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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

SCOTT LAMBERT,
Plaintiff,
vs.
LIBERTY MUTUAL FIRE INSURANCE
COMPANY; ELITHA STOCKETT,
Defendants.

2:14-CV-00521 JWS
ORDER
[Re: Motion at docket 136]

I. MOTION PRESENTED

Defendant Liberty Mutual Fire Insurance Company (“Defendant”) filed a motion *in limine* at docket 136 requesting that Plaintiff Scott Lambert (“Plaintiff”) be precluded from presenting expert testimony from various health care providers based on his failure to comply with the disclosure requirements in Rule 26(a)(2)(C). Plaintiff filed his response at docket 155. Defendant did not file a reply. Oral argument was not requested and would not be of assistance to the court.

II. BACKGROUND

Plaintiff’s expert disclosure statement identifies two health care providers that he plans to use as non-retained expert witnesses—Dr. Sumit Dewanjee and Dr. Paul Mahoney—and for each of these two providers he includes an individual disclosure statement. Plaintiff then proceeds to set forth an additional list of health care providers

1 who may testify. He states that these health care providers have not been specially
2 retained but are percipient medical witnesses who treated him for his injuries. He does
3 not provide an individual disclosure statement for each provider listed but generally
4 states that each “may be called to testify (or provide expert evidence through his/her
5 records) as to his/her findings and opinions concerning [Plaintiff’s] injuries, the cause of
6 his injuries, and the impact of Defendant’s wrongful denial of benefits on [Plaintiff’s]
7 health, final prognosis and future earnings ability.”¹ Defendant argues that the
8 disclosure summary as to these listed health care providers does not comply with the
9 requirements of Rule 26(a)(2)(C). Because of this non-compliance, Defendant requests
10 that the following providers be excluded from providing expert testimony:
11 representatives of STI Physical Therapy; representatives of Back in Action Physical
12 Therapy; Dr. Martin Benoit, representatives of Sonora Quest Laboratorie; Basec
13 Medical Consult Services Inc.; Dr. Greg Allen; Dr. Navtej Tung; Ms. Ann Voght PA;
14 Dr. Kent Vosler; Ms. Geneva Smith PA; Dr. Gary DeBrino; Dr. Laura Bitterman;
15 Dr. Christopher Wie; Ms. Michele Abrose PT; Dr. Patrick Knowles; and Cathy Guinan
16 MP (“Percipient Medical Witnesses”).²

17 **III. DISCUSSION**

18 Rule 26 of the Federal Rules of Civil Procedure requires a party to disclose “the
19 identity of any witness it may use at trial to present evidence under Federal Rule of
20 Evidence 702, 703, or 705.”³ The purpose of the expert disclosure requirement is to
21 allow the opposing party an opportunity to prepare for cross-examination and arrange
22 for countering expert testimony.⁴ Rule 26 contemplates two types of experts: (1) those

24 ¹See doc. 136-1 at pp. 31-35.

25 ²The adequacy of Plaintiff’s disclosure as to Dr. Dewanjee and Dr. Mahoney is the
26 subject of a separate motion *in limine* and is not addressed in this order.

27 ³Fed. R. Civ. P. 26(a)(2)(A).

28 ⁴See Fed. R. Civ. P. 26(a)(2) advisory committee’s notes to 1993 amendment.

1 “retained or specially employed” to give expert testimony; and (2) those who are not
2 retained or specially employed, but who may nevertheless provide expert testimony.⁵
3 That is, the rules recognize “the difference between a percipient witness who happens
4 to be an expert and an expert who, without prior knowledge of the facts giving rise to
5 the litigation, is recruited to provide expert opinion testimony.”⁶ A retained or specially
6 employed expert is required to provide a detailed written expert report in accordance
7 with Rule 26(a)(2)(B). Percipient expert witnesses who are exempt from the written
8 report requirement must still provide a statement in accordance with Rule 26(a)(2)(C).
9 The disclosure statement must set forth both the subject matter of the expert testimony
10 and “a summary of the facts and opinions to which the witness is expected to testify.”⁷

11 Generally, treating physicians are not retained or employed to provide expert
12 testimony because they are percipient witnesses of the treatment rendered. As such, a
13 treating physician does not need to provide a detailed written report under
14 Rule 26(a)(2)(B) as long as his or her expert opinion is formed during the course of
15 treatment.⁸ “Nonetheless, if a treating physician is to testify as an expert, as opposed
16 to a fact witness, he or she must be disclosed [in accordance with] Rule 26(a)(2)(C).”⁹
17 As stated above, the disclosure must state the subject matter of the testimony and
18 provide a summary of the facts and opinions that the physician is expected to provide.
19 The summary does not require “undue detail.”¹⁰ However, it must still “sufficiently
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22 ⁵Fed. R. Civ. P. 26(a)(2)(B)-(C).

