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FAILURE TO DISCLOSE NAMES AND ADDRESSES OF WITNESSES IN DISCOVERY PROCEEDINGS

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INTRODUCTION

Problems often arise when a party attempts to obtain the names and addresses of witnesses in pretrial discovery proceedings. If the party of whom the information is asked fails to give it and later places an undisclosed witness on the witness stand, the question arises as to whether, and under what circumstances, such a witness may be permitted to testify. This note will discuss the relevant case law of Montana and will compare Montana's position with that of other jurisdictions. The ramifications of Rule 26(b) of the Montana Rules of Civil Procedure[1] will also be studied.

MONTANA'S POSITION

Montana's position is somewhat ambivalent. In *Wolfe v. Northern Pacific Railway Co.*,[2] the plaintiff claimed that he had slipped on an oil slick which the defendant had negligently failed to clean. The defendant called a witness to the stand whose identity had not been disclosed in a continuing interrogatory submitted to the defendant by the plaintiff.[3] The witness was "to testify concerning an inspection he had made six or seven hours after the accident of the premises where the injury occurred."[4] The plaintiff objected to the calling of the witness on the grounds of surprise and moved that the witness not be permitted to testify. The district court judge allowed this witness to testify, as well as two subsequent defense witnesses whose identity had not been previously disclosed. The district court's decision was affirmed by the Montana supreme court. The court stated:

> [W]e agree with respondent that under the circumstances of this case the trial was conducted in an impartial and expeditious manner. In ruling on the testimony the court protected the rights of all parties to the action and enabled the jury to make a fair determination of the issues in dispute.[5]

The court, in so deciding, completely ignored Rule 26(b) which provides in part that:

> . . . the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, . . . including the existence, description, nature, custody, con-

[1]M.R.Civ.P. 26(b).

[2]Wolfe v. Northern Pacific Raiway Co., 147 Mont. 29, 409 P.2d 528 (1966).

[3]*Id.* at 531. The interrogatory asked the defendant-respondent to "[S]tate the name, age, address, occupation and place of employment . . . of every person known to the defendant, its agents, servants and employees, having knowledge of any relevant facts pertaining to the above entitled action."

[4]*Id.* at 532.

[5]*Id.* at 534.

> dition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts.[6]

In 1971, the issue was litigated again in *Smith v. Babcock.*[7] The action involved an automobile collision between the plaintiff and the defendant. The plaintiff submitted an interrogatory as part of his pretrial discovery asking for the names and addresses of persons having knowledge of the accident.[8] The defendant failed to supply the name of an expert witness. Over the plaintiff's objection, the witness was produced and allowed to testify.

On appeal, the Montana supreme court did rely on Rule 26(b) this time and held that:

> [P]laintiff had the right under the said rule and the interrogatory propounded to the defendant to be informed in advance that the defendant would use Mr. Heen to testify as an expert witness.[9]

The court noted that:

> [P]laintiff's counsel had no time to prepare for this witness, no time to plan cross-examination, and most important, no time to obtain an expert to rebut or question the testimony of Mr. Heen.[10]

The verdict and judgment in lower court were reversed and a new trial was ordered.[11] Curiously, the court in *Smith* did not mention *Wolfe* although the same Rule and the same policy seem to have been present.

Most recently, the Montana supreme court dealt with the issue in *Sanders v. Mount Haggin Livestock Company.*[12] A wrongful death action was brought by the parents of the decedent who had been killed in an automobile-cow crash. The plaintiffs alleged that the defendant negligently conducted a herding operation which caused the death of their daughter. The defendant submitted an interrogatory to the plaintiffs asking for the names and addresses of all people who witnessed or had knowledge of the accident.[13] The names of two people who lived on the ranch, and who later became key witnesses for the plaintiffs, were not disclosed. The identity of one of the witnesses, however, was disclosed to the defendant four days before the trial. The identity of the other witness was disclosed the morning of the trial. As a result, neither of the witnesses were interviewed or deposed by defendant's counsel prior to their actual appearance on the witness stand. The defendant's

[6]M. R. Civ. P. 26(b).

