NO. 137, ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF MONTANA, Plaintiff

v.

STATE OF WYOMING

AND

STATE OF NORTH DAKOTA, Defendants

BEFORE THE HONORABLE BARTON H. THOMPSON, JR.

SPECIAL MASTER

WYOMING'S RESPONSE TO MONTANA'S OBJECTIONS TO WYOMING'S EXPERT DESIGNATION

GREGORY A. PHILLIPS
Attorney General of Wyoming

PETER K. MICHAEL*
Chief Deputy Attorney General

JAY JERDE
Deputy Attorney General
JAMES KASTE
Senior Assistant Attorney General
CHRISTOPHER BROWN
Senior Assistant Attorney General
DAVID J. WILLMS
Senior Assistant Attorney General
MATTHIAS SAYER
Assistant Attorney General
ANDREW KUHLMANN
Assistant Attorney General
123 Capitol Building
Cheyenne, WY 82002
(307) 777-6196

**Counsel of Record*

The State of Wyoming, through counsel, hereby responds to the State of Montana's Objections to Wyoming's Expert Designation and Expedited Motion for Supplemental Depositions as follows:

INTRODUCTION

As a matter of routine and prudent practice, Wyoming disclosed in summary fashion that its employees will offer testimony that technically falls within the provisions of Fed. R. Evid. 702 as part their testimony about their personal observations made in the normal course of their duties. Wyoming did not represent that its employees would offer testimony created solely for the purposes of this litigation, because these witnesses will not be offered for that purpose. These prudential disclosures meet the letter and spirit of the rules, and do not establish good cause to grant leave for second depositions of these employees, nor do the disclosures need to be supplemented. Montana's objection is unfounded and seems calculated to obtain an extension of time to designate rebuttal testimony and justify new expert opinions. *See* Mt. Objection at 15-16 (requesting such an extension); Mt. Errata (indicating an intent to make such a request in the future).

ARGUMENT

I. Wyoming properly disclosed that its employees will offer testimony that technically qualifies under Fed. R. Evid. 702.

As an initial matter, there can be no dispute that Wyoming's employees are experts in their respective fields and that by virtue of the nature of this case they will offer testimony that qualifies as expert testimony. Expert testimony is testimony based on scientific, technical, or other specialized knowledge that will assist the trier of fact in reaching a decision on an issue. *Nat. R.R. Pass. Corp. v. Railway Express, LLC*, 268 F.R.D. 211, 214 (D. Md. 2010). The specialized nature, unique skills, and knowledge required for Wyoming's employees to perform the routine duties of their employment would cause any court to classify them as experts on the basis of their specialized knowledge. *See id.* (discussing railroad employees).

Similarly, there can be no dispute that Wyoming and the other parties must disclose the identity of any witness they may use at trial to present expert testimony. Fed. R. Civ. P. 26(a)(2)(A). "Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report . . . if the witness is one retained or specially employed to provide expert testimony . . . ." Fed. R. Civ. P. 26(a)(2)(B). However, in cases like this where a full report is not required under Rule 26(a)(2)(B), a party is required to disclose the subject matter on which the witness is expected to present evidence and a summary of the facts and opinions to which the witness is expected to testify. Fed. R. Civ. P. 26(a)(2)(C).

The Advisory Committee Notes explain that Rule 26(a)(2)(C) mandates "*summary* disclosures of the opinions to be offered by expert witnesses who are not required to provide reports under Rule 26(a)(2)(B) and of the facts supporting those opinions." Fed. R. Civ. P. 26, Advisory Committee's Note (2010) (emphasis added). "[T]he disclosures are much less extensive than full written reports. The Advisory Committee Notes specifically caution courts not to require undue detail." Steven S. Gensler, *Federal Rules of Civil Procedure, Rules and Commentary*, Rule 26, p. 12 (March 2013).

When an employee has no connection to the specific events underlying the case, or has reviewed information solely in preparation for litigation, he must produce an expert report. *Nat. R.R. Pass. Corp.*, 268 F.R.D. at 217. Where, however, the employee's testimony will be "predominantly factual in nature and is not likely to involve hypothetical information, knowledge beyond that gained in the witnesses' ordinary duties, or information provided to the witnesses for purposes of the litigation[]" a report is not required. *Id.* Hybrid fact/expert witnesses like the State's employees "may relay factual observations and express opinions flowing from those factual observations given their established expertise" without preparing a report. *Id.* at 216.

Moreover, it is generally accepted that, "a person with specialized training does not testify as an expert by giving first-hand participant testimony, even though it appears to be expert testimony." *Indemnity Ins. Co. of N. Am. v. Am. Eurocopter LLC*, 227 F.R.D. 421, 424 (M.D.N.C. 2005).

