[Cite as *Ramp Creek Community, L.L.C. v. Columbus Ohio Asphalt, L.L.C.*, 2018-Ohio-3022.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

RAMP CREEK COMMUNITY, LLC Plaintiff-Appellee -vs- COLUMBUS OHIO ASPHALT, LLC Defendant-Appellant	JUDGES: Hon. William B. Hoffman, P.J. Hon. Patricia A. Delaney, J. Hon. Craig R. Baldwin, J. Case No. 17-CA-65 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Licking County Court of Common Pleas, Case No. 2015 CV 00618
JUDGMENT:	Affirmed in part, Reversed in part, Final Judgment Entered
DATE OF JUDGMENT ENTRY:	July 25, 2018

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOEL H. MIRMAN The Mirman Law Firm, LLC 5 East Long Street, Suite 200 Columbus, Ohio 43215	SCOTT E. WRIGHT Wright & Noble, LLC 7662 Slate Ridge Blvd. Reynoldsburg, Ohio 43068
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Hoffman, P.J.

{¶1} Appellant Columbus Ohio Asphalt, LLC appeals the judgment entered by the Licking County Court of Common Pleas awarding damages in the amount of $46,295.48 to Appellee Ramp Creek Community, LLC for failure to perform work in a workmanlike manner.

STATEMENT OF FACTS

{¶2} Appellant is an Ohio limited liability company in the business of installing, patching, repairing and maintaining asphalt products. Appellee is an Ohio limited liability company which owns and operates a manufactured home park in Heath, Licking County, Ohio, known as Ramp Creek Community.

{¶3} In 2014, the roadways in the Ramp Creek Community were badly in need of repair. Appellee did not have the funds to repave the roadways with asphalt, so it decided to pave the roadways by a process known as "tar and chip." Appellee sought a road surface which would last until it could obtain financing to pay for a longer-term solution to the paving problem, which it expected to be able to do in January of 2017.

{¶4} On May 16, 2014, the parties entered into a written contract for repaving the roadways. The contract provided Appellant would provide asphalt patch work, tar and chip, striping, and speed bumps at a total cost of $46,295.48. The contract stated, "All material is guaranteed as stated herein. All work to be completed in a workmanlike manner according to standard practices." Appellee paid the contract price in full to Appellant.

{¶5} Almost immediately after the tar and chip process was complete, Appellee began to experience problems with the roadways. When people drove on the roads, clouds of dust were created. Residents of Ramp Creek complained about dust from the tar and chip process, and one resident whose child suffered from asthma called the Health Department. Other residents made a complaint to the Ohio Manufactured Homes Commission. Residents complained of tar covering their cars. An abundance of stone which failed to adhere to the surface accumulated on the roads, in piles on the side of the roads, and in the residents' yards. Potholes which had been filled reopened almost immediately.

{¶6} A few months after Appellant left the job, workers appeared at Ramp Creek unannounced. When confronted by an employee, they stated they were from Appellant and had been sent by the co-owner of the company, Rick Grosse, to fix the roads because the project had failed. Rick Grosse promised Appellee to come correct the defects in the tar and chip paving job, but failed to do so. Grosse admitted in a meeting with personnel from Appellee he had never done a tar and chip job before and Ramp Creek was a "guinea pig."

{¶7} Because of the failure of the tar and chip process, Appellee was unable to wait until they could refinance their property loan without penalty, and was forced to incur a penalty of $240,000.00 to refinance their loan in order to have funding to pave the road properly.

