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| Lauretta Blake, et al. | * | |
| Plaintiffs | * | IN THE |
| v. | * | CIRCUIT COURT |
| NRM, Inc., et al. | * | FOR BALTIMORE CITY |
| Defendants | * | |
| | * | Case Number 24-C-07-000018 |
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MEMORANDUM OPINION

Plaintiffs have filed suit against eighteen defendants, seeking to recover for injuries sustained as a result of exposure to lead based paint under theories of negligence and the Consumer Protection Act.¹ Three of those defendants have filed Motions to Exclude and Motions for Summary Judgment. For the reasons stated below, those motions will be granted.

The original complaint was filed on January 2, 2007 by plaintiff Lauretta Blake only, and before it was served on any of the three defendants who filed the motions that are the subject of this opinion,² on December 18, 2007, she filed an Amendment by Interlineation

¹ Plaintiff’s initial Complaint brought suit against thirteen defendants and five were added by subsequent amendments. Several defendants have been dismissed by prior Motions. Plaintiffs have not completed service against several others.

² Only three defendants were served prior to the First Amendment by Interlineation. They were: Alvin Myerberg, Glen Ora Apartments, and Panda Properties. Myerberg and Glen Ora were granted summary judgment on October 26, 2007. Ronald Bell filed a letter for Defendant Panda Properties stating that Panda Properties filed bankruptcy on February 10, 1992 and no longer is an ongoing business. The letter is docketed as an answer to the Complaint; however, the Court is issuing an order to strike the answer because Rule 2-131(a) provides that a party other than an individual may enter an appearance only through counsel.

adding her siblings, William Blake and James Blake, and her mother, Couretta Blake, as additional plaintiffs.³

Before the Court is defendant Agamemnon Mourges (hereinafter “Mourges”)’s Motion to Exclude Plaintiffs’ Delinquent Expert Reports, Disclosures, and Opinions (hereinafter “Motion to Exclude”) and Motion for Summary Judgment as to 2119 N. Dukeland Street, and defendants NRM, Inc. (hereinafter “NRM”) and Randy Klotzman (hereinafter “Klotzman”)’s Motion for Summary Judgment or in the Alternative to Exclude Certain Expert Witness Opinions as to 2928 Garrison Boulevard. Defendants NRM and Klotzman also adopted Mourges’ Motion to Exclude. A hearing was held on the Motions on September 30, 2009.

The Motions to Exclude

Four days after the end of discovery, Defendant Mourges filed his Motion to Exclude alleging that, with one exception, plaintiffs’ experts and their reports and opinions should be excluded from trial because plaintiffs failed to make timely disclosures and Mourges is prejudiced as a result. Mourges specifically objected to the timing of a report of economist Michael Conte, which was produced on June 23, 2009 and delivered to defendants on July 2, 2009, eight days before the close of discovery. Dr. Conte’s report quoted from other expert reports, which had not been produced as of the date the Motion was filed. Mourges argued that Dr. Conte’s report as well as the Klein and Lieberman reports and opinions referenced in Dr. Conte’s report, “not be considered in further motion or trial proceedings.”

³ The Interlineation also added two more defendants and additional counts against all defendants on behalf of Couretta, William, and James Blake. Plaintiffs filed a Second Amendment by Interlineation on March 12, 2009, which added three more defendants. The three defendants added are not parties to the motions currently being considered by the Court.

In their Opposition, plaintiffs argued that they sent expert disclosures in the form of letters in January and February 2009, that Mourges has had since January and February to depose those experts, and that Mourges, therefore, was not prejudiced by any recent disclosures. In reply, defendant Mourges argued that the January and February letters “simply reiterate boiler plate, generic blurbs regarding each expert,” and that “these are the same boiler plates issued [by all plaintiffs who are represented by this law firm] in every single case.” Mourges also pointed out in his Reply that after the Motion to Exclude was filed plaintiffs, on July 16, 2009, produced a report from Dr. Klein on three plaintiffs and, on July 17, 2009, produced a report by Dr. Lieberman on Laretta Blake.

Maryland Rule 2-402(g)(1)(A) governs the scope of expert disclosures in response to interrogatories. The rule provides:

“A party by interrogatories may require any other party to identify each person, other than a party, whom the other party expects to call as an expert witness at trial; to state the subject matter on which the expert is expected to testify; to state the substance of the findings and the opinions to which the expert is expected to testify and a summary of the grounds for each opinion; and to produce any written report made by the expert concerning those findings and opinions.”

