STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: September 30, 2015)

PAULINE R. HALL	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. PC-08-2420**
	:	
RITA SHIFF, PA-C,	:	
BROWN UNIVERSITY in Providence in the	:	
State of Rhode Island and	:	
Providence Plantations, and	:	
QUEST DIAGNOSTICS, LLC	:	
Defendants.	:	

DECISION

GIBNEY, P.J. Before this Court is Third-Party Defendant Quest Diagnostics, LLC's (Quest or Third-Party Defendant) motion to strike Brown University and Rita Shiff, PA-C's (Brown or Third-Party Plaintiff) expert disclosure, in part, as it relates to internal medicine expert Allan Goroll, M.D. (Dr. Goroll). This motion is made pursuant to Super. R. Civ. P. 26. At issue is whether Brown's newly-identified expert unfairly prejudices Quest. For the reasons set forth below, Quest's motion is denied.

I

Facts

A recitation of the facts of this case was previously recounted by this Court in a Decision of May 23, 2013 regarding Quest's Motion to Compel.[1] Accordingly, the Court will supplement the facts as necessary to decide the instant motion. The underlying litigation was resolved during mediation in February 2011 when Brown settled the case with Ms. Pauline Hall (Ms. Hall). Brown's cross-claim against Quest seeks contribution.

[1] Hall v. Shiff, No. PC-2008-2420, 2013 WL 2363143, at *1 (R.I. Super. May 23, 2013).

This Court has issued a Scheduling Order requiring the parties to disclose experts. Pursuant to that Order, Brown disclosed an expert witness in the field of internal medicine, Daniel J. Sullivan, M.D. (Dr. Sullivan), on August 20, 2010. Quest disclosed expert witness Mark D. Aronson, M.D. (Dr. Aronson), who is also a specialist in the field of internal medicine, on June 16, 2014.

Brown then moved to strike Quest's designation of Dr. Aronson as an expert. This Court denied that motion by Decision dated March 5, 2015.[2] In response, Brown filed a Second Supplemental Interrogatory Answer on June 9, 2015. This Second Supplemental Interrogatory Answer disclosed a new internal medicine expert, Dr. Goroll, who may testify on Brown's behalf at trial.

II

Standard of Review

The trial court is afforded great deference in its role as gatekeeper when deciding whether an expert is permitted to testify or not. See R.I. R. Evid. 104; Gallucci v. Humbyrd, 709 A.2d 1059, 1064 (R.I. 1998) ("This Court will not disturb a trial justice's ruling on the admissibility of expert testimony absent an abuse of discretion.") (citing Frias v. Jurczyk, 633 A.2d 679, 683 (R.I. 1993)). This determination must be "'exercised in the light of reason applied to all the facts and with a view to the rights of all the parties to the action . . . .'" Morra v. Harrop, 791 A.2d 472, 477 (R.I. 2002) (quoting DeBartolo v. DiBattista, 117 R.I. 349, 353, 367 A.2d 701, 703 (1976)).

This Court is mindful that "[t]he purpose of expert testimony is to aid in the search for the truth." Id. In this pursuit, "[f]orbidding a party to call a witness . . . 'is a drastic sanction that

[2] Hall v. Shiff, No. PC-2008-2420, 2015 WL 1084933, at *1 (R.I. Super. Mar. 5, 2015).

should be imposed only if it is apparent that the violation has or will result in prejudice . . . .'" Narragansett Elec. Co. v. Carbone, 898 A.2d 87, 95 (R.I. 2006) (quoting Gormley v. Vartian, 121 R.I. 770, 775, 403 A.2d 256, 259 (1979)). The Court must try "'to prevent trial by ambush'" and ensure litigants the opportunity "'to prepare for trial free from the elements of surprise and concealment . . . .'" Id. (quoting Neri v. Nationwide Mut. Fire Ins. Co., 719 A.2d 1150, 1152 (R.I. 1998)). It is particularly significant whether or not the party offering the witness has a "meritorious explanation" for the late disclosure. Gormley, 121 R.I. at 776, 403 A.2d at 259.

III

Discussion

A

Parties' Arguments

In support of the motion to strike, Quest makes two primary arguments: (1) Brown's expert disclosure unfairly prejudices Quest, and (2) Brown's expert disclosure is a thinly-veiled attempt to circumvent this Court's prior orders regarding the testimony of Dr. Aronson. Brown contends that: (1) its expert disclosure does not unfairly prejudice Quest because there is still time to depose Dr. Goroll prior to trial, and (2) there is a meritorious reason for the late disclosure; namely, that it is a "plan B" in response to this Court's prior orders.