{¶8} Appellee filed the instant action on July 23, 2015, alleging Appellant "failed to provide either serviceable material or failed to perform in a workmanlike manner." The case proceeded to bench trial in the Licking County Common Pleas Court. Following

bench trial, the court found Appellant failed to perform in a workmanlike manner according to standard practices and failed to honor its guarantee. The trial court entered judgment awarding Appellee damages in the amount of $46,295.48. It is from that July 25, 2017 judgment of the court Appellant prosecutes this appeal, assigning as error:

> "I. THE TRIAL COURT ERRED IN PRECLUDING APPELLANT'S WITNESS, MICHAEL WURSTER, OWNER OF PHILLIPS OIL COMPANY, LOCATED ON MCKINLEY AVENUE, IN COLUMBUS, OHIO, FROM TESTIFYING AS AN EXPERT JUST BECAUSE HE WAS INADVERTENTLY MISIDENTIFIED AS MICHAEL PHILLIPS, OWNER OF PHILLIPS OIL COMPANY, LOCATED ON MCKINLEY AVENUE, IN COLUMBUS, OHIO.
>
> "II. THE TRIAL COURT'S FINDING THAT APPELLANT'S "TAR AND CHIP" WORK FOR APPELLEE WAS PERFORMED IN A NEGLIGENT MANNER WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.
>
> "III. THE TRIAL COURT'S AWARD OF DAMAGES IN THE AMOUNT OF $46,295.48 WAS NOT SUPPORTED BY COMPETENT AND CREDIBLE EVIDENCE."

I.

{¶9} In its first assignment of error, Appellant argues the court erred in precluding its witness, Michael Wurster, from testifying as an expert because Appellant had previously identified the witness as Michael Phillips.

{¶10} Appellee served Appellant discovery requests on January 23, 2017. Appellant responded on February 22, 2017, and supplemented the responses on March 7, 2017. In Appellant's Interrogatory Answer No. 1, Appellant identified its witnesses for trial:

> Appellant will call Rick Grosse, Adam Grosse, Mike Phillips (Phillips Oil Companies, 1877 McKinley Ave., Columbus, OH). Rick and Adam Grosse were both present on the job and both are knowledgeable in the area of asphalt paving and other road surfacing practices, as well as the effect of water drainage and infiltration in the roadway. Mike Phillips is the owner of Phillips Oil Companies and his company provided and applied the RS-2 petroleum product that was used in the chip and tar project. Appellant is still determining other possible witnesses and will supplement.

{¶11} Appellee filed a Motion to Compel Discovery and for Sanctions on March 10, 2017. Appellant filed a Memorandum in Opposition on March 23, 2017. The Court held an oral hearing and by judgment entry filed April 7, 2017, held as follows:

> 1. Defendant shall not be allowed to call any witness not identified by it in responses to Plaintiff’s discovery requests on or before March 30, 2017.

2. Defendant shall not be allowed to refer to or offer into evidence any documents not provided to Plaintiff in response to Plaintiff's discovery requests on or before March 30, 2017.

3. The matter of attorney's fees is taken under advisement.

{¶12} The court did not issue separate sanctions and did not award attorney fees.

{¶13} During the bench trial, Appellant called Mike Wurster to testify. The following exchange took place:

MR. WRIGHT: The Defense calls Mike Wurster.

THE COURT: Mike?

MR. WRIGHT: Mike Wurster.

THE COURT: Worster?

MR. WRIGHT: I have a Mike from Phillips Petroleum.

THE COURT: Okay.

MR. MIRMAN: What's his name?

MR. WRIGHT: I think it's Mike Wurster. I – I thought he was Mike Phillips, I'm --

MR. MIRMAN: Well, Your Honor, the Defendant has said they also call Mike Phillips. If they don't have a Mike Phillips, I object to calling this witness.

MR. WRIGHT: Your Honor, he is --

THE COURT: Swear him in. Let's find out what his last name is. Then we will address the motion.

Tr. 189.

{¶14} The witness was sworn in and disclosed his name was Michael Wurster, not Michael Phillips. Appellant's counsel asked about his experience with chip and seal products. Appellee objected and the following colloquy occurred:

MR. MIRMAN: Your honor I -- I object. The -- as I say, in two places Counsel listed and they also call Mike Phillips as an alternate. When we checked to find out who these people are and what they know, I would not be able to find a Mike Wurster and find out whether I have anything that I want to challenge him on because he wasn't identified. This Court has ordered that if a person isn't named, he can't call him. He might as well be Tom Jones. I -- there's no way that we can do our due diligence --

THE COURT: Right. Right.

