IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

LARRY S. MELTON, JOHNNY MELTON, AND BLANKENSHIP/MELTON AVIATION, INC.,	)	
Plaintiffs,	)	**Civ. No. 1:02CV1242 T/P**
v.	)	
JOHN JEWELL, individually, JOHN JEWELL AIRCRAFT, INC., and SHAWN JEWELL,	)	
Defendants.	)	

ORDER DENYING DEFENDANTS' MOTIONS IN LIMINE TO EXCLUDE TESTIMONY OF PLAINTIFFS' EXPERTS JAMES STABLEY AND DAVID LOWE

Before the court is defendants John Jewell, individually, John Jewell Aircraft, Inc., and Shawn Jewell's Motions in Limine to Exclude Testimony of Plaintiffs' Experts James Stabley and David Lowe, both filed October 28, 2005. Plaintiffs filed their responses in opposition on November 14, 2005. These matters were referred to the Magistrate Judge for determination.[1] For the

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[1]A Magistrate Judge's evidentiary determinations regarding expert testimony, even where they may ultimately affect the outcome of a claim or defense, are non-dispositive orders entered pursuant to 28 U.S.C. § 636(b)(1)(A). See Lithuanian Commerce Corp. Ltd. v. Sara Lee Hosiery, 179 F.R.D. 450, 456 (D.N.J. 1998) (citing Ferriso v. Conway Organization, 1995 WL 580197, at *1 (S.D.N.Y. Oct. 3, 1995)(unpublished)); Jesselson v. Outlet Assocs. of Williamsburg, Ltd., 784 F.Supp. 1223, 1227-28 (E.D. Va. 1991).

reasons below, the defendants' motions to exclude are DENIED.[2]

I. BACKGROUND

In this lawsuit, plaintiffs seek recovery of damages from the defendants based on the defendants' alleged negligence in performing maintenance and repairs on plaintiffs' airplane, a Piper Aztec N5533Y. Plaintiffs bring claims based on negligence, negligence per se, breach of contract, fraud, promissory fraud, fraudulent misrepresentation, negligent misrepresentation, outrageous conduct, and failure of defendant Shawn Jewell to report certain observations to the Federal Aviation Administration ("FAA"). In these present motions, the defendants seek an order from the court to exclude the testimony of plaintiffs' two experts, James Stabley and David Lowe.

First, the defendants contend that the plaintiffs and their experts, in performing the testing, disassembly, and inspection of the Aztec aircraft, knowingly violated this court's March 2, 2004 order, in which the court outlined a specific protocol for testing of the aircraft's engines. Specifically, the defendants argue that neither expert performed any test runs of the engines to determine

[2]The court, having carefully reviewed the record, finds that the record before it is adequate and that no evidentiary hearing is necessary to decide these motions. See Nelson v. Tennessee Gas Pipeline Co., 243 F.3d 244, 248-49 (6th Cir. 2001) (court is not required to conduct a hearing to determine whether a proposed expert's testimony meets the Daubert standards). Among other records, the court has received the expert reports and deposition transcripts for both expert witnesses.

how they operated prior to disassembly, nor did they follow the other specific procedures set forth in the court order, such as making proper test run-related notations and abiding by certain disassembly standards.[3] Furthermore, the defendants assert that although the March 2 order provides that the expert-inspector shall preserve and maintain custody of the alleged defective aircraft parts, the plaintiffs have allowed their attorney (and not their experts) to maintain custody of the parts.

Second, the defendants allege that the experts' opinions are improperly based on information provided to them by plaintiffs and/or plaintiffs' counsel, including an undated and unsworn chronology of events relating to the aircraft repairs at issue in this litigation. Likewise, defendants contend that plaintiffs' experts failed to consider other matters in the record, including the deposition testimony of plaintiff Larry Melton and plaintiffs' pilot, Melvin Brasher, and that their opinions contain numerous inconsistencies and contradictions. With respect to Lowe, defendants further claim that he failed to provide the defendants with all of the documents that he considered in forming his opinions, in violation of Federal Rule of Civil Procedure 26(a)(2)(B).

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[3]Defendants state that instead of testing the aircraft engines at Lycoming, where test cells were available to test-run the engines, the aircraft was disassembled at Signature Flight Support, where test cells were not available.

Third, they argue that Stabley and Lowe have no personal knowledge of whether there was an oil pressure or oil temperature problem with the subject engines, and therefore should not be allowed to render an opinion regarding the function of the engines.

