IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

JUANITA VERA, *Plaintiff*, v. STATE AUTO INSURANCE COMPANY and MERIDIAN SECURITY INSURANCE COMPANY, *Defendants*.	§ § § § § § § § § § §	CIVIL ACTION NO. 1:22-CV-378-MJT

ORDER ON DEFENDANT'S MOTION TO PARTIALLY STRIKE EXPERT TESTIMONY OF GARY SANDERS (Doc. #17)

Pursuant to 28 U.S.C. § 636 and the Local Rules of Court for the Assignment of Duties to United States Magistrate Judges, the district court referred Defendant Meridian Security Insurance Company's Opposed Motion to Partially Strike Expert Testimony of Gary Sanders, Designated by Plaintiff (doc. #17) for consideration and disposition.

I. Background

This case involves a dispute over an insurance policy alleged to cover damages from Hurricane Laura. Plaintiff Juanita Vera filed her original petition in state court on August 18, 2022, alleging state law claims against Defendants State Auto Insurance Company and Meridian Security Insurance Company, including breach of contract, noncompliance with Texas Insurance Code: unfair settlement practices, and breach of the common law duty of good faith and fair dealing. (Doc. #3 at 4-5.) This case was removed to federal court by Defendant on September 15, 2022, based on diversity jurisdiction. (Doc. #1.) Plaintiff filed an Amended Complaint on January 31, 2023, correcting the named defendant to Meridian Security Insurance Company with an

associated trade name of State Auto Insurance Company. Defendant Meridian is the only defendant in this suit.

Defendant filed a Motion to Partially Strike Plaintiff's expert witness Gary Sanders on April 4, 2023.[1] (Doc. #17.) Plaintiff responded on April 25, 2023 (doc. #22), and Defendant replied on May 2, 2023 (doc. #24). This matter is now ripe for review.

II. Legal Standard

The admissibility of expert evidence is a procedural issue governed by Federal Rule of Evidence 702 and *Daubert*. *Wells v. SmithKline Beechum Corp.*, No. A-06-CA-126-LY, 2009 WL 564303, at *7 (W.D. Tex. Feb. 18, 2009), *aff'd*, 601 F.3d 375 (5th Cir. 2010) (citing *Cano v. Everest Minerals Corp.*, 362 F. Supp. 2d 814, 821 (W.D. Tex. 2005)); *see also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Federal Rule of Evidence 702 sets forth the requirements that must be satisfied to enable a witness designated as an expert to testify to his or her opinions. An expert may testify in the form of an opinion if: (1) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (2) the testimony is based on sufficient facts or data; (3) the testimony is the product of reliable principles and methods; and (4) the expert has reliably applied the principles and methods to the facts of the case. *See* FED. R. EVID. 702.

Courts use Rule 702 to function as gatekeepers when evaluating the admissibility of expert evidence and determining whether expert testimony should be presented to the jury. *Daubert*, 509 U.S. at 591-93; *see also Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 151-52 (1999)

[1] Separate and apart from the merits of Defendant's motion, the undersigned is troubled by counsel's failure to adhere to the "meet and confer" requirements set forth in the local rules. E.D. TEX. LOCAL R. CV-7(h). One attempt at a telephone call followed by an email exchange does not meet the requirements of a meaningful personal conference. The undersigned advises counsel that adherence to the court's Local Rules regarding the meet and confer requirement is not optional.

(extending courts' gatekeeping function as to the admissibility of scientific evidence to include the admissibility of all expert testimony). The following requirements must be met to admit expert testimony: (1) the expert is qualified; (2) the evidence is relevant to an issue in the case; and (3) the testimony is reliable. *Kumho Tire*, 526 U.S. at 153-54; *see also Daubert*, 509 U.S. at 589, 590-91 (concluding that to be admissible, expert testimony must be relevant and reliable).

