

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

RONALD F. PERRY, et al.,)	
)	
Plaintiffs)	
)	
v.)	Civil No. 96-203-P-C
)	
RYDER TRUCK RENTAL, INC., et al.,)	
)	
Defendants)	

**MEMORANDUM DECISION ON PLAINTIFFS' MOTION IN LIMINE TO LIMIT
TESTIMONY OF EXPERT WITNESS RAYMOND HAGGLUND**

Before the court for decision at this time is a motion *in limine* (Docket No. 45) filed by the plaintiffs seeking to limit the testimony of Robert Hagglund, an engineer and accident reconstructionist designated by the defendants as an expert witness. For the reasons that follow, the motion is denied.

The motion papers indicate that the defendants designated Hagglund as an expert in November 1996, that the plaintiffs received Hagglund's written report on January 31, 1997, and that the plaintiffs deposed the expert witness on February 5, 1997. According to the original designation, Hagglund's opinion is that the tractor-trailer accident at issue in this lawsuit was not caused by load-shifting as alleged by the plaintiffs but by "improper speed and driving maneuvers" attributable to plaintiff Ronald F. Perry. Letter of Elizabeth G. Stouder, Esq. to Joseph Bornstein, Esq. dated Nov. 19, 1996, Exh. A to plaintiffs' motion, at 1.

Among the matters to which Hagglund testified at his deposition in February was the "coefficient of friction" applicable to the load alleged by the plaintiff to have shifted. The motion papers do not shed full light on the relevant principles, but it appears that the higher the coefficient

of friction, the less susceptible the load is to shifting. Without having examined the trailer in question, Hagglund's opinion at his deposition was that the applicable coefficient of friction was .58. In contrast, the plaintiffs' engineering expert, Jarlath McEntee, testified at his deposition on March 5, 1997 that the applicable coefficient of friction was .45. Moreover, unlike Hagglund's calculation, McEntee's was based on an actual examination of the trailer involved in the accident.

There are circumstances that account for why, as of McEntee's deposition, he had examined the trailer but Hagglund had not. Defendant Ryder Truck Rental, Inc. had sold the trailer within weeks of the accident in 1991 and its whereabouts were apparently unknown to any of the parties until January 1997. On January 30, 1997, well over a year after Hagglund had conducted his investigation, plaintiffs' counsel advised the defendants that he had located the trailer. It only stands to reason that the plaintiffs' expert would have had the first opportunity to examine this crucial evidence unearthed by the plaintiffs.

Hagglund inspected the trailer himself on April 9, 1997. He found it to be full of debris, but took some photographs. These photographs were provided to the plaintiffs and, on April 24, 1997, the so-called Poland Spring defendants¹ sent the plaintiffs a supplemental expert witness designation indicting that Hagglund would testify that the physical damage to the trailer that he had observed on April 9 was consistent with his earlier determinations. Two days later — the Poland Spring defendants having successfully negotiated with the owner of the trailer to have its contents removed — Hagglund inspected the trailer a second time. Copies of photographs and notes taken

¹ The Poland Spring defendants are The Perrier Group of America, Inc., Poland Spring Corporation and Great Spring Waters of America, Inc. They have appeared jointly in this litigation. The fourth defendant, Ryder Truck Rental, Inc., appearing separately, had indicated that it joined in the initial designation of Hagglund as an expert witness. Ryder has not subsequently taken any positions before the court concerning Hagglund's testimony.

by Hagglund were furnished to the plaintiffs. On April 29, 1997 the Poland Spring defendants sent the plaintiffs a second supplemental designation, containing the following statement:

During the course of his deposition on February 5, 1997, Mr. Hagglund testified that the friction coefficient assigned by Mr. McEntee was incorrect. In order to test his opinion that Mr. McEntee's assignment of value of [sic] to the static coefficient of friction was much too low and to establish what it actually was, Mr. Hagglund utilized pallets and cases of bottled water from Poland Spring in order to precisely establish the coefficient of friction and found it to be in excess of 0.70.

Second Supplemental Designation with Respect to the Anticipated Testimony of Raymond Hagglund, P.E., Exh. D to motion, at 2.

