

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

JONATHON PORTER, ET AL.,)
)
 Plaintiff,)
)
vs.) No. 01-2970-MaV
)
HAMILTON BEACH/PROCTOR-SILEX,)
INC., ET AL.,)
)
 Defendant.)

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S
MOTION TO STRIKE DEPOSITION ERRATA AND SUPPLEMENTAL REPORT
OF PLAINTIFFS' EXPERT JAMES W. DONNELLY

Before the court in this product liability lawsuit is defendant Hamilton Beach/Proctor-Silex, Inc.'s ("HBPS") motion to strike, filed June 27, 2003. HBPS seeks to strike two items from the deposition errata sheet of Porters' expert, James W. Donnelly ("Donnelly"), and also to strike Donnelly's supplementary report. The motion was referred to the United States Magistrate Judge for determination. For the reasons that follow, the motion is granted in part and denied in part.

BACKGROUND

On October 28, 2001, the plaintiffs Jonathon Porter, a minor, and his mother, Jeanette Porter, filed this cause alleging that Jonathon Porter sustained burn injuries as a result of a faulty

iron manufactured by HBPS. On February 13, 2002, the court entered an initial scheduling order establishing February 28, 2003 as the deadline for completing discovery and setting this case for trial on July 14, 2003. Under the initial scheduling order, the Porters were to designate expert witnesses and serve Rule 26(a)(2)(B) reports by June 3, 2002, and to make those experts available for deposition by July 1, 2002. On May 30, 2002, the Porters sought additional time to obtain expert testimony and received a discovery deadline extension with no objection for HBPS. Under the extensions, the Porters were to serve their expert reports by July 3, 2002, and make their experts available for deposition by August 1, 2002.

On July 3, 2002, the Porters identified expert Michael Macannelli. Macannelli concluded that the fire most likely would not have occurred had the iron been equipped with an automatic shutdown safety switch and an on/off light indicator. However, Macannelli was barred from testifying in this action due to his refusal to cooperate with both the parties and the court.

On February 6, 2003, the court granted the Porters' motion to modify the scheduling order to extend their expert disclosure deadline in order to designate a replacement expert. The Porter's new expert disclosure deadline was fixed at March 20, 2003, a new discovery deadline of June 20, 2003 was established, and trial was

reset to September 30, 2003. On March 17, 2003, the Porters disclosed Donnelly as their new expert. Donnelly opined that the subject iron lacked a thermal fuse and/or overtemperature limiting device and that had the subject iron been equipped with these safeguards, the design would be acceptable and the subject iron would not have caused the fire at issue. (Donnelly Depo. at 110-111)

HBPS served its expert report of Dr. Charles Manning on May 20, 2003. Manning stated that the subject iron did in fact have a thermal fuse and that Donnelly's conclusions were incorrect.

The Porters then served Donnelly's deposition errata sheet, dated June 5, 2003, and his supplemental report, dated June 20, 2003, on HBPS. HBPS now moves to strike the following two items listed on Donnelly's errata sheet: (1) at page 143, line 19, Donnelly changed "thermal fuse" to "thermal fuse that would not prevent the soleplate from exceeding 500 F" and, (2) at page 165, line 22, Donnelly changed "backup thermal fuse" to "back-up thermal fuse that would prevent the soleplate from exceeding 500 F." HBPS also moves to strike Donnelly's supplementary report, which, in most respects, parallels the changes to the errata sheet.

ANALYSIS

As grounds for its motion, HBPS alleges that the Porters violated the Federal Rules of Civil Procedure, case law and the

court's scheduling order by requesting Donnelly to alter his sworn deposition testimony via the errata sheet and to serve an unauthorized supplemental report after his initial report, deposition, and service of HBPS's expert reports were filed. The Porters counter that Donnelly simply clarified in the errata sheet two deposition answers at issue and that Donnelly's supplemental report is valid and was submitted in response to HBPS's untimely discovery responses.

At the outset, the court must address the fact that HBPS has not identified any procedural basis for its motion. The court assumes HBPS is proceeding under Federal Rules of Civil Procedure 12(f) "Motion to Strike." Rule 12(f) authorizes a court to strike certain specified types of matters "from any pleading":

Upon motion made by a party before responding to a pleading, or if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at anytime, the court may order stricken from a pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

FED. R. CIV. P. 12(f). Deposition errata sheets and supplementary reports, however, are not among the documents identified as "pleadings" in Rule 7(a), which only enumerates pleadings as "a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a

cross-claim; a third-party complaint ... and a third-party answer." FED. R. CIV. P. 7(a).

Thus, a motion to strike is not the proper procedural device to object to an errata sheet and supplementary report. See *Dawson v. City of Kent*, 682 F. Supp. 920, 922 (N.D. Ohio 1988) (finding a motion to strike relates only to pleadings and is inapplicable to other filings); *Lombard v. MCI Telecom. Corp.*, 12 F. Supp. 2d 621, 625 (N.D. Ohio 1988) (refusing to strike exhibits to summary judgment motion, holding that Rule 12(f) provides no basis for doing so). It is enough for the movant to make its objections known in a reply memorandum if one is permitted, in open court if a hearing is held, or otherwise. See *Lombard*, 12 F. Supp. 2d at 625 (noting that a court may, at its discretion, disregard inadmissible evidence).

