

IN THE CIRCUIT COURT FOR XYZ COUNTY, TENNESSEE

**CYNTHIA DOE, Individually and as
Surviving Spouse of PHILIP DOE, Deceased,
And TODD DOE and RYAN DOE,
Surviving Children of PHILIP DOE, Deceased,**

Plaintiffs,

**Civil Action No. 1-555-00
JURY DEMANDED**

vs.

**THE HOSPITAL, INC.,
DOUGLAS E. DOCTOR, M.D. and BIG
EMERGENCY PHYSICIANS GROUP, P.C.,**

Defendants.

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SANCTIONS

INTRODUCTION

This brief is submitted on behalf of Cynthia Doe, Individually and as Surviving Spouse of Philip Doe, Deceased, and Todd Doe and Ryan Doe, Surviving Children of Philip Doe, Deceased, Plaintiffs, in support of their Motion for Sanctions. Plaintiffs are seeking an Order from this honorable Court sanctioning defendants Douglas E. Doctor, M.D. and Big Emergency Physicians Group, P.C (hereinafter collectively referred to as “the defendants”) by prohibiting the trial testimony of any expert witnesses called or identified by the defendants. Plaintiffs would show that the defendants (1) have violated the Scheduling Order of this honorable Court entered November 5, 2007 (copy attached hereto as Exhibit A); (2) have failed to provide information regarding their experts as ordered by the Court and required by Tenn. R. Civ. P. 26.02(4)(A)(i); (3) have failed, for over one year, to answer Plaintiffs’ First Set of Interrogatories regarding expert testimony proposed to be offered by the defendants; (4) have failed to supplement or amend their

responses to Plaintiffs' First Set of Interrogatories in violation of Tenn. R. Civ. P. 26.05; and (5) have violated Tenn. R. Civ. P. 26.02(4)(A)(ii) by failing to cooperate in discovery by refusing to respond to repeated requests to schedule the depositions of their experts. Accordingly, Plaintiffs respectfully request that this honorable Court sanction the defendants by entering an Order prohibiting the defendants from presenting any expert testimony at the trial of this case.

FACTS

On November 5, 2007, this Honorable Court entered a Scheduling Order setting forth deadlines the parties were required to meet. These deadlines included identification of expert witnesses and disclosure of the proposed testimony of the experts. Specifically, the Court Ordered:

Plaintiffs shall reveal the names of their expert witnesses expected to testify at trial to opposing counsel no later than January 19, 2008, by delivering that information discoverable under Tennessee Rule of Civil Procedure 26.02(4)(A)(i) without further orders of this Court or the necessity of filing interrogatories.

Defendants shall reveal the names of their expert witnesses expected to testify at trial to opposing counsel no later than February 19, 2008, by delivering that information discoverable under Tennessee Rule of Civil Procedure 26.02(4)(A)(i) without further orders of this Court or the necessity of filing interrogatories.

Exhibit A at ¶¶ 2,3. In full compliance with the Order of the Court, Plaintiffs timely identified their expert witnesses and provided, via supplementation of interrogatory responses, approximately one hundred and four (104) pages of information discoverable pursuant to Tenn. R. Civ. P. 26.02(4)(A)(i). Over sixteen pages of this information dealt solely with disclosures of the opinions of the experts identified. Plaintiffs also willingly made their expert witnesses available for discovery depositions as required by Tenn. R.

Civ. P. 26.02(4)(A)(ii).

In contrast, on February 19, 2008, counsel for the defendants e-mailed Plaintiffs' counsel a list containing the names and addresses of three persons identified as "potential experts." (Copy attached hereto as Exhibit B). Included in the e-mail was defendants' counsel's assurance that the defendants' answers to Plaintiffs' Interrogatories would be "supplemented this week." See Exhibit B. On February 26, 2008, Plaintiffs were served with "Supplemental Responses of Defendants, Douglas E. Doctor, M.D. and Big Emergency Physicians Group, P.C. to First Set of Interrogatories Propounded by Plaintiffs." (Copy attached as Exhibit C). On the same day, Plaintiffs were served with the defendants' initial responses to Plaintiffs' First Set of Interrogatories. The discovery request at issue had been served on the defendants on March 2, 2007.

The defendants' supplemental responses included a response to the following interrogatory:

2. Identify each person whom you expect to call as a witness to offer expert testimony at trial, stating:
 - (a) The name, address, and telephone number, employer, job title of the witness;
 - (b) The field in which the witness is offered as an expert;
 - (c) The subject matter on which the witness is expected to testify;
 - (d) The substance of the facts and opinions to which the witness is expected to testify; and
 - (e) A summary of the grounds for each such opinion.

