

IN THE CIRCUIT COURT OF RANKIN COUNTY, MISSISSIPPI

CITY OF BRANDON

PLAINTIFF

VS.

CIVIL ACTION NO. 61CI1:18-cv-00142-ssr

GOLD COAST COMMODITIES, INC;
ROBERT DOUGLAS; THOMAS
DOUGLAS; AND JOHNS DOES 1-5

DEFENDANTS

**City of Brandon's Memorandum in Support of
Motion to Strike Supplemental Expert Report of Scott McDonald**

Plaintiff City of Brandon ("City") files this Memorandum in Support of its motion to strike the supplemental expert report of Scott McDonald [Doc. # 208-7] and states in support thereof:

Introduction

Despite having 109 days between receiving the supplemental expert report of Nathan Husman on February 4 and the end of the reopened discovery period on May 24, Defendants did not produce their supplemental expert report of Scott McDonald until attaching it as an exhibit to their *Daubert* motion against Mr. Husman on June 23. Mr. McDonald's supplemental report relies in part on a "Manhole Inspection Report" dated to 2018 which Defendants also did not produce, either during the original discovery period ending October 2, 2020 [Doc. # 158] or the reopened discovery period. Because of Defendants' failure to produce the supplemental McDonald report within the prescribed discovery period, exacerbated by its reliance on a 2018 document not previously produced, the report is untimely and should be stricken.

Factual Background

On February 4, 2021, the undersigned counsel sent a letter to counsel for Defendants

explaining that the City had recently removed a stretch of damaged pipe from just downstream of Gold Coast Commodities. Exhibit “A.” Enclosed with the letter were several documents serving as supplemental discovery responses, which counsel for the City acknowledged was required to be provided in sufficient time for all parties to prepare for trial regardless of whether a discovery deadline has passed. These documents included a series of photos of the pipes in question, as well as a supplemental expert report from Nathan Husman, P.E. Exhibit “B.” The letter also informed Defendants that the City had “preserved the lengths of pipes removed in December and we have retained samples in our office. Of course, we will accommodate counsel and/or experts representing Defendants to inspect them in person.” Exhibit “A.”

In response, counsel for Defendants sent an email on February 10, 2021, attaching a draft motion to reopen discovery and a proposed agreed order granting the motion. Exhibit “C.” Counsel for the City, of course, did not object to reopening discovery to allow Defendants to evaluate the discovery responses provided with counsel’s February 4 letter. The final version of the Agreed Third Amended Scheduling Order (“Order”) was entered on February 23, 2021. [Doc. # 189.] The Order reopened discovery for 90 days beginning on the date of entry, meaning the reopened discovery period ended on May 24, 2021. *Id.* Defendants never sought to make arrangements to view the removed sections of pipe. Defendants did not serve any supplemental expert report, or seek an extension of time to do so, by the May 24 deadline for reopened discovery.

The Order went on to set a separate deadline of 120 days for filing of all additional dispositive motions, responses to dispositive motions currently pending, and *Daubert* challenges. *Id.* That placed the deadline for such motions on June 23, 2021. On that date, Defendants filed a *Daubert* motion challenging Mr. Husman’s testimony with respect to the recently-removed PVC

pipes and his February 4 supplemental report. [Doc. # 207 - 208.] As an exhibit to that motion, Defendants attached a supplemental report from their retained expert, Scott McDonald. [Doc. # 208-7.] Mr. McDonald's report – filed four and a half months after the City produced Mr. Husman's supplemental report, 33 days after Mr. Husman's second deposition, and 30 days after the end of the reopened discovery period – purports to refute key points in Mr. Husman's supplemental report.

In doing so, it relies heavily on a document attached to it as an appendix, titled “Manhole Inspection Report,” based on a site visit conducted by Mr. McDonald's colleagues in October 2018. [Doc. # 208-7 at 36-48]. While Defendants made the City aware Defendants intended to have their experts conduct an evaluation of the City's sewer system in October 2018, Defendants had never produced a written report reflecting the findings of this “Manhole Inspection” until its inclusion with the supplemental McDonald report. In its first set of discovery requests (Exhibit “D”), the City requested “all documents you may introduce at trial” in Request for Production No. 14. The City also requested, in Request for Production No. 17, “all documents which you contend support any affirmative defense asserted by you in this action.” *Id.* The Manhole Inspection Report is clearly responsive to one or both of these requests. Nevertheless, Defendants failed to provide it during the Court's prescribed discovery period ending October 2, 2020. Worse, presumably knowing Mr. McDonald would rely on it in forming the opinions in his supplemental report, Defendants did not provide the document during the 2021 reopened discovery period either.

