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State's Motion to Exclude Rebuttal Testimony of Laber

A. Steven Dever
Cuyahoga County Assistant Prosecutor

William D. Mason
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IN THE COURT OF COMOM PLEAS

CUYAHOGA COUNTY, OHIO

2003 APR -5 P 12:28

CHARLES MURRAY, Special Administrator of the Estate of SAMUEL H. SHEPPARD,

Plaintiff

vs.

THE STATE OF OHIO,

Defendant

Judge Ronald Suster

Case No. 312322

STATE'S MOTION TO EXCLUDE REBUTTAL TESTIMONY OF LABER

Defendant, State of Ohio, through and by counsel, William D. Mason, Prosecuting Attorney, Cuyahoga County, Assistant Prosecutor A. Steven Dever requests that this court exclude the testimony of Laber. The reasons and authorities for denying the admissibility of this evidence is outlined in the attached brief, which is incorporated by reference.

Respectfully submitted,

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of Cuyahoga County, Ohio

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INTRODUCTION

LAW AND ARGUMENT

Rebuttal testimony is not for the purpose of bolstering a party's case in chief. A rebuttal witness can only provide testimony in response to new matters introduced by a party opponent. See, *Moore v. Retter* (10 Dist. 1991), 72 Ohio App.3d 167, 174. The general rule is that:

> [a] party upon whom the affirmative of an issue rests is bound to give *all* his evidence in support of the issue in the first instance, and can only give such evidence in reply as tends to rebut the *new matter* introduced by his opponent. (emphasis added)

Id. at 174. See, also, *Cities Service Oil Co. v. Burkett* (1964), 176 Ohio St. 449, 452 (stating that "[u]ndoubtedly, the proper time for the introduction of evidence in support of a litigants' own case is during the introduction of his evidence in chief..."); *Burke v. Schaffner* (10 Dist. 1996), 114 Ohio App.3d 655 (refusing to allow rebuttal witness to testify since there was no "new" evidence to rebut). "A party upon whom the affirmative of an issue rests is bound to give all his evidence in support of the issue in the first instance, and can only give such evidence in reply as tends to rebut the new matter introduced by his opponent." *Burke v. Schaffner,* (1966), 114 Ohio App.3d 655, 665 [citations omitted].

It is anticipated that Laber will be offered to explain an "experiment" wherein he and/or Epstein attempted to recreate the blood marks on a watch.

Laber's testimony should be excluded from this trial because it is improper rebuttal evidence. Plaintiff's own expert, Dr. Epstein, already testified during plaintiff's case in chief that the spots on the watch were not spatter. Plaintiff has already presented evidence regarding blood spatter and cannot again revisit the issue in order to bolster his case in chief.

Furthermore, the State's expert, Toby Wolson, stated in his pre-trial report that some blood on the watch was consistent with impact spatter. As a result, plaintiff knew that such information was going to be raised as an issue at trial, and therefore was bound to give all evidence in support of that issue in the first instance, i.e., during its case in chief. Plaintiff, in fact, did so with the testimony of Dr. Epstein, and therefore cannot revisit the blood spatter issue on rebuttal.

No new evidence was introduced by the State that would allow plaintiff to call Laber and to introduce his testimony regarding his "experiment" concerning blood spatter on a watch. Therefore, Laber should be prohibited from testifying as a rebuttal witness.

Moreover, Laber's experiment is totally lacking in its reliability. See, Evid. R. 702(C) which states:

> (C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all the following apply:
>
> (1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;
>
> (2) The design of the procedure, test or experiment reliably implements the theory;
>
> (3) The particular procedure, test or experiment was conducted in a way that will yield an accurate result.

The factors enumerated in *Daubert v. Merrel Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579, testing, peer review, error rates, and acceptability are missing.

