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LAW REVIEW

"WHAT IN THE PRODUCTS MANUFACTURING LIABILITY IS HAPPENING?"

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Product manufacturers and the insurance companies that defend and indemnify them should pay close attention to the recent Eleventh Circuit decision in *Taylor v. Mentor Worldwide, LLC.* This case is intriguing for three reasons. First, it raises questions about the admissibility of a plaintiff's expert witness's testimony when such testimony falls outside the scope of the expert's Rule 26 report.[1] Second, it teaches defense attorneys a valuable lesson about refraining from asking for

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[1] Rule 26 requires a party to disclose to the other party any expert witness it may use at trial. Unless otherwise stipulated or ordered, the party must accompany the expert testimony disclosure with a written report that is prepared and signed by the expert witness.

alternative relief that could be injurious to one's case without having received an answer from the court as to one's first request for relief that would have been more favorable. Finally, this case serves to remind defense attorneys of the importance of preserving issues at trial for appeal.

This article provides an in-depth analysis of *Taylor* and the repercussions of that case for attorneys. First, it provides a broad overview of how Federal Rules of Civil Procedure 37 and 26 interplay. Second, it provides the factual background of *Taylor* and appellate issues within the case while addressing each party's appellate arguments, including discussions about a Motion for Judgment as a Matter of Law. Third, it dissects the tension between the majority, concurring, and dissenting opinions of the Eleventh Circuit as they relate specifically to its holdings about Rules 26 and 37. Finally, the article concludes with suggestions to practitioners on how to avoid the pitfalls that occurred in *Taylor*.

I. RULE

A. A trial court has broad discretion to provide remedies when an expert's trial testimony is inconsistent with that expert's Rule 26 report

Rule 37 gives the trial court broad discretion to fashion an appropriate remedy concerning an expert's conflicting deposition and trial testimony.[2] A trial court's failure to strike an expert's testimony altogether is not grounds for appeal. This conclusion is especially true when a product manufacturer requests an alternative remedy, which the trial court grants, to rectify the conduct of an expert who failed to comply with Rule 26.[3]

Furthermore, when the issue of the amount of a product a patient can withstand before her safety is risked is not implicated, neither is an expert's testimony regarding the "dose-response relationship."[4] The threshold to burst the punitive damages statutory cap is exceptionally difficult to satisfy unless a patient presents evidence that a product manufacturer acted with the *specific intent to harm* the patient when its wrongful conduct did in fact cause the patient's injuries.[5] To meet the specific intent requirement, the evidence must show that the product manufacturer is certain that the consequences that flowed from its wrongful conduct would occur.[6]

Finally, all similarly situated parties should be cognizant of a circuit split regarding the issue of whether Rule 37 requires an automatic exclusion of

[2] *See* Fed. R. Civ. P. 37(c)(1); Taylor v. Mentor Worldwide LLC, 940 F.3d 582, 593 (11th Cir. 2019).
[3] *Id.* at 589.
[4] *Id.* at 595–96.
[5] *Id.* at 597 (emphasis added).
[6] *Id.*

conflicting expert testimony regardless of the presence of substantial justification or harmlessness.[7] To elaborate further as to this issue, one must dissect the text of Rule 37(c)(1), which states:

> If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence . . . at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:
>
> (A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;
> (B) may inform the jury of the party's failure; and
> (C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

Rule 26(a)(2) requires a party to disclose the identity of any expert witness that a party plans to produce at trial in addition to any written report that witness has drafted and which will serve as the basis of the witness's opinions at trial.[8] Relevant to the current case, Rule 26(e) mandates that if the witness deems it necessary to expand, alter, and/or narrow the scope of his or her opinion, such witness must supplement his or her report and provide that supplementary report to the opposing party in a timely manner.[9]

The Advisory Committee notes to Rule 37 lend some guidance as to whether Rule 37 requires an automatic exclusion of conflicting expert testimony regardless of the presence of substantial justification or harmlessness.[10] On the one hand, examples of harmless non-disclosures include "inadvertent" omission(s) of information to which the opposing party was already privy.[11] On the other hand, the "harmlessness" language was implemented as a catch-all provision to avoid unduly harsh provisions in a multitude of situations.[12] However, the Advisory Committee notes also support the conclusion that a non-disclosure, despite harmlessness, does not automatically warrant exclusion.[13]

For example, the first sentence of Rule 37(c)(1) states that a party who commits a non-disclosure in violation of Rule 26(e) "is not allowed to use that information . . . at a trial, *unless* the failure was substantially justified or is