Because the supplemental McDonald report was filed out of time, a deficiency further exacerbated by its reliance on information not previously produced, the report should be stricken.

Discussion

A. The supplemental report of Scott McDonald was untimely and should be stricken.

Mississippi's trial courts are afforded substantial discretion in managing discovery. *Bowie v. Montfort Jones Mem'l Hosp.*, 861 So. 2d 1037, 1042 (Miss. 2003). "Our trial judges also have a right to expect compliance with their orders, and when parties and/or attorneys fail to adhere to the provisions of these orders, they should be prepared to do so at their own peril." *Id.* In *Bowie*, the plaintiffs failed to designate their expert witness until not only their expert deadline had passed, but the overall discovery deadline had passed as well. *Id.* at 1042-43. The Supreme Court affirmed the trial court's decision not to grant a retroactive extension of time to file the expert report. *Id.* at 1043.

In another Mississippi case, the plaintiff filed an expert report as part of a response to a motion for summary judgment. *Buchanan v. Ameristar Casino Vicksburg, Inc.*, 957 So. 2d 969, 972 (Miss. 2007). The trial court granted the defendant's motion to strike the expert report as untimely, given that the court's discovery deadline had passed. *Id.* Citing *Bowie*, the supreme court first noted that alleged discovery violations are to be addressed on a case by case basis depending on the particular circumstances, and the particular timeline of discovery submissions. *Id.* at 972-73. In *Buchanan*, the trial court had granted plaintiff leave to amend her complaint to add a new defendant, Ameristar-Las Vegas, under a veil-piercing/alter-ego theory. *Id.* at 973. "Importantly, this order also re-opened discovery and provided that Buchanan had *sixty days* from the date of Ameristar-Las Vegas's answer to conduct discovery to support her position, and thereafter, Ameristar-Las Vegas had thirty days, if warranted, to submit a motion to dismiss." *Id.* (emphasis in original). The defendant asked in discovery requests during the reopened discovery period for any expert reports; the plaintiff provided none. *Id.* at 973-74. Only in response to the

defendant's motion for summary judgment did the plaintiff attach an expert report. *Id.* at 974. Because "Buchanan did not timely file Buchanan's expert report from [her expert] within the sixty-day discovery deadline order," the Supreme Court affirmed the striking of the report. *Id.* at 975.

Defendants' late-filed supplemental expert report bears obvious similarities to the report that was stricken in *Buchanan*. Like *Buchanan*, Defendants did not provide an expert report during the reopened discovery period. This despite having the entirety of the 90-day period in which to evaluate and respond to Mr. Husman's supplemental report, which Defendants had in hand for 19 days *before* the Agreed Third Amended Scheduling Order was entered. Indeed, Defendants had time to prepare for and take a second deposition of Mr. Husman based on his supplemental report, which they did on May 21, 2021. Many of the questions posed at this second deposition indicate clearly that counsel had consulted with Mr. McDonald in preparing for it, given their correspondence to points made in the supplemental McDonald report. Exhibit "E," excerpts of second Husman deposition. Yet, as in *Buchanan*, Defendants chose not to produce Mr. McDonald's supplemental report until 30 days after the close of discovery, on the deadline for *Daubert* motions. And in one respect, striking the expert report is even more appropriate here than in *Buchanan*: the reopened discovery period was more generous in this case, as it was for a period of 90 days rather than 60.

After agreeing to a 90-day reopening of discovery based on the newly-provided information on February 4, the City had a right to expect Defendants would abide by the Court's Order. The Order ended discovery 90 days after its entry, yet Defendants chose not to provide their supplemental expert report until 30 days after the end of reopened discovery. The City asked Defendants, in its Interrogatory No. 21, to identify all experts whom they may call to

testify at trial including the “subject matter upon which the expert is expected to testify.” Exhibit “D,” Gold Coast Responses to City’s First Set of Discovery Requests. The City asked in Request for Production No. 13 for a “full, detailed subject-matter report from each and every expert you may call as a witness at the trial of this matter.” *Id.* Mr. McDonald’s supplemental report is clearly responsive to both of these discovery requests, as well as the City’s general Request No. 14 seeking “all documents and things you intend to introduce as evidence at the trial of this matter.” *Id.*