Here, Laber's experiment lacks reliability for several reasons. The experiment Laber performed was novel; had no controls; had no peer review; and had no documentation. Absent these factors, the experiment was not scientifically valid. Furthermore, the watch he used was

not a 1950's era watch; it was not the same brand, size, metal, crystal, or make-up of Sam's watch. Therefore, Laber's experimental results should be excluded since they will not aid the jury in its search for the truth, as required by the Ohio Supreme Court. See *Ishler v. Miller* (1978), 56 Ohio St.2d 447.

The Court should not permit the novel "watch experiments" especially since the Court excluded experiments offered by defendants on the basis that they purportedly lacked the same scientific indicia reliability missing in the Laber "watch experiment". Specifically, the Court excluded Wentzel's pillow blood drying time experiments and Loveyjoy's blunt trauma to skull experiments.

Additionally, as defendant has asserted in a previous motion, Dr. Laber's report was not timely submitted pursuant to the court's case management order (Loc.R.21.1). Pursuant to the court's case management order, all supplemental reports were due January 31, 2000. Dr. Laber's report is dated February 14, 2000 and was served upon defendant, February 17, 2000. "The trial court has discretion to determine whether a party has complied with Loc. R. 21.1 and to determine the appropriate sanction for its transgression [citations omitted] . . . we find no support for the motion that Loc. R. 21.1 does not apply to the production of expert reports used for purposes of rebuttal. Clearly by using the phrase 'all supplemental reports,' Loc.R.21.1 makes irrelevant the intended purpose of the report." *Michael Dolan v. Cleveland Builders Supply Co.* (1993).

In *Paugh and Farmer, Inc. v. Menorah Home for Jewish Aged* (1984), 15 Ohio St. 3d 44, the court excluded the testimony of appellant's expert witness because the appellant failed to file an expert report within the period of time set forth in Loc. R. 21. In *Weyls v. University Hosp.of Cleveland*, (July 28, 1994), Cuyahoga App. No. 65803, the trial court's

exclusion of a witness presenting expert testimony was upheld despite the fact that no case management plan was in place. The court found Loc. R. 21.1 to be self- executing and requires compliance by the parties, even where the court has failed to institute a case management plan.

Respectfully submitted,

WILLIAM D. MASON, Prosecuting Attorney
of Cuyahoga County, Ohio

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CERTIFICATE OF SERVICE

A copy of the foregoing Motion to Exclude Testimony of Laber was served this 5th day of April, 2000, by hand delivery, upon Terry Gilbert, at Court Room 20-B, 1200 Ontario Street, Cleveland, Ohio 44113.

Kathleen A. Martin
Assistant Prosecuting Attorney

Michael DOLAN, et al., Plaintiff-Appellants,
v.
CLEVELAND BUILDERS SUPPLY CO., Defendant-Appellee.

No. 62711.
Court of Appeals of Ohio, Cuyahoga County.
June 17, 1993.

Civil appeal from Court of Common Pleas Case No. 130,515. Affirmed.

Daniel J. Ryan, Cleveland, for plaintiff-appellants.

Joseph A. Farchione, Jr., Cleveland, for defendant-appellee.

JOURNAL ENTRY and OPINION

NUGENT, Judge:

I.

**1 In June, 1987, plaintiffs-appellants Michael and Peggy Dolan (hereinafter "the Dolans") filed a complaint against defendant-appellee Cleveland Builders Supply Co. (hereinafter "CBS") alleging that bricks manufactured by CBS and incorporated into the Dolans' house were not fit for their intended purpose and, as a result, CBS had breached an implied warranty.

The record reveals that in 1977, the Dolans purchased five thousand bricks from CBS. Prior to purchasing the bricks, Mr. Dolan informed CBS that the bricks were for use in the construction of his home. Mr. Dolan was told by a representative of CBS that these bricks, designated as Independence No. 75 R, were suitable for exterior use in northern Ohio.

For assistance in planning the construction of their home, the Dolans used the services of Mrs. Dolans' father, William Platten, Sr., who was a general contractor. Mr. Platten had "overall control" over the construction of the Dolans' home. The bricklayer employed by the Dolans was recommended to them by Mr. Platten, who had a long-standing business relationship with the bricklayer.

