

VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 129-6-16 Oscv

Billis vs. State of Vermont

ENTRY REGARDING MOTION

Title: Motion to Reconsider (Motion: 28)
Filer: Pamela Gayle Lacher
Filed Date: October 10, 2022

The motion is DENIED.

Petitioner's attorney seeks reconsideration of the Order of September 21, 2022 on Motion #25 in which the court denied her request for an extension of the date for disclosure of the opinions of Petitioner's medical expert and the grounds for those opinions. The effect of the ruling was to preclude expert opinion testimony on the medical claim in the case.

The expert, Dr. Alan Abrams, was retained in 2017. In 2019, in response to the State's discovery request, Petitioner provided his name, qualifications, a copy of a transcript of his testimony in another case, medical records, and scientific and other information that Dr. Abrams relied upon for his opinions in general. No expert opinion was provided concerning the facts of this case although one was requested.

On May 7, 2021, a pretrial order agreed to by the parties established November 15, 2021 as the date for expert witness opinion disclosures on both legal and medical issues. Other issues in the case caused delays beyond that date. On May 5, 2022, a status conference was scheduled for June 22, 2022 "to discuss any outstanding issues and to establish the remainder of the discovery schedule." On June 5, 2022, Petitioner confirmed the name and contact information for Dr. Abrams but not the substance of the facts and opinions as to which he was expected to testify in this case nor the grounds for his opinions. At the June 22 status conference, the court ordered Petitioner to provide complete expert disclosure information by June 29, one week later. Petitioner's lawyer filed a motion to extend the date for expert disclosures for two months, to August 29, 2022. Respondent State opposed the motion.

The court granted the motion, providing the additional two months. When the ruling issued on August 1, there were four weeks remaining until the deadline. In the ruling, the court explicitly referenced Rule 26 (b)(5)(A)(i)(II) and (III) and the fact that the required disclosure must state "the subject matter and the substance of the facts and opinions as to which the expert

is expected to testify, and. . . a summary of the grounds for each opinion.” The ruling also stated that the pretrial scheduling order would be strictly enforced, absent extraordinary circumstances.

On August 26, 2022, three days before the deadline, Petitioner filed a Motion for Relief seeking an additional 60 days, stating that the expert needed more time to review material. The court denied the request on the grounds that there had been sufficient time to meet the date, a date which the Petitioner had specifically requested, and no extraordinary circumstances had been shown. Based on the content of the motion, it appeared that the expert had simply not budgeted sufficient preparation time. It has now been shown that circumstances were otherwise.

Petitioner now seeks relief from that ruling and wishes the court to accept a late-filed disclosure letter from the expert. She acknowledges that when she sought the 2-month extension, she had not reached out to Dr. Abrams to confirm how long he needed, and that she did not reach out to him until mid-August, “leaving him only about 2 (two) weeks to draft his report. At that time, I also provided Dr. Abrams with the additional 2,000 or so pages from Attorney Sleight’s file for the first time.” (Declaration of Counsel attached to Motion, ¶¶14, 16.) She had apparently had that material since January. Dr. Abrams contacted her four days before the deadline stating that he needed more time because “there was/is a lot of material to go through in order to verify what medications were taken and on what dates and the possible side effects of those medications relevant to the issues in this case, including but not limited to: depression, sleep apnea and alertness.” *Id.* at ¶ 21. It is apparent that he wanted time in order to formulate a specific opinion related to this case and had not been given the relevant materials until two weeks before a strictly warned deadline.

Attorney Lacher refers to V.R.C.P. Rule 6 (b) governing requests for extension of time. The rule provides that when an act “must be done within a specified time, the court may for good cause, extend the time. . . if a request is made before the original time or its extension expires.” The August 26th Motion seeking a 60 day extension was timely filed prior to the August 29th deadline. Thus, leaving aside the “extraordinary circumstances” requirement in the August 1st Order, the relevant standard under the rule is ‘good cause.’ The required standard is ‘excusable neglect’ when a motion is filed after the deadline has passed. The first motion to extend was before the deadline and the current motion is after the deadline.

Attorney Lacher notes that the August 1, 2022 Order granting the two-month extension specifically stated in bold letters that the date was firm and no extension would be granted except under extraordinary circumstances. She concludes that therefore “good cause” in this case would require a showing of extraordinary circumstances. She argues that she has shown both good cause and excusable neglect.

