

STATE OF VERMONT  
ESSEX COUNTY, SS

Camellia L. Hann and  
Jerald Hann

Essex Superior Court

v.

Patrick Pariseau

Docket No. S 36-91 Ec

Decision and Order:

Motion to Continue;

Motion to Exclude Expert Witness Testimony

This is a suit for personal injury. Plaintiffs have moved for a continuance of the trial, on grounds of a severe illness on the part of plaintiff Jerald Hann. Defendant does not object to this continuance; the continuance is therefore GRANTED.

Defendant has moved for an order of the court preventing plaintiffs from offering certain expert testimony, on the grounds that plaintiffs have failed to make a timely disclosure of their experts.

In order to place the relevant legal issues in a meaningful factual context, a review of the history of this case is in order. The complaint was filed with the court on November 19, 1991. On December 20, 1991, defendant sent plaintiff a set of expert interrogatories. These interrogatories asked plaintiff to state: (1) the names of each person to be called by plaintiff as an expert witness, (2) the subject matter on which each expert was expected to testify, (3) the substance of the facts to which the expert was expected to testify, and (4) the substance of the opinions to which each expert was expected to testify, and a summary of the grounds for each opinion. These are all legitimate matters for discovery under V.R.C.P. 26(b)(4)(A)(i).

On August 31, 1992, the court received from defendant a motion to compel plaintiffs to respond to defendant's discovery requests. On September 30,

1992, Judge Morris ordered: "Plaintiffs to comply fully with defendant's discovery requests NLT [no later than] 10/23/92 or thereafter be subject to costs, sanctions." While Plaintiffs filed an Objection and Response on October 16, 1992, it was a matter of form only and provided no meaningful response to Defendant's discovery request.

On January 6, 1994, this court issued an order scheduling this case for jury draw on May 4, 1994, and setting the trial dates for May 4, 5, and 6 of 1994. On January 19, 1994, defendant's counsel wrote to plaintiff regarding, among other things, the outstanding dispute over the disclosure of expert witnesses. Defense counsel stated that he assumed that plaintiffs' failure to disclose experts amounted to an indication that they had no intention of using experts at trial. On March 9, 1994, plaintiffs' counsel wrote to defense counsel and stated that he did intend to call a general contractor as an expert witness and to rely on one of plaintiff Camellia Hann's treating physicians as an expert witness for purposes of the permanency of the injury.

On March 16, 1994, defendant filed a motion seeking an order precluding the plaintiffs from calling expert witnesses at trial, on the grounds that plaintiffs had failed to comply with any discovery regarding such witnesses. On March 30, 1994, plaintiff filed with the court an "Expert Witness Disclosure," which responds to the questions propounded by defendant in defendant's original December 20, 1991 set of expert interrogatories. This disclosure arrived just a few days before a status conference was to be held on April 6. Also on March 30, 1994, plaintiffs filed a memorandum in opposition to defendant's motion to preclude expert testimony. Plaintiffs contend that defendant misunderstands various aspects of the discovery rules and process. Plaintiffs have not offered any explanation for their delay.

The relevant legal issues here are rather simple.

Parties are required to respond to discovery requests concerning the identity of experts expected to be called as witnesses at trial: V.R.C.P. 26(b)(4)(A)(i). Such responses must be seasonably supplemented to include after-acquired information concerning the identity of experts. V.R.C.P. 26(e)(1)(B). ...[T]he trial court has inherent authority to enforce V.R.C.P. 26(e) by excluding evidence... or taking other appropriate action. ....

White Current Corp. v. Vermont Electric Coop., 158 Vt. 216, 222-23 (1992). If a party fails to comply with an order of the court compelling discovery, the court may respond by precluding the use of the matters which were sought to be discovered. V.R.C.P. 37(b)(2)(b). The use of sanctions is within the discretion of the trial court, and discovery sanctions will not be tampered with on appeal unless the party subjected to sanctions can show that the "court's discretion was either totally withheld or exercised on grounds clearly untenable or unreasonable." White Current, 158 Vt. at 223.

To permit expert witnesses to testify where their identity has not been timely disclosed to the opposing party "would frustrate the primary purpose of liberal civil discovery rules: the prevention of surprise of one's opponent." Id. Liberal discovery is intended to encourage and allow full investigation and trial or settlement of matters on their actual merit, rather than "trial by ambush." Where a party inexplicably fails to disclose the identity of expert witnesses until shortly before trial, a court is justified in precluding those witnesses from testifying. Id. Indeed, where an order compelling discovery has been issued and the party subject to that order has failed to produce the relevant discovery, that party may be held in contempt of court. Kingsbury v. Kingsbury, 137 Vt. 448, 453-54 (1979).

Plaintiffs have supplied no good reason, indeed, no reason at all, for their extreme delay in disclosing the identity of their experts. The better

part of two and one-half years transpired between the defendant's request for information as to plaintiffs' experts and the plaintiffs' eventual belated response. During a good portion of this time, plaintiffs were required by the order of Judge Morris to comply with defendant's discovery requests, yet failed to do so. That order specifically warned plaintiffs of the possibility of sanctions. The fact that the matter is being continued as a result of the illness of one of the plaintiffs does not change the fact that plaintiffs failed to reasonably cooperate in discovery. The continuance therefore furnishes no basis by which the court will depart from holding the plaintiffs to the consequences of their actions and inactions.

For all of the foregoing reasons, the court concludes, in the exercise of its discretion, that because of Plaintiff's repeated disregard for legitimate discovery requests for disclosure of experts and for Plaintiff's disregard of an Order of the court requiring such disclosure, Plaintiffs are precluded from the use of expert testimony at trial.

As the parties have indicated that plaintiffs did disclose to defendant the identity of the treating physicians, plaintiffs may call those physicians, but solely for the purpose of factual testimony on the topics of injury and treatment, based upon their first-hand observations as treating physicians. Plaintiffs may not call the treating physicians as expert witnesses in regard to matters of professional opinion on the extent of the injury, or the future impact of the injury, or any other topics relating to either liability or computation of damages. Plaintiffs argue that the treating physicians are not "experts" because they have not been developed in anticipation of litigation or for trial. That is true of the evidence they may offer with respect to treatment, but it is not true with respect to any expert opinions they may have

about permanency or impairment or damages.

Since Dr. Ford was not even a treating physician, Plaintiff is precluded from calling Dr. Ford as an expert on any subject.

Dated this 16th day of April, 1994, at Guildhall, Vermont.

Mary Miles Teachout  
Mary Miles Teachout  
Presiding Judge