The Dolans moved into their new home in November, 1977. In the summer of 1983, the Dolans noticed certain bricks were failing. The faces of some bricks began chipping off, a process referred to as "spalling." The failure was particularly acute around the chimney, the foundation walls, and the front porch. The bricks continued to deteriorate and affected other areas of the house as of the time of trial.

II.

After several unsuccessful trial dates, the matter was set for trial on September 16, 1991.

On June 12, 1991, counsel for the Dolans forwarded CBS a letter informing it that the Dolans intended to call William Platten, Sr., William Platten, Jr., Charles Schulz and Richard Schulz as witnesses at trial.

In an effort to clarify the Dolans' witness list, counsel for CBS forwarded a letter to counsel for the Dolans on June 26, 1991, which stated, in part:

> It is my understanding that Mr. and Mrs. Dolan will be called as lay witnesses while Mr. Manyo, William Platten, Sr., William Platten, Jr., Charles Schulz and Richard Schulz will be called as expert witnesses at the time of trial. So that there is no question regarding witnesses, please update your Answers to Interrogatories or confirm the validity of my understanding in writing.

No response was forthcoming from the Dolans until the time period between August 9, 1991 and August 21, 1991, during which time the Dolans identified the following individuals as witnesses: Gene Suma, Robert Doyle, John Wessel, Harry Ratka, Donald DaCond, John Adams, Chris Lopez, George Nemeth, Phillip Kerling, Warren Bucher, Jim Darcy, John Powers, Vernon L. Burdick, Walter Kuhfeld, and James Tann. Of these witnesses, an expert report was provided for Mr. Doyle, Mr. Tann and Mr. Suma. No information was provided regarding the remaining witnesses other than their names.

On August 14, 1991, counsel for CBS forwarded a letter to counsel for the Dolans stating, in pertinent part:

**2 If the individuals named on page 2 of your August 13th fax are witnesses whom you intend to

call at the trial of this matter, we are entitled to addresses and some brief summary of the testimony you expect to obtain from these individuals. If it is genuinely your intention to call these witnesses in this case, then please provide us, as soon as possible due to the impending trial date, with the addresses of these individuals and a summary of their testimony.

Please give this your immediate attention so that, in the event it is necessary to depose those individuals, the depositions can be taken before the trial.

We are not waiving any objection to the lateness of your presentation of these witnesses nor are we waiving any objection to them as witnesses in this case by making this request.

Having received no response from the Dolans, on August 28, 1991, CBS filed a motion to exclude these witnesses from testifying at trial or, in the alternative, motion to continue trial.

Additionally, on August 28, 1991, counsel for the Dolans faxed CBS a copy of the expert report of Vernon L. Burdick, a ceramics engineer. On August 29, 1991, CBS filed a motion to exclude Vernon L. Burdick as an expert witness on the grounds that he was identified as an expert less than thirty days before trial.

The Dolans did not respond to either motion to exclude.

On September 17, 1991, the trial court granted both motions to exclude.

III.

At trial, the Dolans presented the testimony of six expert witnesses, including: 1) Steven Manyo, who has a degree in architecture; 2) Donald Hollenbaugh, who is a manager for Solar Testing Laboratories, which provides testing services for construction materials; 3) William Platten, Jr., who is a civil engineer; 4) William Platten, Sr., who is a general contractor; 5) Chris Lopez, who is a civil engineer; and 6) George Nemeth, who has been a bricklayer for the past forty-one years. (FN1)

Mr. Lopez testified that a representative sample of brick from the Dolans' home was subjected to a series of tests according to guidelines set by the American Society for Testing Materials (ASTM). On cross-examination, Mr. Lopez indicated that ASTM sets the standards for the testing of construction materials. Further, he testified that with regard to the durability of a brick product, ASTM C-216 was the applicable standard. After reading ASTM C-216, Mr. Lopez testified that if the average compressive strength of a brick sample was greater than eight thousand PSI or the average water absorption was less than eight percent, then the test to determine the sample's saturation coefficient would be waived. (FN2) In light of the test results for compressive strength and cold water absorption from the Dolans' tests, Mr. Lopez testified that the saturation coefficient was waived in this matter.

