

FILED _____

AT _____ O'Clock _____ M
CLERK OF DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

ROSS N. FARRELL,

Plaintiff,

vs.

TRACY A. HEINTZ, et al.

Defendants.

Case No. **CV 2006 187**

**MEMORANDUM DECISION AND
ORDER ON PLAINTIFF'S MOTION IN
LIMINE**

I. ANALYSIS.

Plaintiff Ross N. Farrell (Farrell) filed his "Motion in Limine to Exclude Testimony of Defense Expert Witness Allan F. Tencer" on October 12, 2007, setting forth two reasons why Farrell believes Tencer's testimony should be excluded. Farrell first claims Tencer was not timely and properly disclosed pursuant to this Court's pre-trial order (Scheduling Order, Notice of Trial Setting and Initial Pretrial Order). Second, Farrell claims Tencer's testimony should be excluded because Tencer's testimony does not meet the standards of I.R.E. 702. Farrell's motion in essence contained a brief, and on December 11, 2007, defendants Heintzes filed their "Memorandum in Opposition to Plaintiff's Motion in Limine", and an "Affidavit of Michael L. Haman in Support of Memorandum in Opposition to Plaintiff's Motion in Limine". Oral argument was held on December 13, 2007, at the conclusion of which, this Court took Farrell's motion in limine under advisement.

The Heintzes disclosed Tencer in "Defendants' Supplemental Expert Witness

Disclosure” on October 4, 2007. Essentially, this disclosure was identical to the disclosure Heintzes made back on December 22, 2006, in Heintzes “Defendants’ Expert Witness Disclosure”, except that in that first disclosure the Heintzes listed a Dr. E. Paul France. At no time did Farrell take France’s deposition. At the December 13, 2007, hearing on Farrell’s Motion in Limine, Dr. Tencer’s deposition was scheduled for December 27, 2007.

Farrell’s Motion in Limine is DENIED based on the untimely disclosure argument, solely as that argument pertains to the 150 day disclosure. The disclosure of Dr. Tencer was untimely, however, the disclosure of Dr. Tencer was identical to the disclosure of Dr. E. Paul France, which disclosure was timely made.

Farrell’s Motion in Limine is GRANTED as to Farrell’s argument that Tencer was not *properly* disclosed. Whether there is “good cause” for Heintzes’ failure to properly disclose Tencer is an issue that will be left for trial.

There are two disclosures that are involved here, the 150-day disclosure and the 28-day disclosure. Neither were properly made by the Heintzes. A cursory review of Dr. E. Paul France’s disclosure filed December 22, 2006, and Dr. Tencer’s disclosure filed October 4, 2007, shows that what was disclosed was not in conformance with this Court’s Scheduling Order, Notice of Trial Setting. The Court indicated on the record at the December 13, 2007, hearing, that this Court’s practice is to hold parties to the extent of their disclosures, and that parties will be limited to exactly what has been given in their disclosures.

This Court’s pretrial order (Scheduling Order, Notice of Trial Setting and Initial Pretrial Order) filed May 5, 2006, requires a defendant in any civil case, 150 days before trial, disclose “at least the subject matter upon which the expert is expected to testify and the substance of any opinions to which the expert is expected to testify.” Scheduling

Order, Notice of Trial Setting, p. 3, ¶5. In defendants' Heintzes' disclosures filed December 22, 2006, and October 4, 2007, there is a description of the "subject matter" to which Dr. France and Dr. Tencer were to testify, but there is simply no "description of the substance of any opinions" to which either Dr. France or Dr. Tencer were to testify. The disclosure of Tencer on October 4, 2007 is as follows:

1. Dr. Allan Tencer, 12700 Riveria Place, Seattle, Washington, 98125. Dr. Tencer may offer testimony regarding the accident which is the subject to the Plaintiff's Complaint, including the forces necessary to generate the claimed damage to the Plaintiff. Dr. Tencer may also offer testimony regarding the forces necessary to produce the injuries complained of and the application of generated force to the facts of this case. Dr. Tencer's opinions may be based on his examination of all of the records provided between counsel through discovery regarding the accident and the Plaintiff's alleged injuries, including any depositions and the testimony of the Plaintiff's treating physicians. Also Dr. Tencer's opinions will be based on his education and experience. This disclosure may be supplemented with Dr. Tencer's opinions and conclusions following his examination of the records and discovery. Dr. Tencer is expected to testify consistently with any report that he develops following his review of the documents in this case. In addition, Dr. Tencer may review and evaluate additional records which were unavailable at the time of his examination. Finally, Dr. Tencer may offer opinions in rebuttal of the testimony of any of the Plaintiff's witnesses, expert or lay, called at trial which fall within his area of expertise.

Defendants' Supplemental Expert Witness Disclosure, pp. 1-2, ¶1. There is simply no disclosure of the "substance" of any of Tencer's opinions. According to Farrell's Motion in Limine to Exclude Testimony of Defense Expert Witness Allan F. Tencer, page 2, Heintzes disclosed that "...Tencer's opinion 'will be that the forces generated as a result of the impact in the subject accident were not significant, and not such to cause the injuries complained of by [Plaintiff] in this action.' Letter of Michael Haman dated 10/2/2007 (attached hereto)." Unfortunately, such letter was not attached to Farrell's Motion in Limine to Exclude Testimony of Defense Expert Witness Allan F. Tencer. In any event, this is an untimely disclosure on October 2, 2007, as at that time trial was scheduled for October 29, 2007. This is also an untimely disclosure relative to the present January 7, 2008 trial date

as it was not made 150 days prior to that date.

This Court's pretrial order (Scheduling Order, Notice of Trial Setting and Initial Pretrial Order) filed May 5, 2006, also requires parties at least 28 days before trial, file with the Court and serve upon all parties, a "supplemental disclosure for each expert witness which shall identify the underlying facts and data upon which the opinions of each expert are based, the extent such information is required to be disclosed pursuant to I.R.C.P. 26(b)(4)(A)(i)." Scheduling Order, Notice of Trial Setting, p. 3, ¶5. This did not occur relative to the May 21, 2007, trial date, it did not occur relative to the July 17, 2007, trial date, it did not occur relative to the October 29, 2007, trial date and it did not occur relative to the present, January 7, 2007, trial date. Heintzes have at no time filed the disclosure regarding the underlying facts and data upon which Tencer's opinion's are based, as required by this Court's Scheduling Order, Notice of Trial Setting, and I.R.C.P.

26(b)(4)(A)(i). That rule requires:

A complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; any qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Some of this information (listing of prior cases in which Tencer testified, listing of publications) is included within Heintzes' Exhibit list which was filed October 19, 2007.

However, no where in the court file can it there a 28 day compliance, nor is there any other pleading filed which contains: "A complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions", I.R.C.P. 26(b)(4)(A)(i) and this Court's Scheduling Order-Notice of Trial Setting. That

Scheduling Order-Notice of Trial Setting states that failure to provide such information, “absent good cause” will result in that expert not being allowed to testify to matters not included in that expert’s disclosure. Scheduling Order-Notice of Trial Setting, p. 3, ¶ 5. This is consistent with *Clark v. Klein*, 137 Idaho 154, 45 P.2d 810 (2002) and *Radmer v. Ford Motor Company*, 120 Idaho 86, 813 P.2d 897 (1991). Were this Court to allow Tencer’s testimony despite Heintzes’ failure to disclose the substance and subject matter of that expert’s testimony, it may be reversible error. 120 Idaho 86, 89, 813 P.2d 897, 900. Heintzes’ counsel made no argument at the December 13, 2007 hearing relative to “good cause.” Unless good cause is shown at trial, Tencer will be limited in his testimony to what has been disclosed, which is very little.

At oral argument on December 13, 2007, this Court indicated that it would take under advisement the issues raised by Farrell regarding I.R.E 702, until the parties furnished a copy of Dr. Tencer’s deposition. As of today’s date, that has not been supplied to the Court. This issue will likewise be taken up at trial.

II. ORDER.

IT IS HEREBY ORDERED that Farrell’s Motion in Limine to Exclude Testimony of Defense Expert Witness Allan F. Tencer is GRANTED due to Heintzes failure to *properly* disclose Tencer. Absent a showing of “good cause” at trial, the testimony of Tencer will be strictly limited to Heintzes’ incomplete disclosure.

Entered this 3rd day of January, 2008.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of January, 2008, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

| <u>Lawyer</u> | <u>Fax #</u> | <u>Lawyer</u> | <u>Fax #</u> |
|-------------------|--------------|------------------|---|
| Richard Whitehead | 765-6895 | Michael L. Haman | 667-3379 per subst. of counsel filed 1/2/08 |

Secretary