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MONTANA ELEVENTH JUDICIAL DISTRICT, FLATHEAD COUNTY

ROB QUIST, and BONNI QUIST, wife, Plaintiffs v. ROCH R. BOYER, M.D., Defendant.	Cause No. DV-94-526A **PLAINTIFFS' CROSS-MOTION TO EXCLUDE EXPERTS AND REPLY RE: DEFENDANT'S DISCOVERY MOTION**

I. MOTION

Plaintiffs Rob and Bonni Quist move the Court to exclude Defendant's music expert witnesses upon the grounds and for the reasons that they have been untimely disclosed, and that the Defendant has failed to provide adequate Rule 26(b)(4) disclosures.

Plaintiffs also respond to Defendant's discovery motions. Plaintiffs should not be required to answer Defendant's Second Interrogatories and Requests for Production for three reasons. First, such discovery requests are untimely according to this Court's Scheduling Order. Second, the requests violate Rule 33 M.R.Civ.P. concerning the length and number of discovery requests. Third, such information requested is unduly burdensome, immaterial to the issues, protected by attorney work product, or has already been provided.

II. BRIEF IN SUPPORT RE: EXPERTS

A. DEFENDANT HAS UNTIMELY IDENTIFIED MUSIC EXPERTS AND HAS FAILED TO PROVIDE ADEQUATE 26(b)(4) DISCLOSURES

On January 23, 1996, Defendant notified the Plaintiffs that previously identified music experts would be replaced by James Harris and Steve Dahl. These experts should be stricken because the Defendant failed to identify these experts on a timely basis as provided by this Court's Scheduling Order. Experts Harris and Dahl should also be excluded because Defendant failed to provide an expert witness disclosure which meets the requirements of Rule 26(b)(4) M.R.Civ.P.

This Court issued its Scheduling Order on February 6, 1995, a copy of which is attached as Exhibit 1. In that Order, this Court required the parties to exchange expert witness lists, together with information described in Rule 26(b)(4) on or before October 25, 1995. The discovery cut-off was December 27, 1995. The defendant did not move the Court for leave to extend the expert witness deadline. On November 6, 1995, the Defendant identified expert witnesses, including music experts, Yelich, Farrell, and Tilley. (See Exhibit 2.) On January 22, 1996, Defendant produced another expert witness disclosure. (See Exhibit 3.) Defendant does not argue it failed to comply with this Court's Scheduling Order.

The Plaintiffs provided their expert witness disclosure, a copy of which is attached as Exhibit 4.

Presumably, before either Counsel lists expert witnesses, relevant information has been sent to the expert, the expert has discussed the facts with counsel, and relevant opinions are obtained. As can be seen by the original disclosure, dated November 6, 1995, it is obvious that Counsel for the Defendant did nothing prior to writing the expert disclosure. Other than identifying the names and locations of these witnesses, there is little or no compliance with Rule 26(b)(4). This is clearly unfairly prejudicial to the Plaintiffs' ability to prepare for trial.

Plaintiffs now learn that these experts were not contacted to discuss this case, ostensibly were not provided information, and, more importantly, such experts did not render <u>any opinions</u> which were supposed to be disclosed to the Plaintiffs on October 25, 1995. Rather, Defendant notes that a "Seattle law firm" supposedly contacted these individuals to determine that they would serve as experts. While Defendant's Seattle Counsel may not have done their job in determining whether these individuals were qualified and would serve as experts, the Plaintiffs should not now be punished for the Defendants not preparing for trial in accordance with the rules or this Court's Scheduling Order.

On January 23, 1996, the Plaintiffs received another expert witness disclosure naming James Harris and Steve Dahl as experts in the music industry. (See Exhibit 3.) Not only did the Defendant miss this Court's requirement that experts be listed and their opinions exchanged before October 25, 1995 (moved to

November 6, 1995 by agreement), but such disclosure is beyond the discovery cut-off set by this Court for December 27, 1995.

