

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DAVIDSON SURFACE/AIR, INC.,)	
)	
Plaintiff,)	
)	
v.)	No. 4:22 CV 547 CDP
)	
ZURICH AMERICAN INSURANCE)	
COMPANY, d/b/a Zurich,)	
)	
Defendant.)	

MEMORANDUM AND ORDER

At the conclusion of the hearing on defendant's motions in limine, I advised counsel that I would consider plaintiff's request to reconsider my earlier ruling to exclude the expert opinion rendered by Jerry Berhorst that the damage to the Davidson roof was valued at \$6,753,600, which was his estimated cost to replace the roof. I also advised counsel that I would take under submission Subparts (2), (3), and (4) of defendant's motions. Upon further consideration of the issues raised, I make the following rulings:

1. Jerry Berhorst

I will not reconsider my determination to exclude Berhorst's expert opinion evidence and testimony, including his opinion that the condition of the roof required full replacement. I will allow, however, introduction of the Proposal from Amaya Roofing, prepared by Berhorst and dated July 25, 2022 (*see* ECF 68-2, pp. 2-6), for

the sole purpose of establishing Amaya's estimate for installing a new roof at the Davidson building.

2. Motion Subpart (2) – Brad Poth/RoofTech Consulting, Inc.

Any statement by Poth or RoofTech, relating to hail impacts to the roof, the size of hail, or resulting damage – whether the statements were made by report, email, or otherwise – constitute expert opinions that were not timely disclosed.

Plaintiff has not shown that it was substantially justified in its failure to disclose the opinions or that their untimely disclosure is harmless. I will therefore exclude those statements under Fed. R. Civ. P. 37(c)(1).

To the extent plaintiff seeks to admit photographs taken by Poth/RoofTech, plaintiff has so far failed to establish proper foundation for their admission. I will reserve ruling on the admission of those photographs until such time as they are offered into evidence at trial, at which time defendant may object. But it is not appropriate to exclude those photographs outright at this time.

To the extent Poth/RoofTech's report, opinions, or photographs were not considered or reviewed by plaintiff's expert witnesses in rendering their opinions, they may not be offered to those expert witnesses at trial to render new or supplemental opinions.

3. Motion Subpart (3) – Mark Schaefer/Schaefer Group

At the motion hearing, plaintiff's counsel represented that he intended to

introduce only the photographs submitted with Schaefer's report and not the report itself. As with the Poth/RoofTech photographs, plaintiff has so far failed to establish proper foundation for their admission. I will therefore reserve ruling on their admission until such time as they are offered at trial.

To the extent Schaefer's report, opinions, or photographs were not considered or reviewed by plaintiff's expert witnesses in rendering their opinions, they may not be offered to those expert witnesses at trial to render new or supplemental opinions.

4. Motion Subpart (4) – Bureau Veritas Report

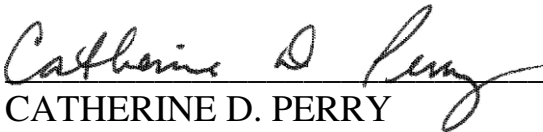
Defendant moved to exclude this report only to the extent it offered an estimated cost for roof replacement in 2029. At the motion hearing, defendant represented to the Court that it seeks to exclude that portion of the report only if Berhorst's estimated cost of roof replacement continued to be excluded. Because I am permitting the Amaya Proposal to come into evidence, the basis for defendant's request made in Subpart (4) is moot.

Accordingly,

IT IS HEREBY ORDERED that defendant's Motions in Limine [68] Subparts (2) and (3) are **GRANTED in part and DENIED without prejudice in part**. Subpart (4) is **DENIED as moot**.

IT IS FURTHER ORDERED that the Amaya Proposal prepared by Jerry Berhorst and dated July 25, 2022, is allowed to be introduced at trial for the sole

purpose of establishing Amaya's estimate for installing a new roof at the Davidson building.



CATHERINE D. PERRY
UNITED STATES DISTRICT JUDGE

Dated this 4th day of June, 2024.