Petitioner’s lawyer was granted the additional two months she asked for to disclose Dr. Abrams’ expert opinion in the case and the grounds for that opinion. It turns out that in making that request, she had not consulted him about how much time he reasonably needed or what additional materials he might need. She did not reach out to him until two weeks prior to the strict deadline, at which time she provided him with 2,000 additional pages of material that he needed to review to formulate an opinion for the case. Thus, the circumstances underlying the

request for additional time were entirely within the control of Petitioner's counsel. She was simply late in contacting him and providing him with the materials he needed to formulate an opinion and a basis for the opinion. The State had made an Interrogatory request for the opinion over three years earlier, and the court had granted her request for a 2 month extension from the June 29, 2022 date, over the State's objection, which was a date beyond an already-extended deadline.

"Good cause refers to situations in which there is no fault on the movant's part—e.g., failure of the Postal Service to deliver the notice of appeal." V.R.A. P. 4, Reporter's Notes—2006 Amendment. In this case, there was clearly fault on the part of the movant in not providing the expert with available materials and notice of the strictly required deadline in a timely manner. The court cannot conclude that there was no fault on the part of the movant.

"Excusable neglect assumes fault on the part of the movant." *Id.* The Vermont Supreme Court applies the excusable neglect standard strictly. Mistakes on the part of attorneys and the effect of procedures within their control are not deemed excusable neglect. *In re Town of Killington*, 2003 VT 87A, ¶¶ 17, 19, (internal office mistake not excusable neglect); *Bergeron v. Boyle*, 2003 VT 89, ¶ 22, 176 Vt. 78, 838 A.2d 918 (lawyer's vacation and internal office procedure breakdown not excusable neglect); *In re Lund*, 2004 VT 55, ¶ 7, (mistaken reading of rule not excusable neglect). The unexpected circumstances that justified excusable neglect in *Clark v. Baker*, 2016 VT 42, are not present in this case.

All of the circumstances were within the control of Petitioner's counsel: maintaining timely communication with the expert, providing him with the available materials he needed to formulate an opinion, notifying him of the requirement of providing an opinion specific to the case and the grounds for it, and notifying him of the strict deadline with sufficient reasonable time to comply. None of the standards that could justify extending the deadline have been met, no matter which of the standards—good cause, exceptional circumstances, or excusable neglect—are applied.

Petitioner's argument that the disclosures made in 2019 constituted sufficient compliance with Rule 26 are without merit. In February of 2019, in Interrogatory 39, the State requested as follows: "Please identify and produce the expert opinion and report of your disclosed expert Dr. Alan Abrams." Rule 26 specifically authorizes such a request. It was not provided. The court Order granting the extension to August 29 specifically quoted the Rule and required that the disclosure must state "the subject matter and the substance of the facts and opinions as to which the expert is expected to testify, and. . . a summary of the grounds for each opinion." This was not done by the required deadline and for the reasons stated above, there is no showing of sufficient justification for an extension.

Attorney Lacher argues that the Rule does not require a "report." The reasonable interpretation of the Interrogatory request to produce "the expert opinion and report" is that it is a request for a written explanation of the grounds for the opinion. There is no requirement that a "report" take a specific form. The information was simply not provided in any form. As shown in the passages from the Reporter's Notes to Rule 26 and from *Stella v. Spaulding*, quoted in the

Motion for Reconsideration, expert disclosures allow opposing counsel to determine whether and how to take depositions, thus avoiding unnecessary expense in trial preparation or promoting efficiency in the taking of depositions.

In this case as in *Stella*, “the vague disclosures lacked the necessary specificity to allow defendants to assess the need for and, equally important, to prepare to take the expert's deposition.” *Stella ex rel. Est. of Stella v. Spaulding*, 2013 VT 8, ¶ 17. When requested, the information is a necessary precursor to an expert deposition. The deadline in this case for depositions of Petitioner's experts has already passed. Petitioner is implicitly requesting a significant delay in all the dates in the strict August 1, 2022 pretrial scheduling order. For the reasons stated above, there has been no showing of justifiable grounds for such an extension. As in *Stella*, the ruling is not a dismissal of the medical claim, but simply precludes Petitioner from submitting expert evidence on the medical claim. *Id.* at ¶ 21.

The court declines to address within the context of this motion an apparent discovery dispute between the attorneys over the scope of required disclosure of the Sleigh file.

For the foregoing reasons, the Motion for Reconsideration is *denied*.

Electronically signed December 2, 2022 pursuant to V.R.E.F. 9 (d).

A handwritten signature in black ink that reads "Mary Miles Teachout". The signature is written in a cursive, slightly slanted style.

Mary Miles Teachout
Superior Judge (Ret.), Specially Assigned