[7]Smith v. Babcock, 157 Mont. 81, 482 P.2d 1014 (1971).

[8]*Id.* at 1019. The interrogatory asked the defendant to "[S]tate the names and addresses of all persons who have any knowledge or information relating to the accident or its cause who are known to you, your counsel. . . ."

[9]*Id.* at 1019.

[10]*Id.* at 1020.

[11]*Id.*

[12]Sanders v. Mount Haggin Livestock Company, ... Mont. ....., 500 P.2d 397 (1972).

[13]*Id.* at 401.

attorneys moved to exclude the testimony of these witnesses. The trial court overruled the objection.

On appeal, the plaintiffs-respondents relied on *Wolfe* to support their position.[14] The court agreed with the plaintiffs' interpretation of *Wolfe* that the Rules " . . . cannot become a weapon for punishment or forfeiture in the hands of a party, or an instrument for avoidance of a trial on the merits."[15] The court, however, went on and quoted that portion of *Wolfe* which provides that:

> In interpreting these rules, we will reverse the trial judge only when his judgment may materially affect the substantial rights of the appellant and allow a possible miscarriage of justice.[16]

The court reversed the district court determination that the rights of the defendant had been substantially affected resulting in a possible miscarriage of justice. Again, the *Wolfe* case was not overruled. Indeed, the court relied heavily upon language from *Wolfe*.[17] In so doing, they actually may have strengthened the *Wolfe* holding.

In sum, the Montana supreme court seems to have adopted a test whereby the "substantial rights" of a party must be affected or there must be a "possible miscarriage of justice" before sanctions will be invoked to enforce Rule 26(b).

MONTANA RULES OF CIVIL PROCEDURE

As stated previously, Rule 26(b) provides in part that ". . . the deponent may be examined regarding any matter, not privileged, . . . including . . . the identity and location of persons having knowledge of relevent facts . . . ."[18] In light of the three Montana cases discussed,[19] the first question raised is whether the court has discretion to enforce Rule 26(b) only when the "substantial rights" of a party are affected or there is a "possible miscarriage of justice."

First, let us turn to the plain meaning of the Rules by analogizing Rule 26(a) of the Montana Rules of Civil Procedure[20] to Rule 26(b). Rule 26(a) provides that "[A]ny party may take the testimony of any person . . . by deposition upon oral examination or written interrogatories for the purpose of discovery."[21] This Rule has never been interpreted to give the court discretion as to whether the tools of discovery

[14] *Id.* at 403.

[15] Wolfe v. Northern Pacific Railway Co., *supra* note 2 at 534. The Rule specifically being referred to is Rule 33 which provides that "[I]nterrogatories may refer to any matter which may be inquired into under Rule 26(b). Therefore, the quote is relevant.

[16] *Id.* at 534.

[17] Sanders v. Mount Haggin Livestock Company, *supra* note 12 at 403.

[18] M. R. Civ. P. 26(b).

[19] Wolfe v. Northern Pacific Railway Co., *supra* note 2; Smith v. Babcock, *supra* note 7; and Sanders v. Mount Haggin Livestock Company, *supra* note 12.

[20] M. R. Civ P. 26(a).

[21] *Id.*

may be used. Rather, the words "may take" have been interpreted to give the parties discretion as to which procedure to use.[22] The requirement that discovery affect the substantial rights of a party has never been read into the words "may take."

Similarly, the language of Rule 26(b) that a party "may be examined" creates a right qualified only by the scope of discovery as defined by the terms therein.[23] The court does not have discretion to decide when the names and addresses of witnesses are discoverable, nor can there be read into the language of the Rule a requirement that the "substantial rights" of a party must be affected or that there must be a "possible miscarriage of justice."

The second question raised by the three Montana supreme court decisions[24] is whether the court has the wisdom to delve into the minds of the jurors and decide whether or not the "substantial rights" of a party are being affected, or whether or not there may be a "possible miscarriage of justice" by the failure of an adverse party to disclose the names and addresses of his witnesses. No individual or group of individuals has the perceptiveness to make this determination in an even-handed and consistent manner. That is a skill desired by many trial lawyers and possessed by few, if any. There simply are too many indeterminable factors that influence a jury's decision. Again, the only alternative is to require full compliance with Rule 26(b) to insure that the substantial rights of a party are not affected.