The Dolans' second expert, Steven Manyo, testified that he inspected the Dolans' home, inspected the brick and, based upon his inspection and review of test results, offered his opinion that the reason the brick was spalling was that there were laminations in the brick which, when water penetrated, would fill up with water and expand during freeze/thaw cycles. Mr. Manyo also testified that the bricks were acceptable in the industry at the time they were sold because they passed the standards set forth in ASTM C-216. On cross-examination, this statement was explored in further detail. Mr. Manyo testified, as did Mr. Lopez, that if the average compressive strength was greater than eight thousand PSI or the water absorption less than eight percent, then the saturation coefficient would be waived.

**3 The Dolans' next expert, Don Hollenbaugh, testified that he performed a series of tests on brick samples from the Dolans' home. On cross-examination, Mr. Hollenbaugh testified that the samples he tested conformed with ASTM standards for compressive strength and cold water absorption.

The Dolans' fourth expert, William Platten, Jr., also testified that a representative sample of brick from the Dolans' home was subjected to a series of tests according to ASTM guidelines. Based on the saturation coefficient, which he calculated, Mr. Platten, Jr. concluded that the bricks were not suitable for use in northern Ohio, a severe weather area. He offered his opinion that the reason for the lack of durability was because the bricks were far too permeable, caused by a manufacturing defect.

On cross-examination, Mr. Platten stated that the waiver provision of ASTM C-216 does not apply to the Dolan brick based on the fact that the brick tested had been used. Mr. Platten testified that ASTM testing methods are written for new bricks before sale.

He stated that once bricks have failed in service, the tests are used to assist in determining the reason for their failure.

Mr. Platten's distinction between new and used brick was contradicted by Mr. Willard Packman, the expert retained by CBS. Mr. Packman testified that the age of the brick or its use will not affect the compressive strength test, the cold water absorption test or the saturation coefficient. Mr. Packman testified that the Dolans' bricks passed both the cold water absorption test and compressive strength test and, therefore, the saturation coefficient and freeze/thaw testing are waived.

Based on his inspection of the Dolan home and the Solar Lab test results, Mr. Packman concluded that the spalling was caused by water penetration and freeze/thaw problems. He offered his opinion that the reason the brick was spalling was due to improper construction and, with regard to the chimney, failure to follow approved plans.

In rebuttal, the Dolans presented the expert testimony of George Nemeth. Mr. Nemeth, a bricklayer for forty-one years, testified that he inspected the brickwork at the Dolans' home, including the chimney, and found it to be of good quality.

At the close of all the evidence, the case was submitted to the jury, which entered a unanimous verdict for CBS.

The Dolans timely appeal and assign three errors for our review.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED IN GRANTING THE MOTION TO EXCLUDE WITNESSES IN THAT THERE WAS NO SHOWING OF ANY VIOLATION OF THE CIVIL RULES OF PROCEDURE NOR ANY EVIDENCE OFFERED IN SUPPORT OF SUCH MOTION ESPECIALLY WHEN SUCH ORDER HAD THE EFFECT OF DISMISSING THE CLAIM OF THE APPELLANT.

ASSIGNMENT OF ERROR II

THE TRIAL COURT WRONGFULLY EXCLUDED THE EXPERTS OF THE APPELLANT WHEN IT PERMITTED A NEW EXPERT TO APPEAR ON BEHALF OF THE APPELLEE WHEN SUCH EXPERT WAS NOT EVEN REVEALED TO APPELLANT UNTIL SIX WEEKS BEFORE TRIAL OF THE ACTION.

