

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ALINA BOYDEN and
SHANNON ANDREWS,

Plaintiffs,

v.

Case No. 17-CV-0264

STATE OF WISCONSIN DEPARTMENT
OF EMPLOYEE TRUST FUNDS, et al.,

Defendants.

**STATE DEFENDANTS' REPLY IN SUPPORT OF RULE 37 MOTION
TO STRIKE PLAINTIFFS' SUPPLEMENTAL EXPERT WITNESS
REPORTS OF DRS. BUDGE AND SCHECHTER**

INTRODUCTION¹

It is elementary that parties “must make [expert] disclosures at the times and in the sequence that the court orders.” Fed. R. Civ. P. 26(a)(2)(D). This Court thus established an orderly process for expert discovery that Plaintiffs ignored. Rather than follow that process, which allowed Plaintiffs only one set of rebuttal reports before summary judgment, they submitted two extra sets along with their summary judgment papers. This places State Defendants at a distinct disadvantage, since they adhered to this Court’s order and submitted only one set of reports, before summary judgment.

¹ This reply brief addresses both of State Defendants’ motions to strike (Dkt. 124, 138), since the same issues arise in both motions and since Plaintiffs only filed a single opposition to both. (Dkt. 139:1 n.1.)

Plaintiffs first try to justify these improper tactics by arguing that their extra two rounds of rebuttals responded to Dr. Lawrence Mayer's deposition testimony. That is partly true, but it simply renders those reports untimely rebuttals, not true "supplemental" reports. Plaintiffs argue next that the reports relate to their original ones, but supplemental reports cannot be used to belatedly expand opinions that should have been fully disclosed from the start. Otherwise, what is to stop either side from disclosing serial "supplemental" reports up to the eve of trial? Last, Plaintiffs say that their tardy disclosures do not prejudice State Defendants. Not so. Plaintiffs seek to obtain summary judgment using expert disclosures that State Defendants have had no opportunity to rebut.² State Defendants' ability to depose Plaintiffs' experts and cross-examine them at trial means little, if Plaintiffs obtain summary judgment on the basis of their "supplemental" expert disclosures. Indeed, Plaintiffs contend that "[t]he parties' motions for summary judgment should be decided based on the merits rather than technicalities related to the form" of their supplemental reports. (Dkt. 139:4.)

² Plaintiffs misleadingly note that State Defendants have already filed a supplemental declaration by Dr. Mayer in support of their summary judgment reply. (Dkt. 139:1 n.2) That document simply noted that Dr. Mayer only had time to conduct a preliminary review of Plaintiffs' supplemental reports but would submit a more complete response, given leave from this Court. (Dkt. 129.)

Given Plaintiffs' disregard of this Court's scheduling order, their so-called "supplemental" reports should be stricken. Otherwise, State Defendants respectfully request an opportunity to respond fully to those tardy reports.

ARGUMENT

I. Plaintiffs fail to show that their untimely sur-rebuttal reports are proper "supplements" under Rule 26(e).

Plaintiffs' opposition rests on the faulty premise that they have an inherent right to submit "supplemental" reports responding to deposition testimony they chose to elicit from State Defendants' expert, without seeking leave from this Court. That premise lacks support from either this Court's scheduling order or Federal Rule of Civil Procedure 26. Plaintiffs cite no authority from either source that guarantees them the right to submit written sur-rebuttals to adverse deposition testimony. To the contrary, Judge Crabb has observed that "a supplemental report is not an opportunity to rebut issues raised in defendant's rebuttal expert report." *Gen. Elec. Co. v. SonoSite, Inc.*, 641 F. Supp. 2d 793, 800 (W.D. Wis. 2009).

