IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

UFP Eastern Division, Inc., *f/k/a Universal Forest Products Eastern Division, Inc.*, Plaintiff, v. Selective Insurance Company of South Carolina, Defendant.	Civil Action No. 4:15-2801-RMG **ORDER AND OPINION**

This matter is before the Court on Plaintiff UFP Eastern Division, Inc.'s motion in limine and motion to strike, and Defendant Selective Insurance Company of South Carolina's motion in limine. For the reasons set forth below, the Court grants in part and denies in part Selective's motion in limine, denies as moot UFP's motion in limine, and grants in part and denies in part UFP's motion to strike.

I. Background

UPF, a Michigan corporation, was a framing contractor to Beazer Homes for the development of 59 single- and multi-story residential buildings in Horry County, South Carolina (the "Park West" project). UFP used several subcontractors on Park West, including VF Builders, which performed the framing scope of work on 13 of the 59 buildings and which was insured by Defendant Selective and two other insurers, Nationwide Mutual and Frankenmuth Mutual. UFP required VF Builders to include UFP as an additional insured on its commercial general liability insurance policy. (Dkt. No. 34-2 § 3.5.)

After the completion of Park West, the Park West Horizontal Property Regime and Park West Homeowners' Association of Myrtle Beach, Inc. (the "Owners") claimed that damaging

water intrusion into the buildings had occurred and that the framing scope of work contributed to that water intrusion. The Owners filed suit against Beazer on January 31, 2013, Beazer in turn filed a third-party complaint against its subcontractors, including UFP, and UFP in turn asserted claims against its subcontractors, including VF Builders (the "Underlying Litigation").

On April 17, 2015, UFP filed the present action in state court against its three insurers. (Dkt. No. 1-1 at 1.) UFP asserts two causes of action. The first cause of action seeks both a declaratory judgment regarding Selective's duty of defense in the underlying litigation and compensatory damages for Selective's alleged breach of that duty of defense. The second cause of action alleges that Selective failed to process UFP's claims in good faith. On June 23, 2015—after the complaint in this action was filed but before it was served—a settlement was reached in the Underlying Litigation. VF Builder's three insurers paid $230,000 in settlement to UFP; Selective contributed $120,000 of that amount. (Dkt. No. 72-1 at 4.) The settlement was allocated as $41,089 for construction defects and $188,911 for attorney's fees. (*Id.* at 7.) UFP released Frankenmuth from all possible claims, but specifically excluded from the settlement were UFP's claims to insurance benefits, including both defense and indemnification, under commercial general liability policies issued by Selective or Nationwide to VF Builders, and UFP's bad faith claims against Selective or Nationwide. (*Id.* at 5–7.) Also excluded were the insurers' defenses against those claims. Those excluded issues are the subject matter of the present litigation. The settlement agreement, however, does provide UFP's insurers an offset of $188,911 in this litigation. (*Id.* at 7.)

UFP's action originally named all three insurers—Selective, Nationwide, and Frankenmuth—as Defendants. (Dkt. No. 1-1). Frankenmuth was dismissed on June 29, 2015, shortly after the settlement agreement and before this action was removed from state court. (Dkt.

Nos. 1-2 at 1; Dkt. No. 1-3 at 1 (removal on July 16, 2015).) Nationwide was dismissed on February 20, 2016, leaving Selective as the sole Defendant. (Dkt. No. 28.) After the complaint was amended to name the proper Selective legal entity, both parties filed renewed motions for summary judgment, which were denied on February 13, 2017. This case is scheduled for jury trial beginning April 18, 2017. Both parties have filed motions in limine, and UFP has filed a motion to strike Robert Gagnon as a witness.

II. Legal Standard

Although not specifically provided for in the Federal Rules of Evidence, motions in limine "ha[ve] evolved under the federal courts' inherent authority to manage trials." *United States v. Verges*, Crim. No. 1:13-222, 2014 WL 559573, at *2 (E.D. Va. Feb. 12, 2014). "The purpose of a motion in limine is to allow a court to rule on evidentiary issues in advance of trial in order to avoid delay, ensure an even-handed and expeditious trial, and focus the issues the jury will consider." *Id.* "Questions of trial management are quintessentially the province of the district courts." *United States v. Smith*, 452 F.3d 323, 332 (4th Cir. 2006); *see also United States v. McBride*, 676 F.3d 385, 403 (4th Cir. 2012) ("[A]ssessing [whether evidence is] relevan[t] is at the heart of the district court's trial management function."). A district court therefore has "broad discretion" in deciding a motion in limine. *Kauffman v. Park Place Hosp. Grp.*, 468 F. App'x 220, 222 (4th Cir. 2012). Nonetheless, a motion in limine "should be granted only when the evidence is clearly inadmissible on all potential grounds." *Verges*, 2014 WL 559573, at *3.

