IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE,
AT CHATTANOOGA

ROY L. DENTON, *Plaintiff*	*	**Case No. 1:07-cv-211**
	*	
	*	**Judge:** ***Collier/ Carter***
v.	*	
	*	
STEVE RIEVLEY, *in his individual capacity* *Defendant*	*	
	*	
	*	
	*	***JURY DEMAND***
	*	

PLAINTIFF'S MOTION TO EXCLUDE DISCOVERY NOT TIMELY DISCLOSED

Comes now, the Plaintiff Roy L. Denton, pro se, (*hereinafter Mr. Denton*) and pursuant to Federal Rules of Civil Procedure 26 and 37, files this motion to exclude discovery of a witness statement document not timely disclosed by the Defendant Steve Rievley.

I. INTRODUCTION

1. On September 3, 2009, the Defendant Steve Rievley (*hereinafter Mr. Rievley*) filed a response with an undated, unwitnessed, unattested handwritten document attached to it that is claimed by Mr. Rievley to had been written by Brandon Denton (*see Court Doc. 61-1*). Such disclosure now is untimely, unfair and prejudicial to Mr. Denton, and amounts to nothing more than gamesmanship. As a result, Mr. Rievley should be precluded from relying on the newly disclosed handwritten statement of Brandon Denton.

II. FACTS

2. On February 15, 2008, this court entered its Scheduling Order (*Court Doc. 6*) setting the discovery cutoff for August 8, 2008 and pretrial disclosures as specified by Fed. R. Civ. P

26(a)(3)(B) and (C) for October 28, 2008. These were the deadline schedules by order of this court (*see Court Doc. 6*).

3. On November 3, 2008, Mr. Denton served a subpoena upon Ronald D. Wells, attorney for the defendant Mr. Rievley (*see Court Doc. 53*). The subpoena was issued **AFTER** the discovery deadline but was however, issued and served upon him **BEFORE** the deadline of the trial set for December 8, 2008. The subpoena specifically requested a copy of that handwritten statement of Jessica Carbajal that Mr. Rievley by and through his attorney said he had and could show as stated and sworn to as such in his response to Request for Admissions filed with the court by Mr. Rievley on June 20, 2008, but for some reason, never did. (*see Court Doc 30 page 2*). Mr. Rievley was evasive in producing Jessica's statement whereas he additionally failed to disclose or even make the existence of the "handwritten statement of Brandon Denton" known to this court or the plaintiff Mr. Denton (*see Court Doc. 61-1*).

4. During much of the entire time from June 20, 2008 up to the service of the subpoena, Mr. Denton on several occasions had all but begged attorney Ronald D. Wells to produce this statement his client Mr. Rievley stated that he had. All attempts to gain discovery for the statement of Jessica Carbajal failed therefore requiring Mr. Denton to file a subpoena demanding the statement be produced among other requests unrelated to this particular pleading. Again, Mr. Rievley clearly could have supplemented his discovery and produced the handwritten statement of Brandon Denton but he didn't. (*see Court Doc. 61-1*).

5. On November 12, 2008, this court entered a memorandum and order (*see Court Doc. 51 and 52*) denying Mr. Rievley summary judgment and whereas Mr. Denton's claims involving his Fourth Amendment claims of unlawful arrest inside his home and unlawful entry prevailed. This court found that Mr. Rievley had violated Mr. Denton's Fourth Amendment right and that such

was a violation of clear established law and was not entitled to rely upon qualified immunity. However, in this same memorandum and order, this court denied Mr. Denton's claim of false arrest due in predominant part that Mr. Denton could not establish his assertion that Mr. Rievley did not have probable cause to arrest him. Even still, Mr. Rievley never disclosed the existence of the handwritten statement of Brandon Denton (*see Court Doc. 61-1*).

6. On November 14, 2008, Mr. Denton filed a copy of the subpoena served upon Ronald D. Wells, attorney for Mr. Rievley in which Mr. Wells complied with in part, by finally disclosing a copy of the written statement of Jessica Carbajal (*see Court Doc. 58-1, Ex. 3*).

7. On November 17, 2008, Mr. Rievley filed his notice of appeal (*see Court Doc. 54*) and this court entered its order terminating the scheduling order deadlines (*see Court Doc. 55*).

8. On December 10, 2008, Mr. Denton having a relative feeling of safety for his family due in part, his prevailing on his Fourth Amendment claims against Steve Rievley, a police officer of a small town, Mr. Denton filed by mail a notice to the court changing his address from Georgia back to his home at 120 6th Ave., Dayton, TN. which such notice was entered into the record December 15, 2008 (*see Court Doc. 56*).

9. At an unspecified date in January 2009, Mr. Denton spoke in person with his son Brandon and questioned him of the events that were purported to had happened on September 9, 2006. On January 27, 2009, Mr. Denton met with his son Brandon and helped reduce Brandon's words to writing in a sworn affidavit (*see Court Doc. 58-1, Ex. 2*).