Under the initial Scheduling Order issued on May 14, 2007, “Expert designations shall include all information specified in Rule 2-402(f)(1)(A) and (B),”⁴ and plaintiffs were required to respond to all interrogatory requests concerning expert findings and opinions and complete and serve psychometric testing results of the minor plaintiffs no later than November 15, 2007. By joint motion to modify that date was changed to October 10, 2008. All discovery was to be completed no later than July 10, 2009, all dispositive motions were

⁴ After the initial Scheduling Order was entered, Rule 2-402 was amended, effective January 1, 2008, at which time the former Rule 2-402(f) became Rule 2-402(g).

to be filed no later than August 10, 2009, and any motions in limine were to be filed no later than 15 days before trial. The trial is set for November 9, 2009.

The scheme created by the discovery rules “contemplates full disclosure by all parties so as to avoid surprises and to facilitate and ‘advance the sound and expeditious administration of justice.’” *Food Lion v. McNeill*, 393 Md. 715, 733 (2006). If a party fails to comply with discovery obligations, a court may impose sanctions, pursuant to Rule 2-433, including that the defaulting party not be permitted to introduce certain evidence. Rule 2-433(b). The factors used to guide a trial court’s decision to impose sanctions for discovery violations are (1) whether the disclosure violation was technical or substantial; (2) the timing of the ultimate disclosure; (3) the reason, if any, for the violation; (4) the degree of prejudice to the parties respectively offering and opposing the evidence; (5) whether any resulting prejudice might be cured by a postponement and, if so, the overall desirability of a continuance. *Lowery v. Smithsburg Emergency Med. Serv.*, 173 Md. App. 662, 672 (2007).

A scheduling order “sets ‘time limits on certain discovery events.’” *Rodriguez v. Clarke*, 400 Md. 39, 60 (2007) (citation omitted). It is intended to “move the case efficiently through the litigation process by setting specific dates or time limits for anticipated litigation events to occur.” *Dorsey v. Nold*, 362 Md. 241, 255 (2001). “[G]ood faith compliance with scheduling orders is important to the administration of the judicial system and providing all litigants with fair and timely resolution of court disputes.” *Helman v. Mendelson*, 138 Md. App. 29, 47, *cert. denied*, 365 Md. 66 (2001). Failure to comply with a scheduling order is sanctionable:

Just as there are sanctions for the violation of discovery rules, sanctions are available for the violation of directives and scheduling orders, although they are not specified in any rule. .

. . . Apart from any actual prejudice that may be suffered by the party in not receiving the information in a timely fashion, or that may be suffered by the court if trial has to be postponed, the court is demeaned by noncompliance with its order.

Dorsey, 362 Md. at 256-57. An expert witness may be excluded if a party fails to disclose the identity of the expert or the expert's opinions in compliance with the scheduling order. *Livingstone v. Greater Washington Anesthesiology & Pain Consultants, P.C.*, 2009 Md. App. Lexis 126, *16-20 (No. 2079, Sept. Term, 2007, August 27, 2009). See also *Shelton v. Kirson*, 119 Md. App. 325, 332, *cert. denied*, 349 Md. 236 (1998).

In determining what sanction is appropriate, “the reasons given for noncompliance, and the need for an exemption from the time deadlines imposed, are significant.” *Livingstone*, 2009 Md. App. Lexis 126 * 18. “[W]hile absolute compliance with scheduling orders is not always feasible from a practical standpoint, we think it quite reasonable for Maryland courts to demand at least substantial compliance, or, *at the barest minimum*, a good faith and earnest effort toward compliance.” *Id.* (citations omitted) “A party's good faith substantial compliance with a scheduling order is ordinarily sufficient to forestay the exclusion of a key witness because of a party's failure to meet the deadlines in its scheduling order.” *Id.* (citations and internal quotation marks omitted). It is up to the trial court to determine the appropriate sanction, *Admiral Mortgage, Inc. v. Cooper*, 357 Md. 533, 545 (2000), and that determination will only be reversed if there is an abuse of discretion. *Wilson v. Crane*, 385 Md. 185, 199 (2005).

Disclosures Made Before the October 10, 2008 Deadline

The July 25, 2008 Scheduling Order required plaintiffs to respond to interrogatory requests regarding the finding and opinions of experts by October 10, 2008. The parties

agree that the report of Dr. Barry Hurwitz on the psychometric testing results of Laretta Blake was properly disclosed prior to the expert disclosure deadline. Plaintiffs filed responses to the Interrogatories on June 17 and 18, 2008, identifying eighteen potential expert witnesses ---- ten were identified as medical and causation experts, four were identified as experts in psychology and neuropsychological evaluations of children with lead poisoning, and two of the four neuropsychological experts were also identified as experts in causation. Plaintiffs also identified one vocational expert and three economic loss experts.

