EXHIBIT 42

LEXSEE 2008 U.S. DIST. LEXIS 91373

HANGER PROSTHETICS & ORTHOTICS, INC., Plaintiff, v. CAPSTONE ORTHOPEDIC, INC., a California Corporation; GLEN ELLIS, an individual; SANTIAGO ROSALES, an individual; DAVID KIMZEY, an individual; and ANGELA FULTON, an individual, Defendants.

2:06-cv-2879-GEB-KJM

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

2008 U.S. Dist. LEXIS 91373*; *76 Fed. R. Evid. Serv. (Callaghan) 948

June 13, 2008, Decided
June 13, 2008, Filed

PRIOR HISTORY: *Hanger Prosthetics & Orthotics, Inc. v. Capstone Orthopedic, Inc., 556 F. Supp. 2d 1122, 2008 U.S. Dist. LEXIS 64756 (E.D. Cal., 2008)*

COUNSEL: [*1] For Hanger Prosthetics & Orthotics, Inc., Plaintiff: David B. Moyer, Nancy Josephine Geenen, LEAD ATTORNEYS, Foley and Lardner (Palo Alto), Palo Alto, CA; Gillian S.B. Morshedi, Foley and Lardner, San Francisco, CA; Kimberly Kristin Dodd, Kristy Kunisaki, Foley and Lardner LLP, San Francisco, CA.

For Capstone Orthopedic, Inc., Santiago Rosales, Glen S Ellis, Defendants: Scott Michael Plamondon, LEAD ATTORNEY, Berry and Block LLP, Sacramento, CA.

For David Kimzey, Angela Fulton, Defendants: Alex James Kachmar, Jr, LEAD ATTORNEY, Weintraub Genshlea Chediak, Sacramento, CA; Robin Kerry Perkins, LEAD ATTORNEY, Palmer Kazanjian Wohl Perkins, LLP, Sacramento, CA.

JUDGES: GARLAND E. BURRELL, JR., United States District Judge.

OPINION BY: GARLAND E. BURRELL, JR.

OPINION

ORDER RE MOTIONS IN LIMINE

On May 23, 2008, Defendants filed two motions in limine. On May 26, 2008 Plaintiff filed five motions in limine. All of the motions are opposed.

I. Defendants' Motion in Limine Number One

Defendants seek to exclude "[P]laintiff's belatedly designated expert witness, Mark Alcock ("Alcock"), from testifying at trial and making references to or introducing evidence of Mr. Alcock's findings and opinions." (Defs.' Mot. No. 1 at 1:25-26.) [*2] Defendants also seek sanctions against Plaintiff "for its bad faith gamesmanship on this issue." (Defs.' Mot. No. 1 at 6:23-24.)

A. Background

On January 17, 2007, shortly after filing its Complaint and roughly a year and a half ago, Plaintiff submitted a declaration by Mark Alcock, a computer forensic investigator, in support of an application for expedited discovery. The declaration detailed Alcock's professional credentials, the investigations he made on a Hanger laptop computer, the files he recovered, and

conclusions he made "based on [his] experience and training and the evidence at hand . . . ." (Alcock Decl., Dkt. No. 18, P 19.) On March 12, 2007, Plaintiff's initial Rule 26 disclosures identified Alcock as a person likely to have discoverable information. On March 13, 2007 a Status (Pretrial Scheduling) Order issued ordering that "[e]ach party shall comply with *Federal Rule of Civil Procedure 26(a)(2)*'s initial expert witness disclosure and report requirements on or before September 28, 2007 and with the rebuttal expert disclosure authorized under the Rule on or before October 29, 2007." [1] (Scheduling Order at 3:11-14.)

> 1 All future references to Rules are to the Federal Rules [*3] of Civil Procedure unless otherwise noted.

On September 28, 2007 Plaintiff disclosed only one expert witness, Suzanne M. Stuckwisch. On January 22, 2008, Defendants moved to exclude Alcock's testimony at trial since Plaintiff had not disclosed him as an expert witness by the deadline to do so. Plaintiff argued that Alcock would testify to matters he personally perceived and would not give expert opinions. Defendants' motion was therefore denied as moot. (Order, Dkt. No. 77.) On February 7, 2008, Defendants moved for summary judgment of all claims against them. In opposition to the motion, Plaintiff submitted the above mentioned Declaration of Alcock. The court rejected Plaintiff's argument that Alcock's declaration contained only lay opinions not covered by the expert disclosure and reporting requirements of *Rule 26(a)(2)*, holding that

> [t]he findings from Alcock's investigation do not constitute lay opinions since Alcock's testimony regarding computer misuse was based upon scientific, technical, or other specialized knowledge. Instead, these findings fall within the scope of *Federal Rule of Evidence 702*, and are governed by its standards and the corresponding expert disclosure requirements [*4] of *Federal Rule of Civil Procedure 26*.