The Defendant should not be allowed to replace three previously identified expert witnesses simply because the experts were not contacted, provided information, or had favorable opinions to give to the Defendant. Counsel had ample opportunity to telephone these experts to discuss their role before listing them as experts. Since discovery is closed and the expert witness deadline has passed, this Court should not allow James Harris and Steven Dahl to serve as experts.

As a practical matter, Plaintiffs' Counsel undertook much work to independently research the backgrounds of Defendant's previously identified experts, Yelich, Farrell, and Tilley. Apparently now, however, since Defendant will not call them, all that effort is wasted. Instead, Plaintiffs' Counsel is now required, should this Court allow defendant to do so, to take the time and effort to begin the background check on two new experts located in the Nashville area. It is unfair to the Plaintiffs at this late date to have to respond to a totally new set of experts, especially when these experts apparently were not even contacted, or willing to give any opinions concerning Rob Quist prior to the time the disclosures were made in the first place. It is no wonder, that when comparing Plaintiffs' Rule 26(b)(4) disclosure with the Defendant's, it was impossible for the Defendants to comply with the Rule concerning subject matters, opinions, and basis of opinions. Even now, the Defendant has not

even provided a copy of the new expert resumes or CV's.

Exclusion of expert testimony is an appropriate remedy when experts have not been timely disclosed as required by the District Court's scheduling order and plaintiff's discovery. See, Miranti v. Orms, 253 Mont. 231, 833 P.2d 164, 166 (1992); Montana Rail Link v. Byard, 260 Mont. 331, 860 P.2d 121, 127-129 (1993).

Since the disclosure produced by the Defendant clearly fails to comply with Court's Scheduling Order, Plaintiffs' discovery requests, and the Rules of Civil Procedure concerning discovery, the Plaintiffs respectfully request the Court to exclude the Defendant from naming wholly new experts for whom a full disclosure has still not been made.

B. DEFENDANT'S DISCOVERY REQUESTS ARE UNTIMELY AND VIOLATE COURT RULES

The Defendant has sent to the Plaintiff Rob Quist over 190 interrogatories. It has also submitted over 13 requests for production.

Rule 33(a) of the Montana Rules of Civil Procedure provides in pertinent part:

> . . . Unless otherwise ordered or stipulated, no party may serve on any other party more than 50 interrogatories in the aggregate. Each subpart shall be counted as a separate interrogatory. . .

A copy of the Second Discovery Requests sent by the Defendant and answered by Plaintiff Rob Quist is attached as Exhibit 5. There are approximately 30 separate interrogatory

questions asked, including sub-parts.[1] The Defendant previously submitted over 160 separate interrogatory requests in its first discovery requests. (See Exhibit 6.) Plaintiffs provided discoverable information when answering the requests. The Defendant now seeks to ask such minute and detailed discovery interrogatories that it makes it very difficult for the Plaintiffs to respond. For example, Request for Production No. 2 states:

> REQUEST FOR PRODUCTION NO. 2: For your touring and performance schedule for each of the years from 1984 through 1992 please produce records showing the following:
>
> (a) Each concert, performance or other engagements for which you received compensation for each of those years stating the date, place, length of performance and the person who employed you for the performance.
>
> (b) State the gross amount of money received for the performance, itemize the expenses for that performance and show how the net income was distributed to you and to any other people.

It is impossible for Plaintiffs to know exactly how many performances were made clear back to 1984, the income, who booked it, the length of the performance, and the expenses for the individual performance. The Plaintiffs simply do not have detailed records that go that far back. It is not only impossible, but to try to reconstruct it, other than through tax returns, would be overly burdensome.

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[1] Many Requests for Production are really interrogatories disguised as production requests.

The Plaintiffs have informally been cooperating with the Defendant in providing requested financial information. Plaintiffs have already provided Plaintiffs' tax returns, income and loss statements for the years 1988 to 1994, and other financial data relative to concert performances, merchandizing and CD sales. Additional financial information for 1995 has been prepared. Moreover, Plaintiffs have provided the Defendant with a comprehensive economic loss report prepared by Joe Kasperick, which outlines some of Plaintiffs' financial losses.

