

UNPUBLISHED

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION**

TERRY DUNAWAY,

Plaintiff,

vs.

McCOLLISTER & COMPANY,

Defendant.

HANSEN TRANSFER, L.L.C.
and GREAT WEST CASUALTY
COMPANY,

Intervenors.

No. C07-3081-MWB

ORDER

On January 12, 2009, the defendant filed a motion to exclude the plaintiff's expert witness Michael Downey from testifying at trial. Doc. No. 41. The plaintiff resisted the motion on January 19, 2009. Doc. No. 43. The motion came on for telephonic hearing on January 21, 2009. Richard F. Hitz and Christopher P. Welch appeared for the plaintiff. Mark Allen Schultheis appeared for the defendant. Scott J. Beattie appeared for the intervenors. The matter now is fully submitted.

This case originally was filed in Iowa state court, but was removed to this court, based on diversity of citizenship, on November 29, 2007. A scheduling order was entered in the case on March 19, 2008, Doc No. 16, establishing a deadline of July 18, 2008, for the plaintiff to serve his expert disclosures. On July 17, 2008, the plaintiff served a supplemental answer to the defendant's interrogatory number 8 (a standard "expert witness" interrogatory), stating the following:

Plaintiff has retained [Michael Downey, a safety expert,] to provide expert testimony. Mr. Downey is expected to provide testimony at trial regarding his opinion of the safety of Defendant's ladder which was used by Plaintiff at the time of his fall. Mr. Downey is expected to provide testimony as to the standard of work site safety expected of company owners and worksite supervisors when providing workers means of accessing elevated work platforms. Mr. Downey is expected to provide testimony regarding deviations from the standard of worksite safety and OSHA violations involved with the Defendants use of an unsafe ladder on their property.

Doc. No. 43-3, p. 5. Although the plaintiff provided the defendant with this summary information, he failed to comply with the disclosure requirements of Federal Rule of Civil Procedure 26(a)(2)(B), until December 30, 2008, when he attached a copy of a report from Mr. Downey to his resistance to the defendant's motion for summary judgment.¹ *See* Doc. No. 38, pp. 14-15. The defendant now has moved to exclude Mr. Downey from testifying as an expert witness at trial.

The plaintiff does not dispute the fact that he failed to make a timely expert witness disclosure for Mr. Downey pursuant to the court's scheduling order. Federal Rule of Civil Procedure 37(c)(1) provides, "If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." The plaintiff makes no claim that his failure to make timely expert disclosures was "substantially justified,"² but he argues it was

¹The report, which is dated November 24, 2008, appears to contain the opinions of the expert and the information relied on by the expert, but the report appears not to satisfy the requirements of Federal Rule of Civil Procedure 26(a)(2)(B)(iii), (iv), (v), or (vi).

²The plaintiff's lawyer explained his failure by pointing out that he filed this case in state court, but it was removed to federal court by the defendant. He explained that he was not familiar with procedures in federal court, but he immediately acknowledged that this was not a legitimate excuse for his failure to comply with the court's orders. The court appreciates his candor.

“harmless.” It is the plaintiff’s burden to establish that his failure was harmless. *Transamerica Life Ins. Co. v. Lincoln Nat’l Life Ins. Co.*, 2008 WL 5265029 at *6 (N.D. Iowa, Dec. 18, 2008) (“the burden should have been placed on the proponent of the late-disclosed evidence or information”).

In *United States v. Hawley*, 562 F. Supp. 2d 1017, 1030 (N.D. Iowa 2008), the court “start[ed] with the premise that a district court may exclude from evidence at trial any matter which was not properly disclosed in compliance with the Court’s pretrial order.” (quoting *Life Plus Int’l v. Brown*, 317 F.3d 799, 803 (8th Cir. 2003), in turn quoting *Dabney v. Montgomery Ward & Co.*, 692 F.2d 49, 51 (8th Cir. 1982) (internal quotations omitted)). The court explained further:

However, when a party fails to make a timely disclosure of evidence, for example, by failing to provide information or identify a witness in compliance with Rule 26(a) or (e) of the Federal Rules of Civil Procedure, “the district court has wide discretion to fashion a remedy or sanction as appropriate for the particular circumstances of the case.” *Wegener v. Johnson*, 527 F.3d 687, 691-92 (8th Cir. 2008). As the Eighth Circuit Court of Appeals just recently explained,

The district court may exclude the information or testimony as a self-executing sanction unless the party's failure to comply is substantially justified or harmless. Fed. R. Civ. P. 37(c)(1). When fashioning a remedy, the district court should consider, *inter alia*, the reason for noncompliance, the surprise and prejudice to the opposing party, the extent to which allowing the information or testimony would disrupt the order and efficiency of the trial, and the importance of the information or testimony. *Sellers v. Mineta*, 350 F.3d 706, 711-12 (8th Cir. 2003); *see also Marti v. City of Maplewood*, 57 F.3d 680, 683 (8th Cir. 1995) (setting forth a variety of possibly relevant factors).

Wegener, [527 F.3d] at 691-92. The court has noted, however, “that the district court's discretion narrows as the severity of the sanction or remedy it elects increases.” *Id.* at 692-93.

Hawley, 562 F. Supp. 2d at 1029-30. In *Hawley*, the court concluded that the resisting party had not been unfairly surprised by any of the purportedly belated supplementation of the plaintiff's discovery responses. *Id.* at 1030.

In the present case, the court finds the plaintiff has failed to show that the late-disclosure of his expert witness was harmless. The defendant has prepared and filed a motion for summary judgment based, in part, on the plaintiff's not having an expert witness on causation. The plaintiff has resisted the motion relying, in part, on a report from a causation expert. The defendant has not had time to depose the expert or to find its own expert to respond to the contentions of the plaintiff's expert. The time for the defendant to designate its own causation expert has passed, as has the discovery deadline. In light of these factors, it is clear the late disclosure was not harmless.

The remaining question is what remedy is appropriate. The court may order the exclusion of this witness at trial pursuant to Federal Rule of Civil Procedure 37(c)(1), but the court has other options under the Rule, as well. The court “may order payment of the reasonable expenses, including attorney's fees, caused by the failure,” “inform the jury of the party's failure,” or “impose other appropriate sanctions[.]” *Id.*

Significant to the court's consideration of this matter is the knowledge that the trial of this case, currently scheduled for March 2, 2009, will be continued to a later date. Bearing this fact in mind, the court orders as follows:

1. The motion to exclude Mr. Downey's testimony at trial is **denied**.
2. The plaintiff is ordered to make full and complete expert disclosures as required by Federal Rule of Civil Procedure 26(a)(2)(B) by **February 18, 2009**.

3. The plaintiff must produce Mr. Downey for deposition, at the defendant's convenience, **by March 4, 2009.**

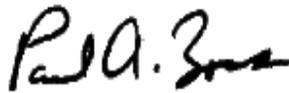
4. The plaintiff must pay the deposition costs, including Mr. Downey's fees for appearing at the deposition.

5. The defendant may designate a rebuttal expert, if desired, **by March 25, 2009.**

6. The defendant may supplement its motion for summary judgment, if desired, to respond to the plaintiff's contentions that are based on Mr. Downey's expert opinions, **by April 1, 2009.**

IT IS SO ORDERED.

DATED this 4th day of February, 2009.



PAUL A. ZOSS
CHIEF MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT