

VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 24-CV-01960

TOWN OF ALBURGH, a Vermont
Municipality,
Plaintiff/Counterclaim Defendant

v.

EDWARD and MAUREEN MURPHY, JOHN
and LEANN MORISSETTE, THE ESTATE
of MARY V. MOONEY, MAURA KELLEY-
PIZZIGNO, EILIS MOONEY, and CALEB
COUTURE,
Defendants/Counterclaim Plaintiffs

DECISION ON MOTIONS

RULING ON MOTION TO EXCLUDE EXPERT AND OTHER RELATED MOTIONS

This action arises out of a dispute between Plaintiff Town of Alburgh and Defendants over a parcel of land that the Town calls Center Bay Beach and Defendants identify as Parcel ID CB038 and SPAN 009-003-10311 (the "Property"). The Town claims that it has legal title to the Property and a historic Town Highway running across it, or alternatively, that it has acquired the right to public use or ownership. Defendants are neighboring landowners and heirs of Mary V. Mooney who claim ownership or easement interests in the Property. They contest the Town's claims to the Property and have asserted counterclaims for fraud, trespass, and unconstitutional takings. After preliminary motion practice, the parties are engaged in discovery. Defendants now move to exclude the Town's expert surveyor who was disclosed to offer an opinion as to the location of the Town Highway in question. The Town opposes the motion, and the parties have filed motions related to the current discovery schedule and for a status conference. Defendants are represented by Thomas C. Nuovo, Esq. and the Town is represented by Liam Murphy, Esq. and Marikate E. Kelley, Esq.¹ For the reasons discussed below, the motion to exclude and motion for status conference are DENIED, and the discovery motions are GRANTED IN PART.

Factual and Procedural Background

On November 25, 2025, the Court issued an Amended Scheduling and Mediation Order, setting deadlines for, among other things, the disclosure of expert witnesses. In paragraph 4, the Order provides that Plaintiff shall disclose experts by March 1, 2026 and Defendants shall take any deposition of such experts by April 15, 2026. On February 27, 2026, in response to

¹ Defendant Maura Kelley-Pizzigno is representing herself and does not appear to have joined in the counterclaims asserted against the Town or the pending motions.

Defendants' discovery request, the Town disclosed a licensed land surveyor, Michael Gervais, to offer an expert opinion on "The location of a town highway in the vicinity of Center Bay Beach." *See* Defs.' Mot., Ex. A. The Town attached a one-page document signed by Mr. Gervais titled "Preliminary opinion," and its expert disclosure referred to the "attached Preliminary Opinion" for the grounds and substance of the facts and opinions Mr. Gervais would offer. In the attachment, Mr. Gervais states his opinion in relevant part as follows:

Given the vague nature of the descriptions with limited ties to physical features or monuments and the fact that they were produced in the late 1700's with crude survey equipment and unknown ability of the surveyors, I cannot determine with 100% accuracy the location of the surveyed location of the roads. However, I can state that portions of both of these roads appear to be in the location of Alburgh Center and the mouth of Mud Creek.

Id. Additionally, Mr. Gervais states that, considering the information he reviewed,

[I]t is my opinion that a town highway existed along the lakeshore of what is now known as "Center Bay Beach." Additional work, including physical inspection, is necessary to confirm the exact location.

Id.

Defendants took the deposition of Mr. Gervais on April 14, 2026. Apparently, there was no discussion between counsel prior to the deposition regarding Gervais's "preliminary opinion" or the fact that the Town "intended to undertake a two-step process" towards disclosing the opinion of its expert. *See* Pl.'s Opp. at 3. During his deposition, Gervais testified that he reviewed documents the Town or the Town's attorney provided to him but that he had not prepared any maps or surveys or conduct research in town land records, as he had not been asked to do so. *Id.*, Ex. B.

Defendants move to exclude Mr. Gervais' expert opinion pursuant to Rule 702 of the Vermont Rules of Evidence and on *Daubert* grounds. *See State v. Sarkisian-Kennedy*, 2020 VT 6, ¶ 23, 211 Vt. 390 (noting that, given that Vermont's rule is "substantively identical to Federal Rule of Evidence 702, Vermont courts apply the analytical framework outlined by the United States Supreme Court in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)"). Defendants do not argue that Gervais does not have the necessary qualifications to testify as an expert surveyor; rather, they assert that because he has not conducted an on-the-ground survey to determine the physical location of the road, his opinion lacks the required "sound factual and methodological basis." Defs.' Mot. at 4-5.

The Town opposes Defendants' motion, stating that it "ignores the potential for supplementation." Pl.'s Opp. at 2. According to the Town, it is "entitled" to supplement Gervais' opinion under Rule 26(e) of the Vermont Rules of Civil Procedure, and in fact, it had planned to follow this "two-step process" all along. *Id.* at 2-3. The Town explains that, after it retained Gervais in November 2025, weather conditions and elevated lake water levels made it difficult for him to conduct an accurate physical survey of the area. Therefore, the Town did not

ask him to do so. However, now that conditions have improved, it is “coordinating” with Gervais to perform his additional work, including “physically inspecting the Center Bay Beach area for evidence of the physical location of the road.” *Id.* at 3-4. The Town intends to supplement their expert disclosure once Gervais has completed these tasks. The Town further states it is “willing to allow Defendants to again depose Mr. Gervais if they choose.” *Id.* at 4.

Discussion

The Town’s reliance on Rule 26(e) is entirely misplaced. Under Rule 26(b)(5), parties may serve interrogatories requiring other parties to identify the expert witnesses they may use at trial, along with “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.” V.R.C.P. 26(b)(5)(A). A court’s Discovery Scheduling Order sets deadlines for such disclosures (if requested) to facilitate the orderly conduct of the discovery process and “proper management of the case,” and to assist the court in maintaining “reasonable control over the pace of the litigation.” V.R.C.P. 16.2, Reporter’s Notes – 2025 Amdt. Nothing in Rule 26 allows a party to avoid court-ordered time limits by producing a “preliminary opinion” to meet the expert disclosure deadline and then following up with a supplemental opinion once the expert has finished the necessary work at some later point in the case. Rather, Rule 26(e) of the Vermont Rules of Civil Procedure imposes a *duty* on a party that has responded to a request for discovery “to supplement or correct the response in a timely manner . . . if the party learns that the response is in some material respect incomplete or incorrect.” V.R.C.P. 26(e).

Indeed, as the federal district court for Vermont has explained, “[a]lthough experts must supplement their reports if incorrect or incomplete, they are not free to continually bolster, strengthen, or improve their reports by endlessly researching the issues they already opined upon, or to continually supplement their opinions.” *McLaughlin v. Langrock, Sperry & Wool*, No. 2:19-cv-112, 2020 WL 3118646, at *5 (D. Vt. Jun. 12, 2020) (quotation omitted).² Thus, Rule 26(e) “does not grant a license to supplement a previously filed expert report because a party wants to, but instead imposes an obligation to supplement the report when a party discovers the information it has disclosed is incomplete or incorrect.” *Sec. & Exch. Comm’n v. McGinnis*, No. 5:14-cv-006, 2018 WL 1633592, at *4 (D. Vt. Apr. 3, 2018) (quotation omitted) (noting that a “party’s duty to supplement its initial expert report does not arise when a party seeks to bolster its earlier submission, but rather, arises only if the expert *subsequently* learns of information that was previously unknown or unavailable to the expert, thus rendering the information previously provided in an initial report inaccurate or misleading because it was incomplete” (quotation and citation omitted)).

In short, “Rule 26(e) is not a vehicle to permit a party to serve a deficient opening report and then remedy the deficiency through the expedient of a ‘supplemental’ report.” *McGinnis*, 2018 WL 1633592, at *4 (quotation omitted). That is exactly what occurred here. The Town does not contend that Mr. Gervais needs to correct the information he previously disclosed

² See *Warner v. Warner*, 2025 VT 70, ¶ 15, 356 A.3d 1052 (Vermont courts “look to federal cases interpreting the federal rule for guidance” when the rules are substantively identical (quotation omitted)).

because an error was discovered, or that he has learned new information that could not have been known before the disclosure deadline. Instead, the Town argues Gervais should be allowed to complete his expert opinion with information and analysis that it knew he had not obtained or performed at the time his disclosure was due. That is not a proper use of Rule 26(e). *See Allen v. Dairy Farmers of Am., Inc.*, No. 5:09-CV-230, 2014 WL 2040133, at *5 (D. Vt. May 16, 2014) (rejecting parties’ assertion “that Rule 26(e) permits them to ‘correct’ an expert opinion” where the “‘correction’ would otherwise be an untimely supplementation of an expert report,” noting that such an “approach to expert supplementation would disrupt trials and trial preparation to the point of chaos and would render the expert disclosure rules meaningless” (citation omitted)).

Defendants contend the Court should exclude the Town’s expert and refuse to allow the supplementation of Gervais’ opinion.³ Under Rule 16.2(d), where a party fails to comply with a scheduling order, the Court may impose sanctions as provided in Rule 37(b)(B) or (C), which would include disallowing any further expert report. However, our Supreme Court has made clear that, before doing so, trial courts must consider other alternatives, especially where the requested discovery sanction could have case-dispositive consequences. In *Smith v. Central Vermont Hospital, Inc.*, 2004 VT 113, 177 Vt. 640 (mem.), the Court noted that while

we recognize fully the importance of affording the trial courts ample leeway to control their dockets through management of the discovery process, we also believe that courts must consider the actual consequences that may arise from perceived discovery violations and consider less drastic responses to the exclusion sanction in the absence of any bad faith, prejudice to the parties, or unwarranted delay in the trial process.

Id. ¶ 15; *see id.* (courts “should consider ‘actual difficulties’ that discovery violation causes and consider ‘less drastic responses’” (quoting *Outley v. City of New York*, 837 F.2d 587, 591 (2d Cir. 1988))). The *Smith* Court also cited with approval “federal decisions interpreting and applying the parallel federal rule of procedure” to Vermont Rule 26(e) that “have identified several criteria to guide the court’s discretion” in addressing a Rule 26(e) violation, “including: (1) the prejudice or surprise to the party against whom the evidence is offered; (2) the ability of the party to cure the prejudice; (3) the likelihood of disruption to the trial; and (4) the bad faith or willfulness involved in not disclosing the evidence at an earlier date.” *Id.* ¶ 11 (quotations omitted).⁴

³ Defendants’ motion initially sought to exclude Gervais’s testimony based on the assertion that his opinion and analysis were incomplete and inadmissible because he had not performed a physical inspection of the Property. However, such an argument goes to the weight and persuasiveness of the opinion on the essential element of the Town’s case involving the location of the road. Defendants do not challenge Gervais’ expert qualifications or contend that the preliminary opinion disclosed was not “sufficiently rooted in scientific knowledge.” *State v. Pratt*, 2015 VT 89, ¶ 17, 200 Vt. 64. Therefore, the Court does not consider Defendants’ objection to present a true *Daubert* challenge, and it does not reach that analysis.

⁴ Contrary to the Town’s assertion, *Smith* does not support the proposition that Rule 26 freely allows supplementation of an expert opinion under the circumstances presented in this case. *See*

Here, if the Town's expert could not finish the necessary work to render a complete and accurate opinion before the disclosure deadline, it was incumbent upon the Town to raise the matter with Defendants and to continue the deposition or seek an extension of the discovery deadlines if no agreement could be reached. This would have allowed Defendants to avoid the need to depose Gervais twice. On the other hand, Defendants were clearly aware that Gervais' opinion was "preliminary" and incomplete, and they could have addressed this issue before proceeding with the expert deposition. Thus, both parties bear at least some responsibility for the position in which they now find themselves.

It is well settled that the "touchstone for determining whether to exclude an untimely expert report is whether the party opposing its admission is prejudiced." *McGinnis*, 2018 WL 1633592, at *6 (quotation omitted); *see also Allen*, 2014 WL 2040133, at *7 (denying supplementation where "the prejudice to Defendants is substantial and cannot be fully redressed by permitting another deposition"). Defendants argue this case has been pending for two years and further delay will be prejudicial. However, discovery apparently has been stalled for some time, as the pace of litigation has been slowed by the actions of both parties, including Defendants' motion for judgment on the pleadings and attempt to assert a third-party claim against the State, as well as a change of venue after the Town designated a Grand Isle Assistant Judge as its deposition representative. Thus, the Court does not find that the ultimate and drastic sanction of exclusion of the Town's expert is appropriate. Rather, there is no substantial prejudice to Defendants in allowing Gervais to prepare a final opinion if done in a timely fashion. Therefore, the Court will allow the relevant deadlines to be extended so that the Town can provide a complete and final expert disclosure. In light of the Town's representation that it was simply waiting for more conducive weather conditions, which surely have arrived, the Court expects that Gervais may well have completed the necessary work already. If not, there is little justification for any further delay. The Town shall disclose any further expert opinions within 30 days of the date of this Order.

However, the Court concludes that Defendants should not have to bear the expense of the Town's mistakes and its failure to comply with court-imposed deadlines. Accordingly, the Court will award Defendants their reasonable attorney's fees and expenses incurred in connection with any second deposition of Gervais, as well as those incurred in filing this motion. *Cf. McLaughlin*, 2020 WL 3118646, at *7 (awarding reasonable fees and costs of motion and second deposition in lieu of "harsh sanction of . . . exclusion" where expert "supplementation was untimely and made without good cause"). Defendants shall submit their requests for such fees and expenses to the Town at the appropriate times, and if the parties disagree as to the amount or timing of payment, Defendants may make an appropriate motion to the Court.

Regarding the parties' various motions to extend or modify the discovery deadlines and scheduling order, as discussed above, the Court agrees that some extensions are warranted. Therefore, the motions are GRANTED in PART. Now that all pending motions have been decided, the Court expects the parties will be able to meet and confer in good faith to agree on a

Pl.'s Opp at 4. Rather, in *Smith*, the Court reversed the trial court's exclusion of an expert's summary judgment affidavit where "the affidavit contained no genuinely new material within the meaning of Rule 26(e)." *Smith*, 2004 VT 113, ¶ 10.

proposed amended Scheduling and Mediation Order. The parties shall do so and submit their proposed order to the Court within 14 days.

Finally, in light of the Court's rulings above, and the fact that the Court does not find that a status conference is necessary at this time, the Motion for Status Conference is DENIED.

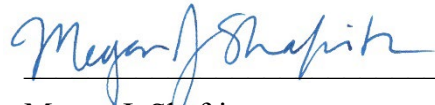
Order

For the foregoing reasons, Defendant's Motion to Exclude Expert (Mot. # 17) is DENIED. The parties' motions to extend or modify the discovery scheduling order (Mots. # 18, # 21) are GRANTED in PART, and the Town's Motion for Status Conference (Mot. # 22) is DENIED.

If it has not already done so, the Town shall disclose any further expert opinions in response to Defendants' discovery request within 30 days of the date of this Order.

The parties shall meet and confer in good faith regarding an amended Scheduling and Mediation Order and shall submit their proposed order to the Court within 14 days of the date of this Order.

Electronically signed on August 11, 2026 at 10:30 AM pursuant to V.R.E.F. 9(d).



Megan J. Shafritz
Superior Court Judge