

DIVISION OF ST. THOMAS AND ST. JOHN

CASE NO. ST-11-CV-586

² *Id.*

On December 3, 2013, CETRI generated a medical evaluation report, and Plaintiff made the report available to WAPA in discovery. On January 28, 2014, Plaintiff's counsel sent an email to WAPA's counsel that had "Demming Expert Depositions" as the email's subject line.³ In the email, Plaintiff's counsel stated that "pursuant to our conversation yesterday, we agreed to each provide a list of experts and their location: ... CETRI: Chicago, IL."⁴ Plaintiff's counsel also inquired whether "Attorneys Alger and Kroblin will be participating in expert depositions."⁵ WAPA deposed CETRI's Dr. Pliskin on March 17, 2014,⁶ and CETRI's Dr. Lee on March 19, 2014.⁷ To date, Plaintiff has refused to permit WAPA to depose the other CETRI specialists listed in the report.⁸

STANDARD

Concerning the disclosures of experts and their reports, Federal Rule of Civil

Procedure 26 provides that:

In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.⁹

Unless otherwise stipulated or ordered by the court, this disclosure 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's employee regularly involve giving expert testimony. The report must contain:(i) a complete statement of all opinions the witness will express and the basis and reasons for them;(ii)

³ WAPA's Exhibit B.

⁴ *Id.*

⁵ *Id.*

⁶ WAPA's Exhibit P.

⁷ WAPA's Exhibit O.

⁸ WAPA's Exhibit Q. The parties have met and conferred on three occasions to resolve this dispute. (*Id.*, at page 2).

⁹ Fed. R. Civ. P. 26(a)(2)(A).

the facts or data considered by the witness in forming them; (iii) any exhibits that will be used to summarize or support them; (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years; (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and (vi) a statement of the compensation to be paid for the study and testimony in the case.¹⁰

Rule 26 also provides that:

A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.¹¹

Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only: (i) as provided in Rule 35(b); or (ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.¹²

ANALYSIS

Although Plaintiff asserts that the report was “organized, supervised, and authored by Dr. Lee,”¹³ Dr. Lee actually testified that the report was generated by the clerical staff of CETRI, which “integrat[ed]” the evaluations of the various CETRI doctors into a composite report.¹⁴ Indeed, the report expressly states that it contains the “specific findings

¹⁰ Fed. R. Civ. P. 26(a)(2)(B).

¹¹ Fed. R. Civ. P. 26(b)(4)(A).

¹² Fed. R. Civ. P. 26(b)(4)(D).

¹³ Plaintiff's Opposition to WAPA's motion, at page 14. Dr. Lee is board certified in plastic and general surgery. Lee Deposition, at page 30. He is not board certified in Internal medicine, neurology, rehabilitation medicine, psychiatry, or radiology. Lee deposition, at pages 31-35.

¹⁴ Lee deposition, at page 44. Lee affirmed that, in generating a composite report, the clerical staff would generally “cut and paste” from the evaluations of the individual doctors in order to get the “meat” of an individual evaluation and would “exclude a lot of history and so forth that's redundant.” Lee deposition, at pages 44 and 45.

from the [eight] specialists”¹⁵ and was composed “from the evaluations and recommendations of CETRI’s affiliated physicians listed [in the report.]”¹⁶ In addition, the various sections of the report correspond with the various specialties of the CETRI medical professionals. The CETRI report is composed of a “pain medicine evaluation,”¹⁷ a “neurology evaluation,”¹⁸ a “rehabilitation medicine evaluation,”¹⁹ a “functional brain imaging” evaluation,²⁰ a “psychiatry evaluation,”²¹ and a “trauma surgery evaluation.”²² Moreover, Dr. Lee testified that Dr. Anitescu performed the pain medicine evaluation,²³ Dr. Pedelty performed the neurology evaluation,²⁴ Dr. Thulborn performed the functional brain imaging evaluation,²⁵ Dr. Weiss performed the rehabilitation medicine evaluation²⁶ and Dr. Cooper performed the psychiatry evaluation.²⁷ Dr. Lee testified he did not know which medical professional conducted the evaluation of Plaintiff that is described in pages 1 thru 4 of the report.²⁸ The Court also notes that the report is unsigned in violation of Fed. R. Civ. P. 26(a)(2)(B).

The Court finds that the CETRI report was authored by all eight of the CETRI medical professionals listed therein. In addition, by disclosing the CETRI report and

¹⁵ WAPA’s Exhibit A, at page 4.

¹⁶ *Id.*, at page 17.

¹⁷ *Id.*, at pages 4 and 5.

¹⁸ *Id.*, at pages 6 and 7.

¹⁹ *Id.*, at pages 8 thru 11.

²⁰ *Id.*, at page 12.

²¹ *Id.*, at pages 12 thru 15.

²² *Id.*, at page 15.

²³ Lee Deposition, at page 55.

²⁴ *Id.*, at page 58.

²⁵ *Id.*, at page 68.

²⁶ *Id.*, at page 59.

²⁷ *Id.*, at page 68.

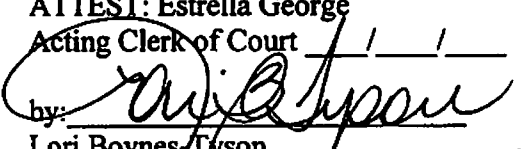
²⁸ *Id.*, at pages 48 thru 55.

placing CETRI on his list of experts to be deposed, Plaintiff designated all eight CETRI medical professionals in the report as testifying experts. As a result, even though Plaintiff claims that Dr. Cooke, Dr. Anitescu, Dr. Pedelty, Dr. Cooper, Dr. Thulborn, and Dr. Weiss are non-testifying experts, Plaintiff is not shielded by the non-testifying expert privilege of Fed. R. Civ. P. 26(b)(4)(D).²⁹ It was Plaintiff's choice to designate all eight CETRI medical professionals as expert witnesses and Plaintiff must "live with the consequence that [WAPA will be] given the opportunity to depose the expert[s] and may even ... call the expert[s] at trial on [its] own behalf."³⁰ In addition, Plaintiff must bear the consequence of the costs associated with deposing all eight of the CETRI specialists.³¹ Accordingly, the Court will grant WAPA's motion to compel the depositions of Dr. Cooke, Dr. Anitescu, Dr. Pedelty, Dr. Cooper, Dr. Thulborn, and Dr. Weiss.

An Order consistent with this Opinion shall follow.

Dated: August 13, 2014

ATTEST: Estrella George
Acting Clerk of Court

by: 

Lori Boynes-Tyson
Court Clerk Supervisor 8/19/14


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

²⁹ See *Brigham Young University v. Pfizer, Inc.*, No. 2:12-mc-143-TS-BCW, 2012 U.S. Dist. LEXIS 42051, 2012 WL 1029304 (D.Utah Mar. 26, 2012) (a party may not convert the shield of Rule 26(b)(4)(D) "into a sword ... [A]llowing a party to designate an expert as testifying and then after obtaining an unfavorable opinion, simply reclassifying that expert as non-testifying to the detriment of the opposing side to avoid any negative consequences ... [would] potentially undermine the [c]ourt's interest in the proper resolution of issues").

³⁰ *Thomas v. Mitsubishi Motors Corp.*, 2:12-CV-1215-DB-PMW, 2014 WL 988785, at *3 (D. Utah Mar. 13, 2014) (citing *Pfizer, Inc.*, *supra*).

³¹ *Id.*