

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION**

<b>In re: BRIDGESTONE/FIRESTONE, INC.,</b>	)	<b>Master File No. IP 00-9374-C-B/S</b>
<b>TIRES PRODUCTS LIABILITY LITIGATION</b>	)	<b>MDL NO. 1373</b>
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<b>THIS DOCUMENT RELATES TO</b>	)	
	)	
<b>MICHELLE GRANT,</b>	)	
	)	
<b>Plaintiff,</b>	)	<b>Case No. IP 03-5775-C-B/S</b>
	)	
<b>vs.</b>	)	
	)	
<b>BRIDGESTONE/FIRESTONE, INC., et al.,</b>	)	
	)	
<b>Defendants</b>	)	

**ENTRY ON PENDING MOTIONS**

This cause is before the magistrate judge on the following motions: Firestone’s Motion to Preclude Plaintiff from Serving Untimely Expert Reports and from Presenting Any Testimony Thereon; Firestone’s Motion to Depose Jason M. Ferguson, Esq.; and Firestone’s Motion to Preclude Plaintiff from Submitting Testimony in This Case. The motions all are fully briefed, and the magistrate judge, being duly advised, **GRANTS** the first motion and **DENIES** the other two for the reasons set forth below.

This case was transferred to this MDL proceeding on August 25, 2003. Based upon the applicable case management order, the plaintiff was required to disclose her expert witnesses by October 13, 2003, and serve her expert reports by November 10, 2003. The plaintiff did neither. On December 12, 2003, Firestone filed its Motion to Preclude Plaintiff from Serving Untimely Expert Reports and from Presenting Any Testimony Thereon, asserting that pursuant to Rule 37(c)(1) the plaintiff should be precluded from offering any expert testimony in this case because she did not disclose any experts or serve any expert reports by the applicable deadlines.

Rule 37(c)(1) provides:

A party that without substantial justification fails to disclose information required by Rule 26(a) . . . is not, unless such failure is harmless, 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. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under Rule 37(b)(2)(A), (B), and (C) and may include informing the jury of the failure to make the disclosure.

Therefore, “[t]he exclusion of non-disclosed evidence is automatic and mandatory under Rule 37(c)(1) unless non-disclosure was justified or harmless.” *Musser v. Gentiva Health Services*, 356 F.3d 751, 758 (7<sup>th</sup> Cir. 2004). The plaintiff’s response to Firestone’s motion to preclude (filed six days late) gives no explanation for her failure to comply with the expert discovery deadlines, essentially conceding that there was no substantial justification for that failure. However, the plaintiff argues that Firestone’s motion nonetheless should be denied because her non-compliance was harmless.

In support of her argument, the plaintiff first notes that Firestone already has dealt with “hundreds” of expert reports offered by plaintiffs in other cases in this MDL, and “it is unlikely that Plaintiff’s expert report, offered prior to the completion of discovery, would contain any assertions that are not addressed either directly or indirectly” in these other reports. This argument is without merit. While the plaintiff’s tire expert in this case may give substantially the same opinion as experts in other cases regarding whether the tire in question was defectively designed (or, in the nomenclature that has evolved in this MDL, may give the same “core” expert opinion), the expert’s opinion regarding whether the defect caused the plaintiff’s accident is necessarily a case-specific opinion, making Firestone’s familiarity with other expert reports in this MDL wholly irrelevant.

Next, the plaintiff notes that no trial date has been set in this case, and therefore extending the discovery schedule to allow Firestone time to depose and respond to the plaintiff’s expert

would not likely have an impact on the trial date. It is true that no trial date has been set, but that is not the only relevant consideration. Indeed, the operative date is not the trial date, but rather the date by which this case will be ready for remand to the transferor court, since the trial date will only be set after remand. Also at stake is the court's interest in enforcing its own deadlines, along with the court's (and the parties') interest in the orderly and efficient disposition of this case. The fact is that the plaintiff did not submit an acceptable expert report until January 13, 2004, a full two months after the deadline and two weeks after the deadline for conducting expert discovery relevant to motions for summary judgment. Permitting the plaintiff to rely upon her untimely report necessarily would delay this case's resolution.<sup>1</sup> Further, and more importantly, the plaintiff fails to acknowledge another significant fact – that the summary judgment deadline in this case was December 15, 2003. In the absence of any expert reports from the plaintiff by that date, Firestone was entitled to, and in fact did, file a motion for summary judgment based upon the lack of expert testimony. Permitting the plaintiff to ignore the expert discovery deadlines and then submit her expert report only after Firestone has filed its motion for summary judgment would not only render Firestone's summary judgment motion moot, but also would require the establishment of an entirely new set of case management deadlines, substantially delaying the progress of this case. This unquestionably would be prejudicial to Firestone. *See Musser*, 356 F.3d at 759 (upholding exclusion of untimely expert reports not served until after motion for summary judgment filed and finding that the additional cost to defendant of preparing a new summary judgment motion and delaying trial constituted "harm" to defendant).

Considering the facts as a whole, the magistrate judge finds that the plaintiff's failure to comply with the expert discovery deadlines was not harmless. Further, the magistrate judge,

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<sup>1</sup>The plaintiff submitted a "investigative report" from her expert along with her response to the motion to preclude, but this report did not contain all of the elements required by Rule 26.

mindful of the effect this will have on the plaintiff's case, nonetheless determines that the sanction sought by Firestone is appropriate under the circumstances. A party ignores the court's deadlines at her peril, and absent any justification for doing so, it would be unfair to prejudice Firestone in order to save the plaintiff from the consequences of her dilatoriness. Accordingly, Firestone's motion is **GRANTED**. The court will not consider any expert reports submitted by the plaintiff in ruling on Firestone's motion for summary judgment, and the plaintiff will not be permitted to submit any other expert testimony in this case.

Firestone's Motion to Depose Jason M. Ferguson, Esquire, is **DENIED AS MOOT**, inasmuch as Firestone wished to take the deposition in order to support its motion to preclude.

Finally, Firestone has moved to preclude the plaintiff herself from testifying in this case as a sanction for her failure to attend her deposition. This motion also is **DENIED**. It appears that the plaintiff was ill and under a doctor's care on the date of her deposition, and while it is not entirely clear that she could not have been deposed on the following day as Firestone wished, and while the medical documentation of her ailment is not as clear as it could have been, she has now been deposed, and the magistrate judge determines that the slight delay in her deposition is not sufficient to justify the sanction sought by Firestone.

ENTERED this \_\_\_\_\_ day of March 2004.

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V. Sue Shields  
United States Magistrate Judge  
Southern District of Indiana

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