Fourth, the defendants assert that the experts' opinion – that the procedure performed by defendant John Jewell in correcting a previously misdrilled hole "[was] not an approved repair and could lead to an engine failure at some point in time" – is contrary to procedures approved by their peers in the aircraft industry as well as the FAA. Moreover, defendants argue that the experts' failure to conduct test runs, in addition to violating the March 2 order, demonstrates that their expert opinions are not based on sufficient facts and data.

Finally, defendants contend that although the plaintiffs, in response to interrogatory requests, informed the defendants that Stabley and Lowe would provide expert testimony regarding "the values and costs, of the airplane, and its components, before and after repair," neither of the experts was able to provide any testimony at their depositions about the valuation of the aircraft or its parts. Thus, defendants argue, the plaintiffs provided a false interrogatory response, and therefore should be sanctioned with an order striking their experts.

The court addresses each issue in turn below.

II. ANALYSIS

Federal Rule of Evidence 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702.

This rule essentially involves three elements. First, the expert must demonstrate to the trial court that he or she is qualified – "by knowledge, skill, experience, training or education" – to proffer an opinion. Second, by referring to "scientific, technical, or other specialized knowledge," Rule 702 requires "evidentiary reliability" in the principles and methods underlying the expert's testimony. Third, the expert's testimony must assist the trier of fact in that the testimony must "fit" the facts of the case. See Pride v. BIC Corp., 218 F.3d 566, 577-78 (6th Cir. 2000); see also Daubert v. Merrell-Dow Pharms., Inc., 509 U.S. 579, 592-93 (1993) ("[T]he trial judge must determine at the outset . . . whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether

that reasoning or methodology properly can be applied to the facts in issue.").

"The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted. The expert's testimony must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded." Fed. R. Evid. 702 advisory committee's notes. The court must "make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999).

Proponents of expert testimony do not have "to demonstrate . . . that the assessments of their experts are correct, they only have to demonstrate . . . that their opinions are reliable . . . . The evidentiary requirement of reliability is lower than the merits standard of correctness." In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 744 (3d Cir. 1994); see also Ruiz-Troche v. Pepsi Cola, 161 F.3d 77, 85 (1st Cir. 1998)("Daubert neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance."). Several factors that the trial court may consider in analyzing the reliability of an expert's methods are: whether a method is testable, whether it

has been subjected to peer review, the rate of error associated with the methodology, and whether the method is generally accepted in the scientific community. See Pride, 218 F.3d at 577.

Although the "focus . . . must be solely on principles and methodology, not on the conclusions that they generate," Daubert, 509 U.S. at 595, "conclusions and methodology are not entirely distinct from one another." General Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997). "[N]othing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the ipse dixit of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." Id.

Nevertheless, the rejection of expert testimony is the exception rather than the rule, and "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." Fed. R. Evid. 702 advisory committee's notes (2000) (quoting United States v. 14.38 Acres of Land, 80 F.3d 1074, 1078 (5th Cir. 1996)).

Finally, the proponent of the evidence has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence. See Fed. R. Evid. 104(a); Bourjaily v. United States, 483 U.S. 171, 175-76 (1987). Plaintiffs, therefore, must demonstrate that the expert opinions offered by Stabley and Lowe satisfy the reliability requirements of

Fed. R. Evid. 702 and Daubert. Wynacht v. Beckman Instruments, Inc., 113 F.Supp.2d 1205, 1207 (E.D. Tenn. 2000).

A. Agreed Order Regarding Aircraft Engine Testing

On March 2, 2004, this court entered an order, jointly signed and submitted by the parties, titled "Agreed Order Regarding Aircraft Engine Disassembly and Testing Protocol." The agreed order provides in relevant part as follows:

> The Plaintiffs have removed the engines from the Piper Aztec N5533Y and intend to test, disassemble and inspect both engines at Signature Aviation at its Memphis, Tennessee, facility. The Parties wish to avoid issues regarding the testing, disassembly and inspection of the aircraft engines which are the subject of this litigation and agree to a written protocol for any testing, disassembly and inspection of both aircraft engines . . . . Either party's experts or representatives may record the testing, disassembly and inspection of the engine by video, still photography or any other means. The agreed protocol is as follows:
>
> 1. If reasonably feasible, each engine will have a test run (on a test cell) prior to tear down . . .
>
> 2. Standard methods and procedures established by Textron Lycoming for disassembly of . . . engines will be employed . . .
>
> 3. Technician/inspector shall inspect all parts related to engine over-heating, low oil pressure and oil temperature and shall, at minimum, make the following notations: . . .
>
> 4. Technician/inspector shall not allow any destructive testing without further Court order specifying the parts and testing procedures.
>
> 5. Technician/inspector shall preserve any and all alleged defective parts and any parts that are alleged to have been improperly installed, modified or damaged and shall maintain custody of those parts until further Court order.

The court, after considering the entire record, concludes that the defendants have not demonstrated that plaintiffs violated the March 2 court order when their experts disassembled the aircraft engines without first conducting a test run. The order provides that each engine will have a test run on a test cell prior to tear down "if reasonably feasible." It is undisputed that the Signature Flight Support facility, where the disassembly of the engines took place, did not have a test cell. In fact, the agreed order plainly states that the inspection and disassembly would take place at Signature, a facility which the defendants knew several weeks in advance did not have a test cell. Thus, it was not possible, much less reasonably feasible, for the plaintiffs to conduct a test run as contemplated in the order.

Moreover, as clearly shown by the email correspondence sent from defendants' prior counsel to plaintiffs' counsel (attached as exhibit 5 to defendant's motion), the parties' purpose in submitting the proposed agreed order to the court was not because they agreed that a test run of the engines was necessary or even proper. Quite to the contrary, the parties had a difference of opinion about the necessity of a test run prior to disassembly, and the defendants anticipated that their disagreement on this issue would be used at trial to discredit plaintiffs' experts:

> This will confirm that the inspection at Signature in Memphis has been rescheduled from February 12, 2004 to March 2, 2004. Raymond E. Ladd will appear on behalf of my clients as an expert. He has been instructed to

> observe, film and photograph the disassembly of the engines from the Piper Aztec N5533Y. . . .
>
> I am returning the agreed order with my signature. You advised the [sic] Signature does not have facilities to perform any test runs of the engines prior to disassembly. The engines belong to your client, and your expert is presumably providing you with guidance regarding the testing, disassembly and inspection of the engines. Ray Ladd [defendants' expert] and my clients believe that a test run for each engine prior to disassembly would be preferable and would provide the most reliable proof as to what the performance of the engines is before disassembly. We cannot dictate to your clients what to do with their engines; however, I presume that your clients, your expert and you will make the final decision, but please be advised that failure to perform the test runs as outlined in the order may be an issue before the jury, if this matter goes to trial. . . .

(Ex. 5). In any event, at minimum, the defendants were on notice several weeks prior to the engine disassembly that no test run would be conducted by the plaintiffs' expert, and as described in defendant's expert report, Ladd had full and ample opportunity prior to and during the plaintiff's engine inspection to observe, photograph and videotape the procedures. Thus, the defendants were in no way prejudiced by the testing conducted by plaintiffs' experts. The issue of whether or not a test run should have been conducted prior to disassembly might be a proper subject for cross-examination, but is not a basis for exclusion.[4]

Likewise, the court finds that Stabley's failure to bring with

[4]Since the plaintiffs did not violate the March 2 order by failing to conduct a test run, they also did not violate the order by failing to make notations of readings related to test runs.

him to the March 3 engine disassembly the written standard methods and procedures established by Textron Lycoming for disassembly of IO540-C4B5 engines does not violate the March 2 order. The order only requires the parties to employ the Textron Lycoming standards, which Stabley testified he applied in this case:

> A. I followed procedures as pretty much outlined in the overhaul manual for disassembly.
>
> Q. Is that Textron Lycoming overhaul manuals?
>
> A. Yes, sir, it is. . . .
>
> Q. You didn't bring the book with you to the disassembly?
>
> A. No, sir. I've disassembled so many of these I really didn't need the book.

(Stabley Dep. at 169). Again, whether the expert's ultimate conclusions, based on his application of the Textron Lycoming standards, are correct is a matter for cross-examination and to be considered by the trier of fact.

Lastly, defendants argue that plaintiffs violated the protocol order by allowing plaintiffs' counsel to maintain custody of the engine parts instead of plaintiff's expert. Even assuming, *arguendo*, that this is true, defendants have not explained how they are prejudiced by this violation. The defendants do not suggest that there has been any destruction or spoliation of evidence. Rather, they only argue that plaintiffs have not complied with the letter of the order, and as a result, they should be sanctioned. The court finds that such a violation, without more, does not

warrant the extreme sanction of exclusion of expert testimony. See Tr. of Mich. Reg'l Council of Carpenters Emple. Benefits Fund v. Carpentry Contrs., Inc., 203 F.R.D. 247, 253 (E.D. Mich. 2001)("The extreme sanction of exclusion, however, should only be used where lesser sanctions would be ineffective.")(quoting Bellinger v. Deere & Co., 881 F. Supp. 813, 817 (N.D.N.Y. 1995)); see also Outley v. New York, 837 F.2d 587, 590 (2d Cir. 1988); Goeken v. Wal-Mart-Stores, Inc., No. 99-4191, 2002 U.S. Dist. LEXIS 10974, at *16 (D. Kan. May 16, 2002) (unpublished).