MR. MIRMAN: -- by checking out the witness --

THE COURT: Mr. Wright—

MR. MIRMAN: -- when I get a false name.

MR. WRIGHT: Your Honor, his -- his company is Phillips Petroleum which I identified via the address in discovery on McKinley Avenue in Columbus, Ohio. Mr. Stewart recognized him as one of the two local

vendors for petroleum emulsion products in the Central Ohio area. He was identified to Counsel and answered interrogatories –

THE COURT: Where?

MR. WRIGHT: It was back --

THE COURT: If you did, I mean, that settles the question. Where is it?

MR. WRIGHT: --Back in January. I identified him. I thought it was Mike Phillips. His company is Phillips Petroleum but it turns out his name is Mike Wurster of Phillips Petroleum. But I identified him as ---

THE COURT: You -- you misidentified him. That -- that's the issue. I mean, you've got his first name right but how does that -- I mean, how can I not enforce the order that said, "Anybody not identified in response to these discovery requests before March 30th can't be called"?

MR. WRIGHT: Your Honor, that wasn't even a part of the Motion to Compel. He was identified before that motion was even --

THE COURT: He was misidentified. Let's get clear here. He was misidentified.

MR. WRIGHT: He was identified --

THE COURT: You identifying him as Mike Phillips gets nowhere near what they need to be able to know to take depositions to propound interrogatories. I mean –

MR. WRIGHT: He's a witness, he’s not a party so you wouldn't be propounding interrogatories. Secondly, the company was identified as

Phillips Petroleum. There was [sic] documents provided by Mr. Phillips for the product that was applied onsite.

THE COURT: Okay. Let's see -- let's see the-- the response here where you're -- you're claiming to have identified this witness. I mean, is he -- is it referenced as an employee of Phillips Petroleum or Phillips-- what's your company?

WITNESS: Phillips Oil Company --

THE COURT: Phillips.

WITNESS: -- of Central Ohio, Inc.

MR. MIRMAN: Your Honor, in the pretrial statement he says, "Defendant may also call Mike Phillips or an alternate as an expert witness to confirm Defendant met industry standards." Now, that was filed January --

THE COURT: That's all it says?

MR. MIRMAN: -- of 2017.

THE COURT: Let's see it.

MR. MIRMAN: Pardon?

THE COURT: January what?

MR. MIRMAN: That was filed January of 17. I think I'm entitled to rely on that. That was his final pretrial statement.

THE COURT: Is that it, Mr. Wright?

MR. WRIGHT: He was also identified in interrogatories your answer, I-

MR. MIRMAN: Also as Mike Phillips.

MR. WRIGHT: As the owner of Phillips Petroleum.

MR. MIRMAN: No. No. Just as Mike Phillips paren Phillip Oil Company -- Phillips Oil companies. Am I to go out to Phillips oil companies and take the deposition of everyone there to find out if there is the real person he meant to name? It is not my responsibility.

THE COURT: Where are you -- let me see what you have there. And I'll take a look at whatever you have, Mr. Wright, if you think you have made a more complete disclosure of the witness' identification.

(Pause in proceedings.)

THE COURT: Are you the owner of Phillips Oil Companies?

WITNESS: Yes.

THE COURT: Did you personally apply the RS 2 petroleum product?

WITNESS: An employee of mine did.

THE COURT: Alright. Well I will let you call him as a fact witness, but if there is an objection to him offering an expert opinion on this I am going to have to sustain it.

MR. WRIGHT: On what basis?

THE COURT: On the basis he was misidentified. (Emphasis added.) You may examine.

Tr. 190-194.

{¶15} Wurster was permitted to testify as a fact witness but Appellee objected to questions it characterized as requesting an expert opinion. The court sustained the objections, and Appellant proffered the testimony of Wurster.