The information provided in plaintiffs' interrogatory responses contained brief boilerplate language regarding the expected testimony of each type of expert. For example, for Dr. Klein, plaintiffs' medical and causation expert, plaintiffs give his name and address,⁵ identify him as an expert in pediatric lead poisoning, and then state:

Dr. Klein is expected to testify to the extent and permanency of the minor plaintiffs' injuries due to exposure to lead paint. Dr. Klein will also testify to the probable source of the lead exposure. Dr. Klein will also testify that exposure to lead-based paint at all of the defendants' subject premises, as stated in the Plaintiffs' complaint, was a substantial factor in the plaintiffs' injuries. If this expert writes a report, it will be provided.

Plaintiffs did not provide any expert opinions that named any of the plaintiffs or the properties owned by defendants. For each category of experts, plaintiffs repeated the same exact summary of expected testimony for each expert within that category. Plaintiffs responses did not comply with Rule 2-402(g)(1)(A) or the Scheduling Order because the information was too generic to have any meaning.

⁵ While a full name and address was provided for Dr. Klein, plaintiffs failed to provide addresses for at least three of the eighteen experts listed in their interrogatory responses. For one expert, Dr. Nelson, plaintiffs failed to provide a first name or any other identifying information.

Disclosures Made after October 10, 2008 and Before July 10, 2009 Close of Discovery

Plaintiffs supplemented their expert disclosures with letters in January and February of 2009. A January 30, 2009 letter informed defendants that, in addition to Dr. Hurwitz, plaintiffs intended to call Dr. Howard Klein and Mark Lieberman as experts at trial. On February 2, 2009, plaintiffs sent a letter to defendants identifying Michael Conte as an economic expert that plaintiffs expected to call at trial. These experts had been previously identified in plaintiffs' interrogatory responses.

Plaintiffs point to these letters as further evidence that they satisfied their expert disclosure obligations.⁶ Although the letters are three pages long, they give the same kind of generic answer that is given in the interrogatory responses, only longer. For example the letter states that Dr. Klein "will opine that the plaintiff was exposed to lead at all of the relevant addresses in this case, including the property owned and/or managed by your client(s)," and that "Dr. Klein's opinion is based upon his review of the relevant medical, psychological, housing, school and other records, as well as any reports generated by other experts. . . ." Except for the caption, there is no reference to the minor plaintiffs James, William, or Laretta, and the letter does not once refer to either the Dukeland or Garrison address or refer to any defendant by name. With respect to Lieberman, the letter states he is "expected to testify as to the nature and extent of the loss of earning capacity sustained by the plaintiff in this case. Mr. Lieberman's opinion is based on his review of the relevant medical, psychological, school, and other records, as well as any reports generated by other

⁶Plaintiffs argued at the motions hearing that their January and February 2009 letters narrowed the field of experts that they expected to call at trial from eighteen to three or four; however, the letters do not explicitly state that plaintiffs intended to call Hurwitz, Klein, Lieberman, and Conte to the exclusion of the other witnesses listed in their earlier responses.

experts. . . .” There is no case specific grounds for Dr. Lieberman’s opinion. The same is true of the February letter on Dr. Conte which states the basis of the opinion is Dr. Conte’s “aforementioned background, training, and experience, as well as the opinions of physicians, psychologists, neuropsychologists, and other professionals.” With regard to all three experts disclosed in the letters, plaintiffs simply stated that if the experts wrote reports, the reports would be provided to defendants. The letters also state that plaintiffs reserve the right to do ARC⁷ testing, state that plaintiffs anticipate calling someone from the Lead Poisoning Prevention Program,⁸ and provide a list of eighteen potential names of past or present representatives of the Program. Finally, plaintiffs also reserve the right to rely on defendants’ expert testimony.

On June 30, 2009, plaintiffs forwarded to defendants Dr. Conte’s economic loss report regarding Laretta Blake only. It was case specific. Plaintiffs also produced ARC Reports to defendants Klotzman and NRM on June 30, 2009 that were case specific.

As with the earlier responses, plaintiffs’ responses did not comply with Rule 2-402(g)(1)(A) or the Scheduling Order. All of the information was late and the information in the letters was too generic to be meaningful even if it had been timely.

Disclosures Made after the Close of Discovery

On July 16, 2009, six days after the close of discovery, plaintiffs produced to defendants case specific reports of Dr. Howard Klein as to Laretta, William, and James

⁷ Arc Environmental, Inc. provides lead paint testing services to plaintiffs. Plaintiffs letters stated that “Plaintiff(s) reserves the right to arrange lead testing of the other properties lived in or visited by the Plaintiff. . . .”

⁸ Plaintiffs stated that the Lead Program representatives are expected to testify as to plaintiffs housing history as recorded by the Health Department, the results of lead testing of plaintiffs, and the representatives’ observations of the subject properties and investigations conducted in this case.