10. On July 2, 2009, Mr. Denton, after weeks on trying to locate Jessica Carbajal, finally found out where her mother lived. Even with that information and two courtesy letters mailed to Jessica in care of her mother's address, Mr. Denton was still unable to speak with Jessica as she was apparently being evasive and her mother became rude and directed Mr. Denton to stop

contacting her. Mr. Denton eventually found out where Jessica worked and he along with a process server (*his wife Kim*) and served Jessica with a subpoena which was in the form of a "***questionnaire***". Jessica opted to talk with Mr. Denton at that point in time and freely answered the questionnaire and signed in front of Mr. Denton and his wife (*see Court Doc. 58-1, Ex. 4*).

11. Armed with **this new information,** information that Mr. Rievley failed to disclose to the plaintiff initially or otherwise, in addition to evading continued requests, Mr. Denton was able to investigate and find out a valid probability of the reasoning for the rather obvious withholding of the Jessica Carbajal statement. The newly discovered facts found turned out to be completely different than those asserted by Mr. Rievley. In fact, Mr. Rievley, through counsel, has artfully evaded even responding to Mr. Denton's "**new information**" in that the direct accusation that Mr. Rievley provided to this court false information when he stated in his sworn submissions to this court that Jessica "**arrived at the jail to make a statement**" (*see Court Doc. 58-1, Ex. 5*). The fact as stated by Jessica herself and NOT the mere assertions of Mr. Rievley, make it undisputable that he was wrong when he said that Jessica came to the jail to give a written statement. Attention should be focused that Mr. Rievley has yet to address how he states that Jessica came to the jail that night to give a written statement when, as this record shows, Jessica states that she NEVER went down to the jail that night to make a statement. So who is to be believed? Do we believe what Mr. Rievley said Jessica said or what Jessica said she said and can testify to that effect. Therefore, it was not possible for Mr. Rievley to had been able to gather any information to support probable cause based upon a written statement that he said was made which the person whom he said made it says "she didn't". ***The evasiveness on the part of Mr. Rievley concerning Jessica Carbajal's statement is relevant to the evasiveness of the undisclosed Brandon Denton handwritten statement***. The facts surrounding how each of those

statements even came about suggest Mr. Rievley's clear intent to not disclose them.

12. Based upon this **newly discovered information consisting of Jessica Carbajal's written statement, her answers to a questionnaire pertaining to that statement along with the sworn affidavit of Brandon Denton**, Mr. Denton filed his Motion to Reconsider Plaintiff's Claim for False Arrest along with a memorandum in support of the motion with 4 exhibits annexed therewith. In addition, NOT as part of any "newly discovered information", but in support thereof, Mr. Denton filed the affidavits of Roy L. Denton and Kimberly Denton (*see Court Doc. 59 and 60, respectively*). Mr. Rievley's assertion to this court that the affidavits of Roy and Kim Denton are part of the "NEWLY" discovered information is an incorrect assertion. The "newly discovered information" found through due diligence on the part of the plaintiff, hindered by Mr. Rievley in his gamesmanship tactics in not disclosing Jessica's written statement.

13. Now at this late untimely stage, Mr. Rievley has ubiquitously "sprung" to the prejudicial surprise to Mr. Denton some sort of unauthenticated handwritten document that looks more in tune to a torn out page from a personal journal, that has no date on it, no witness to it, no attestation, no anything except once again, the sole words of Mr. Rievley to have been written by Brandon Denton. Additionally, Mr. Rievley asserts that this document was written in front of "many officers". If that be the case, where are their affidavits supporting what he now says?

III. MEMORANDUM OF LAW

The Supreme Court promulgated Rule 37(c)(1), the most important rule of evidence contained in the Federal Rules of Civil Procedure. Rule 37(c)(1) provides a self-executing sanction for a party's failure to disclose information required by Rule 26(a) without substantial justification. It bars the derelict party from using at trial, at a hearing or even on a motion any

information—including the testimony of any witness—that was not but should have been disclosed pursuant to Rule 26(a) or (e)(1).

Rule 37(c)(1) provides for the automatic exclusion of anything that should have been, but was not, disclosed under Rule 26(a). If expert demonstrative evidence has not timely been disclosed, Rule 37(c)(1) is designed to bar its introduction at trial. See, e.g., *Finley v. Marathon Oil Co., 75 F.3d 1225, 1230 (7th Cir. 1996)* (undisclosed charts prepared by expert to rebut opposing expert properly excluded); *United Phosphorus v. Midland Fumigant, 173 F.R.D. 675, 677 (D.Kan. 1997)* (undisclosed exhibits excluded). The demonstrative evidence preclusion problem discussed above is not confined to the expert witness realm. Under the 1993 Civil Rules amendments, Rule 26(a)(3) (the general pretrial disclosure rule) is broadly drafted to encompass non-expert demonstrative exhibits. Additionally, the 2000 Civil Rules amendments expanded the sanction of automatic preclusion of evidence in pertinent part, expanding the rule to encompass "unmade discovery".