Plaintiffs misplace their reliance on Rule 26(a)(2)(D)(ii). (Dkt. 139:5–6.) That provision sets a default timeline for expert disclosures that only applies "[a]bsent a stipulation or a court order." Fed. R. Civ. P. 26(a)(2)(D). But Plaintiffs' supposed compliance with these default deadlines is irrelevant,

since a court order governed expert disclosure deadlines. *See Hassebrock v. Bernhoft*, 815 F.3d 334, 336 (7th Cir. 2016) (“The disclosure deadline specified in Rule 26(a)(2)(D) is just a default deadline; the court’s scheduling order controls.”). The scheduling order here clearly states that “Plaintiffs’ rebuttal disclosures, if any, [are] due May 31, 2018.” (Dkt. 61; 62.) Plaintiffs missed this deadline by filing supplemental reports on June 26 and July 9.

Likewise, Plaintiffs’ purported compliance with this Court’s deadline for supplementation does not help them (Dkt. 139:6), since these sur-rebuttal reports are not true “supplements” under Rule 26, as explained in State Defendants’ opening motion (Dkt. 124:6–8).

Nor do any cases Plaintiffs cite support their position. (Dkt. 139:4–5.) In *Ball v. Versar, Inc.*, 454 F. Supp. 2d 783, 798 n.9 (S.D. Ind. 2006), the challenged expert report was submitted *before* the expert report deadline, unlike here, in which Plaintiffs submitted two sets of sur-rebuttal reports *after* the expert deadline. Moreover, the case confronted “the absence of a controlling order,” but here a scheduling order governed expert discovery and set a deadline for rebuttal reports, which Plaintiffs have ignored. Likewise, in *Uncommon, LLC v. Spigen, Inc.*, 305 F. Supp. 3d 825, 844 (N.D. Ill. 2018), the supplemental report was filed “before the initial close of expert discovery” and the court “extended the close of expert discovery another two and a half months, . . . largely to give Plaintiff time to address the supplementary

report.” That is exactly the remedy State Defendants request here for Plaintiffs’ untimely filing, if those filings are not stricken. As for *Biomet Orthopedics, Inc. v. Tact Med. Instruments, Inc.*, No. 01-CV-895, 2004 WL 5499504, at *2 (N.D. Ind. Apr. 7, 2004), the parties had stipulated that the challenged expert could submit a supplemental report 14 days before his deposition, which he did—and so the opposing party’s “claim of surprise when it had always expected a supplemental report from [the challenged expert] [was] unpersuasive.” Here, State Defendants did not stipulate that Plaintiffs’ experts could submit two rounds of sur-rebuttal reports after the deadline for expert reports and in the midst of summary judgment briefing.³

Understanding that they have disregarded the expert disclosure rules, Plaintiffs contend that there is “no sense to the notion” that they cannot submit sur-rebuttal reports responding to Dr. Mayer’s adverse deposition testimony. (Dkt. 139:6.) But that is not an argument; it simply assumes that Plaintiffs have an inherent right to do so. Again, Plaintiffs’ own litigation tactics created their problem. Plaintiffs chose to depose Dr. Mayer after their expert rebuttal deadline, and Plaintiffs chose which questions to ask. Of course Dr. Mayer offered testimony that elaborated on his written opinions—

³ *Builders Ass’n. of Greater Chicago v. City of Chicago*, No. 96-C-1122, 2003 WL 1786489, at *9 (N.D. Ill. Apr. 2, 2003) provides no guidance, as it contains no analysis of Rule 26, no mention of a governing scheduling order, and no indication whether the challenged expert report was timely.

Plaintiffs asked him questions regarding those opinions. As for their tit-for-tat suggestion that State Defendants should also be precluded from relying on Dr. Mayer's testimony, Plaintiffs offer no authority precluding State Defendants from citing deposition testimony that Plaintiffs themselves chose to elicit.