HBPS's motion could be considered a motion for sanctions under Rule 37(c)(1) for failure to disclose. Rule 37(c)(1) applies to disclosure of expert testimony. It provides:

A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a 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 and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these

sanctions may include any of the actions authorized under Rule 37(b)(2)(A), (B), and (C) and may include informing the jury of the failure to make the disclosure.

FED. R. CIV. P. 37(c)(1). In the alternative, HBPS's motion is in the nature of a motion in limine to exclude evidence at trial. The court will treat the motion as a motion in limine.

A. The Errata Sheet

HBPS avers that Donnelly's errata sheet to his deposition transcript is untimely and that, in addition, he did not recite any reasons for changing his testimony. Rule 30(e) governs changes to deposition transcripts. It states:

If requested by the deponent or a party before completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them. The officer shall indicate in the certificate prescribed by subdivision (f)(1) whether any review was requested and, if so, shall append any changes made by the deponent during the period allowed.

FED. R. CIV. P. 30(e).

Rule 30(e) is not necessarily limited only to corrections of errors made in transcribing the deponent's testimony. Compare *Greenway v. Int'l Paper Co.*, 144 F.R.D. 322, 325 (W.D. La. 1992) (disallowing any changes to depositions other than transcription errors) with *Innovative Mktg. & Tech., L.L.C. v. Norm Thompson Outfitters, Inc.*, 171 F.R.D. 203, 205 (W.D. Tex. 1997) (rejecting

defendants' argument that Rule 30(e) only allows "the correction of stenographer/court reporter typographical errors," calling "[s]uch a reading of the rule ... too narrow"). On the other hand, Rule 30(e) does not "allow one to alter what was said under oath. If that were the case, one could merely answer the questions with no thought at all [sic] then return home and plan artful responses. Depositions differ from interrogatories in that regard. A deposition is not a take home examination." *Greenway*, 144 F.R.D. at 325.

Rule 30(e) requires a deponent to state reasons for changing deposition testimony. See *Tingley Sys., Inc. v. CSC Consulting, Inc.*, 152 F. Supp. 2d 95, 120 (D. Mass. 2001) (holding Rule 30(e) is not satisfied unless the deponent supplies a reason for the changes contained in the errata sheet); *Holland v. Cedar Creek Mining, Inc.*, 198 F.R.D. 651, 653 (S.D. W.Va. 2001) (finding that "courts generally construe Rule 30(e) broadly to permit any changes," but granting defendant's motion to exclude changes because deponent failed to supply reason for changes to deposition testimony); *Duff v. Lobdell-Emery Mfg. Co.*, 926 F. Supp. 799, 803-804 (N.D. Ill. 1996) (striking deposition because no explanation was provided for changes). While the aforementioned decisions are not binding on the court, they are persuasive.

Rule 30(e) does not provide an exception to the 30-day time limit for changes in testimony. A failure to comply with the 30-day time limit set forth in Rule 30(e) may result in an errata sheet, or portions therein, being stricken from trial. *Davidson Hotel Co. v. St. Paul Fire & Marine Ins. Co.*, 136 F. Supp. 2d 901, 914 (W.D. Tenn. 2001).

In this case, Donnelly was forwarded a copy of his deposition on April 24, 2003. (Hedgepeth Aff. ¶ 2.) Donnelly returned his deposition errata sheet and signature page on June 6, 2003. (Hedgepeth Aff. ¶ 3.) Donnelly failed to review and return his changes within the thirty days allowed under Rule 30(e). In addition, Donnelly provided no reasons for the changes. Donnelly initially indicated at his deposition that the subject fire would not have started had the iron been equipped with a thermal fuse. After receiving HBPS's expert testimony, Donnelly changed his opinion expressed during his deposition without explanation.

The Porters attempt to justify Donnelly's noncompliance with Rule 30(e) by shifting fault to HBPS. The Porters argue that the requirements of Rule 30(e) should be disregarded by the court, for to hold otherwise would reward HBPS for lackluster discovery efforts. The court finds, however, that both parties have been less than diligent with their discovery responses but that this is no justification for Donnelly's failure to comply with the Federal

Rules of Civil Procedure. It is undisputed that the corrections by Donnelly were not made within the time limits set forth in Rule 30(e). It is also undisputed that Donnelly did not provide any reasons for changing his testimony. Based on the foregoing, HBPS's motion as to the Donnelly errata sheet is granted. The changes in Donnelly's testimony at page 143, line 19 and page 165, line 22, will not be admissible at trial.

B. The Supplementary Expert Report

HBPS seeks to exclude Donnelly's supplemental report as untimely. The supplementary report of Donnelly was served after the Porters' expert disclosures deadline. Rule 26(a)(2)(C) directs the timing of expert disclosures:

These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

FED. R. CIV. P. 26(a)(2)(C).

