

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

<i>PATTY RAE STANLEY,</i>)	
)	
<i>Plaintiff</i>)	
)	
<i>v.</i>)	<i>No. 1:10-cv-345-JHR</i>
)	
<i>EATON PEABODY, et al.,</i>)	
)	
<i>Defendants</i>)	

**MEMORANDUM DECISION ON THREE MOTIONS IN LIMINE FILED BY
DEFENDANTS**

In this action alleging legal malpractice, the defendants have filed three motions *in limine* to exclude: (1) the plaintiff’s opinion of the value of the campgrounds she owned, (2) the testimony of Leta Leighton and certain testimony of the plaintiff, and (3) references to claims of breach of fiduciary duty and negligent misrepresentation. For the reasons that follow, I deny the first and last motion, and grant the second motion only in part.

I. Motion to Exclude Plaintiff’s Opinion

The defendants move to preclude the plaintiff from offering her own opinion of the value of her campgrounds at the time of their sale to ELS. Defendants’ Motion in Limine to Exclude Plaintiff’s Opinion on Value of the Campgrounds (“Value Motion”) (ECF No. 69). They assert that “[t]he bases of her opinion are simply too speculative and uncertain to provide any reliable basis on which she may set forth an opinion of the campgrounds’ value.” *Id.* at 1. They contend that, if the court grants their motion to exclude four “expressions of interest” in the campgrounds

(ECF No. 68), which I have now granted in part, “there is an insufficient remaining basis for [the plaintiff] to offer her speculative opinion.” *Id.*

The defendants acknowledge, *id.*, my earlier statement, in a recommended decision on the defendants’ motion for summary judgment, that the plaintiff’s opinion of the value of the campgrounds could not be excluded in considering of proximate cause. Recommended Decision on Defendants’ Motion for Summary Judgment (“Recommended Decision”) (ECF No. 39) at 9-12. The plaintiff argues that this statement, which appears in a recommended decision which I later adopted after the parties consented to my presiding over this case, ECF No. 48, constitutes “law of the case,” Plaintiff’s Memorandum in Opposition to Defendants’ Motion in Limine to Exclude Plaintiff’s Opinion on Value of the Campgrounds (“Value Opposition”) (ECF No. 75) at 1. Considering the fact that, in that recommended decision, I repeatedly found that the plaintiff had provided insufficient factual information in support of her opinion of value, Recommended Decision at 9-11, the plaintiff’s decision to rest on that ruling, without adding anything more at this time, is not without risk.

The plaintiff also argues that the motion is premature because she “has yet to testify on direct examination.” *Id.* However, a party may always move to exclude testimony before it is given at trial; if this were not the case, juries would routinely hear evidence and then be told to disregard it. When this can be avoided, it is the better practice to do so.

Still, I continue to conclude that the defendants’ objections to the plaintiff’s expected testimony on this point go to its weight rather than its admissibility. In the only First Circuit case cited in this regard by the defendants,¹ *Robinson v. Watts Detective Agency, Inc.*, 685 F.2d 729

¹ The defendants also cite *Culebra II, LLC v. River Cruises & Anticipation Yachts, LLC*, 564 F.Supp.2d 70 (D. Me. 2008), for the proposition that contingent, uncertain, or speculative damages are not recoverable. Value Motion at 2-3. That is a different issue from the question of whether a property owner may testify as to the value of that property.

(1st Cir. 1982), the court rejected a claim that a business owner's testimony about the value of the business was inadmissible because based solely on the opinions of others, *id.* at 739. The defendants make no such argument here, but neither have they shown that the plaintiff's opinion will rest only on "hypothesized facts or speculation on circumstances not in existence[.]" *id.*, the standard quoted from *Robinson* in their motion.

The defendant's motion to exclude the plaintiff's opinion of the value of the campgrounds is **DENIED**.

II. Motion to Exclude Testimony of Leighton and Plaintiff

The defendants move to exclude testimony from Leta Leighton "concerning her opinion of the negotiating skills of Defendants versus ELS' attorneys" and for an order directing the plaintiff "to refrain from using derogatory terms to refer to Defendants at the trial of this matter." Defendants' Motion in Limine to Exclude Testimony of Leta Leighton and Plaintiff ("Leighton Motion") (ECF No. 70) at 1. The plaintiff responds that the motion is premature, because she has not decided whether to call Leighton to testify at trial and that the court lacks authority to "infring[e] on a litigant's right to answer a question in whatever manner he or she deems appropriate." Plaintiff's Memorandum in Opposition to Defendants' Motion in Limine to Exclude Testimony of Leta Leighton and Plaintiff ("Leighton Opposition") (ECF No. 76) at 1.