Blake. On July 17, 2009, plaintiffs provided defendants an employability assessment report regarding Laretta Blake from Dr. Mark Lieberman. On July 24, 2009 plaintiffs provided defendants with the psychometric testing report of James Blake. On August 28, 2009 plaintiffs attached case specific affidavits of Dr. Klein to their oppositions to defendants' Motions for Summary Judgment. Plaintiffs produced the ARC Reports to Defendant Mourges on September 2, 2009 along with Plaintiffs' Opposition to Mourges' Motion for Summary Judgment, after defendant Mourges had filed a Reply to the Motion to Exclude. Assuming that the information in the reports complies with Rule 2-402(g)(1)(A), the responses did not comply with the Scheduling Order because they were produced after the close of discovery.⁹

The Disclosure Violations Were Substantial, the Ultimate Disclosures Were Extremely Late, No Reasons Are Given for the Violations, the Degree of Prejudice to the Defendants Is Substantial, and a Continuance Is Not Desirable.

Plaintiffs' failure to comply with Rule 2-402(g)(1)(A) and the Scheduling Order was a substantial rather than technical violation. Plaintiffs argue that they responded to the interrogatories and have complied with the Scheduling Order. They argue that their responses were sufficient and that if defendants wanted additional information they were free to depose the experts. With respect to the late reports, plaintiffs argue that Rule 2-402(g)(1)(A) does not require their experts to produce reports and when reports were

⁹The Scheduling Order contemplates that defendants will receive plaintiffs' expert information and then have time to develop their own expert information. Under the Scheduling Order defendants were to respond to all interrogatories concerning the findings and opinions of experts and complete their psychometric testing of the minor plaintiffs no later than May 11, 2009; thus the deadline for defendants to respond had passed before plaintiffs provided any meaningful information.

prepared they produced them.¹⁰ Plaintiffs responses belie their argument. Neither plaintiffs' answers to interrogatories nor the supplemental letters "state the substance of the findings and the opinions to which the expert is expected to testify and a summary of the grounds for each opinion." Rule 2-402(g)(1)(A). They do not in any respect respond to the interrogatory or comply with the Court's Scheduling Order. Furthermore, while plaintiffs are correct that their experts are not required to produce reports, any reports that they intend to rely upon must be produced to defendants consistent with the discovery rules and the Scheduling Order. In *Lowery*, 173 Md. App. at 669-70, the plaintiff argued that "the trial judge abused his discretion by granting the motion *in limine* to exclude [his] report," because "even if the report was filed after the discovery deadline," and the time required in the scheduling order, the expert's name was timely disclosed and the scheduling "order did not require an expert report." In affirming the trial judge, the Court of Special Appeals noted that scheduling orders are not to be treated in a casual fashion. "As we observed in *Naughton v. Bankier*, 114 Md.App. 641, 653 (1997), 'if scheduling orders are to be permitted to be treated in such a casual fashion, why bother with them?'" *Lowery*, 179 Md. App. at 678.

Plaintiffs' production of expert reports after the discovery deadline is a clear violation of this Court's Scheduling Order. In addition, plaintiffs' supplemental filings is further evidence that plaintiffs themselves did not believe that their interrogatory and letter disclosures "state the subject matter on which the expert is expected to testify; [or] state the substance of the findings and the opinions to which the expert is expected to testify and a

¹⁰ As discussed more fully, this argument is rejected by the Court but it does not hold up in any event for the ARC Reports, which are both dated March 5, 2009, but were not produced until June 30, 2009 to defendants Klotzman and NRM and September 2, 2009 to defendant Mourges. Plaintiffs provided no explanation for the delay in producing them.

summary of the grounds for each opinion.” Thus, with the exception of Dr. Hurwitz’ report on Laretta Blake, all of plaintiffs responses and reports were late.

While plaintiffs disclosed a list of experts before the October 10, 2008 deadline, the list was meaningless because the disclosures were substantively empty. There were no case specific findings or opinions and neither the plaintiffs or defendants or the properties involved in this case were mentioned. “Scheduling and discovery orders are designed to prevent,” precisely what plaintiffs have done---belatedly offering opinions from experts that “decisively changed the legal landscape.” *Livingstone*, 2009 Lexis 126 at *14 and 15 (No. 2079, Sept. Term, 2007, August 27, 2009) (quoting Wilner, J, concurring in *Marcantonio v. Moen*, 406 Md. 395, 418, 419 (2008)).

Plaintiffs’ failure of discovery is substantial in large part because the timing of the ultimate disclosures allows no time for defendants to conduct meaningful discovery. No meaningful information was given until a few days before the end of discovery or after discovery concluded. Plaintiffs have not offered a reason for the late interrogatory responses, but instead argue that the responses were sufficient, an argument this Court rejects as explained above. With regard to psychometric testing reports, plaintiffs concede that the report regarding James Blake was filed late and that there has not been a report filed for William Blake; however, no explanation has been offered.

