

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION**

UNITED STATES OF AMERICA

PLAINTIFF

V.

CIVIL ACTION NO. 4:05cv33

IKE BROWN, et al.

DEFENDANTS

**DEFENDANTS' OBJECTION TO MAGISTRATE JUDGE'S ORDER;
MOTION FOR REVIEW BY DISTRICT JUDGE**

Come now Defendants Ike Brown and the Noxubee County Executive Committee (hereinafter "Defendants"), by and through undersigned counsel, and hereby object to the Magistrate Judge's *Order* granting the Plaintiff's (hereinafter "United States") *Motion to Strike Defendants' Re-Designation of Expert Witness* entered in this action of the 17th day of November, 2006 and further move the District Court Judge to review and set aside the Magistrate Judge's *Order*. In support of their *Motion*, Defendants offer the following, to wit:

I. PROCEDURAL HISTORY

1. The court originally struck Defendants' Designation of Expert Witness on July 10, 2006 on the grounds that it was untimely because it was not made prior to a May 20, 2006 deadline extension previously granted by the Court.
2. In said *Order* striking the Defendants' Designation of Expert Witness, the Magistrate Judge noted in the Order that a later continuance of the trial date would persuade the Court to consider an out of time designation.
3. On September 8, 2006 the Court continued the trial of this matter to January 15, 2007 and Defendants were granted additional time, until October 10, 2006, to conduct discovery.

4. The Defendants re-designated their Expert Witness on October 2, 2006 to the United States.
5. The United States moved the Court to Strike the Defendants' Re-designation of Expert on October 17, 2006 and the Magistrate Judge entered an *Order* granting the United States' Motion on November 17, 2006.

II. STANDARD OF REVIEW

There are two standards for a district court's review of the order of a magistrate judge. A non-dispositive order may only be reversed if it is "clearly erroneous or contrary to law." 28 U.S.C. §636(b)(1)(a); *Fed. R. Civ. P.* 72(a). Conversely, if the order concerns a dispositive motion, the district court must review the magistrate judge's decision de novo and "may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions." *Fed. R. Civ. P.* 72(a). Because the present matter deals with a nondispositive matter, the Magistrate Judge's order is subject to a "clearly erroneous or contrary to law" standard of review.

III. LAW AND ANALYSIS

A. Any minuscule prejudice or harm to the United States is outweighed by the severe detrimental effect of striking Defendants' re-designation of Expert Witness

1. The United States' *Motion* asserted a "severe" prejudice of having so little time before trial to depose Defendants' expert and or conduct additional discovery based on the expert's testimony. This argument is flawed. Defendants were granted the right to conduct additional discovery and disclose additional witnesses to the United States prior to October 10, 2006 pursuant to the Court's Order. There was NO prejudice to the United States for the Defendants to designate their expert witness for the exact same reasons that there would not have been any prejudice to the United States

if the Defendants had designated an additional fact witness to the United States under these circumstances. Defendants theoretically could have disclosed an additional witness or document relevant to the case up until October 10, 2006. Further, the United States was just as capable to depose Defendants' expert as the United States would have been capable to depose any other witness that Defendants would have produced. The United States argument is not only flawed, it is a pretext attempting to conceal the fact that they will stop at nothing to prevent Defendants from participating in an evenly balanced trial.

2. This is one of the most important *Voting Rights Act* cases in the last decade and the only one in U.S. history where the defendants are black. Considering the importance of this case being decided on its merits, it would be detrimental to the development of the law and to the public's perception of the fairness of the case if the Defendants were denied their opportunity to designate an Expert witness solely for the purpose of refuting the report results of the expert witness for the United States; especially when the Defendants' indigenous status is what caused the late designation. The Defendants cannot even afford to pay their attorneys in this case. These are citizens in one of the poorest counties in the entire nation, not just the State of Mississippi! The court **should** recognize the difference between the ability of the United States Government to promptly pay thousands of dollars to an Expert and the ability of the Defendants to do the same.