23 ⁶*Downey v. Bob’s Disc. Furniture Holdings, Inc.*, 633 F.3d 1, 6 (1st Cir. 2011).

24 ⁷Fed. R. Civ. P. 26(a)(2)(C).

25 ⁸*Goodman v. Staples the Office Superstore LLC*, 644 F.3d 817, 826 (9th Cir. 2011).

26 ⁹*Jones v. Colo. Cas. Ins. Co.*, No. 12-cv-01968, 2015 WL 6123125, at * 2 (D. Ariz.
27 Oct. 19, 2015).

28 ¹⁰See Fed. R. Civ. P. 26(a)(2)(C) advisory committee’s note to 2010 amendment.

1 apprise an opposing party of a treating physician's opinions."¹¹ District courts have
2 concluded that it is not sufficient under Rule 26(a)(2)(C) to simply state that the
3 physician will testify consistent with medical records.¹²

4 Here, Plaintiff has indicated that the Percipient Medical Witnesses will offer
5 expert opinions as to the extent of Plaintiff's injuries, the cause of injuries, and the
6 impact of Defendant's denial of benefits on Plaintiff's health and future earning ability.
7 Defendants acknowledge that these Percipient Medical Witnesses are not retained
8 experts and are otherwise not required to comply with the more stringent requirements
9 of Rule 26(a)(2)(B). Indeed, Plaintiff asserts that the Percipient Medical Witnesses will
10 testify only as to their opinions formed during treatment.¹³ However, that does not end
11 the inquiry. As discussed above, in order to elicit expert opinions from the Percipient
12 Medical Witnesses, even if they will not expand beyond opinions formed during the
13 course of their treatment, Plaintiff must provide a disclosure that comports with
14 Rule 26(a)(2)(C). Plaintiff failed to do so. His general statement that each provider will
15 provide expert testimony about injuries, causation, and the impact of benefit denial on
16 Plaintiff's health, final prognosis, and future earning potential is wholly devoid of any
17 "summary of the facts and opinions" required under Rule 26(a)(2)(C).

18 "If a party fails to provide information or identify a witness as required by
19 Rule 26(a) . . . , the party is not allowed to use that information or witness to supply
20 evidence on a motion, at a hearing, or at trial."¹⁴ This sanction for improper disclosure
21 is automatic and is only excused if "the failure was substantially justified or is
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24 ¹¹*Jones*, 2015 WL 6123125, at * 2 (internal quotations and citations omitted).

25 ¹²*Id.*; see also *Cabrera v. Clark Cty. Detention Ctr.*, No. 12-cv-00918, 2015 WL
26 1815426, at *2 (D. Nev. April 20, 2015).

27 ¹³Doc. 155 at p. 2.

28 ¹⁴Fed. R. Civ. P. 37(c)(1).

1 harmless.¹⁵ It is the violating party's burden to show justification or harmlessness.¹⁶
2 Here, Plaintiff makes no argument to show why his failure to comply with
3 Rule 26(a)(2)(C) was justified or harmless. Moreover, Plaintiff does not make an
4 argument that the court should craft a narrower exemption. However, based on the
5 recently-decided motion for summary judgment, the court is aware that two of the
6 Percipient Medical Witnesses have been deposed by Defendant— Dr. Patrick Knowles
7 and Cathy Guinan MP—and thus there is support for a finding of harmlessness as to
8 these two providers as long as their expert testimony is limited to opinions that were
9 elicited during their respective depositions.

10 **IV. CONCLUSION**

11 Based on the preceding discussion, Defendant's motion *in limine* at docket 136
12 is GRANTED IN PART and DENIED IN PART. Except for Dr. Knowles and Ms. Cathy
13 Guinan MP, the Percipient Medical Witnesses are precluded from offering expert
14 testimony. Dr. Knowles and Ms. Guinan may provide expert testimony as long as their
15 testimony is limited to opinions elicited during their depositions.

16 DATED this 9th day of June 2016

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18 /s/ JOHN W. SEDWICK
19 SENIOR UNITED STATES DISTRICT JUDGE
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27 ¹⁵*Id.*; see also *Goodman*, 644 F.3d at 827.

28 ¹⁶See *Goodman*, 644 F.3d at 827.