Again, it is not premature for a party to seek in advance of trial to exclude potentially inadmissible testimony. The defendants are concerned that Leta Leighton, an accountant who "advised Plaintiff with respect to proposed terms of the deal[.]" will testify at trial, as she did at deposition, that "the Chicago attorneys [who represented ELS] were -- I just felt like they walked all over the attorneys, the Bangor attorneys [who represented the plaintiff]." Leighton Motion at 1-2.

Leighton also testified that she had no prior experience in deal negotiations and did not recall what terms of the deal were being discussed when she formed her quoted opinion. *Id.* at 3-4. Under these circumstances, it is unlikely that her opinion would be admissible, but, rather than attempt to predict what she might say, I will grant the defendants' motion only to the extent that counsel for the plaintiff is instructed to approach sidebar before eliciting any opinion testimony concerning lawyer performance from Leighton, should the plaintiff call her to testify. At sidebar, I will rule on the admissibility of any such testimony under the circumstances prevailing at that time.

The remaining issue raised by this motion is the plaintiff's use of "pejorative and insulting terms" to refer to the defendants during her deposition. Continued reference to the defendants in such terms by the plaintiff in her trial testimony could be as harmful to the plaintiff as to the defendants, if not more so. The plaintiff's attorney is responsible, to the extent reasonably possible, to control his client. Should the need to admonish the plaintiff arise during her testimony, I will certainly do so. I see no need, and no practical advantage, in attempting before trial to provide the plaintiff with a list of descriptive words that she may not use when referring to the defendants. Such a list might only encourage unlisted alternatives, equally pejorative and insulting. Dignified behavior is expected of all litigants in any court, and this court will expect the same at this trial.

The defendants' motion to limit the testimony of the plaintiff is **DENIED** and of Leta Leighton is **GRANTED**, but only to require counsel for the plaintiff to approach sidebar before eliciting from Leighton any opinion testimony about lawyer performance, and otherwise **DENIED**.

III. Motion to Exclude Reference to Certain Claims

The defendants ask the court to prohibit the plaintiff from referring to her breach of fiduciary and negligent misrepresentation claims because these claims are duplicative of her professional negligence claim. Defendants' Motion in Limine to Exclude Reference to Breach of Fiduciary Duty and Negligent Misrepresentation Claims ("Claim Motion") (ECF No. 71) at 1. I see no advantage to the plaintiff should her attorney happen to use these terms during the presentation of evidence, as I will not be charging the jury on duplicative claims, and references to claims that are not included in the jury instructions can only be confusing to the jury. In other words, it would not be strategically wise for the plaintiff's attorney to tell the jurors, "My client has claims for breach of fiduciary duty, negligent misrepresentation, and professional negligence," when the court is likely ultimately to tell them that the plaintiff's claim is for professional negligence only.

Contrary to the plaintiff's assertion, Plaintiff's Memorandum in Opposition to Defendants' Motion in Limine to Exclude Reference to Breach of Fiduciary Duty and Negligent Misrepresentation Claims ("Claim Opposition") (ECF No. 77) at 1, it is unlikely that "evidence of these separate torts [will be] adduced" at trial, as I have already concluded that the count alleging breach of fiduciary duty does not state a cause of action separate from that of professional negligence. Recommended Decision at 8. I will not rule at this time on what might be appropriate in the final jury instructions, as the defendants apparently wish, Claim Motion at 3, but, as it is a matter of law rather than a question of fact, I seriously doubt that the plaintiff can establish that a separate claim of breach of fiduciary duty can be maintained in this case.

While I have not yet ruled on the second question presented by the defendants – whether a claim of negligent misrepresentation is also subsumed under a claim of professional negligence in this case – I see no need to rule on that question in advance of trial. Again, counsel for the plaintiff is on notice that he may well be proved wrong at the end of the case if he tells the jury that his client has a claim for negligent misrepresentation as well as one for professional negligence. I doubt that use of those terms would be helpful to the jury in any event, but the choice, and the risk, remain with plaintiff’s counsel.

The defendant’s motion to exclude reference to claims for breach of fiduciary duty and negligent misrepresentation is **DENIED**.

As always, rulings made on motions *in limine* may be revisited during trial if circumstances warrant.

Dated this 4th day of June, 2012.

/s/ John H. Rich III
John H. Rich III
United States Magistrate Judge

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