

On November 8, 2013, Defendants deposed Toni Templeton. During that deposition, Defendants' counsel discussed with Ms. Templeton the possibility of providing the working document she used to tabulate the publicly available data, and Ms. Templeton responded that she could provide the document requested by the Defendants.² Also during Ms. Templeton's deposition, Defendants' counsel asked Ms. Templeton about a series of numbers contained in various tables in the report that were not the same that counsel thought should match.³ In each instance, Ms. Templeton responded that she would need to go back and review the underlying dataset to clarify whether or not an error had occurred.⁴

In response to this discussion during her deposition, Ms. Templeton and Dr. Rolle reviewed the underlying dataset and prepared a revised report.⁵ The revised report and underlying dataset was provided to the Plaintiffs' counsel for filing with the Court.⁶ On November 25, 2013, the underlying dataset for the revised report was provided to Defendants' counsel. The revised report was available and scheduled to be filed, along with the underlying dataset, however, for reasons undetermined at this time, the revised report was not filed. It was not until the filing of Defendants' motion to strike, and in preparing Plaintiffs' response that counsel became fully of the problems and the lack of filing of the corrected report.

On December 18, 2013, Defendants deposed Dr. Anthony Rolle. Defendants claim that "numerous data errors were identified in Dr. Rolle's report during his deposition," and that Dr. Rolle was also unable to explain "numerous data discrepancies in the data set utilized by

² Defendants' Motion to Strike Charter Plaintiffs' Experts Dr. Anthony Rolle and Toni Templeton.

³ Page 82 of Toni Templeton Deposition; *See also* page 90 of Toni Templeton Deposition.

⁴ *Id.*

⁵ Dr. Rolle and Ms. Templeton submitted a revised report because after the review of the underlying dataset, it was discovered that the discrepancies perceived to be "errors" by Defendants' counsel were miscopies made by Ms. Templeton in manually transcribing the numbers from the underlying dataset to the report.

⁶ *See* Tab 2, Exhibit A.

Toni Templeton.”⁷ However, while he was correct when he responded that he could not explain it; this is simply caused by his being presented with the wrong report, and he was not aware of the problem. Rather, because of the filing error made on November 25, 2013 (filing the datasets, but not the revised report), Defendants’ counsel was questioning Dr. Rolle about perceived “errors” in the report and underlying dataset using a report and datasets that did not match.⁸ As such, Dr. Rolle was unable to explain the discrepancies that Defendants’ counsel asked him to explain. Accordingly, Dr. Rolle’s inability to explain these perceived discrepancies was entirely unrelated to his ability and competencies as an expert, but rather caused by the filing error made on November 25, 2013. Dr. Rolle, qualified as an expert in the initial phase of this trial, remains a qualified expert in this stage of the trial and the line of questioning during Dr. Rolle’s deposition offered by the Defendants does not in any way call into question his expertise.

On January 6, 2014, Plaintiffs submitted to the Court a third revised report and underlying datasets.⁹ As stated in the report, this third revised report contains (i) updated financial data to reflect the Summary of Finance data received by the Plaintiffs from the State of Texas on December 18, 2013, and (ii) updated academic performance data and teacher qualification data as reflected in the Texas Academic Performance Reports released by the Texas Education Agency in December 2013.¹⁰ Accordingly, regardless of any error that may have previously occurred, Defendants have in their possession the expert report and underlying datasets to that report that will be used at trial by the Plaintiffs.

⁷ Motion to Strike, pp. 7-9.

⁸ Plaintiffs’ counsel sent an e-mail to all parties yesterday explaining the discovery of the filing error and providing the revised report that should have been filed along with the underlying dataset on November 25, 2013 and offered to allow Defendants to re-depose either or both of the experts at Plaintiffs’ cost.

⁹ Charter School Plaintiffs’ Designation of Trial Experts, Exhibits and Witnesses.

¹⁰ *Id.*

ARGUMENT

The Texas rule on the failure to timely respond and its effect on trial is set out in the Rules of Procedure as Tex. R. Civ. P. 193.6. This pertinent part of the rule reads as follows:

(a) Exclusion of Evidence and Exceptions. A party who fails to make, amend, or supplement a discovery response in a timely manner may not introduce in evidence the material or information that was not timely disclosed, or offer the testimony of a witness (other than a named party) who was not timely identified, unless the court finds that:

(1) there was good cause for the failure to timely make, amend, or supplement the discovery response; or

(2) the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other parties.

Emphasis, bold and underscore added.

Here, the State cannot prevail because there can be no prejudice or unfair surprise. First and foremost, the Defendants have not articulated or even indicated any unfair surprise or unfair prejudice they may have suffered or will have suffer as a result of a failure to receive the underlying datasets.¹¹ Even assuming, *arguendo*, that they were initially prejudiced in someway, the offer to allow the Defendants to retake the depositions of either or both Ms. Templeton and Dr. Rolle, and the Plaintiffs' willingness pay the expense of the of those depositions alleviates the so-called prejudice.¹²

In fact, because the original expert report (and subsequent revised reports) provided Defendants all the information needed to move forward in its trial discovery and preparation, the

¹¹ Motion to Strike, p. 2. Defendants articulate several reasons as to why the Court should strike both Templeton and Rolle as experts, including allegations that Dr. Rolle, despite being qualified as an expert in the initial phase of this trial, is now unqualified as an expert. However, the Defendants make no mention of any unfair surprise or prejudice.