**4 We address the Dolans' first and second assignments of error together since the Dolans claim in each that the trial court erroneously excluded relevant evidence when it granted the defendant's motions to exclude.

Evid.R. 103(A)(2) provides, in pertinent part, as follows:

> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and * * * in case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. * * *

A motion to exclude evidence, if granted, is a tentative, interlocutory, precautionary ruling by the trial court reflecting its anticipatory treatment of an evidentiary issue. *State v. Grubb* (1986), 28 Ohio St.3d 199, 201, 202. Accordingly, a proponent who has been temporarily restricted from producing evidence by virtue of a motion to exclude evidence must seek the introduction of the evidence, by proffer or otherwise at trial, in order to enable the court to make a final determination as to its admissibility and to preserve any objection on the record for purposes of appeal. *Id.* at paragraph two of the syllabus; *Collins v. Storer Communications, Inc.* (May 5, 1993), Cuyahoga App. No. 55420, unreported.

A trial court has broad discretion in the admission and exclusion of evidence, and a reviewing court shall not reverse a trial court's judgment for failure to admit or exclude evidence unless the trial court has clearly abused its discretion and the complaining party has suffered material prejudice. *Columbus v. Taylor* (1988), 39 Ohio St.3d 162, 164. Accordingly, we would not reverse the trial court's judgment unless the trial court acted unreasonably, arbitrarily or unconscionably in excluding the evidence and the complaining party has suffered material prejudice. *Id.* at 165.

In their first assignment of error, the Dolans argue that witnesses listed in CBS's motion to exclude, filed August 28, 1991, with the exception of Vernon L. Burdick and James Tann, effectively precluded them

from presenting a claim of fraud. (FN3)

Our review of the record shows that the Dolans failed to perfect their rights to appeal the exclusion of the contested witnesses since they failed to proffer the substance of that evidence at trial. In fact, counsel for the Dolans specifically declined to proffer evidence supporting a claim of fraud prior to trial. Counsel for the Dolans engaged in the following dialogue with the court:

> MR. RYAN: I would like to address it in the context, a ruling was made yesterday by Judge Friedman in regards to the exclusion of several witnesses. As I indicated to the Court yesterday * * * generally, I would not bother this particular Court with a pretrial motion, with a start of trial motion, but this particular motion has to do with our ability to put on a claim that my clients are maintaining through me they have a valid claim.
>
> ****5** My personal feeling is, I don't want to get into this, your Honor, because I spent several years on at least five of these cases, and I have spent a lot of time as to the issue of whether or not CBS had prior knowledge of the sale of the bricks. Mr. Farchione knows that I have dropped that claim on four other cases. I think that's a fair representation.
>
> MR. FARCHIONE: I would agree with that.
>
> MR. RYAN: My client, Peggy Dolan, in June, when we had some misunderstanding as to a settlement in this case, made inquiry of me what would be needed to prove an allegation of fraud.
>
> I indicated to her that we would need very strong evidence to show that someone within Cleveland Builders Supply had prior knowledge of the defect of the brick, that it was obvious that this defect was running through all of the brick and he continued to sell the brick.
>
> Mrs. Dolan on her own, without my direction, obtained through the summer the names of several witnesses and information from them.
>
> As she conveyed the names and addresses to me, I, then, immediately conveyed them to Mr. Farchione by August, as soon as I got them. * * *
>
> THE COURT: I've told you already, that's been ruled on. I'm not going to go back into that now.
>
> MR. RYAN: I understand.
>
> * * *
> * * *
>
> MR. RYAN: Your Honor, just so I can move this case along, rather than bother the Court with attempting to put on witnesses--I don't want to be unfair to the Court, but my understanding is that with the exclusion of that testimony, it's almost impossible for me to prove the allegations of fraud.
>
> THE COURT: Yes.
>
> MR. RYAN: I'm not going to trouble the Court with that, but the Court understands I have the opportunity to appeal that ruling by Judge Friedman to the Court of Appeals.
>
> THE COURT: Of course. Of course.