The late production of case specific expert findings and reports makes it virtually impossible for defendants to secure responsive opinions from defense experts, take depositions, arrange independent examinations, and complete discovery in time for the November 9, 2009 trial. Testing was not completed on plaintiff James Blake until July 22, 2009, and testing has not been done on plaintiff William Blake. Defendants cannot do

psychometric testing until at least 6 months after plaintiffs are tested to avoid the “practice effect.” The expert disclosures made by plaintiffs did not implicate defendants’ properties at all until the reports filed after the close of discovery and the August 2009 Affidavit of Dr. Klein that was attached to plaintiffs summary judgment response.¹¹ The ARC Reports for 2928 Garrison Blvd. and 2119 Dukeland Street were produced to NRM and Klotzman for first time on June 30, 2009, more than 8 months after the expert discovery deadline. This was the same time that reports for two other properties where plaintiffs lived were produced, 2037 Braddish Ave. and 2607 ½ Garrison Blvd, Apt. 3. The ARC reports were not produced to Mourges until September 2, 2009. The inability to depose plaintiffs experts on their opinions and the foundations for their opinions is quite significant.

Contrary to plaintiffs’ arguments, defendants were not required by either the discovery rules or the Scheduling Order, to depose plaintiffs’ experts to learn the substance of the experts’ findings, the opinions to which they were expected to testify, and a summary of the grounds for each opinion. Defendants are not required to go to the expense of deposing experts when they are completely unaware of those experts’ opinions.

It clearly would have been the better practice for defendants to file a Motion for Sanctions and/or to Compel after not receiving the psychometric testing results for James and William on the dates required by the Scheduling Order and after receiving the generic interrogatory and letter responses on experts.¹² In another case, the failure to file might

¹¹ The affidavits contain Dr. Klein’s causation opinion with respect to defendant Mourges’ property at 2119 Dukeland Street and defendants Klotzman and NRM’s property at 2928 Garrison. Unsigned affidavits were filed with the Oppositions and signed affidavits were filed on September 9, 2009.

¹² In defense of their failure to file a motion to compel, defendants argued that plaintiffs’ counsel regularly lists numerous experts and later narrows down the list; thus they did not know which of the 18 experts plaintiffs would call. Defendants also argue that because there was no evidence

result in the denial of the Motion to Exclude but it does not in this case for several reasons.¹³

While they did not file a formal motion, defendants wrote two letters to plaintiffs' counsel objecting to the general nature of plaintiffs' expert disclosures. On December 8, 2008 counsel for defendants Klotzman and NRM sent a letter to plaintiffs counsel, which pointed out deficiencies in plaintiffs' expert disclosures and requested that plaintiffs forward expert reports on the other plaintiffs. Defendants Klotzman and NRM further asserted that plaintiffs' answers to interrogatories with regard to experts were overly broad and ambiguous, and requested a list of experts that plaintiffs expected to call at trial. On December 9, 2008, counsel for defendant Mourges sent a letter to plaintiffs' counsel, concurring with and adopting the positions contained in Klotzman and NRM's letter. On

linking their properties to plaintiffs injuries, they were not under an obligation to prompt plaintiffs to produce such evidence.

Counsel for defendant Mourges argued in his Reply in Support of his Motion to Exclude and at the September 30, 2009 motion hearing that plaintiffs' counsel produce the same or similar boilerplate language as expert designations in all their cases. Defendant Mourges attached another Klein affidavit from the case of *Whitby v. Singer* to his reply in support of his Motion for Summary Judgment. That affidavit is similar to the ones filed with plaintiffs' Oppositions in this case, although these are a little more detailed because they provide years when the plaintiffs were at the properties.

¹³ The original filings by plaintiffs named 18 experts, with no meaningful information on any of them. Defendants argued that this is the norm and that the norm is also that plaintiffs will later narrow the number of experts. This norm may be tolerated by counsel but it is not permitted or sanctioned by the discovery rules or the Court's Scheduling Order, and by not filing a motion to compel, defendants become complicit with plaintiffs disregard of the rules and Court order. Defendants may not have their cake and eat it too. Although defendants' letters to plaintiffs' counsel demonstrated a good faith effort to force plaintiffs to provide full disclosures, the discovery rules provide for an order compelling compliance if a motion is timely filed. Rules 2-432 and 2-433. In another case defendants' motions to exclude may be denied because a motion to compel or for sanctions was not filed before the end of the discovery deadline. *See Food Lion*, 393 Md. at 736 ("A party who answers a discovery request timely and does not receive any indication from the other party that the answers are inadequate or otherwise insufficient, should be able to rely, for discovery purposes, on the absence of a challenge as an indication that those answers are in compliance," *Id.* at 736. If discovery is not timely provided, defendants also have the option of filing a motion for sanctions. As the Court of Appeals has stated "discovery issues are best handled during the discovery period. . . ." *Id.*

March 11, 2009 counsel for defendant Mourges sent a letter to counsel for plaintiffs in response to the expert disclosure letters of January 30, 2009 and February 2, 2009 stating that plaintiffs' expert disclosure letters "carried only very generic statements about the subject matter of plaintiffs' testimony. . .with no case-specific findings and opinions."