See Exhibit C. The defendants "supplemented"¹ their response to this expert interrogatory by providing the names and addresses of the same three persons they had provided by e-mail earlier. See id. However, they provided NO information about the subject matter on which the witnesses are expected to testify, NO information about the

¹ The defendants' initial response was: "No decision at this point has been made regarding the retention of an expert witness and the identity of that expert witness. When that decision is made, this response will be supplemented."

substance of the facts and opinions to which the witnesses are expected to testify and NO summary of the grounds for each such opinion. See id. **To date, these defendants have failed to provide any information about the subject matter(s) these witnesses are expected to testify to, any opinions held by these experts, the facts upon which any opinions held by the experts are based or a summary of the grounds for each opinion.**

In a further effort to discover the Rule 26.02(4)(A)(i) information held by these “potential experts,” Plaintiffs’ counsel telephoned defendants’ counsels’ office on February 20, 2008, to obtain dates for their experts’ depositions. Plaintiffs’ counsel was assured that dates would be provided promptly. However, counsel for the defendants did not provide dates for the discovery of their experts as promised. Accordingly, on February 27, 2008, March 5, 2008, March 12, 2008, and March 26, 2008, Plaintiffs’ counsel wrote defense counsel requesting dates for the discovery depositions of their experts. (Copies of said correspondence attached as collective Exhibit D). This correspondence was never answered. **As of today’s date, the defendants have refused to make their experts available for discovery.**

The trial of this case is set to begin on June 19, 2008.

APPLICABLE LAW

The defendants' failure to provide Plaintiffs with the expert information required by Rule 26 and by Order of this Court warrants sanctions. Rule 37.03(1) requires the Court to impose sanctions for failure to supplement interrogatory responses. The Rule states:

A party who without substantial justification fails to supplement or amend responses to discovery requests as required by Rule 26.05 **is not permitted**, unless such failure is harmless, to use as evidence at trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court on motion may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses (including attorneys fees) caused by the failure, these sanctions may include any of the actions authorized under Rule 37.02(A), (B), and (C) and may include informing the jury of the failure to supplement or amend.

Tenn. R. Civ. P. 37.03(1) (emphasis added). The plain language of Rule 37.03(1) makes sanctions for failure to supplement mandatory, not discretionary. The sanctions required by the Rule include that a party “is not permitted ... to use as evidence at trial ... any witness or information” not disclosed in supplementation to interrogatories as required by Rule 26.05. See id. Accordingly, Rule 37.03(1) makes it very clear that a party who fails to supplement expert interrogatories as required by Rule 26.05 does so at its own peril.

Rule 26.05 places an inviolate duty on a party to supplement or amend expert interrogatory responses that are no longer correct. The Rule states that a party is under a duty to seasonably supplement the party's response to an expert interrogatory by supplying “the subject matter on which [each expert] is expected to testify, and the substance of that testimony.” See Tenn. R. Civ. P. 26.05(1). Rule 26.05 also states that a party is under a duty to amend a prior response if the party's prior response is “no longer

true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.” Tenn. R. Civ. P. 26.05(2). Rule 26.05 further states that the duty to supplement “may be imposed by order of the court.” Tenn. R. Civ. P. 26.05(3). Thus, Rule 26.05 demands supplementation of expert interrogatories once a party learns of an expert’s expected testimony.

In the present case, the defendants have violated every provision of Rule 26.05. The defendants have violated Rule 26.05(1) by failing to supplement their response to Plaintiffs’ expert interrogatory with “the subject matter on which [each expert] is expected to testify, and the substance of that testimony.” See Exhibit C. The defendants have violated Rule 26.05(2) by failing to amend their initial response to Plaintiffs’ expert interrogatory with information regarding their experts expected trial testimony. See id. The withholding of information regarding the defendants’ experts’ testimony can only be seen as a “knowing concealment” given that the defendants must have consulted with the three witnesses they have identified. In so doing, the defendants must have learned what the experts’ testimony would be or they would not have been identified. Finally, the defendants have violated Rule 26.05(3) by failing to provide the Rule 26.02(4)(A)(i) information on their experts as ordered by this honorable Court. See id. Accordingly, the defendants should be sanctioned pursuant to Rule 37.03(1) for their failure to supplement. As will be shown below, the appropriate sanction is exclusion of all testimony by the defendants’ proposed expert witnesses.