{¶16} Our standard of review for determining whether the trial court erred in excluding expert testimony as a sanction for violation of discovery was set forth by the Ohio Supreme Court in *Vaught v. Cleveland Clinic Found.,* 98 Ohio St.3d 485, 2003-Ohio-2181, 787 N.E.2d 631, ¶ 13 (2003):

> In *Nakoff v. Fairview Gen. Hosp.* (1996), 75 Ohio St.3d 254, 662 N.E.2d 1, syllabus, this court held: "A trial court has broad discretion when imposing discovery sanctions. A reviewing court shall review these rulings only for an abuse of discretion." As such, in order to have an abuse of discretion, "the result must be so palpably and grossly violative of fact or logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance of judgment, not the exercise of reason but instead passion or bias." Id. at 254, 256, 662 N.E.2d 1, citing *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222, 15 OBR 311, 473 N.E.2d 264.

{¶17} Appellant focuses this court's attention on the inadvertent misidentification of Mike Wurster as Mike Phillips, which Appellant claims is a common mistake due to Wurster's position with Phillips Oil Company. However, Civ. R. 26(B)(5)(b) provides in pertinent part:

> As an alternative or in addition to obtaining discovery under division (B)(5)(a) of this rule, a party by means of interrogatories may require any other party (i) to identify each person whom the other party expects to call as an expert witness at trial, and (ii) to state the subject matter on which the expert is expected to testify.

{¶18} We find Appellant's Answer to Interrogatory No. 1 is insufficient to establish its intention to call Phillips as an expert witness, separate and apart from the issue of the incorrect last name set forth in the answer. Appellant's identification of Phillips in its answer to Interrogatory No. 1, as set forth above, does not state the subject matter on which the purported "expert" was expected to testify, especially when contrasted with the description of the scope of the testimony of Rick Grosse and Adam Grosse set forth in the same answer. At best, the description of Mike Phillips substantiates his status as a "fact" witness. To that extent, we agree with the trial court's conclusion, as set forth above, "it was insufficient identification for someone you [Appellant] expect to call as an expert witness."[1]

[1] The dissent interprets Appellant's Answer to Interrogatory No. 1 as informing Appellee the owner of the company would testify it not only supplied the RS-2 petroleum products but also "would testify that appellant met industry standards". (Dissent at¶ 43 and ¶ 47.) It is on that point our opinions diverge. As the majority, we find no indication the owner would testify as an expert regarding "industry standards" in appellant's answer to the interrogatory.

{¶19} This distinction drawn by the trial court explains its decision to allow Wurster to testify as a fact witness but not as an expert witness. Despite its earlier order Appellant would not be allowed to call any witness not identified on or before March 30, 2017, we find the trial court did not abuse its discretion in allowing Wurster to testify as a fact witness, but not as an expert witness.[2]

{¶20} The first assignment of error is overruled.

II.

{¶21} In its second assignment of error, Appellant argues the judgment finding the tar and chip work was performed in a negligent manner is against the manifest weight of the evidence.

{¶22} A judgment supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction Co*., 54 Ohio St. 2d 279, 376 N.E.2d 578 (1978). As the trier of fact, the judge is in the best position to view the witnesses and their demeanor in making a determination of the credibility of the testimony. "[A]n appellate court may not simply substitute its judgment for that of the trial court so long as there is some competent, credible evidence to support the lower court's findings." *State ex rel. Celebrezze v. Environmental Enterprises, Inc.,* 53 Ohio St.3d 147, 154, 559 N.E.2d 1335 (1990).

[2] Appellee has not set forth a cross-assignment of error to the trial court's ruling allowing Wurster to testify as a fact witness despite the misidentification of Wurster as "Mike Phillips" in discovery.

{¶23} In the instant case, Appellee alleged Appellant failed to perform the tar and chip paving of the roadways in the manufactured home park in a workmanlike manner, as required by the contract between the parties.