3. The SOLE reason the Defendant did not provide an expert designation earlier was his lack of financial resources as outlined extensively in his supporting affidavit to Defendants' response to Plaintiff's Motion to Strike. (*Brown affidavit attached as Exhibit "A"*). It would be a travesty for his poverty to determine the outcome of this very important case.

4. This case is metaphorically *David v. Goliath* and while it is important for the court to adhere to established rules and deadlines, it is just as important - if not more for the Court to recognize the unique perspective of this case, and its importance and effects on people well outside of the parties involved. There is a tremendous financial strain on the Defendants to defend themselves by all means possible against the United States of America. It is necessary and crucial for the Court to recognize the realistic level of prejudice and or harm put forth on the United States by the Defendants' re-designation of an Expert witness in this case.

B. The Magistrate Judge's Order is clearly erroneous or contrary to law

To overturn the Magistrate Judge's decision as clearly erroneous under Rule 72(a), the court must have "a definite and firm conviction that a mistake has been committed." *Ocelot Oil Corp. v. Sparrow Indus.*, 847 F.2d 1458, 1464 (10th Cir. 1988).

The United States alleged they were prejudiced by the Defendants' late designation of an Expert Witness in violation of the scheduling order and of the Rules and sought to have the Defendants sanctioned by the Court striking their Expert. A party that without substantial justification fails to disclose information required by the Rules shall not, unless such failure is harmless, be 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 . . . [including] reasonable expenses . . . Fed. R. Civ. P. 37(c)(1).

Whether a failure is "harmless" largely depends upon "whether the omission caused other parties to suffer prejudice . . ." 6 James Wm. Moore et al., *Moore's Federal Practice*, § 37.63 (3d ed. 1997). That determination is left to the broad discretion of the court. *Newman v. GHS*

Osteopathic, Inc., 60 F.3d 153, 156 (3d Cir. 1995); see also *Dorey v. Dorey*, 609 F.2d 1128, 1135 (5th Cir. 1980) (regarding prior version of Rule 37, stating, "The district court has broad, although not unbridled, discretion in imposing sanctions . . . under Rule 37."). As the Third Circuit explained in *Newman*, "Rule 37 is written in mandatory terms Nonetheless, the rule expressly provides that sanctions should not be imposed . . . if the failure to disclose was harmless. Thus, the rule does not leave district courts without discretion." *Newman*, 60 F.3d at 156. The re-designation of Defendants' Expert to the United States was of little harm, if not harmless. It was clearly erroneous for the Magistrate to sanction the Defendants by striking their Expert designation.

In addition, the Magistrate Judge's Order stated

"...In response to this Motion, Defendant Ike Brown has submitted an Affidavit attesting to his inability to timely procure funds with which to pay his expert witness. He also argues that the Government has needlessly driven up the cost of litigating this matter, to his disadvantage. The court is of the opinion that his argument, while compelling, is made too late, particularly since, on numerous prior occasions, the court has excused the Defendants' tardiness."

The Order states that Defendant Brown's argument is "made too late". However, Defendant Brown's response and argument was timely submitted after the Plaintiff moved to Strike the Defendants' re-designation. There is nothing about Defendant Brown's argument that was "late". In fact, the Defendants had previously objected **TWICE** during this proceeding to both of the United States' requests for leave to depose additional witnesses during discovery. The Defendants objections were based on the associated costs and the financial strain put on them. Despite the Defendants objections, both times the Magistrate Judge granted the United

States leave to depose more witnesses and increase the already substantial costs of this litigation.¹

The United States designated its Expert and sent the report to Defendants on or about March 16, 2006. Upon review, the Defendants knew then it was paramount to their defense to come up with their own Expert and did everything within their meager financial means to do so. The Defendants found a capable and willing Expert but he would not fully commit to this case and begin work on the report until the Defendants would send him a retainer. By the time the Defendants had raised enough money for a retainer, the Expert informed them that he could not have a report finished by the May 20, 2006 Deadline. (*May 12, 2006 email correspondence between Defendants' expert and Defendants' counsel attached as Exhibit "B"*) The Defendants expert began to work on the report but due to the large amount of material involved in this litigation (specifically reading through the excessive number of depositions) he informed Defendants' counsel that he couldn't get a report complete no earlier than the end of August, 2006. (*June 8, 2006 declaration of Defendants' Expert Richard Engstrom attached as Exhibit "C"*²) However due to a number of factors including a move from Louisiana to North Carolina³, as well as additional depositions that the Defendants were able to obtain, the Expert was not able to fully go through the transcripts, pleadings, hundreds of newspaper articles, and produce a report until October 2006.