*Hanger Prosthetics & Orthotics, Inc. v. Capstone Orthopedic, Inc., 556 F. Supp. 2d 1122, 2008 WL 1734771, at *17 n.2 (E.D. Cal. 2008)*. On April 21, 2008, Plaintiff filed a Third Supplemental Initial Disclosure Statement listing Alcock as an expert witness, six months after the deadline for designating experts, three months after the discovery completion date, and less than two months before trial. (Kachmar Decl., Ex. C.)

B. Expert Versus Lay Testimony [2]

> 2 The reasoning for the April 14, 2008 ruling that Alcock's declaration constitutes expert testimony is further explained here.

Federal Rule of Evidence 702 allows expert testimony if the expert is qualified and his or her testimony meets certain foundational requirements. Lay witnesses may give opinion testimony under *Federal Rule of Evidence 701*, but only if their opinions are "not based on scientific, technical, or other specialized knowledge within the scope of *Rule 702*." The 2000 Amendments to *Federal Rule of Evidence 701* added this requirement

> to eliminate the risk that the reliability requirements set forth in *Rule 702* will be evaded through the simple expedient of proffering an expert in [*5] lay witness clothing.
>
> * * *
>
> The amendment does not distinguish between expert and lay *witnesses*, but rather between expert and lay *testimony*. Certainly it is possible for the same witness to provide both lay and expert testimony in a single case. . . . The amendment makes clear that any part of a witness' testimony that is based upon scientific, technical, or other specialized knowledge within the scope of *Rule 702* is governed by the standards of *Rule 702* and the corresponding disclosure requirements of the Civil and Criminal Rules.

Fed. R. Evid. 701 advisory committee's note, 2000 Amendments. "[T]he distinction between lay and expert witness testimony is that lay testimony 'results from a process of reasoning familiar in everyday life,' while expert testimony 'results from a process of reasoning which can be mastered only by specialists in the field.'" Id. (quoting *State v. Brown, 836 S.W.2d 530, 549 (1992)*).

As the Sixth Circuit recently noted in *United States*

v. Ganier, 468 F.3d 920, 926 (6th Cir. 2006), "the categorization of computer-related testimony [as either lay or opinion testimony] is a relatively new question . . . ." In Ganier, the Sixth Circuit considered testimony by a computer [*6] forensic specialist who used forensic software to determine what searches were run on a computer and on what dates they were run. *Id. at 924*. The court rejected the government's argument that this testimony was "simply lay testimony available by running commercially-available software, obtaining results, and reciting them," reasoning "[t]he average layperson today may be able to interpret the outputs of popular software programs as easily as he or she interprets everyday vernacular, but the interpretation Drueck [the specialist] needed to apply to make sense of the software reports is more similar to the specialized knowledge police officers use to interpret slang and code words used by drug dealers," which is expert testimony. *Id. at 925-26* (internal quotations omitted).

Similarly, in *Furmanite Am., Inc. v. T.D. Williamson, Inc., 506 F. Supp. 2d 1126, 1133 (M.D. Fla. 2007)*, the court observed that the testimony of a computer forensic specialist who uncovered and extracted data from computers would be "expert opinion [if it was on] the highly technical question of whether and when a defendant performed a 'selective restoration' of a computer's hard drive in order to maliciously overwrite [*7] data on a misappropriated laptop computer."(citation omitted) (citing *MMI Prods., Inc. v. Long, 231 F.R.D. 215, 216 (D. Md. 2005))*.

A review of Alcock's declaration makes clear that his analysis "results from a process of reasoning which can be mastered only by specialists in the field." *State v. Brown, 836 S.W.2d at 549*. For instance, Alcock declares

> [u]sing forensic software, I was able to establish that an external, mass storage device ("EMSD") had been connected on several occasions to both the Visalia Server and the Laptop; further, I was able to confirm that the exact same EMSD was connected to both systems by confirming its globally unique identification number ("GUID"). I conducted my forensic exam on the working copies [of hard drives] to analyze the data therein. With respect to the Laptop, I discovered that a mass deletion took place, and the contents of the email folders and the 'My Documents' folders for each had been systematically deleted. . . . The Microsoft windows Operating System had been re-installed to further corrupt the pre-existing data. I was able to determine that much of this deletion activity occurred in October 2006, including as late as October 9, 2006, [*8] the day that Ms. Fulton returned the laptop computer to Hanger.