The Scheduling Order required motions in limine to be filed 15 days before the November trial date. Defendant Mourges' Motion to Exclude was filed on July 14, 2009, well in advance of the deadline to file motions in limine, 12 days after receiving Dr. Conte's report, and *before* receiving the other reports. Defendants filed their Motions for Summary Judgment on August 10, 2008, which was the deadline set in the Scheduling Order for filing dispositive motions. Defendants could not have filed an earlier Motion for Sanctions or to Compel as to the reports that were filed shortly before discovery ended and after discovery was closed.

This contrasts with *Food Lion*, where the plaintiff answered the discovery requests timely and the defendant did not challenge the response in a motion to compel, a motion for summary judgment, or a motion in limine. 393 Md. at 725. Instead the defendant waited until the day of trial and the "primary thrust of [the defendant's] challenge," was that the opinion "lacked a sufficient basis and that it fails the test of the third prong of Rule 5-702." *Id.* at 730-731. The Court held that the attempted melding of Rule 2-402(f)(1)(A) on discovery, with Rule 5-702 on the admissibility of an expert's testimony, was not permitted and thus it was error to exclude the expert's testimony *Id.* at 735. Defendants are in a position similar to the defendant in *Lowery v. Smithsburg Emergency Med. Serv.*, 173 Md. App. 662, 671-672 (2007) where the basis for the plaintiff's expert opinion was not submitted until after the discovery deadline had passed.

Finally, a postponement is not a desirable means to cure the prejudice arising from plaintiffs' discovery failures. The trial is scheduled to begin on November 9, 2009. The Scheduling Order has already been modified to extend the expert disclosure and discovery deadlines by nearly eleven months. The Court's July 25, 2008 Scheduling Order stated that "[t]he parties have agreed to the trial date and therefore it will not be modified absent truly exigent circumstances." Plaintiffs filed suit against these defendants in January of 2007. The additional plaintiffs were added in December of 2008. Plaintiffs had at least one and a half years between the amendment of the Complaint and the close of discovery to gather information and complete disclosure of their expert opinions.

For all those reasons, with the exception of Dr. Hurwitz's report as to Laretta Blake, all experts and reports are excluded.¹⁴

The Motions for Summary Judgment

Defendant Randy Klotzman. Defendant Klotzman argues that there is no evidence to support his inclusion as an individual defendant because there is no evidence that he ever owned or managed the premises in question. His interrogatories state that the premises was owned and managed by NRM, Inc.¹⁵ Plaintiffs argue that there is no affirmative statement by Klotzman that he did not own or manage the property and therefore the motion must be denied.

¹⁴ The Court is aware that the prejudice to plaintiffs in granting the motion to exclude is to prevent their case from going forward against these defendants. While this prejudice is great, it is the result of plaintiffs' blatant and inexcusable failure to comply with the discovery rules and Scheduling Order.

¹⁵ Defendant also relied on Request for Admissions 2 and 3. Plaintiffs argued that those could not support a motion for summary judgment because they are not under oath. Rule 2-424. Without deciding if plaintiffs are correct, the Court is not considering the responses to the Requests for Admissions in its decision.

This Court disagrees. Although the better practice would have been for Klotzman to file an affidavit affirmatively stating he did not own, manage or operate the property, the unchallenged answers to interrogatories state that the property was owned and managed by NRM. If plaintiffs wanted to challenge those answers, that challenge should have occurred during discovery.

Plaintiff Laretta Blake. All three defendants argue that any claim by plaintiff Laretta Blake against them must be dismissed because they were never served with a complaint naming her as a plaintiff. Plaintiff Laretta Blake filed the original complaint on January 2, 2007, naming NRM, Inc., Randy Klotzman, and Agamemnon Mourges, among others, as defendants. Before the complaint was served on those defendants, on December 18, 2007, Plaintiff filed a First Amendment by Interlineation adding William Blake, James Blake and Couretta Blake as additional plaintiffs. The First Amendment by Interlineation began with Count 27. It did not repeat the original complaint. It did not mention Laretta Blake at all and did not include the claims in the original complaint. Plaintiffs served the Interlineation only on these defendants and did not serve the original complaint or otherwise notify them of the original complaint. NRM and Klotzman filed an answer February 13, 2008 and Mourges filed an answer March 12, 2008. In both cases, the answers only addressed the counts applicable to them in the Interlineation. These defendants have never filed an answer to Laretta Blake's claims against them.