¹² *Hilburn v. Providian Holdings, Inc.*, No. 01-06-00961-CV, 2008 WL 4836840 (Tex. App.—Houston Nov. 6, 2008) (Court ordered opportunity to depose witness negated any unfair surprise or unfair prejudice).

Defendants' motion was unable to and did not claim unfair surprise or prejudice. This is particularly true given that the Plaintiffs' expert report is based on publicly available information from the Texas Education Agency. Moreover, as demonstrated by the Defendants' rationale to the Court for striking the Plaintiffs' experts, Defendants have ample knowledge and understanding as to the nature and scope of the expert report, and the nature and scope of the testimony to be offered at trial by both Dr. Rolle and Ms. Templeton,¹³ and they have not been, nor can they show prejudice.

Second, the Plaintiffs, as expressed previously to Defendants' counsel, are willing (and hereby reiterate the offer) to allow the State to depose either or both Dr. Rolle and Ms. Templeton. This offer alone resolves any issue of unfair surprise or prejudice. In the previous portion of this trial, depositions were ongoing throughout the proceedings. In the coming portion, Plaintiffs will not present their case until some two to three weeks after the trial resumes. Hence, Defendants have sufficient time to take the depositions of either or both Ms. Templeton and Dr. Rolle, and the Plaintiffs are more than willing to allow any such deposition to occur on a non-trial day or over a weekend. Moreover, any such deposition would be at the expense of the Plaintiffs, and not the Defendants.

Finally, in their Motion to Strike Charter Plaintiffs' Experts, the Defendants cite one case, *Moore v. Mem'l Hermann Hosp. Sys., Inc.*, 140 S.W.3d 870 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (cited at page 14 of the State's memorandum) in support of their request to exclude the Plaintiffs' experts, even while recognizing that the outcome in that case is the exception, not the mainstream.¹⁴ The Defendants failed to inform this Court that the reason for the decision in *Moore* was that the plaintiff who offered the expert did not *offer any argument*

¹³ Motion to Strike, pp. 16, 18 and 20.

¹⁴ “[A]t least one court upheld exclusion...for failure to comply with TRCP 194.2(f).” Motion to Strike, p. 14.

concerning how that failure would not have unfairly surprised or prejudiced the defendant. She contended only that the expert's testimony engendered as much surprise on her part as on the part of defendant, which is not a valid reason for allowing the expert to testify.¹⁵

The more relevant case is *City of Laredo v. Limon*, 04-12-00616-CV, 2013 WL 5948129 (Tex. App.—San Antonio Nov. 6, 2013, no. pet. h.). There, the Court recognized that if the complaining party cannot show that there would be no unfair surprise or prejudice at trial, the testimony should be allowed. The appellate court explained that at a pretrial motion in limine hearing to exclude the expert witness, the plaintiff's attorneys who had presented the expert referred to the absence of surprise and prejudice. "As previously noted," the appeals court writes, "even if the specific language in [plaintiff]'s response failed to properly disclose [the expert] in compliance with Rule 194.2(f), he would still be permitted to testify if [plaintiff]'s failure to properly disclose him would not unfairly surprise or unfairly prejudice the other parties. Tex. R. Civ. P. 193.6." In overruling the City's objection at trial, the trial court did not state the basis for its ruling, and could implicitly have determined that the City was not unfairly surprised or prejudiced. In light of its determination that the expert physician's medical records adequately revealed his opinion, much like the report timely disclosed by Dr. Rolle and Templeton, the Court of Appeals affirmed the trial court's ruling that the defendant who opposed the expert testifying "had suffered no surprise or prejudice."¹⁶

¹⁵ 140 S.W.3d at 875 n.2.

¹⁶ *City of Laredo v. Limon*, 04-12-00616-CV, 2013 WL 5948129 (Tex. App.—San Antonio, Nov. 6, 2013, no. pet. h.).

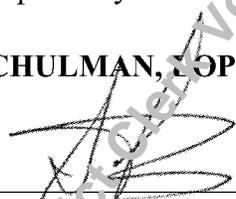
CONCLUSION

For the reasons discussed above, Defendants cannot prevail because Defendants have not been unfairly surprised or unfairly prejudiced and therefore, the testimony of the Plaintiffs' expert witnesses should be allowed.

WHEREFORE, PREMISES CONSIDERED, the Flores Plaintiffs respectfully request a hearing on this matter, and after such hearing, request that Defendant's Motion to Strike be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on January 16, 2014, a true and correct copy of the foregoing Response was served upon the following counsel of record *via* e-mail pursuant to the agreement of the parties and in compliance with the Texas Rules of Civil Procedure and the Texas Local Rules:

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