deadlines for September/November 2006 in anticipation of a January 2, 2007 trial. The court warned the parties:

> All disclosures mandated by this paragraph must comply with the requirements of Rule 26(a)(2)(A), (B) and (C). There shall be no third round of rebuttal expert reports. Supplementation pursuant to Rule 26(e)(1) is limited to matters raised in an expert's first report, must be in writing and must be served not later than five calendar days before the expert's deposition, or before the general discovery cutoff if no one deposes the expert.
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> * * *
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> Failure to comply with these deadlines and procedures could result in the court striking the testimony of a party's experts pursuant to Rule 37. The parties may modify these deadlines and procedures only by unanimous agreement or by court order.

Dkt. 8 at 3-4.

According to defendants, last spring, they served on plaintiff an interrogatory on plaintiff seeking an itemized statement of plaintiff's claimed damages. On April 22, 2006, plaintiff's attorney responded:

> At my request, Dr. Schindler is calculating [*and*] itemizing potential damages for the referenced defendants. We will not, however, be able to calculate numbers any time soon that we can point to as final or even close damages assessments. This is in part due to the complexities of calculating potential damages for a multiple-defendant action such as this. More relevantly, at this stage of [*the*] proceedings (with much discovery yet to be conducted), it is premature to give a fully-informed damages assessment, even were the calculations and allocations simple.

> We ask that you please allow us time on the issue of damages. If it is important we provide estimated damages before your anticipated motion in July, please let me know.

Dkt. 224, Exh. C.

Defendants wrote back on April 23, 2006, disagreeing with the assessment that this was a complex damages case:

> Dr. Schindler essentially claims lost income as his damages, and he should have all of the information and documentation necessary to make that calculation. We note that plaintiffs are typically required to provide a categorization and calculation of damages at the outset of litigation under [*Rule*] 26(a)(1)(C). That is what we want from Dr. Schindler based upon information currently within his possession, custody or control.

Id., Exh. D.

On April 26, 2006, the court granted the parties' joint request to loosen the schedule a bit, moving the expert disclosures to October 27, 2006/December 8, 2006, closing discovery on January 5, 2007 and moving the trial to February 5, 2007.

On July 24, 2006, defendants revisited the damages discovery issue, re-iterating their position that this was a simple calculation and requesting an immediate response. *Id.,* Exh. E. Defendants acknowledge that thereafter, the parties agreed to table their discovery concerns pending a decision on defendants' motion for partial summary judgment based on a claim of statutory immunity. The court ruled on that motion on October 13, 2006. The parties ultimately agreed that plaintiff would disclose his experts by December 1, 2006, with defendants disclosing their experts by January 15, 2007, all in anticipation of a February 5, 2007 trial date.

On November 13, 2006, defendants again wrote to plaintiff to seek a response to their interrogatory asking for a damages calculation. They contended that the interrogatory no longer was premature, the immunity motion was by the boards, plaintiff should have had this information available when he commenced his lawsuit, and

> moreover, your letter of April 22, 2006 indicates that [*Dr. Schindler*] in fact, was calculating those damages over seven months ago. Please let me know as soon as possible if Dr. Schindler refuses to respond to Interrogatory No. 10 so that we may seek appropriate relief from the court.

Id., Exh. F.

As of December 11, 2006, defendants had not received a response to their interrogatory.

What they had received, on December 1, 2006, was the expert report of Bruce A. Seaman, an associate professor of economics at Georgia State University. The guts of this 3½ page, nine-paragraph report are, in their entirety::

> My final expert opinion as to exact damages will include the present value of net lost income both past and future and will incorporate all evidence related to mitigation of such losses including fringe benefits as well as salary losses. . . . The scope of my testimony will be limited to economic damages only using the sound economic principles that I have used in many other cases in which I have been involved. I do believe that Dr. Schindler's damages can be fairly traced and related to the compensation he received as an employee of Marshfield Clinic and extrapolated to those he would have received as a partner/shareholder at a later date based on profiles of those neurosurgeons who have proceeded similarly in the absence of any arguable breech of contract by the Marshfield Clinic. Such a final damage estimate will by necessity be offset by any earnings accrued through mitigation. . . . This is a complex case and my preliminary estimate as to a range of damages wherein

> my final figure will lie is presently from $3.803 million to $9.000 million. My present most exact and readily defensible scenario puts damages at 6.045 million. I still require some clarification as to tax adjustments, growth rates, timing of shifting to director status, a better estimate of differential fringe benefit value and the typical income Dr. Schindler would have realized as a director and I reserve the right to adjust my final estimate based on further study and calculation.