{¶24} Charles Stewart, Appellee's expert witness, testified when he examined the tar and chip job done by Appellant, it was "probably the worst tar and chip I've ever encountered." Tr. 36. He testified none of the stone adhered to the road, and the stone was in piles along the sides of the roadways. He testified he noticed the stone was not #8 limestone, as required by the contract, and believed this is why the job failed. He testified "screenings" were used by Appellant in place of #8 limestone, which are dirty. As a result of using unwashed stone, the liquid adhered to the dust on the stone instead of to the rock itself, causing the rock to not adhere to the liquid. He testified the job was not workmanlike and "really shoddy." Tr. 39.

{¶25} Heather Dales, who was the community coordinator of Appellee at the time of the paving project, testified she found it treacherous to ride her golf cart through the community after the paving project due to the abundance of loose stone. She testified bushes and homes were covered in dust, and stone accumulated in yards. She testified residents had tar on the cars, and she had tar on her office floor.

{¶26} Kelly Case, co-general partner and executive director of Appellee testified at a meeting after the work was done, Rick Grosse stated initially he had not done a tar and chip job in twenty years, then later admitted he had never done a tar and chip job and Ramp Creek was a "guinea pig." Tr. 117. He testified Rick Grosse admitted there was a bonding problem with the stone.

{¶27} Dawn Palya-Maharry, co-general partner of Appellee, resided in the community at the time of the paving. She testified there was tar on her car, which would carried on to the cement drives. She testified there was loose gravel and dust everywhere.

{¶28} We conclude the judgment of the court finding the tar and chip work was not performed in a workmanlike manner is supported by competent, credible evidence and is not against the manifest weight of the evidence, despite Appellant's evidence to the contrary.

{¶29} The second assignment of error is overruled.

III.

{¶30} In its third assignment of error, Appellant argues Appellee failed to prove damages related to filling potholes and installing speed bumps.

{¶31} The trial court found Appellee received no value from the tar and chip job and had been damaged in the amount of $46,295.48 by virtue of Appellant's breach of contract.

{¶32} Appellant first argues there is no evidence it did not complete the pothole repair in a workmanlike manner in accordance with the contract, and therefore the court erred in awarding damages of $7,350 for the asphalt patch work.

{¶33} Charles Stewart, Appellee's expert, testified Appellant did not meet industry standards by paving prior to filling the potholes. Kelly Case testified the fixed potholes failed, and he had to pay someone else to come and refill those potholes. We find this evidence was competent, credible evidence to support the award of damages for failure to properly fill the potholes in accordance with the contract.

{¶34} As to the speed bumps, in its complaint Appellee pled Appellant had damaged four of the fifteen installed speed bumps, but had not replaced or repaired the damaged speed bumps. However, at trial Appellee presented no evidence with regard to installation of the speed bumps. At the close of the presentation of Appellee's evidence, the court noted:

> THE COURT: Okay. I—there's—just so we're clear, there's no—there was no testimony with regard to the speed bump issue to in terms of there being some sort of failure there or breach of a workmanlike standard, but –
>
> MR. MIRMAN: If I may, Your Honor, the—the long—they still had to rip up the road and redo it, so the speed bumps had to be redone.
>
> THE COURT: Yeah, I think we get into that on a damages question, if we get there, so. Alright.
>
> Tr. 188-189.

{¶35} This statement by counsel for Appellee is not evidence, and Appellee did not present evidence the repaving as a result of the failure of the tar and chip necessitated removal and/or replacement of the speed bumps. As pointed out by the trial court, Appellee presented no evidence the speed bumps were completed in an unworkmanlike manner. Therefore, we conclude the Court erred in awarding Appellee damages in the amount of $1875 for breach of the contract to install speed bumps.

{¶36} The third assignment of error is overruled in part and sustained in part.

{¶37} The judgment of the Licking County Common Pleas Court is affirmed in part and reversed in part. Pursuant to App.R. 12(B), we hereby enter final judgment in favor of Appellee in the amount of $44,420.48 plus interest at the legal rate.