(Alcock Decl. PP 10, 15.) Alcock's proposed testimony also includes identifying "files and fragments of files previously deleted from the Laptop," which he indicates involved expert reasoning since his work was "a time-consuming process due to the number of computer drives and files involved, and **the complexity of retrieving files and artifacts damaged due to the attempts of sterilizing the drive** to conceal or deprive the use of data once present on the laptop." (Alcock Decl. PP 16, 17, 18 (emphasis added).) Accordingly, Alcock's proposed testimony constitutes expert testimony.

C. Failure to Disclose

Therefore, Plaintiff was required to have disclosed Alcock as an expert witness under *Rule 26(a)(2)(A)*. *Rule 37(c)(1)* "gives teeth to [this] requirement[]," *Yeti by Molly, Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1106 (9th Cir. 2001)*, by prescribing: "If a party fails to provide information or identify a witness as required by *Rule 26(a)* . . . the party is not allowed to use that . . . witness to supply evidence . . . at a trial, unless the failure was substantially justified or is harmless." *Fed. R. Civ. P. 37(c)(1)*. The Advisory Committee Notes to the 1980 Amendment to Rule [*9] 37 state that this is an "automatic," "self-executing sanction." "[T]he burden is on the party facing sanctions to prove harmlessness." *Yeti by Molly, 259 F.3d at 1106*. The Ninth Circuit analyzed this harmless element in Yeti by Molly "by looking at whether the failure to disclose the information prejudiced the opposing party." *Galentine v. Holland Am. Line--Westours, Inc., 333 F. Supp. 2d 991, 993 (W.D. Wash. 2004)*.

Plaintiff argues "[f]ederal courts have found that precluding expert testimony is a 'drastic remedy and should only be applied in cases where the party's conduct represents flagrant bad faith and callous disregard of the Federal Rules.'" (Pl.'s Opp'n at 6:4-13 (citing *Sullivan v.*

Glock, 175 F.R.D. 497, 504 (D. Md. 1970)).) However, in the circumstances at issue here, unless harmlessness is shown, "even absent a showing in the record of bad faith or willfulness, exclusion is an appropriate remedy for failing to fulfill the required disclosure requirements of *Rule 26(a)*." *Yeti by Molly, 259 F.3d at 1106*.

Plaintiff argues "Hanger's failure to timely disclose Alcock as an expert witness has not resulted in any unfair prejudice or surprise[, since Hanger] identified Alcock as [*10] a percipient fact witness, timely disclosed its intention to rely upon Alcock's observations as well as the entire contents of his testimony over the entire course of this litigation . . . ." (Opp'n at 3:17-21 (emphasis removed).) Plaintiff contends:

> Defendants had every opportunity to depose or propound discovery relating to Mr. Alcock and the repeated disclosures of the nature and scope of his personal knowledge. More importantly, even though Defendants chose not to depose Mr. Alcock, additional discovery relating to [the] nature of Mr. Alcock's 'conclusions' is unnecessary as Defendants have been aware of the scope of Mr. Alcock's testimony since his affidavit was filed . . . .

(Id. at 5:20-6:3.) Defendants rejoin they are harmed:

> First, plaintiff's refusal to designate Alcock as an expert witness in compliance with the Court's Scheduling Order deprived defendants of an opportunity to designate their own expert in rebuttal to Mr. Alcock. Second, Defendants would have been unable to depose Mr. Alcock as an expert because an expert cannot be deposed until there has been compliance with *F.R.C.P. 26(a)(2)(B)* requirements. (See *F.R.C.P. 26(b)(4)(A)*.) Finally, defendants were justified . [*11] . . in relying on plaintiff's express representations that Mr. Alcock would not be called as an expert witness at trial. As plaintiff admits, as late as November 1, 2007, well after the deadline for disclosing expert witnesses, plaintiff considered Mr. Alcock to be its 'forensic computer consultant," not a designated expert witness. (See Plaintiff's Opposition at p. 5:5-8.) Therefore, under the Rules of Federal Procedure, Defendants would have been unable to depose Mr. Alcock since he was not a designated expert but instead, was a consultant. (See *F.R.C.P. 26(b)(4)(B)*; see also California Practice Guide, Federal Civil Practice Before Trial (2008), § 11.370, at pp. 11-43 - 11-44 (recognizing that a party may not depose an opposing party's "consultant" absent "extraordinary circumstances.").)