In deciding whether to admit or exclude expert testimony, the Supreme Court has offered a non-exclusive list of factors for courts to use in evaluating the validity or reliability of expert testimony: (1) whether the expert's theory or technique can be or has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error of the challenged method; and (4) whether the theory or technique is generally accepted in the relevant scientific community. *Daubert*, 509 U.S. at 593-94; *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 244 (5th Cir. 2002). These factors are not necessarily limited to scientific evidence and may be applicable to testimony offered by non-scientific experts, depending on the circumstances of the case. *Kumho Tire*, 526 U.S. at 150.

When evaluating *Daubert* challenges, courts focus "on [the experts'] principles and methodology, not on the conclusions that [the experts] generate." *Metzler v. XPO Logistics, Inc.*, No. 4:13-CV-278, 2014 WL 7146108, at *1-2 (E.D. Tex. Dec. 15, 2014) (quoting *Daubert*, 509 U.S. at 594); *see also Watkins v. Telsmith, Inc.*, 121 F.3d 984, 989 (5th Cir. 1997) (*Daubert* analysis for both scientific and nonscientific experts focuses on the reasoning or methodology, not the ultimate conclusion). The *Daubert* factors are not "a definitive checklist or test," and the *Daubert* framework is a "flexible one." *Dearmond v. Wal-Mart Louisiana LLC*, 335 F. App'x 442, 445 (5th Cir. 2009) (per curiam). A trial court, therefore, has wide latitude in deciding whether to exclude an expert's testimony. *See Kumho Tire*, 526 U.S. at 152. However, the

rejection of expert testimony is the exception rather than the rule, as the court's gatekeeper role is not intended to serve as a replacement for the adversary system. *Eagle Oil & Gas Co., v. Travelers Prop. Cas. Co. of Am.*, No. 7:12-CV-00133-O, 2014 WL 3744976, at *3 (N.D. Tex. July 30, 2014) (quoting FED. R. EVID. 702, Advisory Committee's Notes (2000)).

III. Discussion

A. Sanders' Expert Report does not meet the requirements of Rule 26 and Rule 702

Plaintiff designated Sanders as an expert to testify about the "probable or likely cause of the loss for damages in his scope of loss… [and to] offer opinions related to the home's design as well as the materials most likely used in construction." (Doc. 17-1 at 1.) Sanders is a retained expert witness (doc. #17-1 at 1); thus, he must submit an expert report that meets the requirements of Rule 26(a)(2)(B). FED. R. CIV. P. 26(a)(2)(B). Defendant seeks to partially strike Sanders' testimony on the cause of the losses alleged by Plaintiff on the ground that Sanders' expert report fails to meet the requirements of Rule 26(a)(2)(B) on causation. (Doc. #17 at 5.) Defendant additionally asserts that Sanders' proffered testimony on causation does not meet the reliability requirements of Rule 702 because the report fails to identify any methodology for his opinion. (Doc. #17 at 9-12.) Defendant does not object to Sanders' qualifications as an expert.

Under Rule 26(a)(2)(B), a retained expert must provide a report containing "(i) a complete statement of all opinions the witness will express and the basis and reasons for them; (ii) 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." FED. R. CIV. P. 26(a)(2)(B). Additionally, the advisory

committee notes to Rule 702 state that, while experience alone may provide a sufficient foundation for expert testimony, the notes further explain:

> If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply "taking the expert's word for it." *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995) ("We've been presented with only the experts' qualifications, their conclusions, and their assurances of reliability. Under *Daubert*, that's not enough.").

FED. R. EVID. 702, Advisory Committee Notes (2000). Here, under Rule 702, Plaintiff must demonstrate that Sanders' expert testimony is based on "sufficient facts or data," that it is "the product of reliable principles and methods," and that Sanders has "reliably applied the principles and methods to the facts of the case." FED. R. EVID. 702(b)-(d).