Dkt. 210 at ¶ 3.

That's the report. No footnotes, no calculations, no attached substantive documents, no work shown. Although Seaman filed this document on the last day on which plaintiff was allowed to disclose experts, he refers to a "final report" that apparently he intended to issue on some unknown date in the future. Which, on one level, is reassuring: Seaman's December 1 submission doesn't even qualify as an acceptable synopsis of a lost-income report. It's hopelessly equivocal, with a $5.2 million, 237% range in the estimate damages, and with the "present most exact" number still subject to "clarification" of five variables. This is the sort of preliminary ball-parking that a Ph.D. in economics would be able to perform with a pad of paper and a four-function calculator during a 20 minute preliminary interview. It is *not* an expert report as defined and required by Rule 26(a)(2)(B).

Plaintiff heatedly defends Seaman's report and accuses defendants of vexatious impropriety for having challenging it. Plaintiff even musters the *chutzpah* to "cross-move" for fee-shifting in his favor. Some people say that the best defense is a good offense, but even when this tactic is appropriate, it's important to have a *good* offense. Plaintiff's impassioned rhetoric and sanctimonious finger-pointing are misdirected and frankly,

puzzling: why would plaintiff invest so much energy and emotion defending a palpably inadequate report? Such lashing out is not anchored to reality and it smacks of desperation.

Ultimately, however, plaintiff will suffer no substantive harm from his series of gaffes because on December 11, 2006, Seaman supplemented his first "report" with exhibits, tables, calculations and explanation that meet the threshold requirements of Rule 26(a)(2). He did not actually violate Rule 26(e) or the letter of this court's order because he did not raise any new topics and his supplementation was not untimely. Even so, it violated the spirit of the Rule 26 and of this court's order for plaintiff to stick his proverbial foot in the door on the last day of his disclosure deadline with the hope of shoving an actual damages report through the opening before the door slammed shut.

This is where plaintiff lucked out: on January 4, 2007, after the instant motion was filed and briefed, this court *sua sponte* moved the trial date from February 5 to March 19 because of trial calendar congestion. Whether they wanted it or not, both sides got six extra weeks within which to finish their lingering discovery and to prepare for trial on the remaining claim.[2] But for this, plaintiff ran a high risk that his eight-month failure to provide any meaningful information about his claimed damages would result in the court striking Seaman's supplemental report and his trial testimony. The six extra weeks of breathing room, unrequested though it may have been, gives defendants the opportunity to

[2] The parties are briefing whether and how to extend discovery. *See* dkt 244..

digest Seaman's information and depose him in a timely manner before presenting their expert report on damages.

Plaintiff also lucked out because Seaman filed his supplemental report on December 11, 2006, the same day that defendants filed their motion to strike his first "report." This propitious timing negates the inference that plaintiff induced Seaman to beef up his *ersatz* report in response to the motion to strike it.

That said, I am shifting to plaintiff the cost of defendant's motion to strike. Plaintiff violated Rule 37(a)(2)(B) by failing ever to answer defendants' Interrogatory No. 10; then on the last day to disclose experts, plaintiff foisted on defendants a useless shell of a damages calculation. With time running very short, defendants not only were justified to file their motion to strike, they almost were compelled to do so in order to protect their rights at trial. The make-whole philosophy undergirding Rule 37(a)(4) militates toward shifting onto plaintiff the costs of defendants' motion to strike. Plaintiff ordinarily would not be responsible for defendants' second brief (because the court's standing order does not allow reply briefs), but he fashioned his response a "cross motion for fees and costs" that required a response from defendants. So plaintiff will have to reimburse defendants for this work as well.

ORDER

For the reasons stated above, it is ORDERED that:

(1) Defendants' motion to strike the initial expert report of Bruce A. Seaman is GRANTED;

(2) Defendants' motions to strike Seaman's supplemental report and to preclude him from testifying at trial are DENIED because the court rescheduled the trial date;

(3) Plaintiff's cross-motion for fees and costs is DENIED; and,

(4) Plaintiff shall pay defendants the reasonable expenses incurred in making their motion. Defendants may have until January 16, 2007 within which to file and serve an itemized bill of all costs incurred in filing their motion and response to plaintiff's cross-motion. Plaintiff may have until January 22, 2007 within which to file and serve any response challenging the reasonableness of the amount claimed.

Entered this 8th day of January, 2007.

BY THE COURT:
/s/
STEPHEN L. CROCKER
Magistrate Judge