

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**AMERICAN SOCIETY FOR THE  
PREVENTION OF CRUELTY TO  
ANIMALS, et al.,** :  
: :  
: :  
**Plaintiffs,** :  
: :  
**v.** :  
: :  
**FELD ENTERTAINMENT, INC.,** :  
: :  
**Defendant.** :  
\_\_\_\_\_ :  
:

**Case No. 03-2006 (EGS/JMF)**

**SUPPLEMENTAL AUTHORITIES REGARDING TESTIMONY OF  
DEFENDANT’S EXPERT DR. SCHMITT**

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Defendant Feld Entertainment, Inc. ("FEI") hereby submits additional points and authorities regarding the scope of Dr. Schmitt's testimony at trial.

**I. Dr. Schmitt was disclosed as a fact witness over two years ago**

For the first time at trial, plaintiffs claim surprise that Dr. Schmitt would testify about the medical records or plaintiffs' expert Dr. Ensley's analysis of them. FEI disclosed both Dr. Schmitt and Gary Jacobson in the fact discovery stage of this case. See Ex. 1, FEI's Second Supp. Response to Interrogatory # 1 (1/31/07) (identifying Dr. Schmitt). Both men were also subsequently identified in FEI's expert disclosures, submitted to plaintiffs on October 19, 2007. Their dual status as both expert and fact witnesses ("hybrid" witnesses under the caselaw) was reiterated again by FEI's counsel at the June 11, 2008 status conference. See Ex. 2, Hear. Tr. at 12 (6/11/08). Upon further inquiry from plaintiffs' counsel, both men were **again** specifically identified by name as dual fact/expert witnesses. See Ex. 3, Joiner e-mail to Sanerib (7/1/08). As a properly disclosed fact witness, Dr. Schmitt can testify to anything he knows regarding Ringling's elephant herd. In addition, he has also submitted an expert report to provide his *opinions* regarding the same.

**II. Plaintiffs Have Waived Their Objections Regarding Dr. Schmitt's Report**

Plaintiffs' belated claim regarding Dr. Schmitt's report as it relates to Dr. Ensley was not raised in their Notice of Daubert Objections. See Pls' Notice of Daubert Objections (9/16/08) (Docket # 352). Nor did they list any such objections to his testimony in their Pretrial Objections. Instead, Plaintiffs indicated that they would "move to exclude some of that testimony at trial, *as explained in plaintiffs' Notice of Daubert Objections.*" See Pls' Amended Objections & Responses to Def's Amended Pre-trial Statement at 16 for Dr. Schmitt (1/12/09) (red-line version) (Docket # 394-2). The plaintiffs failed to raise any limitation of Dr. Schmitt's

testimony based on their claim of surprise in their Notice of Daubert Objections. Id. Therein, they raised only limitations of opinions about stereotypic behavior, credibility of plaintiff witnesses and elephant conservation. Id. at 10-11, 13, 19. Pursuant to the Court's pretrial order, expert objections were due by September 16, 2008. See Pretrial Order at ¶ 6 (10/15/08) (Docket # 373). By no later than January 12, 2009, all pre-trial objections were due. See Order at 1 (11/4/08) (Docket # 387). Plaintiffs made no objection regarding Dr. Schmitt's report as it related to Dr. Ensley as required by these two orders, and have therefore waived this objection. Moreover, FEI is substantially prejudiced by this failure: their objection must be denied.

### **III. Plaintiffs Had Notice of Dr. Schmitt's Opinions and the Bases for Them.**

As indicated above, Dr. Schmitt was designated as a fact and expert witness in this case.

Regarding the opinions he held at the time, Dr. Schmitt stated the following in his report:

Based on my knowledge of these elephants, almost all of the plaintiff witnesses' observations are not health problems at all. The observations that are truly health problems do not result from poor elephant husbandry or a "taking" as alleged in this lawsuit. Instead, they result from the natural course of life in healthy captive elephants that are receiving attentive husbandry and veterinary care. **At trial, I anticipate addressing any health problems alleged by plaintiff witnesses, whether mentioned in this Report or not.**

(DX 23, Schmitt Report at 25) (emphasis added). He stated that the elephants were under his care and were in "excellent condition, and the retired elephants are active and only exhibit minor health problems, associated with old age, in any species that is long-lived." Id. at 12. By these and other statements, he notified the plaintiffs that he would testify about the health conditions of the elephants based on this knowledge of them. Obviously, the medical records were part of such knowledge.