By: Hoffman, P.J.

Delaney, J. concurs

Baldwin, J. dissents

Baldwin, J., dissenting

{¶38} I respectfully dissent from the majority's analysis of the first assignment of error. I would find that the appellant did not violate the rules of discovery and, assuming a violation did occur, the exclusion of the testimony of appellant's expert was not warranted.

{¶39} This Court has held that:

> The exclusion by the trial court of reliable and probative evidence under Civ.R. 37 "is a severe sanction and should be invoked only when clearly necessary to enforce willful noncompliance or to prevent unfair surprise." *Nickey v. Brown* (1982), 7 Ohio App.3d 32, 34, 454 N.E.2d 177. Further, under Civ.R. 37(D), exclusion is only one of several means of remedying unfair surprise. Id., citing *Hair v. Certified Laboratories* (Aug. 3, 1979), Summit App.No. 9160. "Courts typically exclude a party's expert testimony for failure to disclose the subject matter of that testimony when the subject matter is revealed for the first time at trial and the opposing party had no reason to anticipate it." *Wright v. Suzuki Motor Corp*., Meigs App.No. 03CA2, 03CA3, 03CA4, 2004-Ohio-3494, ¶ 66, emphasis added, citing Walker v. Holland (1997), 117 Ohio App.3d 775, 788, 691 N.E.2d 719.

Paul C. Harger Tr. v. Morrow Cty. Regional Planning Comm., 5th Dist. Morrow No. 07 CA 6, 2009-Ohio-18, ¶ 14.

{¶40} The majority's ruling strays from that holding to the extent that it fails to consider all of the facts in the record and whether the appellee suffered or claimed surprise in the case *sub judice*. However, I would not reach that part of the analysis because appellant's discovery responses were sufficient to put the appellee on notice of the identity of the expert, his expertise and the subject matter of his testimony. The appellee was not "ambushed," surprised or prejudiced.

{¶41} Appellant disclosed in its pre-trial statement that "Defendant may also call Mike Phillips, or an alternate, as an expert to confirm that Defendant met industry standards." (Defendant's Final Pretrial Statement, Jan. 9, 2017, Docket #15). In response to an interrogatory seeking the identity of experts, appellant replied:

> Defendant will call Rick Grosse, Adam Grosse, Mike Phillips (Phillips Oil Companies, 1877 McKinley Avenue, Columbus, Ohio). Rick and Adam Grosse were both present on the job and both are knowledgeable in the area of asphalt paving and other road surfacing practices, as well as the effects of water drainage and infiltration in the roadway. Mike Phillips is the owner of Phillips Oil Companies and his company provided and applied the RS-2 petroleum product that was used in the chip and tar project. Defendant is still determining other possible witnesses and will supplement.

Exhibit E to Motion to Compel Discovery and for Sanctions, Mar. 10, 2017, Docket # 25.

{¶42} Appellee was not satisfied with the reference to the defendant "still determining other possible witnesses and will supplement" but appellee did not object to the responses provided and did not request, in its motion to compel discovery,

supplemental information regarding Mr. Phillips. Further, Rick Grosse testified as an expert on behalf of the appellee with no objection regarding his identification in appellee's discovery responses.

{¶43} The record does not show that appellee attempted to contact Michael Phillips, schedule his deposition or acquire any further information regarding his background or opinion. Appellee did not request additional information nor did it contend that the information provided was an incomplete response to its interrogatory. Appellee undeniably was aware that a person who was the owner of the company that provided and applied RS-2 petroleum products would testify that appellant met industry standards.