Further, the substance of the excluded evidence was not revealed from the context within which evidence was developed at trial. Compare *State v. Gilmore* (1986), 28 Ohio St.3d 190. Since the substance of that testimony was not revealed by proffer or otherwise, this court cannot determine whether its exclusion prejudiced the Dolans. Evid.R. 103(A). Accordingly, we overrule the Dolans' first assignment of error.

Turning to the Dolans' second assignment of error, the Dolans contend that the trial court abused its discretion in excluding the expert testimony of Mr. Burdick and Mr. Tann. The Dolans argue that the late announcement of these expert rebuttal witnesses was due to the late production of the expert report of Mr. Willard Packman by CBS.

Although the Dolans characterize the announcement of Mr. Packman as an expert for CBS as an "ambush," our review of the record shows that counsel for the Dolans consented to the late production of Mr. Packman's report. The record reveals the following: On June 11, 1991, counsel for CBS received a facsimile from the Dolans' counsel containing the expert report of William Platten, Jr., civil engineer. In response, counsel for CBS faxed a letter to the counsel for the Dolans on June 12, 1991, which stated, in part:

> ****6** I am in receipt of your facsimile of June 11,

1991, containing your new expert report drafted by Mr. Platten [Jr.], and dated June 5, 1991. I will not object to the production of this report so close to trial, so long as I may have the house inspected, and produce a report by an expert in the same field as Mr. Platten. I would like to do this during the week of June 17, 1991. Please advise today, either by return facsimile, or by contacting my secretary.

In response, the Dolans' counsel faxed a letter dated June 12, 1991 stating, in part, " * * * I have no objection to your having an expert review the home of my clients, so that he can come up with a report for you."

Nothing in this train of events suggests that CBS "ambushed" the Dolans when it identified Mr. Packman as an expert on its behalf.

With regard to Mr. Tann, the Dolans failed to proffer any information as to how Mr. Tann would support their allegations as required by Evid.R. 103.

Assuming, *arguendo,* that the substance of the excluded evidence is contained in Mr. Tann's deposition testimony, which was filed with the trial court, we note that the trial court's exclusion of such evidence would not warrant reversal. At his deposition, Mr. Tann testified as follows:

Q. When were you first contacted about this matter?

A. I was contacted by Mrs. Dolan in the early part of 1991, probably March.

Q. What were you asked to do, and what information was provided to you at that time?

A. I was asked for information on performing an inspection of their residence, as far as the condition or existing condition of the brick in question. As we are a trade association of brick manufacturer's policy on performing inspections, it is a service to our member manufacturers and asking Ms. Dolan, the manufacturer of the brick in question, it was determined that they were a non-member of ours in the past, and that we were unable to perform that inspection, because of our policies. We did, then, forward some names of other experts in the field that she may want to contact.

* * *
* * *

Q. Mr. Tann, do you have any opinions relative to the design, the masonry work, the mortar, the maintenance or construction of the Dolan residence?

A. I have not see the Dolan residence, and cannot comment on it.

Based on Mr. Tann's own testimony, he would not have added any information relevant to fraud or whether the brick was defective. Accordingly, the trial court's pretrial ruling did not substantially prejudice the Dolans.

As was the situation with Mr. Tann, the Dolans also failed to proffer any information as to how Mr. Burdick would support their allegations as required by Evid.R. 103. Assuming, *arguendo,* that the substance of the excluded evidence is contained in Mr. Burdick's written report, we note that the trial court's exclusion of such evidence was within its discretion. (FN4)

Civ.R. 16 empowers courts to adopt rules regarding the exchange of expert reports of witnesses to be called at trial. Former Loc.R. 21.1 of the Cuyahoga County Court of Common Pleas, General Division, provided as follows:

**7 (A) Since Ohio Civil Rule 16 authorizes the court to require counsel to exchange the reports of medical and expert witnesses expected to be called by each party, each counsel shall exchange with all other counsel written reports of medical and expert witnesses expected to testify in advance of the trial. The parties shall submit expert reports in accord with the time schedule established at the Case Management Conference. The party with the burden of proof as to a particular issue shall be required to first submit expert reports as to that issue. Thereafter, the responding party shall submit opposing expert reports within the schedule established at the Case Management Conference. Upon good cause shown, the court may grant the parties additional time within which to submit expert reports.