HBPS contends these timing and disclosure provisions never come into play if the court has ordered a discovery plan pursuant to Rules 16 and 26. HBPS founds its argument on two primary cases - *IBM v. Fasco Ind., Inc.*, 1995 WL 115421 (N.D. Cal. 1995)

(unreported) and *Akeva, L.L.C. v. Mizuno Corp.*, 212 F.R.D. 306 (M.D.N.C. 2002).

In *IBM v. Fasco Ind., Inc.*, 1995 WL 115421 (N.D. Cal. 1995) (unreported), both parties designated discovery experts pursuant to the court's scheduling order. The defendant then designated six rebuttal experts after the time had passed for disclosure. Addressing the issue of whether the court-ordered schedule trumped provisions of Rule 26(a)(2)(C), the court held that the supplementary disclosures must be excluded because, when "the court crafted its own schedule for expert disclosures, the mechanism set forth in Rule 26 was nullified, including the provision for supplementary disclosures." *Id.* at *2.

HBPS also relies on *Akeva, L.L.C. v. Mizuno Corp.*, 212 F.R.D. 306 (M.D.N.C. 2002), in which each party had submitted one expert report in compliance with the court's schedule. After discovering that the defendants' expert testimony was both different from and detrimental to their cause, the plaintiffs identified a second expert whose conclusions would serve as supplementary rebuttal testimony. *Id.* As with *IBM*, the court concluded that "the discovery plan did not permit a third tier of expert disclosure as plaintiff contends . . . [W]hen there is a discovery plan covering expert disclosures, the plan controls and not the explicit provisions of Rule 26(a)(2)(C)." *Id.* at 310.

Unlike *IBM* and *Akeva*, the instant case, however, does not deal with an additional or new rebuttal expert, but instead deals with the initial expert's supplementation of his own conclusions. The Porters explain that Donnelly is not rebutting HBPS's expert testimony, but is merely clarifying his own testimony.

Another provision of the Federal Rules of Civil Procedure - Rule 26(e) - controls in this instance. Rule 26(e) states:

(e) Supplementation of Disclosures and Responses. A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:

(1) A party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) 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 expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 26(a)(3) are due.

FED. R. CIV. P. 26(e). Rule 26(e) requires supplementation of disclosures when a "party learns that in some material respect, the information disclosed [under subdivision (a)] is incomplete or

incorrect." *Id.* It requires disclosure if ordered by the court or in certain enumerated circumstances. With respect to an expert, the duty to supplement extends both to information contained in the report and to information provided through a deposition of the expert. The supplementation of expert testimony must be made by the time disclosures are due under Rule 26(a)(3).

Here, trial is scheduled for September 30, 2003. The Rule 26(a)(3) disclosures are due thirty days before trial, that is, by August 31, 2003. Donnelly's supplemental report was filed on June 20, 2003, well in advance of the Rule 26(a)(3) deadline. As such, the supplemental report of Donnelly is timely.

Moreover, HBPS was untimely in some of its discovery responses. It appears that some of HBPS's untimely disclosures consisted of engineering plans and specifications for the subject iron. This information was no doubt pertinent to Donnelly's investigation. Rule 26(e) does not prohibit an expert from supplementing his disclosures based on information thereafter received from the opposing party.

Additionally, the absence of an expert supplementary disclosure deadline does not preclude supplementation by an expert. As the advisory notes to Rule 26 observes, it may "be useful for the scheduling order to specify the time or times when the supplementation should be made." FED. R. CIV. P. 26, Adv. Comm.

Note to 1993 Amends. If a court fails to designate an expert supplementation deadline, then Rule 26(e) controls and the supplemental reports must be made by the Rule 26(c) deadline.

Based on the foregoing, HBPS motion as to Donnelly's supplementary report is denied, and the Donnelly supplementary report is admissible at trial. HBPS will not be prejudiced by the admission of the supplemental report. HBPS will have an opportunity at trial to cross-examine Donnelly about the discrepancies between the two reports.

Because Donnelly's supplementary report substantially changes his prior opinion, the court will allow HBPS to depose Donnelly a second time. HBPS will have no more than thirty days from the date of service of this order to complete the deposition. The Porters are instructed to pay HBPS all reasonable expenses, including attorney fees, that are caused by any additional questioning of Donnelly.

CONCLUSION

In conclusion, HBPS's motion is granted in part and denied in part. The court grants HBPS's motion to exclude from trial the two items from Donnelly's errata sheet. The court denies HBPS's motion to exclude from trial Donnelly's supplementary report. The court grants HBPS thirty days from the date of this order to depose Donnelly a second time, and the Porters are instructed to pay

HBPS's reasonable costs and attorney fees associated with the second deposition of Donnelly. The parties are reminded that future noncompliance with the Federal Rules may be grounds for sanctions.

IT IS SO ORDERED this 28th day of July, 2003.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE