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Order on Plaintiff's Motion to Exclude Opinions
and Testimony of Purported Experts Disclosed by
Defendants (United Community Bank)

John J. Goger
Fulton County Superior Court

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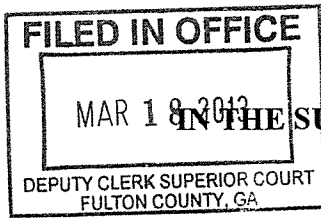


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**IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA**

COPY

UNITED COMMUNITY BANK,)
)
 Plaintiff,)
)
 v.)
)
 MCDIAPERS, INC., RICHARD J. WIELER,)
 GAEL COAKLEY, JR., and COLLIN)
 BROWN, III,)
)
 Defendants.)
)

**Civil Action File No.
2011CV207946**

**ORDER ON PLAINTIFF’S MOTION TO EXCLUDE OPINIONS AND TESTIMONY OF
PURPORTED EXPERTS DISCLOSED BY DEFENDANTS**

This matter is before the Court on Plaintiff United Community Bank’s Motion to Exclude Opinions and Testimony of Purported Experts Disclosed by Defendants McDiapers, Inc. (“McDiapers”), Richard J. Wieler, and Gael Coakley Jr. (collectively, the “McDiapers Defendants”). Upon consideration of the briefs submitted on the motion and the record of the case, the Court finds as follows:

Plaintiffs seek to exclude two experts identified by the McDiapers Defendants because Plaintiffs contend that the experts have nothing probative to offer, only personal interpretations of some of the contracts at issue in this case, and that the testimony is merely in the realm of legal conclusions that will not be helpful to the trier of fact.

The McDiapers Defendants identified two experts—Angela Johnson and Sara Cushing Weigle, Ph.D. (“Dr. Weigle”). Because the McDiapers Defendants have withdrawn Angela Johnson as an expert, the Court finds the motion moot as to Ms. Johnson.

Turning to Dr. Weigle, the McDiapers Defendants have offered her as an expert “in the field of applied linguistics and the meaning and interpretation of language in ... contracts.” In support of the Motion for Leave to Assert Defendant McDiapers, Inc.’s Omitted Counterclaim, McDiapers submitted Dr. Weigle’s affidavit to assist the Court in evaluating whether a waiver provision¹ contained in a promissory note precluded McDiapers from asserting its counterclaim.² Dr. Weigle analyzed the role of the phrase, “impair, fail to realize upon or perfect Lender’s security interest in the collateral,” in the waiver provision, as well as the object of the phrase.

Dr. Weigle concluded that there are three potential interpretations:

- a. All such parties... agree that Lender may... impair, fail to realize upon or perfect Lender’s security interest in the collateral.
- b. All such parties waive any right to... impair, fail to realize upon or perfect Lender’s security interest in the collateral.
- c. All such parties waive any right to require Lender to...impair, fail to realize upon or perfect Lender’s security interest in the collateral.

Dr. Weigle also opined that “security interest” and not “collateral” is the subject of the possible actions. The McDiapers Defendants contend that Dr. Weigle’s testimony will be helpful to the jury should the Court determine that the waiver provision in the promissory note is ambiguous.

O.C.G.A. § 24-7-702 provides: “[i]f 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

¹ The waiver provision provides: “All such parties...agree that Lender may ...impair, fail to realize upon or perfect Lender’s security interest in the collateral.” The parties disagreed over whether this provision prevented McDiapers from asserting claims premised on the alleged impairment of certain collateral securing McDiapers’ loan from Plaintiff.

² The Court did not consider Dr. Weigle’s testimony, finding instead that it was not appropriate to consider matters outside the pleadings in evaluating whether a defendant could assert an omitted counterclaim.

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 which have been or will be admitted into evidence before the trier of fact.” O.C.G.A. § 24-7-702(b).

The parties agree that Dr. Weigle’s testimony will not be considered, unless the Court first determines that the contract is ambiguous and then cannot reconcile the ambiguity after applying the rules of contract construction. See McKinley v. Coliseum Health Group, LLC, 308 Ga. App. 768, 770 (2011). Only then does the matter of the parties’ intent pass to the jury. Id.

On the chance that the Court identifies a jury issue, McDiapers Defendants submit that the testimony of Dr. Weigle would be helpful in assisting the jury on the question of the parties’ intent by explaining the three possible interpretations of the waiver provision in the promissory note.

The Court disagrees. Georgia law is clear on the role of an expert in the interpretation of a contract:

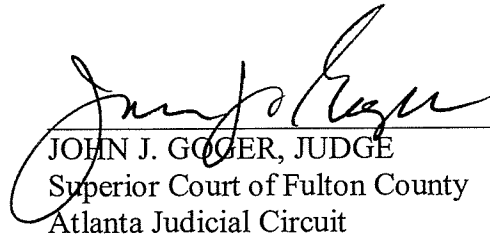
Expert testimony may be admitted to explain technical terms in a contract. Testimony as to what the parties to a contract understood it to mean may also be admissible. However, the personal interpretation of a contractual provision by a stranger to the contract obviously has no probative relevance whatsoever.

Williams Tile & Marble Co. v. Ra-Lin & Assoc., 206 Ga. App. 750, 751 (1992).

The Court finds that Dr. Weigle’s testimony is not appropriate and offers no probative value to any matter at issue. The McDiapers Defendants do not contend that the waiver provision contains technical terms, in which case an expert would be helpful in explaining such terms to a jury. And to the extent that Dr. Weigle seeks to expose any ambiguity in the provision

at issue, the Court finds that the matter is within the exclusive province of the Court and will not be the subject of jury determination. Finally, should there be a jury question, Georgia law makes clear that the question of the parties' intent is not susceptible to the opinion of an expert. The parties, themselves, can testify to their understanding of the terms of their agreement. Moreover, the interpretation of the provision is within the ken of a layman. See Raines v. Maughan, 312 Ga. App. 303, 307 (2011) ("where the path from evidence to conclusion is not shrouded in the mystery of professional skill or knowledge and the conclusion determines the ultimate issues of fact in a case, the jury must make the journey from evidence to conclusion without the aid of expert testimony"). Accordingly, Plaintiff's Motion is **GRANTED**.

SO ORDERED this 18 day of March, 2013.



JOHN J. GOGGER, JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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