Clearly, Defendant's nearly 200 separate interrogatories exceed the number allowed in the Montana Rules. As such, the Plaintiffs are under no obligation to answer the same.

The second, and equally important reason to deny Defendant's Second Discovery Requests, is because they are untimely. This Court's Scheduling Order stated the following:

> Prior to December 27, 1995: discovery completed. "The term completed means that the requests for production, interrogatories, and requests for admission shall have been filed so that the required responses are due on or before this date."

Defendant admits that its discovery requests are untimely. The Plaintiffs did not receive these requests until December 5, 1995. With 30 days to answer, the requests are clearly beyond the Court's Order. As such, the Defendant again ignored this Court's Scheduling Order and did not timely ask for such information.

It is not that Plaintiffs' Counsel does not wish to provide meaningful information to the Defendant for settlement purposes

or trial. Nonetheless, the minute information requested in the discovery requests, has for the most part been provided to the Defendant in the form of tax returns, deposition testimony, income and loss statements, and other financial information given. However, neither the Plaintiffs nor their Counsel have the time or resources to try to answer requests which are clearly irrelevant and immaterial to this action. Defendant has failed to tell the Court what particular discovery it now needs given Plaintiffs' cooperation.

Defendant contends that it did not know that Plaintiffs' losses were related to the music industry. This is a misstatement. The Defendant has known from the outset that Plaintiff Rob Quist's only employment was as a musician. He has been hospitalized over six times with medical problems relating to the negligence of Dr. Boyer. He has had to undergo numerous surgeries. Defendant has been told by Plaintiff himself how this affected his earnings and his music career. It is ironic that the Plaintiffs are supposed to be totally familiar with medical liability issues, but the Defendant is able to claim surprise and difficulty in evaluating the country western music industry. If Plaintiffs are able to marshall the evidence for expert witness disclosures, etc., on the issue of medical issues, the Defendant is in no position to complain he cannot do the same thing relating to the impact this negligence has had on Rob Quist's musical career.

As Defense Counsel states, the Parties have been able to work out informal agreements which accommodate the very busy professional and personal life of Defense Counsel and the Parties' medical and damage experts. This is not to say that the Plaintiffs waived the right to object to discovery matters that counsel did not agree upon. Plaintiffs informed Defendant's Counsel that they would object to substituting experts at this late date and taking depositions in Nashville on February 7 and 8 without adequate notice or opportunity to investigate Defendant's new experts.

C. RULE 26(b) DISCLOSURES

Finally, Plaintiffs ask this Court to compare the Expert Witness Disclosure Statements the Plaintiffs provided to those of the Defendant. There is no reason why the Defendant cannot be as detailed in its disclosures as the Plaintiffs. The Plaintiffs will object to presenting any expert witness whose opinion are not properly disclosed in accordance with the Rules of Civil Procedure and this Court's Order.

Defendant's argument that it must respond to the Plaintiffs' witness disclosure is incredulous. Given the fact that the alleged negligence of the Defendant has been clearly stated in discovery responses to the Defendant as of May 31, 1995, there can be no excuse that the Defendant should be allowed to file additional Rule 26(b) disclosures, list new witnesses, or present witnesses at trial who have not been properly identified.

III. CONCLUSION

The Plaintiffs respectfully request the Court to strike the Defendant's newly disclosed experts Harris and Dahl. The Plaintiffs further request this Court to deny Defendant's Motion to Compel Discovery that was untimely filed and in violation of Rule 33(a) of M.R.Civ.P. and deny Defendant's additional request to amend the Rule 26(b)(4) statements.

Both Parties believe that it is of paramount importance that the trial date in this matter not be continued beyond the May 13, 1996 trial date. Witnesses from all across the country are planning to attend. The Court should enforce its Scheduling Order and not allow additional discovery or experts unless agreed upon by the Parties.

RESPECTFULLY SUBMITTED this 30th day of January, 1996.

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