Mourges' counsel saw the original complaint for the first time on February 27, 2009 and saw that Mourges was a defendant. NRM and Klotzman learned about Laretta's claims around the same time. Defendants argue that because her claims are subject to dismissal under Rule 2-507(b), the service on them did not comply with Rules 2-121 (a) and 2-341(d),

and that the Court does not have personal jurisdiction over them as to those counts (Counts 25 and 26 as to defendant Mourges and Counts 1-4 for defendants NRM and Klotzman). They argue that they have not waived service because their answers did not address those counts.

Plaintiffs respond that defendants were mailed a copy of the original complaint and have had a copy of the complaint since at least February 27, 2009, that defendants deposed plaintiffs' mother on March 9, 2009, and that defendants are not prejudiced. During argument plaintiffs' counsel stated that defendants had been "served" a copy of the original complaint but was unable to state the date of the service or to produce an affidavit of service. Plaintiffs also argued that defendants could not file a Motion to Dismiss for lack of jurisdiction under Rule 2-507(b).

Until filing their motions, defendants have acted in every respect as if they had been served with the claims of Laurretta. All three defendants filed interrogatories and other discovery with respect to Laurretta. By engaging in discovery and filing their Motions to Exclude and for Summary Judgment, defendants have addressed Laurretta Blake's claims on the merits. In sum, although they have not filed an answer, defendants have waived service of the complaint on them.

Consumer Protection Counts. Defendant Mourges argues that the Consumer Protection Counts against him must be dismissed, and plaintiffs concede that there is no evidence to support those counts. Therefore, judgment will be entered for Mourges on Counts 26, 43, and 46 for this reason.

Circumstantial Evidence. All three defendants argue that the circumstantial evidence in this case is insufficient as a matter of law to create a factual dispute that there was lead

paint in their properties at the time plaintiffs were tenants. *Dow v. L & R Properties, Inc.*, 144 Md. App. 67 (2002), held that circumstantial evidence of lead paint is sufficient to create a dispute of material fact. In *Dow* the circumstantial evidence was:

- A certified document of the Baltimore City Department of Public Works that indicated that the dwelling at 1237 Myrtle Avenue was in existence as early as 1935;
- Baltimore City Health Department documents reflecting that Dow was diagnosed with lead poisoning;
- Defendants' own answers to interrogatories, in which they asserted, that Dow had lived at 1237 Myrtle Avenue from the time she was two months old until after she was diagnosed;
- Dow's mother said that Dow spent virtually all of the relevant time at 1237 Myrtle Avenue and could not have been exposed to lead anywhere else;
- Defendant did not dispute that there was evidence that the dwelling was built prior to 1950, that such dwellings often contain lead-based paint; and
- Dow ate paint chips in the dwelling.

Id. at 75-76.

The *Dow* Court contrasted those facts to the facts in other cases where the Court had said in *dicta* that direct evidence of the presence of lead was required. *Compare Davis v. Goodman*, 117 Md. App. 378, 393 (1997) (no indication that the plaintiffs resided exclusively at the dwelling in question and could not have been exposed to lead elsewhere); *Webb v. Joyce Real Estate, Inc.*, 108 Md. App. 512, 517 n.2, (1996) (plaintiff "offered no evidence of the presence of lead-based paint" and plaintiffs were diagnosed with lead poisoning several weeks after moving from premises); *Bartholomee v. Casey*, 103 Md. App. 34, 40, 58 (1994) (evidence indicated that plaintiff had been exposed to lead-based paint at other locations) *cert. denied*, 338 Md. 557(1995). *Dow*, 144 Md. at 76-77.

Plaintiffs' evidence is that they lived in or visited 17 houses, with no precise dates for most of them. Documentation and testimony established that plaintiffs lived at 2830 W. North Ave. from 1986 until October 1991. There is a fairly comprehensive, contemporaneous record of lead exposure while plaintiffs lived there. The Baltimore City Health Department's inspections of 2830 W. North Ave., beginning in 1990, show deteriorated paint in numerous areas with leaded substrate, and Couretta Blake confirmed that the paint was in deteriorated condition, with chipping throughout the house.