The Poland Spring defendants have agreed to produce Hagglund for a second deposition in Portland during the last week of June.² The case is set for trial in July. Relying on case law arising under Fed. R. Civ. P. 26(e), the plaintiffs move *in limine* for an order excluding from evidence any opinions related to site work or calculations done by Hagglund since his initial deposition in February.

Fed. R. Civ. P. 26(a)(2) obligates a party to make certain disclosures to the other parties to the litigation relative to any expert witnesses the disclosing party intends to call at trial. These disclosures involve the identity of such witnesses, and a written report from each expert including, *inter alia*, a complete statement of all opinions to be expressed and their bases, the data considered by the expert in forming the opinions, and any exhibits the expert intends to use. Fed. R. Civ. P.

² In response to a written indication from the plaintiffs expressing concern that the Poland Spring defendants might not produce Hagglund for a second deposition as promised, I conducted a telephonic conference of the parties on June 20, 1997. At that time, counsel for the Poland Spring defendants indicated they would tender Hagglund for deposition during the last week of June. My decision is premised on the assumption that Hagglund will be so tendered.

26(a)(2)(A) and (B).³ The deadline established for the defendants to make their Rule 26(a)(2) disclosures to the plaintiffs was November 14, 1996; the plaintiffs do not raise any issues relative to the timeliness of the initial disclosures concerning Hagglund. Rule 26 further imposes a duty to supplement expert witness disclosures

if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert⁴

Fed. R. Civ. P. 26(e)(1).

Rule 26(e) should not be read “mechanically, but rather in light of its dual purposes,” which are “narrowing of issues and elimination of surprise.” *Johnson v. H.K. Webster, Inc.*, 775 F.2d 1, 7 (1st Cir. 1985) (internal quotation marks omitted).⁵ The court must “balance fairness to the opposing party with the realities of adversarial litigation.” *Id.* The court must also keep in mind that the duty to supplement is not without limits, otherwise “the actual trial would be merely a recital of

³ Local Rule 26(d) provides that the required disclosures need not be made in the manner and sequence prescribed by Fed. R. Civ. P. 26(a)(2). *See also* Standard Scheduling Order requirement respecting experts (“[Parties] shall designate experts (including treating physicians) and, with respect to each of them, provide a complete statement of all opinions to be expressed and the basis and reasons therefor by [deadline].” *E.g.*, Report of Scheduling Conference and Revised Scheduling Order (Docket No. 8).

⁴ Because Local Rule 26(d) modifies the requirements of Fed. R. Civ. P. 26(a)(2)(B), the duty to supplement, and the substantive requirements for such supplementation, obviously apply in this District to parties with respect to a designated expert concerning whom a statement is required pursuant to the court’s scheduling order.

⁵ Rule 26(e) has been amended since *Johnson* was decided, chiefly to clarify the duty to supplement and to extend it to areas other than expert testimony. *See* Fed. R. Civ. P. 26 Advisory Committee Notes to 1993 Amendment at Subdivision (e).

earlier responses to written interrogatories and deposition questions.” *Id.* The First Circuit has suggested that the soundest basis for excluding evidence under Rule 26(e) is in response to “some evasion or concealment, intentional or not, on the part of the litigant offering the evidence.” *Id.* at 8; *see also Fusco v. General Motors Corp.* 11 F.3d 259, 265 (1st Cir. 1993) (“experts, like lawyers themselves, may increase their efforts as trial approaches, and we do not suggest any general bar to an exhibit created in good faith for the expert after initial discovery”); *Thibeault v. Square D Co.*, 960 F.2d 239, 244 (1st Cir. 1992) (court should carefully examine reason for failure to update discovery seasonably).

