

IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF ARKANSAS  
HOT SPRINGS DIVISION

GARY L. EUBANKS

PLAINTIFF

V.

Civil No.12-cv-6139

FOREMOST INSURANCE COMPANY

DEFENDANT

**ORDER**

Before the Court is the Report and Recommendation filed April 11, 2014, by the Honorable James R. Marschewski, United States Magistrate Judge for the Western District of Arkansas. (ECF No. 44). Judge Marschewski recommends that Defendant Foremost Insurance Company's ("Foremost") Motion to Strike (ECF No. 34) and Motion for Summary Judgment (ECF No. 27) be denied. On April 28, 2014, Foremost filed objections to Judge Marschewski's Report and Recommendation. (ECF No. 45). On May 5, 2013, Plaintiff Gary L. Eubanks ("Eubanks") responded. (ECF No. 46). After reviewing the record *de novo*, the Court adopts Judge Marschewski's Report and Recommendation as its own.<sup>1</sup>

As to the Motion to Strike, Foremost objects because it asserts Eubank's expert witnesses, William Gary Holt ("Holt"), Ben Engel ("Engel"), and Bud Whetstone ("Whetstone") should be excluded because Eubanks failed to comply with Fed. R. Civ. P. 26(a)(2)(B). Foremost asserts that even though Holt, Engel, and Whetstone are not retained or specially

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<sup>1</sup>In reviewing the record for the motion to strike, the Court uses the clearly erroneous standard. *Haviland v. Catholic Health Initiatives-Iowa, Corp.*, 692 F. Supp. 2d 1040, 1043(S.D. Iowa 2010) (citing *Hines v. Liggett Group, Inc.*, 975 F.2d 81, 92 (3d. Cir. 1992)("It is undisputed that the proper standard of review for discovery orders is the 'clearly erroneous or contrary to law standard.'")).

employed to provide expert testimony and do not regularly give expert testimony, Eubanks was required to provide a written report.

The Court disagrees. As Judge Marschewski stated, Rule 26(a)(2)(B) provides that “unless otherwise stipulated or ordered by the court, this disclosure [of expert testimony] must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party employee regularly involve giving expert testimony.” Fed. R. Civ. P. 26(a)(2)(B). Foremost admits that Holt and Whetstone were not retained or specially employed to provide the expert testimony. Further, Foremost admits that Engel’s employment duties do not involve giving expert testimony. Accordingly, Rule 26(a)(2)(B) did not require Eubanks to provide a written report concerning Holt, Whetstone, and Engel’s testimony. Thus, Foremost’s objections are without merit, and Judge Marschewski properly denied its Motion to Strike.

As to the Summary Judgment Motion, Foremost argues that Judge Marschewski should have granted its Motion for Summary Judgment because Eubanks “has not proved his case.” Specifically, Foremost asserts that Eubanks has not proven his case because Eubanks cannot point to a specific client or business he lost when he was recuperating from his injuries and Eubanks’s tax return actually increased at the time he was recuperating. Eubanks responds that because of the nature of his law practice as a plaintiff’s attorney, he did not lose income at the moment he was unable to work. Eubanks contends that his losses will only show up years later. To prove his losses, Eubanks offers the testimony of Holt, Whetstone, and Engle to establish the nature of his law practice. Given this testimony, the Court agrees with Judge Marschewski that the amount of lost income is a disputed fact for the jury to decide.

For the reasons set forth above, the Court overrules Defendant Foremost's objections and adopts Judge Marchewski's Report and Recommendation. (ECF No. 44). Accordingly, Defendant Foremost's Motion to Strike (ECF No. 34) and Motion for Summary Judgment (ECF No. 27) are **DENIED**.

**IT IS SO ORDERED**, this 6th day of June, 2014.

/s/ Susan O. Hickey  
Hon. Susan O. Hickey  
United States District