The first sentence of Rule 37.03(1) makes it clear that the favored sanction is exclusion of evidence. This sanction is appropriate because the interrogatory at issue has been outstanding to the defendants for over one year. During this time, the defendants

have failed to provide Plaintiffs with any information about the proposed testimony of their experts. Furthermore, the defendants have known since November 5, 2007 (the date of the entry of the Scheduling Order), that they were required to provide expert information mandated by Rule 26.02(4)(A)(i). Despite this knowledge, the defendants have failed to provide the necessary court-ordered information. Thus, exclusion of the proposed expert testimony would be the fitting sanction.

In addition, the exclusionary sanction is appropriate because the defendants have willfully withheld the expert information. This willfulness is apparent because the defendants have listed the names and addresses of three expert witness, but have failed to provide any other information requested by the interrogatory or required by Rule 26.02(4)(A)(i). The willfulness is even more apparent when it is considered that the defendants have undoubtedly had discussions with their proposed experts regarding their proposed testimony before they supplemented Plaintiffs' First Set of Interrogatories with names and addresses of these experts. Thus, when providing "supplemental responses" to Plaintiffs' expert interrogatory, the defendants made a conscious decision to provide the names and addresses of their experts. It is unreasonable to believe that the defendants "just forgot" to provide information regarding their experts' expected testimony. This failure to supplement can only be seen as a conscious, purposeful decision. Exclusion of the defendants' expert proof is the most appropriate remedy for their willful failure to supplement.

It cannot be rationally argued that the defendants' failure to supplement is anything other than a ploy to prejudice the Plaintiffs. The defendants' arrogance in failing to comply with Rule 26 and the Scheduling Order of this Court show that they do

not believe that the Court will impose significant sanctions. The defendants' apparent strategy is to either (a) hope that this Honorable Court will allow the defense experts to testify at trial without supplementation, thus depriving the Plaintiffs of a fair opportunity to prepare for the testimony; (b) hope the Court will allow late supplementation which will also deprive the Plaintiffs of a fair opportunity to prepare; or (c) hope the Court will postpone the trial of this case which will benefit the defendants and prejudice the Plaintiffs. This honorable Court should not allow the defendants to avail themselves of this unfairly prejudicial tactic.

Rule 37.03(1) was specifically added to the Rules of Civil Procedure to protect those parties who have been diligent and cooperative from those who have not. In the instant case, Plaintiffs have met every deadline set by the Court and fully disclosed in great detail the Rule 26.02(4)(A)(i) information regarding their experts' testimony. Plaintiffs have also willingly made all of their experts available for discovery upon request. The defendants, on the other hand, have been resistant to discovery at every turn. The Plaintiffs should not be punished for the defendants' willful disobedience by the Court allowing the defendants to present expert testimony that has not been disclosed. Accordingly, the appropriate sanction is that the defendants should not be allowed to present any expert testimony at trial.

Rule 37.03 allows "other appropriate sanctions" in lieu of, or in addition to, the exclusion of evidence at trial. See Tenn. R. Civ. P. 37.03(1). However, the plain language of the Rule and the Advisory Commission Comment to the Rule make it clear that exclusion of evidence is the preferred sanction. The first sentence of the Rule states a party "is not permitted ... to use as evidence at trial ... any witness or information" not

disclosed in supplementation to interrogatories as required by Rule 26.05. See id. Further, the Advisory Commission Comment states: “Rule 37.03(1) expressly provides sanctions for failure to supplement or amend discovery responses. **The usual sanction will be exclusion of evidence at trial.**” Tenn. R. Civ. P. 37.03 Advisory Commission Comment to 2006 Amendment (emphasis added). Therefore, the proper sanction for the defendants’ failure to supplement their responses to Plaintiffs’ expert interrogatory is exclusion of the testimony of the defendants’ expert witnesses at trial.

The only exceptions to sanctions under Rule 37.03(1) are “substantial justification” for the failure to supplement or when the failure is “harmless.” Neither of these exceptions applies to the instant case. In the present case, there is no “substantial justification” for the defendants’ failure to provide the minimum information required by Tenn. R. Civ. P. 26.02(4)(A)(i). The expert interrogatory at issue has been outstanding since March 2, 2007. The defendants have had at least 14 months to contemplate their response to this standard request for discovery. The defendants have obviously discussed this case with three proposed expert witnesses because their names and addresses have been identified. Also, the defendants have known since November 5, 2007, that they were required by Court Order to provide the Rule 26.02(4)(A)(i) information on or before February 19, 2008. However, this information was purposely withheld from Plaintiffs. The failure to supplement with the required information cannot be seen as inadvertence or excusable neglect, but only as an intentional trial strategy. Certainly, the defendants would not have named experts without knowledge of the subject matter on which their proposed experts are expected to testify, their opinions and the facts upon which these opinions are based. To assert otherwise stretches the bounds of reason and belief.