Plaintiffs' evidence that they were lead poisoned at 2119 Dukeland, Defendant Mourges' property, is:

- ARC Report of a February 2009 inspection of the exterior, which will be excluded from evidence and not considered by the Court because of the reasons set forth above on the Motion to Exclude;¹⁶
- The ARC Report does not support an inference of lead paint poisoning at the residence in any event, because the mother testified there was chipping and peeling on the interior;
- Plaintiffs lived at the property at some unspecified time in 1992;
- At the motion hearing there was nothing in the record that indicated when the house was built, i.e. nothing to show it was built before 1950;
- Because plaintiffs' mother is unable to say what months they lived on Dukeland, it is not possible to state that any of the blood lead level readings occurred while the plaintiffs were living on Dukeland. The lead level of the plaintiffs during the operative time period when they might have been residing there was:
 - Lauretta– 13 in December 1992; in contrast her peak was 22 in January 1989 while she was living at 2830 W. North Ave., where she had lived

¹⁶ Defendant Mourges also argues that the Report is hearsay and should not be considered as it is unaccompanied by an affidavit. The Court agrees with Mourges. In response to a motion in a similar lead paint case, counsel for plaintiffs state that a defendant's report of no lead is not admissible because it is not accompanied by an affidavit "from a qualified expert concerning the conclusions." What is good for the goose is good for the gander.

from date of her birth until she was 5 years, 9 months. She lived in one or two additional houses prior to moving into the Dukeland address;

- William- 16 on February 7, 1992 and 18 on July 31, 1992, in contrast his peak was 32 on September 11, 1990 while living at 2830 W. North Ave., where he had lived from his birth until he was three years and four months;
- James - 18 on July 30, 1992 and 17 on December 4, 1992. James' peak was 20 on June 24, 1991 when he lived at 2830 W. North Ave., where he lived from birth until he was 1 year, 20 months old.
- Dr. Klein said they were poisoned while living there but his report is not admissible for the reasons stated above.¹⁷

Plaintiffs' evidence that there was lead paint at 2928 Garrison Blvd, defendants NRM and Klotzman's property, is:

- ARC Environmental Report of lead on the exterior as of February 3, 2009, which will be excluded from evidence and not considered by the Court because of the reasons set forth above on the motion to exclude;
- The ARC Report does not support an inference of lead paint poisoning at the residence in any event because the mother testified there was chipping and peeling on the interior;
- Plaintiffs resided in the house from October 1994 to May 1995;

¹⁷ Both defendant Mourges and defendants NRM and Klotzman argue that Dr. Klein's affidavit should not be considered for other reasons in addition to being untimely. Defendant Mourges argues that Dr. Klein's affidavit is not admissible evidence in any event because it does not address the issue of alternative sources of poisoning, does not address issue of plaintiffs' peak levels before they moved into Dukeland and is based on speculation because there is no information on the months the plaintiffs lived there.

Defendants NRM and Klotzman argue that in addition to being untimely, Dr. Klein's affidavit is deficient because it does not mention 13 of the 17 properties where plaintiffs lived; it does not distinguish lead exposure at different properties; Dr. Klein had no information on lead paint at their property when he did his report; there is no evidence that their property had lead paint during plaintiffs' tenancy, or that if it did, that the lead paint was in any way accessible; and the report lacks an adequate factual foundation because Klein did not have the deposition testimony of Couretta, Lauretta, William or James Blake concerning where they lived, any information on the age or abatement status of the 17 properties, an inspection report on 2928 Garrison Blvd., or information on the condition or lead content of properties plaintiffs visited while they lived at 2928 Garrison Blvd.

Because the affidavit is excluded as a discovery sanction, the Court is not addressing whether it is otherwise admissible.

- At the Motion hearing there was nothing in the record indicated when the house was built, i.e. nothing to show it was built before 1950;
- There is no evidence of what the lead levels of the plaintiffs were while they lived in the house; and
- Dr. Klein said plaintiffs were poisoned while living there but his report is not admissible for the reasons stated above.

Even if believed, this evidence could not establish that plaintiffs' residency at either 2928 Garrison Blvd. or 2119 Dukeland St. was a substantial factor in their lead poisoning. *Pittman v. Atlantic Realty Co.*, 359 Md. 513, 521 (2000).¹⁸

For all the reasons stated above, the Court will issue an Order granting the Motions to Exclude and for Summary Judgment of defendants NRM and Klotzman and defendant Mourges.

Dated: October 26, 2009

Judge Evelyn Omega Cannon

¹⁸ After the hearing plaintiffs filed a Supplemental Opposition attaching certified copies of what plaintiffs say are "Property Cards" public records from the City of Baltimore Department of General Services Record Section for 2119 Dukeland Street that Plaintiffs say establish 2119 was in existence since at least 1919 and that establish that 2912/32 Garrison Blvd. has been in existence since at least 1963 and a deed for 2912/32 that goes back as far as 1922. Defendants NRM and Klotzman filed a Response pointing out that the submission is untimely and is not accompanied by an affidavit. Furthermore they point out that the Deed attached by plaintiffs only references "2914" Garrison, not "2928;" thus, even if it is considered there is no evidence that the apartment building at 2928 was built prior to 1950. The Court agrees. Furthermore, even if the Property Card is considered as to 2119 Dukeland Street, there is still insufficient evidence for a jury to find that plaintiffs' residency at 2119 Dukeland was a substantial factor in their lead poisoning.