III. Discussion

A. Defendant's motion in limine

Selective moves to bar expert opinion testimony from UFP witnesses Jason Gregorie and Kelvin Causey, including any opinion testimony about the cause of damages observed in buildings on which VF Builders worked or the repair costs for any consequential damages arising from VF

Builder's work. (Dkt. No. 83.) The bases of Selective's motion are 1) neither witness was identified as an expert witness, and 2) Mr. Gregorie, a professional engineer who was an expert witness in the Underlying Litigation but is a fact witness in this case, testified in his deposition that he "ha[s] personal knowledge as to the [Park West] facility as a whole, but not as to the individual buildings or specifics of individual buildings." (*Id.* at 3.)

Regarding Mr. Gregorie, UFP argues that he worked with the Owners and with Beazer Homes to develop the scope of repair for Park West and that he has personal knowledge about the property damage at Park West and the scope of repair costs. (Dkt No. 91 at 2.) In reply to that, Selective argues that a lay witness is prohibited from relying on his own professional experience or on the reports or analyses of other persons with specialized knowledge and information. (Dkt. No. 95 at 2 (citing *James River Ins. Co. v. Rapid Funding, LLC*, 65 F.3d 1207, 1214 (10th Cir. 2011).)

Selective's argument is sound but overreaching. Mr. Gregorie may testify from his personal knowledge about Park West, including the damages he observed and the repairs that were deemed necessary, to the extent his "inferences do not require any specialized knowledge and could be reached by any ordinary person." *James River Ins.*, 658 F.3d at 1214. That he is identified as lay witness and not an expert certainly limits the potential scope of his testimony, but the Court does not find that specialized knowledge is required in order to make any personal observations of damages in a building development. Nor does simply stating, from personal knowledge, what repairs were in fact undertaken appear to require specialized knowledge.

Selective specifically seeks to exclude testimony on the cause of damages observed in buildings on which VF Builders. Mr. Gregorie may not testify about defects in or damages to specific buildings, because he has testified that he has no personal knowledge about individual

buildings. Any opinion about specific buildings, therefore, would be impermissible unnoticed expert opinion testimony. To the extent testimony on causation of damages in Park West generally is relevant, Mr. Gregorie may testify from his personal experience. Although Mr. Gregorie may not offer expert opinions as a professional engineer, the Court again is not convinced that *any* testimony about causation in this case must be expert testimony—that defective workmanship may lead to water intrusion and that water intrusion may damage a house are not necessarily facts "beyond the realm of common experience and which require the special skill and knowledge of an expert witness." *James River Ins.*, 658 F.3d at 1214. If, at trial, Selective believes UFP is attempting to elicit expert opinion testimony from Mr. Gregorie, the Court will take up Selective's objection at that time.

The Court, however, notes that defective framing work caused water intrusion damage at Park West does not appear to be seriously contested. To the extent the point needs to be established, the Court sees no reason why Mr. Gregorie should not be permitted to provide evidence. But the real issue appears to be attribution of a portion of the damages at Park West to work VF Builders performed. UFP must somehow show that VF Builders caused the damages it seeks to attribute to VF Builders. The potential relevance of Mr. Gregorie's testimony to that issue is unclear, given that VF Builders only worked on a few of the Park West buildings and given that Mr. Gregorie has no knowledge about individual buildings. The Court previously found that "Mr. Gregorie's testimony may be important to a material issue in this case—identification of damages in the underlying litigation that are or are not attributable to work insured by Selective." (Dkt. No. 60 at 4–5.) Given Mr. Gregorie's deposition testimony, that possibility now appears remote.

Regarding Mr. Causey, UFP's general manager of operations, Selective's argument appears only to be that he was not noticed as an expert. Certainly, he is a lay witness and thus may

not offer expert opinion testimony. But it appears highly likely that UFP's operations manager has personal knowledge relevant to this matter, which arises from the operations of UFP and its subcontractors, including first-hand knowledge about damages and repairs.

The Court therefore grants Selective's motion in limine to the extent that Mr. Gregorie and Mr. Causey may not offer expert opinion testimony at trial, but denies Selective's motion to exclude all testimony about the cause of damages or cost of repairs at Park West.

B. Plaintiff's motion in limine

UFP moves to exclude evidence regarding settlements between UFP and Nationwide Mutual Fire Insurance, Frankenmuth Mutual Insurance, State Farm Insurance, Auto-Owners Insurance, Upon the Rock Construction, Inc., Hardworkers Construction, AC Construction, and SAL Construction. (Dkt. No. 82.) Selective agrees that under Rule 408 of the Federal Rules of Evidence such evidence should not be submitted to the jury. (*See* Dkt. No. 90.) Selective argues that settlement evidence should be admitted as exhibits that do not go to the jury to prove set-off amounts, which Selective argues should be determined by the Court as a matter of law. Selective also argues UFP should be excluded from referring to settlements with other insurers to support its bad faith claim. In reply, UFP agrees the Court should determine set-off amounts as a matter of law and UFP asserts it does not intend to use settlements with other insurers to support its bad faith claim. (*See* Dkt. No. 94.)

Because the parties agree on the issues raised in UFP's motion in limine, the Court denies the motion as moot.