B

Prejudice to Quest

This Court is satisfied that the expert testimony of Dr. Goroll will not result in unfair prejudice to Quest. First, the late disclosure was not made on the precipice of trial. Expert depositions have not yet been completed, and no trial date has yet been set. There is still sufficient time for Quest to depose Dr. Goroll and prepare for his cross-examination. Cf. Neri, 719 A.2d at 1152 (finding prejudice where there was not enough time for the opposing party to

depose or prepare to cross-examine the late disclosed expert). While the disclosure was indeed late and may, at the time, have come as a surprise to Quest, the availability of extra time to depose and prepare vitiates any conceivable arguments about the lasting prejudice of the late disclosure. See Narragansett Elec. Co., 898 A.2d at 95. Accordingly, this Court is reluctant to find unfair prejudice where Quest retains the capacity to mount a full and fair case regarding the newly-disclosed expert.

Second, this Court is satisfied that the expected testimony of Dr. Goroll is not substantially different from that of Dr. Sullivan. Dr. Sullivan was expected to testify that Ms. Shiff's treatment of Ms. Hall was "appropriate and in accordance with the standard of care." Mem. in Supp. of Obj. of Brown to Quest's Mot. to Strike Brown's Expert Disclosure, Ex. A at 9. Similarly, Dr. Goroll's expected testimony includes the opinion that Ms. Shiff's treatment of Ms. Hall was "appropriate and in accordance with the standard of care." Id., Ex. B at 4. The particulars of these expert opinions may differ somewhat, but their conclusions are identical. As Quest has already deposed Dr. Sullivan, Quest need not reinvent the wheel when approaching Dr. Goroll's testimony. As such, the inclusion of Dr. Goroll's testimony does not unfairly prejudice Quest.

C

Meritorious Reason for the Late Disclosure

The Rhode Island Supreme Court has recognized that a party's late disclosure is particularly excusable if the party has a "meritorious explanation." Gormley, 121 R.I. at 776, 403 A.2d at 259. This Court finds that Brown has such an explanation. Brown first disclosed its experts on August 20, 2010. The underlying litigation concerning Ms. Hall was then still in dispute. Quest did not disclose Dr. Aronson until June 16, 2014. Brown has made clear its

position on Dr. Aronson's testimony and its anticipated impact on Dr. Sullivan's testimony.[3] Unable to prevail in its attempts to limit Dr. Aronson's testimony, Brown chose to pursue a new expert. While this Court does not pass judgment on the wisdom of litigation tactics, it can understand why Brown elected to disclose a new expert at this stage in the proceedings. Of particular note is the fact that Brown disclosed its experts over five years ago and did so prior to Quest's expert disclosures. Cf. Gormley, 121 R.I. at 776, 403 A.2d at 259 (finding no meritorious explanation where failure to disclose information was due to an oversight). Additionally, there is no evidence that Brown disclosed Dr. Goroll for any purpose other than zealous advocacy; this Court does not detect any improper motives on Brown's part. See In re McBurney, 13 A.3d 654, 655 (R.I. 2011) ("We expect all attorneys to advocate zealously on behalf of their clients."). As such, Brown's decision to disclose Dr. Goroll as a "plan B" is a satisfactory explanation for the late disclosure.

In so holding, this Court is not unaware of the considerable expense and effort that Quest expended toward deposing Brown's first internal medicine expert, Dr. Sullivan. By finding that the late disclosure does not unfairly prejudice Quest and that Brown had a meritorious explanation for doing so, this Court is cognizant of Quest's potential inconvenience. However, such inconvenience does not rise to the actionable level of unfair prejudice substantial enough for this Court to preclude Brown's expert from testifying, an admittedly "drastic sanction" on the facts here. See Narragansett Elec. Co., 898 A.2d at 95. This Court is instead satisfied that in affording Brown the opportunity to use Dr. Goroll as an expert, the eventual judgment in this case will "rest upon the merits of the case rather than the skill and maneuvering of counsel." Gormley, 121 R.I. at 775, 403 A.2d at 259.

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[3] See Hall v. Shiff, No. PC-2008-2420, 2013 WL 2363143, at *1 (R.I. Super. May 23, 2013); Hall v. Shiff, No. PC-2008-2420, 2015 WL 1084933, at *1 (R.I. Super. Mar. 5, 2015).

IV

Conclusion

For the aforementioned reasons, this Court denies Quest's Motion to Strike Brown's Expert Disclosure.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Hall v. Shiff, PA-C, et al.**
CASE NO:	**PC-2008-2420**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**September 30, 2015**
JUSTICE/MAGISTRATE:	**Gibney, P.J.**
ATTORNEYS:	
For Plaintiff:	**Yvette M. Boisclair, Esq.; Mark S. Mandell, Esq.**
For Defendant:	**Stephen P. Harten, Esq.; Anthony S. Aprea, Esq.; William J. Dailey, Jr., Esq.; Mark P. Dolan, Esq.**