Plaintiffs now effectively ask this Court to extract them from a dilemma of their own making. Having chosen to elicit unhelpful deposition testimony *after* the deadline for rebuttal expert disclosures, Plaintiffs wanted to respond to that testimony but knew that the time for rebuttal reports had expired. They could have avoided that problem in two ways: First, by deposing Dr. Mayer before the rebuttal deadline; or second, by seeking leave from this Court to submit sur-rebuttals. Instead, they chose a third option—submit untimely reports without this Court's leave. That choice upended the orderly scheduling imposed by this Court and should not be excused simply due to Plaintiffs' apparent regret over their litigation tactics.

II. Plaintiffs' "supplemental" reports do relate to their original reports, but not closely enough to properly be considered "supplemental" under Rule 26.

Plaintiffs next argue that Dr. Budge's and Dr. Schechter's "supplemental" opinions are permissible because they fall "within the scope" of their original reports. (Dkt. 139:8–14.) That rule cannot be correct, as it would permit parties to ignore expert disclosure deadlines and file

“supplemental” reports up until trial with only the barest connection to opening reports. Courts do not apply Rule 26 so broadly. (Dkt. 124:7–8 (citing cases).⁴) Rather, Plaintiffs’ “supplemental” opinions are thinly-disguised rebuttals, untimely under the scheduling order. *SonoSite*, 641 F. Supp. 2d at 800 (“[A] supplemental report is not an opportunity to rebut issues raised in defendant’s rebuttal expert report.”).

A. Dr. Budge.

1. Certain of Dr. Budge’s opinions respond to topics in Dr. Mayer’s report and should have been raised in an ordinary rebuttal.

As for Dr. Budge, many of her “supplemental” opinions—even if “within the scope” of her original report—should (and could) have been disclosed on the ordinary schedule for rebuttal reports. Experts have “a duty to supplement when the expert formulates new opinions based on material that was not available at the time that the original opinions were due.” *GSI Grp., Inc. v. Sukup Mfg. Co.*, No. 05-3011, 2007 WL 757818, at *3 (C.D. Ill. Mar. 8, 2007). Many of Dr. Budge’s supplemental opinions respond to opinions disclosed in Dr. Mayer’s opening report, and so her response was due at the ordinary time for rebuttals.

⁴ Plaintiffs try to distinguish these cases (Dkt. 139:14–15), but none of their responses undermine the basic point: “supplemental” reports cannot be used to disclose new (or rebuttal) opinions after the ordinary time for expert disclosures.

In her first supplemental report, she opines on whether “medical treatments to lessen gender dysphoria [are] the same as treatments for cisgender persons seeking cosmetic surgery to change or enhance their bodies.” (Dkt. 119:2–3.) This opinion could have been timely delivered in rebuttal to Dr. Mayer’s opinion that “[i]f a transgendered woman is entitled to feminization procedures to reduce her distress, surely a cis-gendered woman, similarly distressed, should be entitled to the same procedure” and that “[n]either patient as presented above is entitled to the procedure as a medical necessity.” (Dkt. 90:9.) Nothing in Dr. Budge’s opinion here references Dr. Mayer’s later deposition testimony, and so Dr. Budge had no need to wait until summary judgment to offer this opinion.

Also in Dr. Budge’s first supplemental report, she addresses whether “medical interventions [can] save transgender individuals’ lives.” (Dkt. 119:9–11.) None of this references Dr. Mayer’s deposition testimony either, and it could have been delivered in an ordinary rebuttal to his earlier-disclosed opinion that “[t]he evidence that these [surgical and medical] interventions are safe, effective, and optimal is minimal.” (Dkt. 90:8.)

The same goes for Dr. Budge’s opinion on whether “there is consensus in the medical/psychological community regarding whether or not one’s gender identity can be changed.” (Dkt. 119:11–12.) That did not address Dr. Mayer’s deposition testimony, and could have been responsive to his

earlier-disclosed opinion that “[t]he formation of gender identity is a developmental process. Budge’s report suggests that gender identity is a process of discovery of a latent variable, present at birth, and revealed around the age of three, rather than developed over time. There is not a scintilla of scientific support for this idea.” (Dkt. 90:7.)

