

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

**1704 FARMINGTON, LLC,
1711 FARMINGTON, LLC, and
1685 FARMINGTON, LLC,**

Plaintiffs,

v.

No. 2:08-cv-02171

CITY OF MEMPHIS,

Defendants.

**ORDER GRANTING DEFENDANT’S MOTION TO STRIKE LATE EXPERT
DESIGNATION BY PLAINTIFFS**

Before the Court is Defendant City of Memphis’s Motion to Strike Late Expert Designation by Plaintiffs of Frank Palumbo (“Motion to Strike”). (D.E. #39). The instant motion was referred to United States Magistrate Judge Charmiane G. Claxton for determination. (D.E. #40). For the reasons set forth herein, Defendant’s Motion to Strike is GRANTED.

I. Introduction

This case arises from allegations that City of Memphis has not maintained a drainage ditch adjacent to Plaintiffs’ property. On March 17, 2008, Plaintiffs filed its Complaint to Abate a Common Law Nuisance and for Damages. On June 18, 2008, the Court entered a Scheduling Order setting deadlines of December 19, 2008 for Plaintiffs’ Rule 26 Expert Information and February 19, 2009 for Depositions of Plaintiffs’ Expert Witnesses, the latter of which was subsequently extended to May 4, 2009.

On May 29, 2009, Plaintiffs filed a Motion for Modification of the Scheduling Order to Permit Plaintiffs to Designate an Additional Expert Witness (“Motion for Modification”). Plaintiffs requested that the Court extend the date “within which Plaintiffs shall be permitted to identify Frank P. Palumbo, P.E. . . . as an expert witness to testify for Plaintiffs.” Mot. for Modification at 1. Plaintiffs stated that they would comply with Rule 26 of the Federal Rules of Civil Procedure and submit “all that is required under said rule, including but not limited to *an expert report prepared by Mr. Palumbo.*” *Id.* (emphasis added). Defendant did not oppose the extension requested in the motion but reserved its right to object to Palumbo as an expert witness at a later date. On June 1, 2009, the District Court granted Plaintiffs’ Motion for Modification and permitted Plaintiffs five days from the entry of the order to designate Palumbo as an expert.

On June 5, 2009, counsel for City of Memphis received a letter stating that Plaintiffs were formally designating Palumbo as an expert witness. City of Memphis asserts that Plaintiffs’ counsel stated that he was “in the process of receiving a written report and the corresponding information required by Rule 26(a)(2) from Mr. Palumbo and would forward same as soon as it was available.” Mot. to Strike at 2.

On June 8, 2009, counsel for City of Memphis sent counsel for Plaintiffs a letter via electronic mail and United States mail requesting the Rule 26 expert report prior to Palumbo’s deposition, which was scheduled for June 9, 2009. Counsel for City of Memphis did not receive any expert report prior to Palumbo’s deposition, and they objected on the record at the deposition to Palumbo’s designation as an expert on that basis. Mot. to Strike, Ex. A, at 2. On June 26, 2009, City of Memphis received Plaintiffs’ “Supplemental Expert Disclosures.” See Resp. in Opposition to Mot. to Strike, Ex. B. In the Supplemental Expert Disclosures, Plaintiffs asserted as follows:

The City of Memphis has already been provided a copy of Mr. Palumbo's expert report through his deposition, which was taken on June 9, 2009 in the instant case. Mr. Palumbo's deposition is the entirety of his opinion with regard to the instant case. Any data or other information considered by Mr. Palumbo is discussed in his deposition and either was made an exhibit hereto or has been entered as an exhibit in a prior deposition. Mr. Palumbo also does not anticipate any additional exhibits or documentation to support/summarize his position other than what is stated in his expert report, including the discussed exhibits.

Id. at 2.

After receiving Plaintiffs' Supplemental Expert Disclosures, City of Memphis filed the instant motion asserting that Plaintiffs did not timely designate Palumbo as an expert, that Plaintiffs have failed to comply with the requirements of Rule 26 of the Federal Rules of Civil Procedure, and that the late designation of Palumbo would create undue prejudice. On July 20, Plaintiffs filed an Affidavit of Frank Palumbo stating that he provided "all the information and support" for his opinion, that "there is nothing more or other I can say by way of reporting what my opinion is," and that, "[i]f I had been asked to write a report on a piece of paper other than the paper on which the transcript is written, I would have written nothing more or other than what appears in the transcript." Aff. of Frank Palumbo ¶¶ 3, 6-7. On July 23, Plaintiffs filed their Response in Opposition to City of Memphis's Motion to Strike asserting that they designated Palumbo as an expert within the time permitted by the Court's June 1, 2009 extension, that they complied with Rule 26's requirement of a written expert report by providing a copy of Palumbo's deposition transcript, and that City of Memphis would not experience prejudice due to Palumbo's designation as an expert.

II. Analysis

The sole issue presented in the instant motion is whether the Court should strike Plaintiffs' designation of Palumbo as an expert witness. Rule 26(a)(2) of the Federal Rules of Civil Procedure provides the framework for disclosure of expert testimony. Rule 26(a)(2) requires that "a party must

disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.” Fed. R. Civ. P. 26(a)(2)(A). Further, Rule 26(a)(2) requires that, “[u]nless otherwise stipulated or ordered by the court, *this disclosure 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 or one whose duties as the party’s employee regularly involve giving expert testimony.*” Fed. R. Civ. P. 26(a)(2)(B).

In the instant case, Plaintiffs did not provide any disclosure that was accompanied by a written report within five days of the District Court’s order granting Plaintiffs’ Motion for Modification. Thus, Plaintiffs failed to comply with the provisions of Rule 26 regarding the proper disclosure of expert testimony. Although Plaintiffs filed an Affidavit by Palumbo asserting that his deposition testimony was essentially the same in substance as any report could have been, the Court does not find this argument persuasive for two reasons.

First, the transcript of Palumbo’s deposition testimony was not provided within five days of the District Court’s entry of its Order Granting Plaintiffs’ Motion for Modification. Because Rule 26(a)(2)(B) specifically states that a disclosure of expert testimony “must be accompanied by a written report,” the June 5, 2009 letter sent to counsel for City of Memphis is insufficient under Rule 26 for the Court to consider that Plaintiffs’ made a proper and timely disclosure of Palumbo as an expert.

Additionally, even if the transcript were provided within five days of the entry of the Court’s June 5, 2009 Order, the transcript could not be considered as a proper expert report because it was neither prepared nor signed by the expert. Thus, Plaintiffs’ assertion that the deposition transcript is essentially the same as the written expert report is mistaken. The Federal Rules of Civil Procedure

do not provide broad discretion for parties to create their own procedures for disclosure of expert testimony even if they believe that their methods of disclosing their expert are equally effective. Therefore, because Plaintiffs' failed to comply with Rule 26's clear dictates, the Court finds that Palumbo must be stricken as an expert witness. Accordingly, in accordance with Rule 26(a)(2)(A), Palumbo shall not be permitted to present evidence under Federal Rule of Evidence 702, 703, or 705 as a witness at trial.

III. Conclusion

For the reasons set forth herein, Defendant City of Memphis's Motion to Strike Late Designation of Expert Witness by Plaintiffs is hereby GRANTED.

IT IS SO ORDERED this 31st day of July, 2009.

s/ Charmiane G. Claxton
CHARMIANE G. CLAXTON
UNITED STATES MAGISTRATE JUDGE