(B) A party may not call an expert witness to testify unless a written report has been procured from the witness and provided to opposing counsel. It is counsel's responsibility to take reasonable measures, including the procurement of supplemental reports, to insure that each report adequately sets forth the

expert's opinion. *However, unless good cause is shown, all supplemental reports must be supplied no later than thirty (30) days prior to trial.* The report of an expert must reflect his opinions as to each issue on which the expert will testify. An expert will not be permitted to testify or provide opinions on issues not raised in his report. (Emphasis added.)

The trial court has discretion to determine whether a party has complied with Loc.R. 21.1 and to determine the appropriate sanction for its transgression. *Pang v. Minch* (1990), 53 Ohio St.3d 186, 194. Such determinations will not be reversed on appeal absent an abuse of discretion. *Id.* at 194.

In this case, we cannot conclude that the trial court abused its discretion in excluding the expert opinion of Mr. Burdick. Despite the Dolans' argument to the contrary, we find no support for the motion that Loc.R. 21.1 does not apply to the production of expert reports used for purposes of rebuttal. Clearly, by using the phrase "all supplemental reports," Loc.R. 21.1 makes irrelevant the intended purpose of the report. Absent a demonstration of how the Dolans were prejudiced by the exclusion of Mr. Burdick's expert opinion, this court will not endeavor to create reasons. We conclude that the trial court did not abuse its discretion in excluding the expert testimony of Mr. Burdick.

The Dolans' second assignment of error is not well taken and is overruled.

ASSIGNMENT OF ERROR III.

THE TRIAL COURT ERRED IN NOT CHARGING THE JURY THAT THE AMERICAN STANDARD TESTING METHODS (ASTM) HAD NO RELEVANCY AND SHOULD NOT BE CONSIDERED IN ARRIVING AT THEIR VERDICT AND FURTHER SHOULD HAVE INSTRUCTED THE JURY THAT THE WAIVER CLAUSE CONTAINED IN EXHIBIT 27 WHICH WAS C-216 OF THE ASTM HAD NO APPLICATION NOR RELEVANCY IN THE TRIAL OF THE ACTION.

In their third assignment of error, the Dolans contend it was that the trial court erred in failing to instruct the jury that the ASTM standards did not apply, in any manner, in this case. The Dolans argue that the trial court erroneously admitted evidence regarding ASTM standards and, therefore, the trial court had a duty to give a curative instruction to the jury regarding their inapplicability, notwithstanding that fact that counsel never requested a curative instruction and failed to object to the omission of a curative instruction. Moreover, it was the Dolans who introduced the ASTM standards as an exhibit.

**8 Civ.R. 51(A) provides as follows:

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. Copies shall be furnished to all other parties at the time of making the requests. The court shall inform counsel of its proposed action on the requests prior to counsel's arguments to the jury and shall give the jury complete instructions after the arguments are completed. The court also may give some or all of its instructions to the jury prior to counsel's arguments. The court need not reduce its instructions to writing.

On appeal, a party may not assign as error the giving or the failure to give any instruction unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

The rationale behind this rule is two-fold: the object of the portion of the rule requiring the parties to enter their objections to the charge before the jury retires to consider the verdict is to allow the court, while it still has the chance, the opportunity to correct the error or omission before the jury begins its deliberations. *Presley v. Norwood* (1973), 36 Ohio St.2d 29. The object of the portion of the rule requiring the court to inform counsel, prior to jury argument, of its proposed action upon requested instructions is to require the judge to inform the trial lawyers what the charge is going to be so they may conform their arguments to law and intelligently argue the case to the jury.