Rule 26(a)(3) provides that - in the absence of a judicially-directed final pretrial order - the parties must exchange every "exhibit, including summaries of other evidence," **30 days before trial**. Failure to honor this pretrial disclosure requirement also leads to Rule 37(c)(1) preclusion.

The timetable prescribed in Rule 26(a)(3), like that provided in Rule 26(a)(2), may be trumped by a court order. Accordingly, the timing of exchanging all types of demonstrative evidence - not just expert demonstratives - should be addressed in the final pretrial order, to obviate the risk of automatic preclusion under Rule 37(c)(1). However, no such order has ever been entered in this matter.

To ensure compliance with Rule 26, Rule 37(c)(1) provides:

- **"any party that 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 on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless."**

Clearly, Mr. Rievley's past responses filed with this court has afforded him substantial opportunity to disclose such a document that he now untimely presents to be of great weight and importance, however for some reason, he has failed to disclose this "handwritten statement of Brandon Denton". Mr. Rievley in responding to motions filed by Mr. Denton to strike statements on account of "hearsay" even then he failed to produce this document. Why?

In the numerous filings that have specifically attacked Mr. Rievley's credibility in not being able to keep his story straight, to his many contradictory statements shown by Mr. Denton throughout much of this entire record, yet instead of presenting and disclosing the very existence of this "handwritten statement" that he himself attaches some sort of great weight, he failed to even disclose this document at those pertinent times in responding to the direct attacks upon his statements that were shown to be inconsistent, contradictory, misleading or false. Even then Mr. Rievley failed to produce or even disclose even a hint of its existence. Why?

"The exclusion of non-disclosed evidence is automatic and mandatory under Rule 37(c)(1) unless non-disclosure was justified or harmless." *Finley v. Marathon Oil Co.*, 75 F.3d 1225, 1230 (7th Cir.1996). See *Musser v. Gentiva Health Servs.*, 356 F.3d 751, 756 (7th Cir. 2004). "The exclusion of non-disclosed evidence is automatic and mandatory under Rule 37(c)(1) unless non-disclosure was justified or harmless." *Id.* at 758.

Federal Rule of Civil Procedure 37(c)(1) requires absolute compliance with Rule 26(a), that is, it 'mandates that a trial court punish a party for discovery violations in connection with Rule 26 unless the violation was harmless or is substantially justified.'" *Roberts ex rel. Johnson*

v. Galen of Virginia, Inc., 325 F.3d 776, 782 (6th Cir. 2003) (citing *Vance v. United States,* 1999 WL 455435, at *3 (6th Cir. June 25, 1999) (footnote omitted)). *Salgado v. General Motors Corp.,* 150 F.3d 735, 742 n. 6 (7th Cir.1998) (holding that Rule 37(c)(1) puts teeth into Rule 26 and that "the district court acted well within its discretion when it decided to impose the sanction of precluding the witnesses from testifying" since "the sanction of exclusion is automatic and mandatory unless the sanctioned party can show that its violation of Rule 26(a) was either justified or harmless"); *King v. Ford Motor Co.,* 209 F.3d 886, 900 (6th Cir.2000), cert. denied, 531 U.S. 960, 121 S.Ct. 386 (2000) (affirming the district court's exclusion of expert testimony under Rule 37(c)(1) for failure to comply with strictures of Rule 26(a)). Furthermore, the Sixth Circuit has determined that the burden is on the potentially sanctioned party to prove lack of prejudice. *Roberts ex rel. Johnson v. Galen of Virginia, Inc.*, 325 F.3d 776, 782 (6th Cir. 2003).

Therefore, the timing of demonstrative evidence in the form of Mr. Rievley's untimely disclosure of "unmade discovery" has not been addressed in a stipulation or court order, and Mr. Rievley cannot now avoid automatic preclusion under Rule 37(c)(1), and the preclusion of the "handwritten statement of Brandon Denton" should be precluded from the record to avoid any unfair prejudice upon the plaintiff Mr. Roy L. Denton which requires in the interest of fairness and as a matter of law, Mr. Denton's motion to exclude the unmade discovery of the handwritten statement of Brandon Denton (*Court Doc. 61-1*) should be granted as justice so requires.

Respectfully submitted, this 14th day of September, 2009.

BY: _____

Roy L. Denton, *pro se*
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that an exact copy of this document has been served upon all parties of interest in this cause by placing an exact copy of same in the U.S. Mail addressed to such parties, with sufficient postage thereon to carry same to it's destination, on this 14th day of Sept, 2009.

Roy L. Denton

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