¹ The costs of the deposition transcripts alone exceed \$25,000.00 and to get a full set of transcripts, the cost is closer to \$50,000.00. Because of these unaffordable costs, Defendants will have to go to trial and defend themselves without copies of all of the deposition transcripts.

² Engstrom's Declaration was submitted to the Court in support of *Defendant's Response in Opposition of the United States Motion to strike Expert Designation* filed on June 8, 2006.

³ Dr. Engstrom lived in New Orleans and lost his home due to Hurricane Katrina; subsequently deciding to move and accept employment at Univ. of North Carolina-Chapel Hill.

The Defendants have never purposely delayed designation of their expert or attempted to conceal the identity of their expert or his report from the United States. The Defendants originally designated their Expert on May 20, 2006 to the United States and provided an incomplete report that detailed what specifically the Expert would be testifying about in the case. The United States knew about the Defendants' Expert and the substance of his report and testimony *as far back as May, 2006*. This was not an 11th hour designation as they claimed in their *Motion to Strike*. The Defendants' expert designation and accompanying report is merely a response to and a critique of the United States' Expert Report. There are no new facts, claims, or pieces of evidence trying to be introduced through the Expert Testimony. The United States misrepresent their level of harm and prejudice to the Court by the Defendants' re-designation of Expert.

The Court reset the scheduling deadlines, the defendants were given until October 10, 2006 to complete discovery, the defendants designated an expert on October 2, 2006, the Plaintiff moved to strike said designation on October 17, 2006, and the Defendants responded in opposition on October 27, 2006. The Defendants have not submitted a "too late" argument for their expert designation. Moreover, there was no finding of by the Magistrate Judge of prejudice or harm to the Plaintiff by allowing the re-designation by Defendants. The Defendants pray upon the District Court Judge to look at the totality of the circumstances surrounding the designation of the Defendants' Expert Designation and share the Defendants' definite and firm conviction that a mistake has been committed by the Magistrate Judge. The Defendants then ask the Court to find the Magistrate's Order as clearly erroneous and to set it aside.

IV. CONCLUSION

For the reasons stated herein, Defendants Ike Brown and the Noxubee County Democratic Executive Committee respectfully request the District Court Judge to review and set aside the Magistrate Judge's *Order* granting Plaintiff's *Motion* to Strike Defendants' Re-Designation of Expert Witness.

Submitted, this the 30th day of November, 2006.

BY: /s/ Edward L. Pleasants, III
EDWARD L. PLEASANTS, III
(MSB # 101857)
**Counsel for Defendants Ike Brown
and The Noxubee County
Democratic Executive Committee**

OF COUNSEL:

THE COLOM LAW FIRM, L.L.C.
P. O. Box 866
Columbus, MS 39703-0866
Telephone: 662/327-0903
Facsimile: 662/329-4832

CERTIFICATE OF SERVICE

I, Edward L. Pleasants III, hereby certify that a copy of the foregoing document was served upon the following counsel of record by electronic means: Ellis Turnage, Esq., Christopher D. Hemphill, Esq., J. Christian Adams, Esq., Christopher Coates, Esq., and Joshua L. Rogers, Esq.

This document will be delivered by other means to:

Dunn Lampton, U.S. Attorney's Office
188 E. Capitol Street, Suite 500
Jackson, MS 39201.

This the 30th day of November, 2006.

/s/ Edward L. Pleasants III
Edward L. Pleasants III