[7] *See* Pitts v. HP Pelzer Auto. Sys., 331 F.R.D. 688, 695 n.7 (S.D. Ga. 2019).
[8] Fed. R. Civ. P. 26(a)(2).
[9] *Id.*
[10] Fed. R. Civ. P. 26 advisory committee's note to 2006 amendment.
[11] *Id.*
[12] *Id.*
[13] *Id.*

harmless."[14] Nonetheless, the next sentence provides: "[i]n addition to or *instead of this sanction*, the court" may impose "other appropriate sanctions."[15] Given this text, one can argue that exclusion is not automatically required.[16]

B. The Circuits are split as to the appropriate remedy under Rule 37.

As evident by the different interpretations of Rule 37, a circuit split evolved. The Second, Sixth, and Seventh Circuits concluded that the absence of substantial justification or harmlessness does not automatically result in exclusion whereas the First, Fourth, Eighth, and Ninth Circuits mandate automatic, or near-automatic, exclusion under the same circumstances.[17] *Pitts* noted that the Eleventh Circuit has not squarely decided this issue.[18] Even in the current case, the Eleventh Circuit still refused to decide this very issue.[19]

Despite the current circuit split, the Third, Fifth, Tenth, and Eleventh Circuits have not weighed in on this issue as evidenced by the *Pitts* decision.

II. *TAYLOR* ILLUSTRATES THE ISSUES WITH RULE 26 AND 37

A. Factual Background

In *Taylor*, Teresa Taylor sued Mentor Worldwide, LLC and Mentor Corporation for compensatory and punitive damages associated with injuries she sustained from a polypropylene mesh sling—named ObTape—which was manufactured by Mentor and implanted in Taylor to treat her stress urinary incontinence.[20] Taylor alleged that ObTape caused both her urethral wall to thin and chronic bladder inflammation.[21]

Taylor endeavored to prove at trial that her injuries resulted from design defects in the ObTape.[22] Specifically, Taylor alleged that the small pore size did not allow adequate tissue ingrowth, and it had a propensity to degrade and shed polypropylene particles into the body.[23] Taylor relied "on several expert witnesses to establish both general causation—that is, that ObTape was capable of causing the types of injuries from which she suffered—and specific causation—that is," the ObTape implant caused her injuries.[24]

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[14] Fed. R. Civ. P. 26(e) (emphasis added).
[15] *Id.* at R. 37(c)(1) and 37(c)(1)(C) (emphasis added).
[16] *Id.*
[17] *See Pitts*, 2019 WL 2448821, at *5 n.7.
[18] *Id.*
[19] *See Taylor*, 940 F.3d at 582.
[20] *Id.* at 586.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*

"The jury awarded Taylor $400,000 in compensatory damages and $4 million in punitive damages."[25] "Mentor moved for judgment as a matter of law or [] alternative[ly], for a new trial or to reduce the punitive damages award."[26] The district court upheld the jury's verdict as to "liability and compensatory damages, but concluded that the punitive damages award exceeded Florida's statutory cap" because the trial evidence was insufficient to support that Mentor had "specific intent" to cause Taylor's injuries.[27] The district court reduced the punitive award to $2 million.[28] Both Taylor and Mentor appealed the district court's judgment.[29]

B. Appellate Issues

The court examined four issues on appeal. The first two issues were whether the district court erred in receiving certain expert testimony when determining specific causation and applied an incorrect causation standard to Taylor's failure to warn claims.[30] The third issue was whether Mentor was entitled either to: (1) a new trial because of several evidentiary rulings or (2) an amended judgment eliminating or further reducing the punitive damages award.[31] The fourth issue was whether the district court erred in reducing the jury's punitive damages award.[32] The Eleventh Circuit found no error in the district court's judgment and affirmed.[33]

C. Rules And Analysis

1. *Motion for Judgment as a Matter of Law*

Mentor argued that it was "entitled to judgment as a matter of law or, alternatively, to a new trial because the district court failed to strike Dr. Porter's testimony to the extent he offered opinions at trial that had not been disclosed in his Rule 26 report."[34] The Eleventh Circuit reasoned that the district court did not err in denying Mentor's motion to strike Dr. Porter's testimony because the only true inconsistency between Dr. Porter's Rule 26 report and his trial testimony was regarding "urethral erosion."[35] "Dr. Porter's trial testimony as to causation was not inconsistent with his Rule 26 report, which was the basis for Mentor's motion to