B. Bases for Opinions and Supporting Documents

Defendants' second argument is that plaintiffs' experts improperly base their opinions on information provided to them by plaintiffs and/or plaintiffs' counsel; they fail to consider other matters in the record, including the deposition testimony of the Larry Melton and Melvin Brasher; and they offer opinions that contain various inconsistencies and contradictions. With respect to each of these points, the court concludes that these matters go to the weight of the experts' testimony and their credibility, but do not bar their admissibility. Indeed, the reliability of the source of the experts' information, whether they should have considered other information, and whether their opinions are contradictory are all subjects that may be raised on cross-examination. "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." Daubert, 509 U.S. at 596.

The court finds that, based on the entire record, Stabley and Lowe's expert opinions are based on sufficient facts and data as required under Fed. R. Evid. 702 and Daubert. Stabley relied on, among other things, Lycoming service bulletins, letters, and service instructions, Lycoming Overhaul and Maintenance Manuals, Lycoming Engine Operator's Manual, Lycoming Parts Catalog, the Aircraft Operator's Manual, the FAA Airworthiness Directive, and the aircraft and engine logbooks in rendering his opinion. Moreover, he has been in the general aviation industry for over 35 years, and spent 26 years employed by Textron Lycoming. Likewise, Lowe relied on Lycoming service letters and instructions, as well as the engine logbooks and his 25-plus years of experience in aircraft restoration and repair, in rendering his opinion.

On a related matter, the defendants also contend that Stabley and Lowe have no personal knowledge of whether there was an oil pressure or oil temperature problem with the subject engines, and therefore should not be allowed to render an opinion regarding the function of the engines, specifically as to oil temperature or oil pressure. Defendants also claim that the experts improperly relied on other information provided to them by plaintiffs and/or their counsel, including a chronology of events apparently created by plaintiffs.

An expert may rely on data not within his personal knowledge. See Fed. R. Evid. 702, 703; United States v. Foresome Entm't Co., 78 Fed. Appx. 458, 461 (6th Cir. 2003); Remtech, Inc. v. Fireman's Fund Ins. Co., No. 05-0087, 2006 U.S. Dist. LEXIS 1145, at *3 (E.D.

Wash. Jan. 4, 2006) (unpublished); Cargill, Inc. v. Sears Petroleum & Transp. Corp., 334 F. Supp. 2d 197, 250 n.42 (N.D.N.Y. 2004) ("The fact that the expert does not possess personal knowledge on the matters upon which he or she is opining is not unusual – in fact, is quite normal – and does not provide a basis to exclude the proffered testimony assuming that the court is convinced that the requirements of Rule 702 have been met.").

Moreover, an expert's reliance on hearsay, in and of itself, does not render the expert's testimony inadmissible. Conwood Co., L.P. v. U.S. Tobacco Co., 290 F.3d 768, 786 (6th Cir. 2002) ("[E]xperts are entitled to rely on documents, even hearsay documents that are otherwise inadmissible."); Engebretsen v. Fairchild Aircraft Corp., 21 F.3d 721, 728 (6th Cir. 1994) ("Rule 703 allows a testifying expert to rely on materials, including inadmissible hearsay, in forming the basis of his opinion."); see also United States v. Locascio, 6 F.3d 924, 938 (2d Cir. 1993) ("[E]xpert witnesses can testify to opinions based on hearsay or other inadmissible evidence if experts in the field reasonably rely on such evidence in forming their opinions."). The court concludes that Stabley and Lowe's reliance on the information provided to them by plaintiffs and/or counsel was not improper, and thus does not provide a basis for exclusion of their testimony at trial.

Finally, with respect to Lowe, defendants claim that he failed to provide the defendants with documents he considered in forming his opinions, either attached to his report or at his deposition,

in violation of Federal Rule of Civil Procedure 26(a)(2)(B). During his deposition, he identified the documents he relied upon in forming his opinion, but did not bring them with him to the deposition as required.

The court concludes, however, that his failure to bring these documents to the deposition does not warrant the extreme sanction of exclusion of evidence. "Rule 37 provides that the trial judge should not exclude expert testimony unless the failure to disclose is both unjustified and harmful." United States v. Rapanos, 376 F.3d 629, 644-645 (6th Cir. 2004); Fed. R.Civ. P. 37(c)(1) 2000 advisory committee's notes ("Even if the failure [to disclose] was not substantially justified, a party should be allowed to use the material that was not disclosed if the lack of earlier notice was harmless."). Here, the court finds that the failure to bring the supporting documents to the deposition was harmless. According to Lowe's deposition testimony, his expert opinion is based almost exclusively on his observations during the disassembly of the aircraft's engines and his many years of experience as an aircraft mechanic. His reliance on Lycoming service letters and instructions, as well as the aircraft engine logbooks, was disclosed in his expert report. Therefore, defendants' motion is DENIED on these grounds.