Viewing the situation through this prism, it becomes clear that these circumstances do not require the court to prevent Hagglund from testifying about the data he gathered by inspecting the trailer involved in the accident.⁶ As best I am able to ascertain from the motion papers, Hagglund has refined rather than revised his opinion that the applicable coefficient of friction rules out load-shifting as the cause of the accident. The situation is thus similar to that in *Smith v. Massachusetts Inst. of Tech.*, 877 F.2d 1106 (1st Cir. 1989). *Smith* was an age discrimination case in which the defendant’s expert testified about the statistical relationship between age and involuntary terminations by the defendant-employer. *Id.* at 1110. The plaintiff contended that the trial court erred by allowing the expert to testify because the defendant had not furnished the plaintiff with the data used by the expert nor informed the plaintiff that the statistical relationship in question would

⁶ In their reply memorandum, the plaintiffs also suggest that Hagglund plans to testify about a visit he made to the accident scene in April 1997 at which he sought to establish certain correlations between what he observed at the scene and marks he observed on the trailer. To the extent that the visit to the accident scene might be a separate basis for excluding any of Hagglund’s testimony, it is beyond the scope of the original motion *in limine* and I therefore do not consider issues relating to the April site visit.

form the basis of the expert's testimony. *Id.* The First Circuit found no error, noting that "the data about which the plaintiff complains did not result in an abrupt volte-face in the expert's testimony. This is not the situation of a new or alternate theory being offered for the first time at trial." *Id.* at 1111. Rather, the additional data "merely added to the statistical picture and made it more complete." *Id.* at 1111-12.

As the plaintiffs themselves concede, the three decisions of this court cited in the plaintiffs' motion all involve failures to make initial Rule 26(a) disclosures on a timely basis. Nothing even approaching that magnitude has occurred here. Evidence of evasive conduct is entirely lacking. The only conduct that could possibly be construed as dilatory is the delay of more than two months between the date on which the plaintiffs revealed their discovery of the trailer and the date on which Hagglund first inspected this important evidence. In my view, while Hagglund might have done his work with greater dispatch, in the circumstances this delay is not so egregious as to be sanctionably dilatory. Once Hagglund had finished his work at the trailer, the Poland Spring defendants could scarcely have been more prompt in revealing the results.

Although the plaintiffs received the revised information concerning Hagglund's opinions very late in the game, this did not occur so close to trial as to preclude the plaintiffs and their experts from confronting this evidence, particularly given the opportunity to conduct another deposition of Hagglund. The purposes of Rule 26(a) — narrowing of the issues and the elimination of surprise — are not at all ill-served by permitting this expert to testify based on the revised expert designations provided by the Poland Spring defendants.⁷

⁷ The plaintiffs also suggest that a further basis for excluding the challenged testimony is that Ryder has submitted no supplemental disclosures whatsoever. Assuming that Ryder intends
(continued...)

At a hearing I conducted on June 13, 1997 to resolve certain outstanding discovery disputes, the plaintiffs indicated they are in disagreement with the Poland Spring defendants concerning who should bear the cost of Hagglund's second deposition. The plaintiffs take the position that the circumstances of this deposition warrant a departure from Fed. R. Civ. P. 26(b)(4)(C), which provides that, "[u]nless manifest injustice would result," a party seeking to depose an opponent's expert witness must pay a fair portion of the fees and expenses associated with the witnesses' appearance. In my opinion, it would be manifestly unjust to require the plaintiffs to bear this expense here. The plaintiffs should not be punished for their own diligence in locating the trailer. On the date they deposed Hagglund in February, the Poland Spring defendants could have — but apparently did not — advise the plaintiffs that the recent discovery of the trailer might lead to the conducting of further testing by Hagglund, thus possibly making the February deposition premature for a party desiring to learn all of Hagglund's expert views. Absent such a warning, the plaintiffs were entitled to assume they were expending their resources wisely in deposing Hagglund on February 5. For purposes of allocating the cost of redeposing Hagglund, it would be manifestly unjust to permit the Poland Spring defendants to take advantage of having caused the plaintiffs to make such an assumption.

For the foregoing reasons, the motion *in limine* of the plaintiffs is **DENIED** and it is further ordered that the Poland Spring defendants shall bear all of the costs and expenses of Robert Hagglund

⁷(...continued)
somehow to rely on Hagglund's opinion concerning load-shifting (which goes to the plaintiffs' theory of liability as to the Poland Spring defendants), Ryder's failure to sign onto the supplemental disclosures of the Poland Spring defendants is of no import since the purposes of the rule — narrowing of issues and elimination of surprise — have been served.

in connection with his appearance for a second deposition in this case.

Dated this 20th day of June, 1997.

David M. Cohen
United States Magistrate Judge