Similarly, in Dr. Budge’s second supplemental report, she asserts that “M[a]yer makes an inaccurate assertion that body dysmorphic disorders and gender dysphoria are similar, and therefore he indicates that similar treatments should be used for the disorders.” (Dkt. 136:9.) Dr. Mayer disclosed that opinion in his opening report and Dr. Budge should have responded to it at the proper time. (Dkt. 90:9.) She also opines in that second report on whether “certain aspects or ideals of masculinity and femininity are culturally dependent, [such] that the medical interventions used to treat gender dysphoria are primarily cosmetic,” but that topic was addressed in Dr. Mayer’s opening report, too. (Dkt. 90:10–11.)

Since all of these opinions could and should have been disclosed at the proper time for Plaintiffs’ rebuttal/reply reports, they are untimely and should be stricken.

2. Dr. Budge’s other opinions also amount to untimely rebuttals of Dr. Mayer’s deposition testimony or State Defendants’ summary judgment papers.

Plaintiffs concede that other of Dr. Budge’s “supplemental” topics respond to Dr. Mayer’s deposition testimony and State Defendants’ summary judgment arguments. (Dkt. 139:9 (Dr. Budge’s “supplemental reports . . . rebut[] the opinions offered by Dr. Mayer in his deposition”).) But, again, “a supplemental report is not an opportunity to rebut issues raised in defendant’s rebuttal expert report.” *SonoSite*, 641 F. Supp. 2d at 800. Likewise, in *Solaia Tech. LLC v. ArvinMeritor, Inc.*, 361 F. Supp. 2d 797, 806, (N.D. Ill. 2005), where a “much expanded opinion was prompted solely by [the other party’s] summary judgment motion,” the court found that was “not the proper role for supplementation of a report by an expert.”

As for the two topics in Dr. Budge’s first supplemental report that expressly respond to Dr. Mayer’s deposition testimony—whether “there [is] a difference between gender dysphoria and anxiety and mood disorders” and “[w]hat is the appropriate methodology for conducting research on the efficacy and safety of treatments for gender dysphoria” (Dkt. 119:4–9)—her original report expressly discussed neither of these topics. *See Sonosite*, 641 F. Supp. at 799 (excluding supplemental report that “add[ed] new expert opinion as opposed to merely supplementing the subjects addressed in plaintiff’s initial expert report”). Rather than simply submit new, untimely expert opinions,

Plaintiffs should have either deposed Dr. Mayer before their rebuttal deadline or sought leave from this Court to submit a late sur-rebuttal. They did neither.

The other topics in Dr. Budge's second supplemental report simply respond to State Defendants' summary judgment papers. (Dkt. 136:2–3 (responding to report "relied on by Defendants in their Response to Plaintiffs' Proposed Finding of Fact"), 3–6 (responding to assertions in State Defendants' additional findings of fact and response to Plaintiffs' findings of fact), 7 (responding to State Defendants' response to Plaintiffs' finding of fact).) Those are also necessarily new opinions not expressed in Dr. Budge's opening report. And, again, the scheduling order did not allow the parties to submit expert reports, after the disclosure deadline, that simply responded to opposing summary judgment papers.

Plaintiffs then offer a straw-man, suggesting that State Defendants' argument "is premised on the notion that experts are bound by the testimony offered in their initial report and are unable to respond to the opinions offered by an opposing party's expert." (Dkt. 139:11.) That is far from State Defendants' argument, which is instead that deadlines matter. There is a time and a place for both supplementing an expert report and rebutting an opposing party's expert. Where the court sets a schedule for rebuttals, that is the time for rebuttals, and disregarding that schedule unfairly prejudices the

opposing party. As a corollary, untimely rebuttal reports cannot simply be recharacterized as “supplemental” reports to avoid rebuttal deadlines.