This mandate is consistent with the requirements of Rule 26(a), which provides that an expert's initial report must include "a *complete* statement of all opinions the witness will express and the *basis and reasons* for them." *Culter v. Louisville Ladder, Inc.*, No. 4:10-4684, 2012 WL 2994271, at *5 (S.D. Tex., July 20, 2012) (emphasis added) (quoting FED. R. CIV. P. 26(a)(2)(B)(i)). The proponent of the expert testimony bears the burden of establishing that the proffered testimony is admissible under Rule 702, *see, e.g.*, *Mathis v. Exxon Corp.*, 302 F.3d 448, 459-60 (5th Cir. 2002), thus the party offering expert testimony should take care to ensure the expert report demonstrates how the proffered opinions are admissible—a deficient or poorly written expert report generally cannot be bolstered after-the-fact. *Cf. Tejada v. Jefferson Cnty*, No. 1:06-CV-351, 2007 WL 9725152, at *4 (E.D. Tex. June 29, 2007) (citing *Finisar Corp. v. DirectTV Group, Inc.*, No. 1:05-CV-264, 2006 WL 1207828, at *2 (E.D. Tex. May 2, 2006)) ("The parties have no right to, and should not expect to have, a hearing at which an expert is allowed to expound upon a skimpy, poorly written report."); *Joseph v. Signal Int'l LLC*, No. 1:13-CV-324,

2015 WL 12766134, at *3 (E.D. Tex. Feb. 12, 2015) (discussing that courts have struck "so-called 'supplemental' reports" when they were merely offered as an attempt to bolster the original report).

The purpose of the expert report under Rule 26 is to accelerate the exchange of information so that parties can raise objections to the expert's opinions and prepare to cross-examine the expert at trial based on what is contained within the report. *See* FED. R. CIV. P. 26, Advisory Committee Notes (1993). This goal is echoed by the district court's Scheduling Order (doc. #7), which requires relatively early objections to expert witnesses via a motion to strike or limit expert testimony accompanied by a copy of the expert's report to provide the court *with all the information necessary* to make a ruling on any objection. In short, the expert report *itself* must demonstrate that the proffered opinions are admissible under Rule 702, including but not limited to explaining how the expert's experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts when the expert is relying solely or primarily on experience. FED R. EVID. 702, Advisory Committee Notes (2000).

Unfortunately, Sanders' expert report fails to fully meet any of these standards. The "expert report" does not contain a complete statement (nor any statement *at all*) of the basis and reasons for Sanders' opinions that Hurricane Laura caused the damage to the Plaintiff's home except to claim it to be so. Sanders' expert report consists only of a short resume, cost estimates and accompanying photographs and measurements of the property. (Doc. #17-1.) While Plaintiff points out that Sanders does state that "Hurricane Laura was the cause of the loss," Sanders does not explain in his report how his experience as a claims adjuster led him to reach his conclusions, why his experience is a sufficient basis for those conclusions, or how that experience is reliably applied to the facts as required by Rule 26. Moreover, as the expert report does not include any

explanation as to the reliability of his opinion, and it fails to demonstrate that Sanders' opinion on causation is based on sufficient facts or data, is the product of reliable principles and methods, and that Sanders reliably applied those principles and methods in forming his estimate as required by Rule 702. *Barnes v. Allstate Tex. Lloyd's*, No. 1:21-CV-00217-MJT-ZJH, 2022 WL 2999200, at *4-5 (E.D. Tex., June 2, 2022). Much like the report struck in *Barnes*, Sanders' report is "completely devoid" of the information necessary to determine the reliability of Sanders' testimony on causation. Accordingly, Plaintiff has failed to meet her burden. Sanders should be excluded from testifying as an expert witness on causation and to the extent his report offers an opinion on causation, such portions should be struck.

IV. Order

For the foregoing reasons, it is **ORDERED** that Defendant's Motion to Partially Strike Expert Testimony of Gary Sanders (doc. #17) is **GRANTED**. Sanders' expert report is **STRICKEN** as to causation, and Sanders is **EXCLUDED** from testifying as an expert witness on causation. All other portions of the Sanders' proffered expert testimony and expert report remain unaffected by this order.

SIGNED this the 12th day of May, 2023.

Christine L Stetson
UNITED STATES MAGISTRATE JUDGE