> Rule 26 uses the term expert "to refer to those persons who will testify under Rule 702 of the Federal Rules of Evidence with respect to scientific, technical, and other specialized matters." Fed.R.Civ.P. 26(a)(2) advisory committee's note to the 1993 amendments. That definition does not encompass a percipient witness who happens to be an expert. If the individual is not providing testimony under Rule 702, he is not an expert witness for the purpose of Rule 26. *See id.*

Gomez v. Rivera Rodriguez, 344 F.3d 103, 113 (1st Cir. 2003). *See also, e.g., St. Vincent v. Werner Enterprises, Inc.*, 267 F.R.D. 344, 345 (D. Mont. 2010) ("Treating physicians, however, are generally not subject to the mandatory expert witness disclosure requirements."); *Brusso v. Imbeault,* 699 F. Supp. 2d 567, 578 (W.D.N.Y. 2010) ("A treating physician need not be disclosed as an expert unless the doctor's opinion testimony extends beyond the facts disclosed during care and treatment of the patient and the doctor is specifically retained to develop opinion testimony.") (internal citation and quotation marks omitted). Paradoxically, this is true, even though Fed. R. Evid. 701(c) states that lay opinion testimony is "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."

As is apparent from the foregoing, there is a tension between the two rules of evidence and the disclosure rules as it relates to a percipient witness who also happens to be an expert. As a result, a litigant can take the position that disclosure of these witnesses is not required at all, because the witness is offering lay rather than expert testimony even though the witness's testimony is based on scientific, technical, or other specialized knowledge. However, if a litigant takes this position, particularly without advising the court and counsel in advance, it runs the risk that the witness's testimony may be excluded at trial because it was not disclosed. On the other hand, a prudent litigant can disclose the identity of the witness and formally advise the court and the other parties that as a result of his position the witness will invariably offer scientific or technical information flowing directly from their participation in the events at issue. This course precludes any claim of surprise, but can invite objections from litigants who fail to recognize the distinction between percipient witnesses and witnesses offering classic expert testimony. Obviously, the later course represents the better approach, because under Fed. R. Civ. Pro. 37(c)(1), the penalty for non-disclosure is exclusion. There is no penalty for over-disclosure.

Wyoming followed the more forthcoming approach and identified in its disclosure its percipient witnesses who also happen to be experts. In the experience of all counsel for the State of Wyoming, this is standard procedure in the District of Wyoming and other federal courts, and wholly unobjectionable.

As punishment for Wyoming's forthcoming disclosure, Montana suggests that Wyoming should be required to supplement its disclosure with the functional equivalent of a report for each of these percipient witnesses. This is not so, and Wyoming is not obligated to recount the entirety of each witness's factual testimony in the disclosure. If that were true, and applied to fact witnesses who happen to be experts, disclosures promulgated under the summary procedure outlined in Rule 26(a)(2)(C) would dwarf reports promulgated under Rule 26(a)(2)(B). The cases cited by Montana requiring more thorough disclosures all proceed from the assumption not present in this proceeding that the testimony of the witness at issue will exceed the bounds of their perception, and are therefore, inapplicable.

Of course, it would present an actual problem if Wyoming were attempting to hide a specially retained expert in the garb of a percipient witness, as was the case in *Meredith v. International Marine Underwriters* cited by Montana. 2012 WL 3025139, *5 (D. Md. 2012) ("Central to the Court's holding is its threshold determination that Mr. Smith is a retained expert witness."). But Wyoming's disclosure specifically notifies the court and counsel that these witnesses will testify to the facts and information obtained through their ordinary employment, and therefore, that they have not developed expert opinions specifically for the purposes of this litigation.

Wyoming is guilty of being thorough, honest, and acknowledging that there is a tension in the rules which should be resolved by erring on the side of disclosure of the fact witnesses who happen to be experts. Accordingly, Montana's objection to Wyoming's disclosure should be denied.

II. Leave to take second depositions should not be granted.

In light of the fact that Wyoming has done no more than formalize the identity of the fact witnesses who also happen to be experts, Montana's request for supplemental depositions is baseless.

Pursuant to Fed. R. Civ. Pro. 30(a)(2)(ii), a party must obtain leave of court before it can depose a witness who has already been deposed in the case. Moreover, the court must limit the frequency or extent of discovery if such discovery is unreasonably cumulative and duplicative or the party seeking discovery has had ample opportunity to obtain the information. *See* Fed. R. Civ. Pro. 26(b)(2)(C)(i) and (ii). In addition, Case Management Plan No. 1 provides that supplemental depositions are only warranted if a deponent acquires new information, forms new opinions, or develops new grounds to support previous opinions. *See* CMP No. 1 at 13.