{¶44} I would find that the record contains no evidence of an intentional violation warranting exclusion of expert testimony. *Jones v. Murphy,* 12 Ohio St.3d 84, 86, 465 N.E.2d 444, 446 (1984). There is no element of ambush in the record. *State v. D'Ambrosio*, 67 Ohio St.3d 185, 1993-Ohio-170, 616 N.E.2d 909 (1993). If "a complaining party knows the identity of the other party's expert, the subject of his expertise and the general nature of his testimony, a party cannot complain that they are ambushed." *Revilo Tyluka, L.L.C. v. Simon Roofing & Sheet Metal Corp*., 8th Dist. No. 94952, 193 Ohio App.3d 535, 2011-Ohio-1922, 952 N.E.2d 1181, ¶ 48 (Internal citations omitted). The record shows that appellee had sufficient information to know that the witness was the owner of the company that produced a product that was used to complete the chip and tar project and that person would testify that the appellant met industry standards. The only objection presented by appellee at trial and in its appellate argument is the error in the last name of the witness. Appellee did not claim it did not anticipate the testimony of

an expert witness on the stated topic, but only objected when it discovered that the witness's correct name was Michael Wurster and not Michael Phillips.

{¶45} For those reasons, I disagree with the majority's conclusion that appellant's disclosure violated Civ. R. 26(B)(5), but that is not the end of the analysis. Even if appellant's disclosure was deficient, "[i]n fashioning a sanction for a discovery rule violation, the trial court must impose the least severe sanction that is consistent with the purpose of the rules of discovery. *Rice v. Natl. Fleet Serv.,* 5th Dist. Stark No. 1998CA00117, 1998 WL 753199, *3, citing *City of Lakewood v. Papadelis* (1987), 32 Ohio St.3d 1, 511 N.E.2d 1138, paragraph two of the syllabus. "The purpose of these rules, as herein applicable, "is to prevent surprise to either party at the trial or to avoid hampering either party in preparing its claim or defense for trial. * * *" *Huffman v. Hair Surgeon, Inc.*, 19 Ohio St.3d 83, 85–86, 482 N.E.2d 1248, 1250–51 (1985). "[N]ot every violation of Civ.R. 26 will call for the drastic remedy of excluding an expert witness. Instead, the trial court should weigh the conduct of the party offering the expert witness along with the level of prejudice suffered by the opposing party attributable to the discovery violation, in order to determine the appropriate sanction." *Savage v. Correlated Health Serv., Ltd.*, 64 Ohio St.3d 42, 1992-Ohio-6, 591 N.E.2d 1216 (1992) When a complaining party knows the identity of the other party's expert, the subject of his expertise and the general nature of his testimony, a party cannot complain that they are ambushed." *Miller v. Gen. Motors Corp.*, 8th Dist. Cuyahoga No. 87484, 2006-Ohio-5733, ¶ 11.

{¶46} I believe the trial court was obligated to analyze the alleged discovery violation to determine whether there was "surprise" or an "element of ambush" or other

prejudicial impact because “the existence and effect of prejudice resulting from noncompliance with the disclosure rule is of primary concern.” *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 85, 482 N.E.2d 1248. The trial court barred the expert testimony because the expert was misidentified, but the record lacks any analysis of the prejudicial impact on the appellee. Trial transcript, p. 194, line 14. On the record presented to this court, I would find the appellee had sufficient information to put it on notice of identity of the other party's expert, the subject of his expertise and the general nature of his testimony, despite the error in the name. I would further find that the appellee did not suffer any surprise or prejudice, aside from the consequences of appellee’s own failure to request the deposition of this witness and that therefore, the trial court abused its discretion by relying on “misidentification” to exclude expert testimony.

{¶47} Finally, I am concerned that the majority establishes a precedent in this case whereby inadvertent typographical errors may be used to justify the exclusion of otherwise probative and relevant evidence. The appellee was aware that the owner of a company that produced and applied a product would testify as an expert that the work was done according to industry standards. The only surprise was the error in the last name, an inconsequential fact when the record contains no evidence that this error prejudiced the appellee in its ability to prepare for trial.

{¶48} For those reasons I must dissent. I would affirm the first assignment of error, vacate the judgment and remand the case for re-trial. I would find the second and third assignment of error moot.