Plaintiffs’ citations do not rebut these two basic points. (Dkt. 139:11–12.) In *Metavante Corp. v. Emigrant Savings Bank*, 619 F.3d 748, 762 (7th Cir. 2010), the court found that the supplemental disclosure allowed the opposing side to adequately cross-examine the expert at trial. But the issue here is State Defendants’ ability to effectively oppose summary judgment—Plaintiffs’ belated expansion of their experts’ opinions makes this more difficult, regardless of how well State Defendants can cross-examine Dr. Budge at trial. As for *La Playita Cicero, Inc. v. Town of Cicero*, No. 11-CV-1702, 2017 WL 1151066, at *5 (N.D. Ill. Mar. 28, 2017) and *City of Gary v. Shafer*, No. 2:07-CV-56, 2009 WL 1370997, at *6 (N.D. Ind. May 13, 2009), no scheduling orders apparently governed expert disclosures in those cases, and so those courts decided that default civil procedure principles allowed sur-rebuttal reports. Here, however, the default rules in Fed. R. Civ. P. 26(a)(2)(D) do not apply, given the presence of a scheduling order. See *Hassebrock*, 815 F.3d at 336. Had the schedule permitted sur-rebuttal reports, it would have said so.

Nor did State Defendants disclose any new facts that necessitated an updated opinion from Dr. Budge, unlike in *Noffsinger v. Valspar Corp.*, No. 09-cv-916, 2012 WL 5948929, at *4 (N.D. Ill. Nov. 27, 2012). There, the

plaintiff in a tort case changed his theory of injury just before trial, and so the opposing expert was owed an opportunity to update his opinion. *Id.* Here, State Defendants disclosed their expert testimony as scheduled, and Plaintiffs had a full and fair opportunity to rebut it. And while it is true that in *Talbert v. City of Chicago*, 236 F.R.D. 415, 421–22 (N.D. Ill. 2006), the court allowed a supplemental report to rest on information available at the time of the original report, there were no issues of timeliness or prejudice, unlike here. *Id.* at 424–25.

B. Dr. Schechter.

Dr. Schechter’s untimely supplemental reports suffer from the same defects as Dr. Budge’s. Even though they may loosely “fall within the scope” of his original opinion, that does not give Plaintiffs license to ignore the scheduling order. Those opinions either could (and should) have been disclosed in Dr. Schechter’s original report (Dkt. 116:3–4 (opinions regarding breast reconstruction procedures)), or they simply respond to Dr. Mayer’s deposition testimony and State Defendants’ summary judgment papers (Dkt. 116:4 (opinions regarding depression treatments); 137:2 (opinions regarding surgeries with reconstructive and cosmetic aspects)).

Plaintiffs respond that there is no basis for excluding sur-rebuttal expert testimony, but they again cite *Playita Cicero* (Dkt. 139:14), which does not apply here because no scheduling order governed expert disclosures in

that case. Federal Rule of Civil Procedure 16(f)(1)(C) makes clear that “fail[ing] to obey a scheduling . . . order” is grounds for sanctions under Rule 37, including striking the offending filing. And simply pointing to Rule 26’s allowance for supplementing “incomplete” disclosures cannot absolve Plaintiffs’ conduct since, again, that rule would permit endless supplementations until the eve of trial and thereby prejudice *both* parties.

III. State Defendants would be prejudiced if Plaintiffs may submit four sets of expert reports in support of summary judgment compared to only one set by State Defendants.