C. Plaintiff's motion to strike

Plaintiff moves to strike Robert Gagnon, Selective's initial claims adjuster for Park West claims, as a witness for Selective because he was not identified as a witness during discovery. (Dkt. No. 110.) Selective first identified him as a witness on March 14, 2017 (after jury selection).

Rule 37 of the Federal Rules of Civil Procedure provides that "[i]f a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). "[T]he basic purpose of Rule 37(c)(1) [is] preventing surprise and prejudice to the opposing party." *S. States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 596 (4th Cir. 2003). Thus, the district court has broad discretion to determine whether a nondisclosure of evidence is substantially justified or harmless. *Id.* at 597. "[I]n exercising its broad discretion to determine whether a nondisclosure of evidence is substantially justified or harmless for purposes of a Rule 37(c)(1) exclusion analysis, a district court should be guided by the following factors: (1) the surprise to the party against whom the evidence would be offered; (2) the ability of that party to cure the surprise; (3) the extent to which allowing the evidence would disrupt the trial; (4) the importance of the evidence; and (5) the nondisclosing party's explanation for its failure to disclose the evidence." *Id.*

As the initial claims adjuster, Mr. Gagnon may be an important witness. That factor advises against UFP's motion to strike, and, indeed, this Court is highly reluctant to deny the jury testimony from important witnesses on procedural grounds. But the other *Southern States* factors strongly support striking him as a witness. The late identification of Mr. Gagnon creates considerable surprise for UFP.[1] Now that a jury has been empaneled, trial cannot be delayed to reopen discovery so there is no ability to cure that surprise. Further, allowing an insurer to present its claims adjuster as a surprise witness in an insurance coverage case would be disruptive.

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[1] Selective argues there is no surprise because UFP had identified him as a potential witness. (Dkt. No. 112 at 1.) The Court finds that argument to be without merit. UFP's interrogatory response simply shows that UFP knew he was the initial claims adjuster and therefore someone likely to have knowledge of material facts (and that UFP had not taken any statements from him and did not even know his address), not that he would be a witness for Defendant.

The final factor is the non-disclosing party's explanation for its failure to timely identify the witness. Selective does not explain its late identification and instead argues that its late identification of Mr. Gagnon is equivalent to UFP's late identification of Ms. Lagrand, Ms. Herron, and Mr. Gregorie. (*See* Dkt. No. 112 at 2–3.) The Court finds that to be a false equivalence. UFP untimely identified Ms. Lagrand, Ms. Herron, and Mr. Gregorie, on March 3, 2016, three days after the close of discovery. Selective moved to exclude those witnesses as untimely identified. (Dkt. Nos. 33, 57.) UFP responded that it first learned of the need for Ms. Lagrand and Ms. Herron on February 22, 2016—only ten days before they were disclosed as witnesses and, as it turns out, 379 days before the jury was empaneled in this case. (Dkt. No. 37 at 2-3.) The Court therefore found UFP had shown good cause for its late identification of Ms. Lagrand and Ms. Herron, especially since that identification was late *by only one month.* (Dkt. No. 60 at 4.) By contrast, Selective does not even attempt to proffer an explanation for its late identification of Mr. Gagnon other than to say his testimony was not necessary until UFP untimely identified Ms. Lagrand and Ms. Herron as witnesses—*which happened over one year ago.*

UFP also untimely identified Mr. Gregorie. The Court found UFP failed to show good cause for his late identification, but, applying the *Southern States* factors, found that any harm from his late identification could be cured by amending the scheduling order to allow Selective to depose Mr. Gregorie, as well as Ms. Lagrand and Ms. Herron, and to identify additional witnesses in response to their testimony, by September 19, 2016. (*Id.* at 4–5.) That was a clear invitation for Selective to identify Mr. Gagnon as a witness by September 19, 2016. Selective failed to identify him until March 14, 2017, a week after jury selection.

Because the jury is empaneled, the Court cannot amend the schedule to cure the prejudice Selective's late identification of Mr. Gagnon creates. Absent extraordinary circumstances,

important witnesses cannot be first identified after the jury is sworn. Selective fails to show any extraordinary circumstances. The Court therefore strikes Robert Gagnon from Selective's trial witness list. The Court, however, agrees with Selective's position that lay witnesses used solely for impeachment need not be identified under Rule 26 of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 26(a)(1)(A)(i) (requiring disclosure "unless the use would be solely for impeachment"). Selective may offer Mr. Gagnon as an impeachment witness.

IV. Conclusion

For the foregoing reasons, the Court **DENIES AS MOOT** Plaintiff's motion in limine (Dkt. No. 82), **GRANTS IN PART AND DENIES IN PART** Defendant's motion in limine (Dkt. No. 83), and **GRANTS IN PART AND DENIES IN PART** Plaintiff's motion to strike (Dkt. No. 110).

AND IT IS SO ORDERED.

Richard Mark Gergel
United States District Court Judge

April 6, 2017
Charleston, South Carolina