IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

THOMAS C. and PAMELA McINTOSH	**PLAINTIFFS**
VERSUS	**1:06-CV-1080-LTS-RHW**
STATE FARM FIRE & CASUALTY COMPANY, FORENSIC ANALYSIS & ENGINEERING CORPORATION, AND E.A. RENFROE & COMPANY, INC.	**DEFENDANTS**

STATE FARM'S MOTION *IN LIMINE* TO EXCLUDE
PLAINTIFFS' UNDESIGNATED EXPERT WITNESS TIM RYLES

State Farm Fire and Casualty Company respectfully submits this motion *in limine* to exclude Plaintiffs' undesignated expert witness, Tim Ryles, pursuant to Federal Rules of Civil Procedure 26 and 37, Local Rule 26.1, and this Court's Case Management Order ("CMO").[1] Plaintiffs have not designated Mr. Ryles as an expert witness or made the requisite Rule 26(a)(2)(B) disclosures regarding Mr. Ryles. Consequently, any evidence from Mr. Ryles must be excluded from trial.[2]

Plaintiffs' untimely designation of Mr. Ryles as an expert witness is woefully deficient. On January 16, 2007, this Court entered the CMO for this proceeding. [Doc. 12]. Under the CMO, Plaintiffs were ordered to designate their experts seventeen months ago, by March 30, 2007, *id.* at ¶ 6(b), and discovery was ordered to be completed by September 4, 2007, *id.* at ¶ 6(d). On September 14, 2007,

[1] In the interests of judicial economy, State Farm respectfully requests that this Court waive the requirement of filing a separate brief inasmuch as all authority and arguments in support of this motion are set forth herein.

[2] This Court has pending before it State Farm's Renewal of its Motion *in Limine* No. 6: to Exclude Evidence of Out-of-State Conduct and its Objections to Plaintiffs' Undisclosed "Evidence" of Out-of-State Conduct [Docs. 1215, 1230], which demonstrates that Mr. Ryles' expert evidence should be excluded because it is inadmissible under Federal Rules of Evidence 401-403, because it is constitutionally inadmissible, and because Mr. Ryles was untimely disclosed. Mr. Ryles' evidence should be excluded for the reasons set forth in that motion, as well as the reasons set forth herein.

the CMO was amended, in relevant part, by resetting the discovery cutoff to November 1, 2007. Plaintiffs did not designate Mr. Ryles as an expert witness in compliance with those deadlines, nor have they ever made the corresponding expert disclosures as required by Fed. R. Civ. P. 26(a)(2)(B) and Local Rule 26.1(A)(2).

In fact, Plaintiffs did not mention Mr. Ryles until May 23, 2008, when he was included on their list of purported evidence of out-of-state conduct. Doc. 1198. Both in their briefing on that subject, and in their portions of the proposed Pre-Trial Order, Plaintiffs make clear that they now intend to offer Mr. Ryles as an expert witness. *See, e.g.*, Doc. 1226 at 4.

Given their failure to designate Mr. Ryles as an expert witness on a timely basis, or in accordance with the requirements of Rule 26(a)(2)(B) or Local Rule 26.1(A)(2), the Court should exclude Mr. Ryles' expert evidence. Rule 26(a)(2)(B), which governs the form and content of expert reports, requires disclosure of all of the witness's opinions and the basis for them, the information considered in forming them, his qualifications and publications, his prior trial or deposition testimony, and his expert fee:

> Unless otherwise stipulated or ordered by the court, this disclosure [the expert designation required by Fed. R. Civ. P. 26(a)(2)(A)] must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case . . . . The report must contain:
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> (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
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> (ii) the data or information considered by the witness in forming them;
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> (iii) any exhibits that will be used to summarize or support them;
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> (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
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> (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
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> (vi) a statement of the compensation to be paid for the study and the testimony in the case.

Fed. R. Civ. P. 26(a)(2)(B). Such information has never been furnished with respect to Mr. Ryles.

Local Rule 26.1(A)(2) provides that failure to provide timely and full expert disclosure allows the expert witness to be stricken:

> *Expert Witnesses*. A party shall, as soon as it is obtained, but in any event ***no later than the time specified in the case management order***, make disclosure as required by Fed.R.Civ.P. 26(a)(2)(A).
>
> . . . .
>
> (b) An attempt to designate an expert ***without providing full disclosure information*** as required by this rule ***will not be considered a timely expert designation*** and may be ***stricken*** upon the proper motion or sua sponte by the court.

N.D. & S.D. Miss. Unif. Local R. 26.1(A)(2) (emphasis added).

Because Plaintiffs failed to timely designate Mr. Ryles as an expert witness or comply with the requirement of Rule 26(a)(2)(B), they are "not allowed to use that information or witness." Fed. R Civ. P. 37(c)(1); *cf.* Local R. 26.1(A)(2). This result is generally "automatic and mandatory." *Salgado ex rel. Salgado v. Gen. Motors Corp.*, 150 F.3d 735, 742 (7th Cir. 1998); *accord Campbell v. Keystone*, 138 F.3d 996, 1000 (5th Cir. 1998).

Courts in the Fifth Circuit apply a four-factor test when considering whether to exclude expert evidence for a party's failure to comply with Rule 26. The four factors are: (1) the explanation, if any, for the party's failure to comply; (2) the importance of the proposed evidence; (3) the potential prejudice to the opposing party of allowing the proposed evidence; and (4) the availability of a continuance to cure such prejudice. *See, e.g., Barrett v. Atl. Richfield Co.*, 95 F.3d 375, 380 (5th Cir. 1996) (affirming district court's striking of expert testimony for failure to comply with scheduling order); *Geiserman v. MacDonald*, 893 F.2d 787, 791-92 (5th Cir. 1990) (same). *See also McLarty v. STD, Inc.*, No. 1:06cv077-D-A, 2007 WL 2579970, at *2-3 (N.D. Miss. Sept. 4, 2007) (applying same four factors for violation of Local Rule 26.1(A)(2)).