Where a party fails to interpose a specific objection to the court's instructions, the error or omission is waived, absent a finding of plain error. *Reichert v. Ingersoll* (1985), 18 Ohio St.3d 220. Although the plain error doctrine is a principle applied almost exclusively in criminal cases, the Ohio Supreme Court has stated that the doctrine may also be applied in civil causes, even if the party seeking to utilize the

doctrine failed to object to the court's charge to the jury. *Id.* at 225.

In order for an unrequested, unobjected-to jury instruction to rise to the level of plain error, it must appear on the face of the record not only that error was committed, but that except for the error, the result of the trial clearly would have been otherwise and that not to consider the error would result in a clear miscarriage of justice. *State v. Underwood* (1983), 3 Ohio St.3d 12, paragraph one of the syllabus.

The Ohio Supreme Court has made it clear that courts of appeals should take notice of plain error charily, see *State v. Long* (1978), 53 Ohio St.2d 91, to correct only particularly egregious errors--those errors that "would have a material adverse effect on the character and public confidence in judicial proceedings." *Schade v. Carnegie Body Co.* (1982), 70 Ohio St.2d 207, 209. See, also, *Yungwirth v. McAvoy* (1972), 32 Ohio St.2d 285, 288.

**9. In the instant case, the trial court did not err in failing to instruct the jury that ASTM standards did not apply.

In an effort to show that the bricks were defective when they purchased them in 1977, the Dolans presented evidence that in 1988, the bricks failed to conform to ASTM requirements for absorption and saturation. Mr. Platten, Jr. testified that based on the bricks' extremely high saturation coefficient, they were not suitable for use in northern Ohio, a severe weather area.

In direct contradiction to this testimony, CBS presented evidence that the bricks met ASTM standards for compressive strength and water absorption and, therefore, according to ASTM C-216, CBS was not required to calculate the saturation coefficient. This evidence was not offered by CBS, as the Dolans could have us believe, to mislead the jury into thinking that the waiver provision of ASTM C-216 acted as a legal bar to their consideration of the evidence. Rather, CBS offered this evidence to show that the bricks did not contain a manufacturing defect.

As the evidence established that ASTM standards were relevant to a determinative issue, that is whether the bricks contained a manufacturing defect at the time they were sold, we cannot say that the trial court erred in failing to give a curative instruction regarding their applicability.

Accordingly, the Dolans' third assignment of error is not well taken and is overruled.

PATTON, P.J., and BLACKMON, J., concur.

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof, this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

FN1. The trial court permitted the Dolans to present the expert testimony of Mr. Lopez in their case-in-chief and Mr. Nemeth on rebuttal, notwithstanding the fact that both individuals had been excluded when CBS's August 28, 1991 motion to exclude was granted.

FN2. ASTM C-216 provides in pertinent part as follows:

4.1 Durability. * * * If the average compressive strength is greater than 8,000 psi (55.2MPa) or the average water absorption is less than 8.0% after 24-h submersion in cold water, the requirement for saturation coefficient shall be waived.

4.2 Freezing and Thawing. * * * Note 1-Brick are not required to perform to the provisions of 4.2 [freezing and thawing], and these do not apply unless the sample fails to conform to the requirements for absorption and saturation coefficient prescribed in Table II or the strength and absorption requirements in 4.1.

FN3. This court has not been asked to determine whether the complaint of the Dolans sufficiently sets forth a claim of fraud within the meaning of Civ.R. 9(A). See *Baker v. Conlan* (1990), 66 Ohio App.3d 454.

FN4. In Mr. Burdick's written opinion, he concluded that the bricks were unsound and not durable enough for use in northern Ohio. He offered the opinion that the reason for the lack of durability was immature firing temperatures at the time of manufacture.