It has been often stated that the purpose of modern discovery is to assist in the administration of justice by aiding the parties in the preparation of their case and by avoiding the element of surprise at the trial itself.[25] In *State ex rel State Highway Comm'n. v. Dist. Ct.*,[26] the Montana supreme court stated the following:

> [O]ur Rules were adopted to get away from the booby traps which beset lawyers and the courts under the previous practice. If these Rules are to work to accomplish the purpose for which they were intended and provide an honest and fair judicial system, they must be interpreted to guarantee fair play to all litigants.[27]

Indeed, in the *Wolfe* case the court said that the Rules are to be ". . . liberally construed to make all relevant facts available to parties in

[22]Town of New Castle v. Rand, 101 N.H. 201, 136 A.2d 914 (1957); and Pan-O-Ram Club, Inc. v. State ex rel Davis, 217 Tenn. 137, 395 S.W.2d 803 (1965).

[23]M. R. Civ. P. 26(b) limits discovery to ". . . any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . ."

[24]Wolfe v. Northern Pacific Railway Co., *supra* note 2; Smith v. Babcock, *supra* note 7; and Sanders v. Mount Haggin Livestock Company, *supra* note 12.

[25]Evtush v. Hudson Bus Transp. Co., 7 N.J. 167, 81 A.2d 6 (1951); Jeppesen v. Swanson, 243 Minn. 547, 68 N.W.2d 649 (1955); Greyhound Corp. v. Superior Court of Merced County, 56 Cal.2d 355, 364 P.2d 266, 15 Cal. Rptr. 90 (1960); Hardenbergh v. Both, 247 Iowa 153, 73 N.W.2d 103 (1955); Coca-Cola Co. v. Dixi-Cola Laboratories, 30 F. Supp. 275 (D.C. M.D. 1939).

[26]State ex rel State Highway Comm'n. v. Dist. Ct., 147 Mont. 348, 412 P.2d 832 (1966).

[27]*Id.* at 839.

advance of trial and to reduce the possibilities of surprise and unfair advantage."[28] Rule 26(b) is essential to the accomplishment of these goals. The idea of the surprise witness is incompatible with the concepts of justice and equity. The judicial process exists to serve the parties who come before it to have issues litigated. The attorney's role is to act as an advocate for his client and present his case in the best possible manner. Seeking an unfair advantage by not revealing the name and address of a witness who will be called to testify should not be allowed.

CASE LAW AROUND THE COUNTRY

The failure to disclose names and addresses of witnesses in discovery proceedings has been litigated in other jurisdictions. The overwhelming number of cases require strict compliance with Rule 26(b) or its equivalent. Interpreting a New Jersey Rule of Civil Procedure which is identical to Montana Rule 26(b),[29] the New Jersey superior court, appellate division, held that "[F]ailure to disclose the names and addresses of witnesses in response to interrogatories constitutes failure to comply with the rule and a deprivation of substantial rights."[30] The court in requiring a strict compliance with the Rule precluded any use of discretion by the trial court. Again in 1960, the New Jersey court held that disclosure must be strictly complied with saying that ". . . the penalty for failure to name a witness in answer to interrogatories is the exclusion of the testimony of that witness at the trial."[31]

The Washington supreme court dealt with the issue in 1953[32] when a litigant denied knowledge of witnesses, which he in fact had, and then attempted to produce those witnesses at the trial. The court held that:

> The trial judge can . . . refuse to permit the witness to testify or can order his testimony stricken; or he can grant a continuance to give the surprised party an opportunity to investigate the witness and secure rebuttal testimony; and it is possible that, under circumstances in which no other relief or penalty could remedy the situation created by the deception, he could grant a mistrial.[33]

At no time did the court mention the possibility that the witness could testify as long as the "substantial rights" of a party were not affected and there was no "possibility of a miscarriage of justice."