Moreover, Dr. Schmitt clearly stated that in drafting his report he considered, inter alia, Dr. Ensley's report and the appendices and exhibits thereto, the medical records of the elephants

at issue, and his experience in providing medical care to those elephants. Id. at 28. Thus, the plaintiffs were on notice that Dr. Schmitt had reviewed those materials and stood ready to testify about them at trial of this case. This notice was more than reasonable. Dr. Ensley's report is voluminous as he admitted – 290 pages minus appendices. Tr. at 18.1 – 19.20 (Feb. 24 AM). The appendices are voluminous as demonstrated to the Court on March 13, 2009. Plaintiffs admit same: “Moreover, with the exception of Dr. Ensley's report – which focuses on the elephants' voluminous medical records . . . .” See Pls' Opp. to Def's Motion for an Extension of Time to Prepare Its Expert Reports at 4-5 (Dkt. No. 292). The report had a single-spaced 164-page appendix discovery documents allegedly relied upon in some way. Dr. Ensley testified that he reviewed 12-14 boxes of documents, including thousands of papers recounting and chronicling the health of the lives of close to 140 elephants. Id. To do so, he spent a little over 1300 hours over a three year period reviewing those records. Id. Dr. Schmitt's report covered each of the elephants at issue, discussed injuries specific to those elephants that were alleged by many plaintiff experts and clearly notified the plaintiffs that he had reviewed Dr. Ensley's report and the medical records in reaching those opinions. Given the extremely voluminous nature of Dr. Ensley's report and materials cited therein, such was all that reasonably could have been done, an extension of time notwithstanding.

Plaintiffs had notice that Dr. Schmitt had considered those materials. At deposition, they asked Dr. Schmitt how the FEI medical records made. Yet, plaintiffs failed to ask Dr. Schmitt about his opinions about either the medical records or Dr. Ensley's analysis of them. They had time to do so: the deposition began at 9:24 a.m. and concluded at 3:40 p.m., with 55 minutes for lunch. Ex. 4, Schmitt Depo. at 1, 138, 229.

**IV. Dr. Schmitt's testimony regarding the FEI medical records or Dr. Ensley's review of them should not be excluded from evidence or limited in any way.**

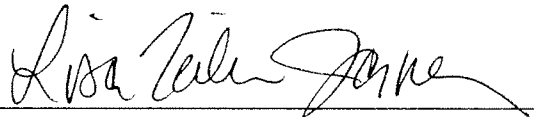
First, as treating physician, Dr. Schmitt is a fact witness and expert witness. He is the lead veterinarian for FEI. The elephants at issue have been and remain under his care. Thus, he cannot be precluded from giving opinions about the FEI elephant medical records. Dr. Schmitt's role as the head veterinarian for Ringling Bros. is no different than that of a treating physician for humans. Plaintiffs ask, in essence, that his testimony be limited solely to the four corners of his report, which in this case means *precluding any testimony from him as a fact witness*. This is the precise opposite of what the hybrid caselaw holds. Hybrid witnesses can clearly testify about what they know in their role as a treating physician. If, however, they want to testify as to conclusions regarding causation or duration of alleged injuries, then they must submit a report. Dr. Schmitt in this case has done both, and should not be precluded from testifying as either a fact or expert witness in this case. See, e.g., Kirkham v. Societe Air France, 236 F.R.D. 9, 12-13 (D.D.C. 2006) (written report requirement for treating physicians applies, if at all, to "causation, prognosis and permanency"); Riddick v. Wash. Hosp. Center, 183 F.R.D. 327, 330 (D.D.C. 1998) (treating physician may describe what has seen, her diagnosis, and treatment prescribed).

Second, as established *supra*, Dr. Schmitt's report gave the plaintiffs notice that he intended to opine about all of Dr. Ensley's opinions and the bases for them. Even if Dr. Schmitt were not a fact witness or treating physician, the following cases demonstrate that Dr. Schmitt's opinions regarding Dr. Ensley's review of medical records should not be excluded from evidence or limited in any way. Muldrow ex rel. Est. of Muldrow v. Re-Direct, Inc., 493 F.3d 160 (D.C. Cir. 2007) ("The purpose of [Rule 26] is to eliminate "unfair surprise to the opposing party... But it does not limit an expert's testimony simply to reading his report.... The rule contemplates that the expert will supplement, elaborate upon, [and] explain ... his report in his oral testimony." *Id.* at 167-68 (internal citations omitted)); Bowersfield v. Suzuki Motor Corp., 151 F. Supp. 2d

625, 631 (E.D. Pa. 2001) (“While the conclusions presented by Mr. Cantor at the Daubert hearing were consistent with his expert report, much of the methodology and bases for the conclusions to which he testified were not contained in his expert report....Testimony of an expert on matters within the expert’s expertise but outside of the expert’s report is not only permissible at trial, but the exclusion of such testimony may be reversible error.... An expert may testify beyond the scope of his report absent surprise or bad faith.” (internal citations omitted)); Altman v. Ingersoll-Rand Co., 2008 WL 596066, \*5 (W.D. PA. March 4, 2008) (“[e]xcluding expert testimony as a sanction is a drastic measure that should be imposed in only extreme situations. ...Exclusion of critical evidence should not occur absent a showing of willful deception or “flagrant disregard” of a court order by the proponent of the evidence.” (internal citations omitted)).

Dated this 13<sup>th</sup> day of March, 2009.

Respectfully submitted,



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