In this case, all of the factors weigh heavily in favor of excluding Mr. Ryles from trial. First, Plaintiffs have provided no explanation for the failure to abide by the Federal Rules of Civil Procedure

(or the Local Rules of this Court) and provide the disclosures required by Rule 26(a)(2)(B). Second, Mr. Ryles' testimony is not important because Plaintiffs offer him only to testify regarding irrelevant, unfairly prejudicial, and constitutionally inadmissible evidence of out-of-state conduct. *See* n.2, *supra*; Doc. 1215 at 20-32; Doc. 1230 at 2-4. Third, State Farm has been substantially prejudiced by Plaintiffs' total failure to submit Rule 26 expert disclosures in a timely fashion. For example, State Farm must now prepare for the trial of this matter without the disclosures required by Rule 26, which are designed to avoid forcing a party to go to trial, or depose an expert, with only a "sketchy and vague" understanding of that witness's testimony and opinions. Fed. R. Civ. P. 26 advisory committee's note to 1993 amendments. Indeed, mandatory expert disclosure exists precisely to eliminate prejudice from surprise, as well as to conserve judicial time and resources. *Ciomber v. Cooperative Plus, Inc.*, 527 F.3d 635, 643 (7th Cir. 2008). State Farm would also be prejudiced because at this late date it would need to identify and designate witnesses and other evidence to meet whatever opinions Mr. Ryles purports to offer. Finally, trial has already been postponed once, and a continuance will not cure the prejudice caused by Mr. Ryles' irrelevant, constitutionally inadmissible opinions, *see* n.2, *supra*; Doc. 1215 at 20-32; Doc. 1230 at 2-4.

Moreover, Plaintiffs' attempt to inject Mr. Ryles into the proceedings at this late date violates the Court's CMO, and his expert testimony should be excluded for that non-compliance as well. *See, e.g.*, Local R. 26.1(A)(2). The Fifth Circuit has recognized the importance of compliance with discovery deadlines:

> Regardless of [the untimely party's] intentions, or inattention, which led to the flouting of discovery deadlines, such delays are a particularly abhorrent feature of today's trial practice. They increase the cost of litigation, to the detriment of the parties enmeshed in it; they are one factor causing disrespect for lawyers and the judicial process; and they fuel the increasing resort to means of non-judicial dispute resolution. Adherence to reasonable deadlines is critical to restoring integrity in court proceedings.

Geiserman v. MacDonald, 893 F.2d 787, 792 (5th Cir. 1990). "District judges have the power to control their dockets by refusing to give ineffective litigants a second chance to develop their case." *Reliance*

Ins. Co. v. La. Land & Exploration Co., 110 F.3d 253, 258 (5th Cir. 1997). A scheduling order "is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril." *Gesterner Corp. v. Case Equip. Co.*, 108 F.R.D. 138, 141 (D. Me. 1985). Indeed, as this Court recently noted in denying State Farm's ***unopposed*** motion for leave to file a motion for summary judgment, "the deadline for dispositive motions, November 9, 2007, expired over nine months ago. The pre-trial conference is scheduled for September 8, 2008, and the case is set for trial on the October 6, 2008 calendar. The Court declines to grant leave to file a summary judgment motion less than a month before the scheduled trial." Aug. 27, 2008 Order [Doc. 1289] at 1. A similar result is mandated here.

Nor does the fact that Plaintiffs are now represented by new counsel furnish them with grounds to smuggle in a new expert witness that predecessor counsel did not designate. "There is no principle that each new attorney for a litigant must have an independent opportunity to conduct discovery. Shortcomings in counsel's work come to rest with the party represented. They do not justify extending the litigation, at potentially substantial expense to the adverse party." *Carson v. Bethlehem Steel Corp.*, 82 F.3d 157, 159 (7th Cir. 1996) (citation omitted). Rather, the law instructs that new counsel takes the case the way they find it. "That new counsel is dissatisfied with the state of the case it inherited is not grounds . . . for reopening discovery long after the court-ordered deadlines have passed." *Marcin Eng'g, LLC v. Founders at Grizzly Ranch, LLC*, 219 F.R.D. 516, 521 (D. Colo. 2003); *see also Keystone Mfg. Co. v. Jaccard Corp.*, 2007 WL 4264609, at *2 (W.D.N.Y. Nov. 30, 2007) (rejecting request to reopen discovery because new counsel were retained); *Colletti v. Fagin*, 1999 WL 126461, at *3 (S.D.N.Y. Mar. 10, 1999) (similar).

Accordingly, this Court should exclude the evidence from Plaintiffs' undesignated expert witness Tim Ryles pursuant to Federal Rules of Civil Procedure 26 and 37, Local Rule 26.1(A)(2), and this Court's CMO.

CONCLUSION

For all the foregoing reasons, State Farm respectfully requests that the Court enter an order precluding Plaintiffs from introducing evidence from their undesignated expert witness Tim Ryles.

Dated: September 2, 2008

Respectfully submitted,

/s/ John A. Banahan

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CERTIFICATE OF SERVICE

I, **JOHN A. BANAHAN**, one of the attorneys for the Defendant, **STATE FARM FIRE & CASUALTY COMPANY**, do hereby certify that I have on this date electronically filed the foregoing document with the Clerk of Court using the ECF system which sent notification of such filing to all counsel of record.

DATED, this the 2nd day of September, 2008.

/s/ John A. Banahan
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