Accordingly, there is no “substantial justification” for the defendants’ failure to provide the information required by Rule 26.02(4)(A)(i) and they should be sanctioned.

Likewise, the defendants should be sanctioned because their failure to provide the required information is not “harmless.” Plaintiffs have been harmed because this matter is set for trial in less than one month and Plaintiffs do not know what defendants’ proposed experts are expected to testify to, the opinions held by the experts or the facts upon which this expert testimony will be based. This honorable Court sought to prevent the defendants’ trial by surprise strategy by requiring them to provide Rule 26.02(4)(A)(i) information on or before February 19, 2008. The purpose of the Court’s Order was to allow Plaintiffs a fair amount of time (4 months) to discover the defense experts’ opinions and prepare for their trial testimony. However, the defendants have ignored the Court’s Order in an attempt to prejudice the Plaintiffs at trial. There is now insufficient time to have the withheld information reviewed by Plaintiffs’ consulting experts, have the defendants’ experts deposed, have the transcripts reviewed by Plaintiffs’ consulting experts and allow Plaintiffs’ counsel to prepare for the defendants’ experts proposed trial testimony. Thus, Plaintiffs have been deprived of a meaningful window in which to discover and prepare for the defense experts’ testimony. Accordingly, the defendants’ failure to provide the Rule 26.02(4)(A)(i) information is not “harmless” and they should be sanctioned.

Furthermore, the defendants should be sanctioned for willfully disobeying the Scheduling Order of this Court. Rule 16.06 states that if a party or party’s attorney fails to obey a scheduling or pretrial order the Court may impose sanctions pursuant to Rule 37.02. See Tenn. R. Civ. P. 16.06. Rule 37.02 provides multiple sanctions for parties

who fail to obey an order requiring them to provide or permit discovery. See Tenn. R. Civ. P. 37.02. In particular, Rule 37.02(B) allows sanctions “prohibiting [a] party from introducing designated matters into evidence.” Id. In the instant case, this honorable Court entered an Order requiring the defendants to provide “that information discoverable under Tennessee Rule of Civil Procedure 26.02(4)(A)(i) without further orders of this Court or the necessity of filing interrogatories.” See Exhibit A. As noted above, the defendants have willfully failed to provide Rule 26(4)(A)(i) information regarding the subject matter on which their proposed experts are expected to testify, their opinions and the facts upon which these opinions are based. Thus, the proper sanction under Rule 37.02(B) is exclusion from evidence of this information. Accordingly, the defendants’ failure to obey this Court’s Order warrants exclusion of the testimony of defendants’ expert witnesses at trial.

Finally, Plaintiffs have been deprived of their right to depose the defense experts by the defendants’ refusal to schedule their experts’ depositions. Rule 26.02(4)(A)(ii) gives Plaintiffs the absolute right to take the depositions of any witnesses expected to testify at trial for the defendants. See Tenn. R. Civ. P. 26.02(4)(A)(ii). Requests to schedule these depositions were made on February 20, 2008, February 27, 2008, March 5, 2008, March 12, 2008, and March 26, 2008. See Exhibit D. However, the defendants have refused to respond to any of these requests. The defendants have thus frustrated every effort Plaintiffs have made to discover the substance of the defense experts’ testimony, their opinions and the facts they rely upon. Sanctions are warranted for the defendants’ refusal to cooperate in discovery. The most appropriate sanction is exclusion of all testimony by the defendants’ proposed expert witnesses.

CONCLUSION

The defendants have violated the scheduling order of this honorable Court, failed to provide the expert information ordered by the Court, required by Tenn. R. Civ. P. 26.02(4)(A)(i) and mandated by Tenn. R. Civ. P. 26.05. Furthermore, the defendants failed, for over one year, to answer Plaintiffs' First Set of Interrogatories regarding expert testimony proposed to be offered by the defendants. They have also refused to respond to repeated requests to schedule the discovery depositions of their experts. The failure of the defendants to cooperate in discovery and obey the Order of this Court is a purposeful strategy designed to prejudice the Plaintiffs at trial. Sanctions are warranted for this willful misbehavior. Accordingly, Plaintiffs respectfully request that this honorable Court enter an Order prohibiting the defendants from presenting any expert testimony at the trial of this case.