Defendants, of course, had a duty under M.R.C.P. 26(f) to timely supplement their responses to these discovery requests. Providing Mr. McDonald’s report 30 days after reopened discovery ended, and 139 days after Defendants received Mr. McDonald’s supplemental report, cannot in any sense be deemed “timely.” *See Bowie*, 861 So. 2d at 1042; *Buchanan*, 957 So. 2d at 973. Nor can the inclusion of the 2018 Manhole Inspection Report as an appendix, after not having produced it during either the original or the reopened discovery period. As in *Bowie* and *Buchanan*, Defendants’ failure to abide by the Court’s discovery deadline should be remedied by striking Mr. McDonald’s supplemental report, and the opinions contained therein, from the record.

i. The particular circumstances of the supplemental McDonald report further support striking it.

As the Mississippi Supreme Court noted in *Buchanan*, the particular remedy for a discovery violation depends on the specific context of the case. 957 So. 2d at 973. Here, Defendants waited until the deadline to file a *Daubert* motion under the Agreed Third Amended Scheduling Order – 30 days after the reopened discovery period ended – to provide Mr. McDonald’s supplemental report. This was 139 days after Defendants first received Mr. Husman’s supplemental report. Defendants attached a 2018 document on which Mr. McDonald

relied, which was responsive to numerous discovery requests yet had not been produced either during the original discovery period ending in October 2020 or during the reopened discovery period.

By comparison, the original Agreed Amended Scheduling Order [Doc. # 126] provided the City's expert reports were due January 24, 2020 and Defendants' were due February 28, 2020. That is, the Court's usual practice is to allow roughly 30 days for defendants to evaluate and respond to plaintiffs' expert reports with their own. Defendants certainly had the ability to provide a responsive supplemental report within the 90-day reopened discovery period, which did not begin until Defendants had Mr. Husman's supplemental report in hand for 19 days. Indeed, Defendants prepared for and took a second deposition of Mr. Husman based on his supplemental report on May 21, within the discovery period. They provided Mr. McDonald's original report on June 15, 2020, roughly two months after Mr. Husman's report was filed¹ and three months *before* Defendants took Mr. Husman's deposition. [Doc. # 140.] Defendants, then, were perfectly capable of providing a responsive expert report and taking Mr. Husman's deposition within the time allotted. Adding the inclusion of a not-previously-produced 2018 document forming part of the basis of Mr. McDonald's new opinions, the specific circumstances here clearly favor striking the supplemental report.

B. Persuasive federal authority further supports striking the supplemental report.

Mississippi's federal courts have addressed similar issues and come to the same conclusion: an expert report filed after the close of discovery without justification should be

¹ By agreement, the City provided an amended expert designation including Mr. Husman's report on May 3, 2020, after the City's original expert in the field withdrew due to health concerns. [Doc. # 137.] Defendants filed their expert designation on May 4, 2020 [Doc. # 138], but due to delays caused by the coronavirus pandemic did not file Mr. McDonald's full report at that time.

stricken as untimely. In one Southern District of Mississippi case, the plaintiff submitted a supplemental expert report 20 days after the close of discovery because the expert had finally inspected the equipment at issue. *Elliot v. Amadas Industries, Inc.*, 796 F.Supp.2d 796, 801 (S.D. Miss. 2011). The plaintiffs argued the expert's supplemental report was "not untimely insofar as it does not contradict his preliminary report, withdraw any portion of the preliminary report, or include any opinion not previously disclosed in the preliminary report." *Id.* The court disagreed, concluding that if the new report was "comprised of new, previously undisclosed opinions," it was due on the plaintiff's expert deadline, but in any event even if it was "truly a supplement, it was due by the discovery deadline." *Id.* at 802.

