IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Rachel Moore, as independent administrator of the estate of Henry Lee Moore, deceased Plaintiff, v. Chicago Transit Authority, a municipal corporation, and Ronald D. Butler, individually, Defendants.	)	No. 18 L 5967

MEMORANDUM OPINION AND ORDER

Supreme Court Rule 201 gives a court broad discretion to craft a protective order to prevent unreasonable disadvantage, while Rule 213(f)(3) permits an expert witness to rely on otherwise inadmissible evidence. The Department of Veterans Affairs refuses to make the plaintiff's treating physician available to testify. That decision justifies barring the witness, but not the opportunity to disclose an expert to the same end. For those reasons, the motion to bar is granted in part and denied in part.

Facts

On June 9, 2017, a Chicago Transit Authority bus crashed into the rear of another vehicle. Henry Lee Moore was a passenger on the bus and was ejected from his seat and injured. Henry received primary care for his injuries from Dr. Sean Blitzstein, a physician employed by the United States Department of Veterans Affairs.

On June 7, 2018, Henry filed this lawsuit against the CTA and Ronald D. Butler, the bus driver, for the injuries Henry allegedly sustained in the accident. On September 2, 2018, a little less than three months after filing suit, Henry died of natural causes and before he had answered written discovery or been deposed. The probate division opened an estate, and on March 29, 2019, Rachel Moore, the independent administrator of Henry's estate, filed an amended complaint.

On June 21, 2019, Rachel answered the defendants' interrogatories, stating that Henry had sustained injuries to his left hand and arm, head, knees, and back. The answers indicated that Henry's anticipated medical bills from June 9 to September 2, 2018 would total $163,263.52. The answers also admitted that Henry had undergone heart surgery and been treated for diabetes, opioid addiction, arthritic knees, and liver disease before the bus accident.

On July 25, 2019, defendants issued a subpoena setting Blitzstein's discovery deposition for August 21, 2019 and sent the subpoena and notice to Blitzstein by certified mail. On August 27, 2019, the defendants sent a formal request for Blitzstein's deposition to the Office of the General Counsel for the Department of Veterans Affairs. On September 26, 2019, the department responded that it refused to make Blitzstein available because neither he nor the government was a party to the lawsuit and federal law did not require him to testify.

On February 7, 2020, the defendants filed a motion to bar Blitzstein from testifying. On May 11, 2020, Rachel filed a response, and on June 6, 2020, the defendants filed their reply. This court has reviewed the parties' submissions.

Analysis

The defendants seek an order barring Blitzstein's trial testimony as well as any other testimony or evidence relating to Henry's medical treatment at the Department of Veterans Affairs.

The defendants argue that Rachel has not and cannot properly disclose Blitzstein's testimony as required by Supreme Court Rule 213(f)(2) and that she has failed to show how Henry's post-accident mental state was caused by the accident. The defendants correctly point out that Veterans Affairs will not make Blitzstein available for a deposition; therefore, the defendants will be unable to defend against Henry's claims of emotional injuries and post-traumatic stress disorder. The defendants also argue that Rachel's vague Rule 213(f)(3) disclosure fails to meet Rule 213 requirements and, therefore, all testimony and evidence relating to Henry's medical treatment at Veterans Affairs be barred.

Rachel argues that a Rule 219 sanction may be an appropriate punishment against a party that violates discovery rules, but that she has not caused any rule violation or wrongdoing. She points out that she timely disclosed Henry's medical records and bills. She also argues that since Veterans Affairs records and bills are public documents, they are not hearsay, *see* Ill. R. Evid. 803(8), but are admissible as self-authenticating documents, *see* Ill. R. Evid. 902 (1) & (2). According to Rachel, Blitzstein is not needed to lay a foundation for the records and bills since Veterans Affairs generated them and they are the type of "reliable documents" customarily relied on by others in the medical field and, therefore, are deemed reasonable under federal law. *See* 44 U.S.C. § 1507.

The resolution of this dispute lies with Illinois Supreme Court Rule 213(f). It is plain that Rachel needed to disclose Blitzstein as a Rule 213(f)(2) witness because he would have been an "independent expert witness" who would have given expert testimony, but not as a retained expert. *See* Ill. S. Ct. R. 213(f)(2). Under the Rule, Rachel had the duty to identify the subjects on which Blitzstein would have testified and the opinions he would have provided.

Yet Veterans Affairs made Blitzstein unavailable. The September 26, 2019 letter informed the parties that Blitzstein will not to testify because the government is not a party to the lawsuit.

In those instances, the Code of Federal Regulations governs the testimony by Veterans Affairs' personnel and the production of its records. *See* 38 C.F.R. §§ 14.800-810. Under these provisions, the Office of General Counsel is authorized to determine whether a Veterans Affairs' employee may comply with a subpoena or other request in litigation.

Veterans Affairs has made it plain that Blitzstein *will not* be a witness in this case, but the defendants seek assurances that Blitzstein *cannot* be named as a witness in this case. They seek a barring order from this court so they may chart their future litigation strategy. That request is wholly reasonable. To that end, this court will bar Rachel from naming Blitzstein as a testifying witness in this case.

It is also plain that Rachel's inability to name Blitzstein as a Rule 213(f)(2) witness is not her fault and, to that end, she should not be punished for his unavailability. Rule 213(f)(3) provides her a remedy. Rule 213(f)(3) applies to a "controlled expert witness" and requires a party to disclose each retained witness's: (1) subject of testimony; (2) conclusions, opinions, and bases; (3) qualifications; and (4) reports about the case. *See* Ill. S. Ct. R. 213(f)(3). Rule 213(f)(3) experts may rely on facts or data gathered by experts in other specialties and may rely on hearsay or other inadmissible evidence, as long as experts in that field would reasonably rely on such information to reach their conclusions. *See* Ill. R. Evid. 703 ("If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence"); *see also Wilson v. Clark*, 84 Ill. 2d 186, 193-94 (1981). Further, a jury may consider those inadmissible underlying facts for the "limited purpose" of "deciding what weight, if any, [to] give the [expert's] opinions." Ill. Pattern Jury Instructions (Civil) No. 2.04. A jury may not, of course, consider those underlying facts and data for their truth, since they go only to weight and credibility. *See id.*

It is certainly within the realm of possibility that Rachel may be able to identify and disclose a Rule 213(f)(3) retained expert witness who will be able to rely on Blitzstein's or other Veterans Affairs providers' records and bills and render opinions as to the necessity of Henry's course of treatment and the reasonableness of the charges. It also possible that Rachel will be unable to locate such a person. Regardless of the result, she cannot be denied the opportunity.

If Rachel is able to disclose a Rule 213(f)(3) witness, the defendants certainly cannot be denied the same opportunity to name their own Rule 213(f)(3) expert witness. The solution at this point is, therefore, not to bar any expert testimony, but see first if any will be disclosed. With that record, a trial judge will be able to determine whether any such testimony may be submitted to the jury.

Conclusion

For the reasons presented above, it is ordered that:

1. The defendants' motion to bar Dr. Blitzstein is granted;
2. The defendants' motion is otherwise denied;
3. The plaintiff shall have until August 24, 2020 to make a disclosure pursuant to Illinois Supreme Court Rule 213(f)(3); and
4. This matter shall be set for case management upon further notice of this court or the clerk.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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