C. Expert Opinions Conflict With "Peer Opinions"

The defendants contend that the experts' opinions that the procedure performed by defendant John Jewell in correcting a previously misdrilled hole "[was] not an approved repair and could

lead to an engine failure at some point in time" is contrary to procedures approved by their peers in the aircraft industry as well as the FAA. Defendants further argue that the experts' failure to conduct test runs demonstrates that their expert opinions are not based on sufficient facts and data.

The court disagrees. Even assuming, *arguendo*, that others in the field may disagree with plaintiffs' experts' ultimate conclusions regarding Jewell's drilling method, or that the FAA may have approved of the procedure employed by Jewell, that would not be a basis to exclude the expert testimony. A party's disagreement with an opposing expert's reasoning or conclusions is not a basis for exclusion, but rather such arguments are proper subjects of cross-examination and go to the weight of the evidence. See Lone Mt. Processing, Inc. v. Bowser-Morner, Inc., No. 00-00093, 2005 U.S. Dist. LEXIS 16340, at *50-51 (W.D. Va. Aug. 10, 2005) (unpublished) ("Alleged gaps in reason or a disagreement on causation are not a basis for exclusion of an expert. Instead, such arguments go to the weight of the evidence, not its admissibility."); United States v. Sullivan, 246 F. Supp. 2d 696, 698 (E.D. Ky. 2003) ("Daubert does not require universal acceptance – only general acceptance. That some scientists in a field disagree with an expert's theories or conclusions does not render those theories or conclusions unreliable under Daubert."); see also United States v. Vesey, 338 F.3d 913, 917 (8th Cir. 2003) ("The gatekeeper role should not, however, invade the province of the jury, whose job it is to decide issues of credibility and to

determine the weight that should be accorded.") Likewise, as discussed earlier, the experts' decision not to conduct a test run prior to disassembly is a matter for cross-examination. The motions are DENIED on these grounds.

D. False Interrogatory Response

Defendants' final argument is that the plaintiffs provided a false interrogatory response, and thus should be sanctioned. Specifically, plaintiffs stated in their interrogatory response that Stabley and Lowe would provide expert testimony regarding the values and costs of the airplane and its parts. However, neither of the experts indicated in their reports that they would offer such an opinion, and neither was able to provide any testimony at their depositions about the valuation of the aircraft or its parts. Thus, defendants argue, the plaintiffs provided a false and misleading discovery response, and therefore should be sanctioned by the court with an order striking their expert witnesses.

At Stabley's deposition, he testified as follows:

> Q. Do you consider yourself an expert on the values and costs of airplanes?
>
> A. No, sir.
>
> Q. Is that outside your area of expertise?
>
> A. Yes, sir.

(Stabley Dep. at 122-123). Lowe also testified at his deposition that he is not qualified to render an opinion on valuation of aircrafts and parts:

> Q. Okay. Did Mr. Warlick ask you to testify as to value of this aircraft?

> A. No, sir. . . .
>
> Q. When did you get that [defendant's valuation expert report] from Mr. Warlick?
>
> A. You have to ask Mr. Warlick, because I am not considered an expert on the value of the airplane. . . .
>
> Q. . . . You're not an expert on the value of the but he sent you a copy of Exhibit 16 (as stated), which is a copy of Mr. Iacobucci's report. Does that same testimony apply to these three ads for a Piper Aztec?
>
> A. Yes, sir. I'm not here to testify to what the value of the airplane was.

(Lowe Dep. at 45, 48).

The court concludes, however, that even though the interrogatory response was not accurate – and that plaintiff and their counsel should have been more careful in drafting their response and should have seasonably supplemented their response as required by Rule 26 – there is no indication that the plaintiffs acted wilfully or with an intent to mislead or deceive the defendants. Moreover, the defendants have not explained how they have been harmed by this response. Thus, the motions are DENIED on these grounds.

III. CONCLUSION

For the reasons above, defendants' motions in limine are DENIED.

Plaintiffs' request for attorney's fees, contained in their response, is also DENIED.

IT IS SO ORDERED.

S/ Tu M. Pham
_____
TU M. PHAM
United States Magistrate Judge

February 17, 2006
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Date