[25] *Taylor*, 940 F.3d at 590.
[26] *Id.* at 586.
[27] *Id.* at 586, 591 (citing In re Mentor Corp. ObTape Transobturator Sling Prods. Liab. Litig., No. 4:08-MD-2004 (CDL), 4:12-CV-176 (Taylor), 2016 WL 6138253 (M.D. Ga. Oct. 20, 2016)).
[28] *Taylor*, 940 F.3d at 591.
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.* at 586.
[33] *Id.* at 601.
[34] *Taylor*, 940 F.3d at 591.
[35] *Id.* at 592

strike."[36] The Eleventh Circuit explained that the district court had discretion under Rule 37 to fashion an appropriate sanction regarding Taylor's failure to supplement Dr. Porter's Rule 26 report on the topic of "urethral erosion," and that the court had done so by allowing Mentor an overnight continuance to prepare Dr. Porter's cross-examination in light of his conflicting testimony.[37] Finally, the Eleventh Circuit reasoned that "[a]ny unfair surprise as to [the 'urethral erosion'] issue was minimal because 'erosion,'" generally, was extensively covered in pretrial discovery.[38] Dr. Porter disclosed his belief that "ObTape could cause 'erosion of mesh into tissues or organs'" in his Rule 26 report.[39]

D. Concurring and Dissenting Opinions

1. *Judge Julie Carnes, Circuit Judge, Concurring Specially*

Judge Carnes concurred with the majority's conclusion and explained that the tie-breaker for deciding not to exclude conflicting expert testimony was that Mentor proposed an alternative remedy before receiving a ruling on Mentor's motion to strike Dr. Porter's testimony.[40] Mentor requested an overnight continuance in which to prepare Dr. Porter's cross-examination in light of his conflicting testimony.[41] Mentor only sought alternative relief from its motion to strike.[42] Based upon these facts and upon the district court's broad discretion under Federal Rule of Civil Procedure 37[43] to fashion an appropriate remedy, Judge Carnes concurred that the district court did not abuse its discretion by granting Mentor's alternative request for relief.[44]

2. *Gerald Bard Tjoflat, Circuit Judge, Dissenting*

Judge Tjoflat opined that the majority's opinion contained two legal errors: (1) "it applie[d] the wrong legal standard to determine whether Dr. Porter's trial testimony should have been excluded under Federal Rule of Civil Procedure 37(c)(1)", and (2) even if the majority applied the correct legal standard, it still "botche[d] the analysis in concluding that Taylor's Rule 26 violation was not prejudicial."[45] Judge Tjoflat concluded that the majority's opinion gave "the green light to Taylor's 'ambush tactics.'"[46]

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[36] *Id.*
[37] *Id.* at 593.
[38] *Id.*
[39] *Id.*
[40] *Taylor*, 940 F.3d at 602 (Carnes, J., concurring).
[41] *Id.*
[42] *Id.* at 604–05 (Carnes, J., concurring).
[43] Fed. R. Civ. P. 37.
[44] *Taylor*, 940 F.3d at 606 (Carnes, J., concurring).
[45] *Id.* at 606 (Tjoflat, J., dissenting).
[46] *Id.* (citing Licciardi v. TIG Ins. Grp., 140 F.3d 357, 359 (1st Cir. 1998)).

III. PRACTICAL EFFECTS

So what does *Taylor* mean for practitioners? For practitioners in the Fifth Circuit, it means that the issue brought about by Rule 37 would be novel to the Fifth Circuit, it could be decided to mandate automatic, or near automatic exclusion or in opposition to, and that practitioners should guard against unfavorable outcomes of this issue by providing supplemental expert reports to the opposing parties out of an abundance of caution. In other words, Fifth Circuit practitioners should be complete, thorough, and precise about the opinions their expert witnesses will give at trial; the basis of such opinions; and should transparently share such information with the opposing party to avoid exclusion of the witness's trial testimony.

Finally, if a Fifth Circuit practitioner finds herself in a precariously similar position as the Defendant in the current case, she should move to strike the expert witness's trial testimony altogether or, alternatively, to the extent it falls outside the scope of the witness's Rule 26 report. She should then allow the court to decide such motion before requesting an alternative remedy, such as a continuance to prepare a more thorough cross-examination of the witness. Failure to do so could be viewed by an appellate court as an alternative sanction to the opposing party even if it is ultimately not the most favorable or desired sanction for the party requesting relief.