

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

STEPHANIE B. BARRETT,	:	CIVIL ACTION
	:	
Plaintiff/Counterclaim Defendant,	:	NO. 06-CV-240-SM
	:	
v.	:	
	:	
AMBIENT PRESSURE DIVING, LTD.,	:	<u>JURY TRIAL DEMANDED</u>
	:	
Defendant/Counterclaim Plaintiff.	:	

**DEFENDANT/COUNTERCLAIM PLAINTIFF
 AMBIENT PRESSURE DIVING, LTD.’S OBJECTION AND
 MOTION TO STRIKE THE SECOND REPORT
 OF PLAINTIFF’S EXPERT ALEX DEAS, PH.D. AS UNTIMELY
 OR, IN THE ALTERNATIVE, TO CONTINUE DEADLINES
TO FILE A COMPREHENSIVE OBJECTION AND MOTION TO STRIKE**

Defendant/Counterclaim Plaintiff Ambient Pressure Diving, Ltd. (“Ambient”), by its undersigned counsel, hereby objects and moves to strike the second expert report of Plaintiff Stephanie Barrett’s liability expert, Alex Deas, Ph.D., which was served on April 5, 2008, as untimely. Alternatively, Ambient moves for a continuance of the deadlines to object to expert testimony so Ambient can file a comprehensive objection and motion to strike Dr. Deas’ second expert report.

In support thereof, Ambient states as follows:

1. The parties’ original Joint Discovery Plan [Doc. No. 49] approved and adopted as a scheduling order by the Court on November 15, 2006, set the deadline for completion of discovery as April 1, 2008.

2. The Court subsequently granted the parties' Joint Motion to Continue and Extend Deadlines Dates for Expert Disclosure to permit the parties to conduct a joint equipment examination in Orlando, Florida during the first week of November 2007. The new deadline set for the production of Plaintiff's expert reports was November 19, 2007, and the new deadline set for the production of Defendant's expert reports was January 19, 2008.

3. On December 26, 2007, Ambient filed an assented-to motion to extend the deadlines for filing objections to expert testimony and summary judgment motions to no earlier than February 1, 2008 to allow Ambient time to prepare expert reports in response to the voluminous expert reports produced by plaintiff, and to allow both parties time to then prepare and file objections to expert testimony and summary judgment motions. [Doc. No. 104]

4. By Endorsed Order dated December 28, 2007, the Court granted Ambient's motion.

5. Because the Discovery Plan governing the case had gone out of date, on February 22, 2008, undersigned counsel filed an Assented-to Motion for Permission to File a Revised Discovery Plan and for a status conference with Judge McAuliffe.

6. On February 25, 2008, the Court granted the request to file a revised discovery plan, stating that the parties "may file an agreed-upon proposed amended pretrial scheduling order, or separate motions to amend the currently applicable order."

7. Ambient has received and clearly understands the Court's recent admonishments that counsel must work together and move forward to cooperatively accomplish the necessary discovery in this case. To this end, with the substantial involvement of local counsel, Ambient has engaged in numerous conferences with Plaintiff's counsel that it thought were designed to

resolve discovery disputes, agree on and prepare a joint motion to modify the Joint Discovery Plan, and generally streamline the issues with an eye toward reducing the amount of time needed for trial and pre-trial matters.

8. On January 17, 2008, Ambient filed an assented-to motion to extend the deadlines for filing objections to expert testimony and summary judgment motions so the parties could meet and confer in an effort to prepare and file a joint motion to modify the Discovery Plan. This motion was granted by Endorsed Order dated January 18, 2008. No new deadlines have yet been set for the filing of these motions.

9. Since January 18, 2008, the parties have engaged in numerous meetings and conversations to meet and confer in an effort to finalize a new Discovery Plan. By way of example, the parties conducted a two hour face-to-face meeting between lead counsel in Pennsylvania on January 30, 2008, a discussion after the deposition of Lt. Stephen Englert on February 25, 2008, a 1.25 hour telephone conference led by Ambient's local counsel on February 29, 2008, a four hour telephone conference led by Ambient's local counsel on March 10, 2008, and countless shorter telephone conferences and e-mails on various related subjects. During these meetings, substantial progress was made on outstanding discovery issues, leading to the filing of a Joint Motion to Clarify the Magistrate's Prior Discovery Orders.

10. The Joint Motion to Clarify was filed on March 19, 2008.

11. As a result of consensus achieved during these conversations, Ambient's local counsel drafted and circulated a proposed joint motion to modify the Discovery Plan, which included new proposed dates for the filing of objections to expert testimony and summary

judgment motions, the potential scheduling of *Daubert* hearings, the completion of discovery, and a new date for trial.

12. On April 1, 2008, the date set by the original discovery plan as the final day of discovery, plaintiff's counsel informed Ambient's counsel that the plaintiff likely would not assent to the revised Discovery Plan. All counsel conducted another lengthy telephone conference on April 1, 2008 in an attempt to reach an agreement on this issue, and plaintiff's counsel promised to give additional consideration to a revised Discovery Plan. However, on April 2, 2008, plaintiff's counsel informed Ambient's counsel that the plaintiff was adamantly opposed to any continuance. Therefore, discovery in this case has now closed.