(Defs.' Reply at 4:20-5:5 (emphasis in original).)

Plaintiff relies on *Donell v. Perpetual Invs., Inc., 2007 U.S. Dist. LEXIS 97888, 2007 WL 4707739, at *1-2 (D. Nev. May 7, 2007)*, in which the court denied defendants' motion to exclude a witness, previously designated as a fact witness, from testifying at trial as an expert. The court reasoned, "any prejudice that will result from allowing [the witness] to testify as an expert [*12] will be the result of Defendants' strategic decisions in avoiding deposing [the witness] and in failing to object to the sale of the property in the underlying SEC action." Id. Thus, under these circumstances, the court concluded defendants were not harmed.

Harm was found in *Castillo v. City and County of San Francisco, 2006 U.S. Dist. LEXIS 13698, 2006 WL 618589, at *2 (N.D. Cal. Mar. 9, 2006)*, a case in which both parties listed Dr. Blackwell as a fact witness in their initial disclosures and defendants gave "vague cross-reference to the other side's witnesses in its expert disclosure," but failed to name Dr. Blackwell. Defendants were subsequently prevented from having Dr. Blackwell give expert testimony since he was not properly designated in their expert disclosures. *2006 U.S. Dist. LEXIS 13698, [WL] at *1-2*. The court held the failure to disclose was not harmless because "[i]f plaintiff had known that defendants were seeking to use Dr. Blackwell for an opinion" they could have deposed him, retained a rebuttal witness or brought a motion in limine to bar his opinions as lacking adequate foundation. *2006 U.S. Dist. LEXIS 13698, [WL] at *2*.

The witness exclusion sanction was also upheld by the Seventh Circuit in *Musser v. Gentiva Health Servs., 356 F.3d 751, 754 (7th Cir. 2004)*, [*13] a case in which witnesses were only identified earlier in the proceeding as

fact witnesses. Plaintiff argued in Musser, "it would be a pointless formality to disclose in writing a list of names of persons already known to Gentiva through prior discovery . . . with the designation 'expert witness.'" *Id. at 757*. The court rejected the argument stating,

> [f]ormal disclosure of experts is not pointless. Knowing the identify of the opponent's expert witnesses allows a party to properly prepare for trial. [Defendant] should not be made to assume that each witness disclosed by [plaintiffs] could be an expert witness at trial. The failure to disclose experts prejudiced [defendant] because there are countermeasures that could have been taken that are not applicable to fact witnesses, such as attempting to disqualify the expert testimony on grounds set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc., [509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)]*, retaining rebuttal experts, and holding additional depositions to retrieve the information not available because of the absence of a report.

Id. at 757-58.

Plaintiff has not sustained its burden of showing Defendants would not be harmed if the late disclosure is allowed [*14] on the eve of trial, scheduled to commence next week. Allowing Alcock to be disclosed as an expert witness at this stage of the proceeding is not harmless. For the reasons stated, Defendants' motion to exclude Alcock's proposed expert testimony is granted.

D. Additional Sanctions

Defendants "request the Court to sanction [P]laintiff for its bad faith tactics in belatedly designating Alcock as an expert after representing to the Court that he would not offer opinion testimony in this matter." (Defs.' Mot. No. 1 at 6:12-15.) Plaintiff rejoins sanctions are unwarranted since "Defendants have not demonstrated that Plaintiff willfully or intentionally attempted to subvert Defendants' ability to take discovery or fulfill its notice obligations with respect to Mark Alcock. Instead, . . . Defendants have been aware of Mr. Alcock's observations and personal knowledge relevant to this lawsuit for more than 16 months." (Pl.'s Opp'n at 6:22-27.)

While it is recognized that Plaintiff appears to have engaged in gamesmanship with respect to the disclosure of Alcock as an expert witness, that its failure to timely disclose Alcock is inexcusable, and has resulted in Defendants' expenditure of attorney's [*15] fees, the additional sanction Defendants' seek will not be imposed.

II. Remaining in limine motions

The remaining motions in limine are denied.

Dated: June 13, 2008

/s/ Garland E. Burrell, Jr.

GARLAND E. BURRELL, JR.

United States District Judge