Ignoring the fact that these “supplemental” reports were snuck into the record in the midst of summary judgment briefing without the Court’s leave, Plaintiffs argue that their conduct did not surprise or prejudice State Defendants. (Dkt. 139:16.) It is hard to understand this position. State Defendants built their litigation strategy around the court-ordered expert disclosure schedule: before summary judgment briefing, the parties would exchange an opening report from Plaintiffs, a rebuttal from State Defendants, and a rebuttal/reply from Plaintiffs. (Dkt. 61; 62.) It was very much a surprise when Plaintiffs filed new expert reports along with their summary judgment opposition and reply briefs, long after the deadline for Plaintiffs’ rebuttal/reply expert disclosures. Moreover, State Defendants did not have adequate time to prepare a response from Dr. Mayer—the incomplete, draft document submitted with their motion to strike represents all the work

Dr. Mayer could complete in the eight business days between Plaintiffs' first supplemental reports and State Defendants' reply deadline. (Dkt. 125-2.) And State Defendants have had no opportunity at all to address the second supplemental reports submitted with Plaintiffs' summary judgment reply papers.

While it is true that State Defendants can still depose Plaintiffs' experts regarding these supplemental reports without disruption to the October trial date, that misses the point. (Dkt. 139:16.) Again, the problem is that Plaintiffs have now received two more bites at the expert apple during summary judgment than State Defendants have. That is an obvious advantage to Plaintiffs. Moreover, Dr. Mayer has no further opportunity to defend himself from Plaintiffs' critiques either at the summary judgment stage or before trial, unless State Defendants obtain leave from this Court. In short, State Defendants are following the Court's rules, unlike Plaintiffs, who should not be rewarded for breaking them.

Plaintiffs also suggest that State Defendants could have deposed their experts before the summary judgment deadline, but that makes little sense. (Dkt. 139:17.) State Defendants need an opportunity to submit expert testimony of their own to respond to Plaintiffs' critiques, not depose Plaintiffs' experts. Likewise, when were State Defendants supposed to depose Plaintiffs' experts on the supplemental reports? Plaintiffs disclosed two of them eight

business days before the reply deadline, and the other two the day of the reply deadline. It is absurd to suggest that State Defendants should have deposed Plaintiffs' experts in that one-week gap (that also happened to fall over the July 4 holiday). Moreover, the fact that State Defendants have cited Dr. Mayer's deposition testimony changes nothing, since he has had no opportunity to respond to the two extra rounds of attacks that followed his deposition.

As for Plaintiffs' supposed lack of bad faith or willfulness (Dkt. 139:16), there is no doubt that they willfully submitted sur-rebuttal reports after the final deadline for expert disclosures without this Court's leave. Whether Plaintiffs' supplemental reports were issued "promptly" (Dkt. 139:16) after Dr. Mayer's deposition is irrelevant—the basic problem is that those reports disregarded the schedule. None of the "bad faith" cases Plaintiffs cite dealt with experts who simply ignored disclosure deadlines because they sought to respond to adverse deposition testimony or summary judgment briefing. (Dkt. 139:16 (citing cases).)

Lastly, Plaintiffs' suggestion that they deserve yet *another* round of expert reports if State Defendants are given a fair opportunity to respond is hard to take seriously. (Dkt. 139:17.) Plaintiffs have now submitted four rounds of expert reports, compared to State Defendants' one. (Even counting Dr. Mayer's deposition would only amount to two rounds.) Giving Dr. Mayer

an adequate chance to defend himself would simply level the playing field, not entitle Plaintiffs to a fifth round of reports.

CONCLUSION

State Defendants respectfully ask this Court pursuant to Fed. R. Civ. P. 16(f) and 37(b) to strike Plaintiffs' "supplemental" expert witness reports from the record and forbid them from being used in this case for any purpose.

Alternatively, if the Court declines to strike these reports, State Defendants' respectfully seek leave: (1) to file a supplemental rebuttal expert witness report limited to the topics addressed in Plaintiffs' supplemental reports, (2) to file a short sur-reply brief in support of their motion for summary judgment limited to the topics addressed in Plaintiffs' supplemental expert reports, and (3) to file an amended response to Plaintiffs' Supplemental Proposed Findings of Fact that rely on their "supplemental" expert opinions.

Dated this 30th day of July, 2018.

Respectfully submitted,

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