As is evident from Wyoming's disclosure of these witnesses, no new facts, opinions, or grounds were identified. Accordingly, any supplemental deposition will be duplicative of the original deposition. Montana complains that the original depositions were limited to fact-based matters, and it was precluded from inquiring into expert opinions. First, Montana inquired about the education, training, and experience of every Wyoming witness, which makes clear Montana's understanding that these fact witnesses happen to be experts. Montana went on to explore without limitation each fact related to the witness's employment and any opinions the employee may have formed related to their employment that Montana deemed important. More importantly, however, Wyoming's disclosure of its employees indicates that they will be offered as percipient witnesses, and therefore, a fact-based deposition completely covers the substance of the testimony that will be offered by the witness at trial. This is true even though these witnesses by the nature of their employment will be offering testimony based on scientific, technical, or other specialized knowledge.

Montana had ample opportunity to discover the information held by these witnesses during the original depositions, and there is no basis for authorizing second depositions in this matter.

III. Montana's complaints about the testimony of Wyoming's witnesses at trial are both unfounded and premature.

Wyoming's case-in-chief is a rebuttal of Montana's case-in-chief by definition. Wyoming's witnesses can and will be asked about the testimony offered in Montana's case-in-chief. To the extent that Montana's testimony is factually false or a qualified witness disagrees with an opinion or assertion expressed by one of Montana's witnesses, Wyoming's witnesses will say so. Wyoming fails to understand how this differs from routine practice at any trial. Moreover, and more importantly, Montana's objection is premature and must be made at the time specific testimony is offered at trial. Accordingly, Montana's premature objection to Wyoming's boilerplate reservation of its right to offer rebuttal testimony should be denied.

CONCLUSION

Montana's objection to Wyoming's disclosures should be denied, because Wyoming's disclosures satisfy both the letter and the spirit of Rule 26. In the event that the Court believes that the safer course of action is not to disclose percipient witnesses as Wyoming did, then the obvious, and only appropriate, remedy is to authorize Wyoming to remove them from its disclosures. Additional depositions or supplementation of the disclosures are not required by Rule 26 or the Case Management Plan, and would be a complete waste of time for everyone involved. That being said, the historic and factual testimony of these witnesses at trial will be based on scientific, technical, or other specialized knowledge. There is no way around this fact for Wyoming's employees and probably a number of Montana's witnesses as well.

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DATED this 17th day of April, 2013.

THE STATE OF WYOMING

GREGORY A. PHILLIPS
Attorney General of Wyoming

PETER K. MICHAEL*
Chief Deputy Attorney General

JAY JERDE
Deputy Attorney General
JAMES KASTE
Senior Assistant Attorney General
CHRISTOPHER BROWN
Senior Assistant Attorney General
DAVID J. WILLMS
Senior Assistant Attorney General
MATTHIAS SAYER
Assistant Attorney General
ANDREW KUHLMANN
Assistant Attorney General
123 Capitol Building
Cheyenne, WY 82002
(307) 777-6196

**Counsel of Record*

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of Wyoming's Response to Montana's Objections to Wyoming's Expert Designation was served by electronic mail and by placing the same in the United States mail, postage paid, this 17th day of April, 2013.

Jeanne S. Whiteing
Whiteing & Smith
1628 5th Street
Boulder, CO 80302
jwhiteing@whiteinglaw.com

Cory J. Swanson
Montana Attorney General's Office
P.O. Box 201401
Helena, MT 59620-1401
coswanson@mt.gov

John B. Draper
Jeffrey Wechsler
Montgomery & Andrews
325 Paseo de Peralta
Santa Fe, NM 87501
jdraper@montand.com
jwechsler@montand.com

Jennifer Verleger
North Dakota Attorney General's Office
500 North Ninth Street
Bismarck, ND 58501
jverleger@nd.gov

James J. Dubois
United States Department of Justice
Environmental and Natural Resources
Division of Natural Resources Section
999 18th St. #370 South Terrace
Denver, CO 80202
James.dubois@usdoj.gov

Solicitor General of the United States
US Department of Justice
950 Pennsylvania Avenue, Room 5614
Washington, DC 20530-0001
SupremeCtBriefs@usdoj.gov

Michael Wigmore
Bingham McCutchen, LLP
2020 K Street NW
Washington, DC 20006-1806
Michael.wigmore@bingham.com

Barton H. Thompson Jr.
Susan Carter, Assistant
Jerry yang and Akiko Yamazaki
Environment & Energy Building, MC-4205
473 via Ortega
Stanford, CA 94305-4205
Susan.carter@stanford.edu

Wyoming Attorney General's Office