Applying a four-part test set forth in *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., Inc.*, 73 F.3d 546, 572 (5th Cir. 1996), the trial court concluded it should strike the untimely disclosures. *Elliot*, 796 F.Supp.2d at 805. First, the importance of the supplemental report to the plaintiffs' case was deemed substantial, but that "merely underscores the need for Plaintiffs to have complied with the court's deadlines or at least informed the judge in advance if good faith compliance was not possible." *Id.* at 803, quoting *Geiserman v. McDonald*, 893 F.2d 787, 791 (5th Cir. 1990). Here, Mr. McDonald's supplemental report addresses only a small portion of the total amount of City sewer pipe which was damaged by Defendants. But to the extent it is important to Defendants' arguments regarding that stretch of pipe, Defendants should have produced Mr. McDonald's report within the 109 days between receiving Mr. Husman's supplemental report and the end of reopened discovery. Defendants also should have produced the 2018 Manhole Inspection Report, on which the supplemental McDonald report relies, before the end of discovery in October 2020. The reopened discovery period provided an opportunity to rectify that failure, which Defendants declined to do.

Second, the court found the opposing party was prejudiced by the late filing of the report. *Id.* at 804. There, the finding of prejudice was based on delay in preparing for trial. *Id.* Here, prejudice arises in a number of ways. Defendants used Mr. McDonald's report as the basis for a *Daubert* motion they filed against Mr. Husman *simultaneously* with the filing of the supplemental McDonald report. Had they complied with the Court's scheduling Order, the City would have been aware of these challenges to Mr. Husman's opinion in advance of the *Daubert* motion deadline and would have had the opportunity to consider further supplementation of his report if appropriate. Filing the supplemental McDonald report on the *Daubert* deadline also had the obvious effect of depriving the City of an opportunity to consider a possible *Daubert* challenge of their own to Mr. McDonald's new opinions. Finally, had Defendants timely provided the 2018 Manhole Inspection Report on which Mr. McDonald relies, Mr. Husman would have had access to the information contained therein in forming his own opinions.

The third factor is whether such prejudice could be cured by a continuance. *Id.* The court in *Elliot* addresses this possibility: "While a continuance may cure the above-cited prejudice, it would also result in additional delay, increase the expense incurred by all parties to this lawsuit, and require the expenditure of further Court resources." *Id.*, citing *Hamburger v. State Farm Mut. Auto. Ins. Co.*, 361 F.3d 875, 883 (5th Cir. 2004). This case was filed over three years ago, on July 10, 2018. Discovery has already been reopened, by agreement, to address additional evidence discovered after the end of the original discovery period. Defendants' failure to comply with the Court's deadlines, despite having plenty of time to do so, should not result in yet another delay.

Finally, the fourth factor to consider is "the explanation, if any, for the party's failure to comply with the discovery order." *Id.* at 803, citing *Sierra Club*, 73 F.3d at 572. As in *Elliot*, this

factor also favors striking the supplemental report. Defendants provided no indication they intended to produce a supplemental report from Mr. McDonald to address Mr. Husman's supplemental report. They had 109 days from the time they received Mr. Husman's supplemental report until the end of reopened discovery. The key phrase in evaluating this factor is "if any;" Defendants have no explanation for their failure to provide the supplemental McDonald report during the reopened discovery period or for their failure to provide the 2018 Manhole Inspection Report during the original discovery period.

These factors, of course, are persuasive and not binding authority in this Court. They are presented simply as one framework for evaluating whether Defendants' supplemental report should properly be stricken. Mississippi's federal courts have consistently applied them to similar situations and, as in *Elliot*, determined late-filed supplemental reports should be stricken. *See, e.g., Bailey v. Stanley Access Techs., Inc.*, No. 3:14-CV-72-SA-JMV, 2015 WL 6828921 (N.D. Miss. Nov. 6, 2015) (striking late-filed supplemental expert report due to lack of substantial justification for missing discovery deadline and lack of request to continue or reopen discovery); *Clark v. Lard Oil Co., Inc.*, No. 2:18-CV-109-KS-MTP, 2019 WL 3953963 (S.D. Miss. Aug. 21, 2019) (partially granting motion to strike because, whether characterized as new or supplemental, expert report is untimely if filed after the discovery deadline).

Conclusion

For the reasons stated herein, the supplemental expert report of Scott McDonald [Doc. # 208-7] should be stricken and Mr. McDonald should be prohibited from offering testimony on any of the opinions set forth therein.

Respectfully submitted, this the 16th day of July, 2021.

CITY OF BRANDON

By: /s/ W. Abram Orlansky

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Certificate of Service

I hereby certify that I this day electronically filed the foregoing with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

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This the 16th day of July, 2021.

/s/ W. Abram Orlansky
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