13. Under the original Discovery Plan, the trial in this matter is scheduled to begin on May 6, 2008; pretrial statements and motions *in limine* were due on April 4, 2008; LR 16.2 objections are due on April 18, 2008; and the final pretrial conference is scheduled for April 25, 2008. Ambient has labored mightily to meet these deadlines, but its efforts have been complicated by a series of late disclosures by Plaintiff.

14. Ambient is grateful that the discovery period in this case, which lasted nearly four years, is finally closed, and Ambient is eager to proceed to trial. However, there are significant pretrial issues that remain unresolved, and the resolution of these issues could significantly reduce or eliminate the need for a trial altogether. At a minimum, the resolution of these issues would significantly streamline the issues for trial. Among other things, Ambient intends to file a motion and supporting memorandum on the proper choice of law, objections to expert testimony (which Ambient has already begun to file), a summary judgment motion, and several motions *in*

limine. Accordingly, on April 4, 2008, Ambient filed a Motion to Extend Pretrial Filing Deadlines and Approve a Revised Discovery Plan. [Doc. No. 139.]

15. After the Plaintiff informed Ambient that she would not agree to a continuance of any deadlines, Ambient worked diligently during the week of April 1st to meet the filing deadlines for pretrial statements and motions *in limine* on April 4, 2008. Incredibly, although discovery was closed, the Plaintiff began producing new exhibits and reports generated by her expert witnesses.

16. On April 2, 2008, one day after the close of discovery and four and one-half months after the deadline for Plaintiff's expert disclosures, Plaintiff produced a six page chart entitled "080401 Rebreather Accident List Exhibit," which purportedly summarizes, in minuscule type, 153 rebreather accidents that have supposedly occurred since 1949. The underlying information used to prepare this summary exhibit was never produced in discovery and, indeed, much of it was apparently communicated to the author, who is not identified, in "confidential communications."

17. In the two days Ambient had left before the deadline expired to file motions *in limine*, Ambient quickly prepared and filed a Motion *in Limine* to Preclude Plaintiff from Offering Expert Testimony Based on Information Not Produced in Discovery [Doc. No. 138], and a Motion *in Limine* to Exclude Evidence of Other Accidents or Incidents Involving Rebreathers [Doc. No. 141]. However, due to a last minute problem converting its documents to Adobe .pdf format for electronic filing, Ambient missed the midnight deadline for filing the second motion *in limine* by just seven minutes. A corrected Memorandum of Law and Exhibits in support of Ambient's Motion *in Limine* to Exclude Evidence of Other Accidents or Incidents Involving Rebreathers were filed on April 7, 2008 to fix this problem. [Doc. No. 144, replacing Doc. No. 141.]

18. Late on the evening of Saturday, April 5, 2008, one day after the deadline to file motions *in limine*, five day after the close of discovery and four and one-half months after the deadline for Plaintiff's expert disclosures, Plaintiff produced a new expert report from her liability expert, Dr. Deas. The new 183 page report, which replaces the original 128 page report generated by Dr. Deas on November 19, 2007, contains, among other things, new theories of product defects, new testing, new methodology, different contributors, an analysis of satellite imagery, and a myriad of faulty conclusions and analyses. *See* Summary Comparison of Dr. Deas First and Second Reports, attached hereto as Ex. A. It does not, however, contain any expert opinions based on new documents or other evidence produced in discovery between November 19, 2007 and March 31, 2008.

19. No justification has been offered for the Plaintiff's untimely disclosure. However, based on the contents of the new report and the timing of its late disclosure, it appears the Plaintiff intentionally failed to produce the report during discovery or before April 4, 2008 specifically to avoid the Defendant filing an objection or motion *in limine*. Accordingly, Ambient objects to this report as untimely and moves to strike it under Fed. R. Civ. P. 37(c).

20. Alternatively, Ambient moves for a continuance of the deadlines to file objections to expert testimony and motions *in limine* so it may file a comprehensive motion objecting to Dr. Deas expert report and expert testimony, and a memorandum of law outlining why the opinions expressed by Dr. Deas are inadmissible under the standards enunciated by U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997); and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).

21. Ambient has conferred with Plaintiff's counsel about the relief sought in this motion, and Plaintiff has not provided her assent.

22. The undersigned counsel has conferred with Ambient and advised Ambient that a continuance to file additional motions is likely to delay the trial in this matter. Ambient has consented to such a continuance only for the purpose of filing additional motions, not to reopen discovery.

WHEREFORE, Ambient respectfully moves for entry of an Order either striking Dr. Deas expert report as untimely or continuing the deadlines to file motions *in limine* and objections to expert testimony.

Respectfully submitted,

Ambient Pressure Diving, Ltd.

By its attorneys,

**SHEEHAN PHINNEY BASS + GREEN,
PROFESSIONAL ASSOCIATION**

Dated: April 10, 2008

By: /s/ Robert H. Miller
Robert H. Miller, Esquire NHBA #13881
1000 Elm Street
PO Box 3701
Manchester NH 03105
(603) 627-8145
rmiller@sheehan.com

**LAW OFFICES OF DAVID G. CONCANNON,
LLC**

/s/ David G. Concannon
David G. Concannon, Esquire
200 Eagle Road, Suite 116
Wayne, Pennsylvania 19087
(610) 293-8084
concannonlaw@msn.com