[28]Wolfe v. Northern Pacific Railway Co., *supra* note 2 at 534.

[29]Both of the Rules grant to the parties a right to discover the ". . . identity and location of persons having knowledge of relevant facts."

[30]Abbatemarco v. Colton, 31 N.J. Super. 181, 106 A.2d 12, 14 (1954).

[31]Band's Refuse Removal, Inc. v. Borough of Fair Lawn, 62 N.J. Super. 522, 163 A.2d 465, 480 (1960).

[32]Sather v. Lindahl, 43 Wash.2d 463, 261 P.2d 682 (1953).

[33]Id. at 682, 689.

The Illinois rule of civil procedure which is identical to Montana Rule 26(b)[34] was also interpreted to require a strict compliance with the terms of the rule by the appellate court of Illinois.[35] The court in *Battershell v. Bowman Dairy Co.* held that the lower court ". . . should have excluded the witness or imposed as an alternative a sanction which would have effectively protected plaintiff against harm to his case due to lack of prior knowledge of the witness."[36]

In interpreting Federal Rule 26(b)[37] which is substantially similar to Montana Rule 26(b),[38] a United States district court ruled that ". . . it is clear that the testimony or witnesses whose identity is deliberately withheld in discovery may not subsequently be introduced at trial."[39] As a basis for this position, the court relied on the plain meaning of the language of Rule 26(b). Another United States district court, in interpreting Federal Rule 26(b),[40] said that: ". . . to allow the Defendant to not disclose the names of important witnesses and to later call them at the trial was taking advantage of the Plaintiff and a violation of the rules of civil procedure. . . ."[41] The witnesses who were not disclosed were excluded from testifying at the trial.

The common bond between all these cases is that the courts relied on the "plain meaning" of Rule 26(b) or its equivalent. None of the decisions required that the "substantial rights" of a party had to be affected or that there must exist a "possible miscarriage of justice" before the Rule would be enforced.

CONCLUSION

As mentioned previously, Montana's position as to the enforcement of Rule 26(b) seems to be based on standards of "substantial rights" and a "possible miscarriage of justice."[42] Using these standards, the two most recent Montana cases reached the better result by granting a new trial when the witnesses were allowed to testify.[43] However, by their very recognition of these standards, the court has kept alive the possibility that an undisclosed witness might be allowed to testify when there is no effect on a party's "substantial rights" or there is

[34]Both of the Rules grant to the parties a right to discover the ". . . identity and location of persons having knowledge of relevant facts."

[35]Battershell v. Bowman Dairy Company, 37 Ill. App.2d 193, 185 N.E.2d 340 (1962).

[36]*Id.* at 344.

[37]FED. R. CIV. P. 26(b).

[38]Federal Rule 26(b) grants to the parties a right to discover the ". . . identity and location of persons having knowledge of any discoverable matters." Montana Rule 26(b) substitutes the words "relevant facts" in place of "any dicoverable matter."

[39]Ceco Steel Products Corp. v. H. K. Porter Co., 31 F.R.D. 142, 144 (D.C. I.D. 1962).

[40]Newsum v. Pennsylvania R. Co., 97 F. Supp. 500 (D.C. N.Y. 1951).

[41]*Id.* at 502.

[42]*See,* discussion *supra* note 16.

[43]Smith v. Babcock, *supra* note 7; and Sanders v. Mount Haggin Livestock, *supra* note 12.

no "possibility of a miscarriage of justice." Such a decision would clearly violate the spirit of the Montana Rules of Civil Procedure.

The purpose of litigation is to obtain a judicial determination of legal and factual issues in dispute. The end result should achieve to the fullest extent possible the goals of fairness, justice, and equity for the parties involved. Rule 26(b) is essential to the accomplishments of these goals. If a party does not comply with the terms of Rule 26(b), one of two sanctions should be invoked depending on the circumstances. If the non-compliance is justifiable, a continuance should be granted to allow the adverse party adequate time to prepare. If the failure to comply is unjustifiable, the undisclosed witness should not be allowed to testify.