

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
FORT WAYNE DIVISION

IN RE: CASE NO. 04-10427 )  
 )  
AUBURN FOUNDRY, INC. )  
 )  
Debtor )  
 )  
 )  
REBECCA HOYT FISCHER, TRUSTEE )  
 )  
Plaintiff )  
 )  
vs. ) PROC. NO. 05-1059  
 )  
CITIZENS GAS & COKE UTILITY )  
 )  
Defendant )

**DECISION AND ORDER SUSTAINING OBJECTION  
TO DESIGNATION OF EXPERT WITNESS**

At Fort Wayne, Indiana on May 2, 2006.

This matter is before the court with regard to the plaintiff's objection to the defendant's designation of Dorman Wood as an expert witness, together with the defendant's response thereto. The only issue raised by the parties' arguments is whether the defendant's designation is timely. Plaintiff contends that it is not while the defendant, not surprisingly, contends that it is.

This adversary proceeding was commenced by the debtor-in-possession while Auburn Foundry's bankruptcy case was still pending under chapter 11. The original scheduling order, which was issued on April 21, 2005, required the disclosure of expert testimony to be made "no later than forty-five days before the date by which all discovery is to be completed." Order of April 21, 2005, ¶ 2. Auburn Foundry's bankruptcy case was subsequently converted from chapter 11 to chapter 7. Among other things, this necessitated the substitution of the chapter 7 trustee, Rebecca Fisher, for

the originally named plaintiff. That issue was the subject of a hearing held on December 7, 2005. Another issue that was also addressed at the hearing of December 7 was a motion the parties had filed to vacate all existing deadlines in the litigation. Although the court granted the motion for substitution, and substituted Ms. Fisher for the originally named plaintiff, it did not go so far as to unqualifiedly grant the motion to vacate all of the litigation deadlines. Instead, it simply modified those deadlines to accommodate the fact that the chapter 7 trustee had taken over the litigation. The court's order of December 16, 2005, required all discovery to "be completed within ninety days" and directed the parties to jointly file a "proposed pre-trial order within thirty days after the close of discovery."

One deadline which the court did not specifically change was the deadline for the disclosure of expert testimony. There was really no need to do so because that deadline was tied to the discovery cut-off date, so that extending the one automatically extended the other. Consequently, following the court's order of December 16 all discovery should have been completed on or about March 16, 2006, and the disclosure of expert testimony should have been made 45 days prior to that deadline, i.e. on or about February 1.

Following the order of December 16, the parties requested and the court approved another change in the litigation deadlines, this time to accommodate the deposition of Dennis Maude which the parties planned to take on April 11. In order to accommodate that deposition and any additional discovery that might be needed in order to supplement what was learned during the deposition, the deadline to complete discovery was extended until April 30, 2006, and the deadline for filing the joint pre-trial order extended to May 30. See, Order of March 16, 2006. The designation of Dorman Wood as an expert witness was apparently made around the time of the Maude deposition. Plaintiff's objection indicates that the defendant first suggested that Wood would be used as an

expert witness at trial on or about April 7, 2006. The defendant's objection indicates that the designation was formally made on April 14, 2006. The court does not need to resolve the disparity between whether the defendant first designated Wood as a expert witness for trial on April 7 or April 14. The date does not matter because the designation would not be timely regardless which date is used.

The original scheduling order for this litigation required the disclosure of expert testimony to be made no later than forty-five (45) days before the close of discovery. While the discovery deadline was changed on at least two occasions, the court never changed or eliminated the deadline for making the disclosure of expert testimony. That deadline was originally tied to the deadline for discovery and that tie was never broken. Accordingly, when the court extended the deadline for completing discovery, whether by the order of December 16, 2005 or the order of March 16, 2006, the deadline for making the expert disclosures was adjusted accordingly. It was not eliminated. As a result, when the court granted the parties' motion to extend the discovery deadline to April 30, 2006, this had the effect of moving the deadline for making expert disclosures to mid-March. It was not until three or four weeks after that time – April 7 or April 14 depending on whether the court uses the plaintiff's or the defendant's date – that the defendant first indicated it intended to call Wood as an expert. By that time it was too late.

Whether a party will be allowed to belatedly designate an expert witness is a matter committed to the court's discretion. Salgado by Salgado v. General Motors Corp., 150 F.3d 735, 739 (7th Cir. 1998). In this instance, the defendant has failed to give the court a satisfactory reason for its untimely designation. Wood has apparently been involved in this litigation and has been assisting the defendant in one capacity or another for quite some time. It appears that the only reason he was not previously designated as an expert was because his opinions had not yet been confirmed by the

facts that had been gathered through discovery, and it was not until around the time of the Maude deposition that the defendant was able to make an informed decision concerning whether or not he would be used as a testifying expert. While those circumstances might form the basis for a motion to extend the time to make the disclosures of expert testimony and/or an extension of the discovery deadline, they do not justify an untimely designation.

As near as the court can tell from the defendant's response, Wood was not designated as an expert not because the defendant was not aware that there might be a need for expert testimony or of his existence but because he had not yet formulated an opinion that was capable of being properly disclosed and he did not do so until after the deadline for designating experts had passed. Those circumstances do not justify the belated designation. The entire purpose of establishing deadlines is to require the parties to focus their attention on the matter at hand. Taylor v. Freeland & Kronz, 503 U.S. 638, 644, 112 S.Ct. 1644, 1648 (1992). To allow the defendant to make a belated designation under these circumstances would, in the court's opinion, be tantamount to allowing any litigant to ignore the deadline for designating expert testimony simply because they did not get around to complying with it.

Plaintiff's objection to the defendant's designation of Dorman Wood as an expert witness is sustained and he may not testify as an expert at the trial of this matter.

SO ORDERED.

/s/ Robert E. Grant  
Judge, United States Bankruptcy Court