NNH CV17-6073811 S : SUPERIOR COURT

ALEXANDER NIEVES, ADMINSTRATOR OF THE ESTATE OF MARIA I. OCASIO : JUDICIAL DISTRICT
: OF NEW HAVEN
: AT NEW HAVEN

V.

MERIDEN-WALLINGFORD ANESTHESIA GROUP, P.C., HARTFORD HEALTHCARE CORPORATION D/B/A MIDSTATE MEDICAL CENTER AND MIDSTATE MEDICAL CENTER; GUY J. ALIOTTA, M.D. : JUNE 6, 2024

MEMORANDUM OF DECISION ON MOTION IN LIMINE No. 291.00

In order no. 280.50 dated May 21, 2024, this court dismissed an apportionment complaint no. 261.00 filed by the anesthesia defendants against Dr. Housein M. Wazaz, a gastroenterologist. After this court issued its order, on May 24, 2024, the plaintiff filed a withdrawal of the entire consolidated action, No. 19-6094518-S, in which Dr. Wazaz was a named defendant. The plaintiff also filed a withdrawal against several other defendants in this case. After those withdrawals were filed, the anesthesia defendants filed in this case a notice of apportionment no. 288.00, in which they seek to apportion any plaintiff's verdict in this case between themselves and Dr. Wazaz. They also filed a disclosure of expert witness, Dr. Brian Weiner, no. 289.00. Both were filed on May 24, 2024. The plaintiff previously disclosed Dr. Weiner on the issue of causation in this case (no. 203.00) and on the issues of standard of care and causation in the consolidated action (no. 135.00).

291.10

In the motion no. 291.00 before the court, the plaintiff now seeks to preclude any testimony from Dr. Weiner. Because expert testimony from Dr. Weiner would be the linchpin for any apportionment case against Dr. Wazaz, the plaintiff also seeks in this motion to preclude any questioning, evidence or argument that would suggest that anyone other than the anesthesia defendants was at fault in the plaintiff's decedent's care. The anesthesia defendants oppose the motion. Nos. 301.00, 302.00. The court has considered the motion, the objections, its previous order on the motion to dismiss, and the oral argument on June 4, 2024.

The plaintiff argues that Dr. Weiner should be precluded from testifying because his disclosure is untimely and in violation of the court's scheduling order for expert disclosures, the plaintiff is prejudiced, and preclusion is a proportionate sanction. The defendants respond that they could not disclose Dr. Weiner as their expert until they could seek apportionment, which was not until the plaintiff settled with Dr. Wazaz. They further argue that their disclosure was timely under Practice Book § 13-4(g)(3) and (g)(2). They dispute that the plaintiff suffered any prejudice from any delay.

The first issue is whether the expert disclosure was timely. The plaintiff argues that the disclosure is late because scheduling order no. 255.00 required the defendants to disclose experts by January 31, 2024. They argue that compliance with that order was required by Practice Book §§ 13-4(e) and (g). Practice Book § 13-4(e) provides:

> "If any party expects to call as an expert witness at trial any person previously disclosed by any other party under subsection (b) hereof, the newly disclosing party shall file a notice of disclosure: (1) stating that the party adopts all or a specified part of the expert disclosure already on file; and (2) disclosing any other expert opinions to which the witness is expected to testify and the substance of the grounds for any such expert

> opinion. Such notice shall be filed within the time parameters set forth in subsection (g)."

Practice Book § 13-4(g) begins: "[u]nless otherwise ordered by the judicial authority, or otherwise agreed by the parties," the schedule set forth in subsection (g)(1) governs. The court and the parties here did not use that Schedule for Expert Discovery. Instead, they agreed upon the deadline of January 31, 2024. Nos. 255.00, 255.20.

Although the defendants rely on subsection (g)(2) in support of their argument that their disclosure was timely, the court does not find that subsection applicable here. No new party was added to this case.

The defendants argue that subsection (g)(3) applies here. That section reads:

> "Unless otherwise ordered by the court, disclosure of any expert witness under subsection (e) hereof shall be made within thirty days of the event giving rise to the need for that party to adopt the expert disclosure as its own (e.g., the withdrawal or dismissal of the party originally disclosing the expert)."

The defendants argue that their disclosure on May 24, 2024 was within 30 days of the withdrawal of the consolidated action in which Dr. Wazaz was a party, which also was on May 24, 2024. Therefore, they argue that their disclosure was timely.

Neither party was able to provide the court with any authority on the application of subsection (g)(3) to a situation where a notice of apportionment was filed as to a "settled or released person." Nor does there appear to be any authority interpreting subsection (g)(3). The language of the current subsection first appeared in the Practice Book in 2009, but the Rules Committee did not provide any commentary directed to that language. The plaintiff argued at oral argument that it is limited to the situation where the party who

originally disclosed an expert withdraws or is dismissed, but that language is predicated by "e.g.," suggesting that that is just one example of where it could be applicable.

The court is not convinced that Dr. Wazaz is a "settled or released person" for this action. In its decision on the motion to dismiss, the court did not resolve whether Dr. Wazaz was a settled or released person for this action. The withdrawal that supposedly triggered the 30-day timeframe for subdivision (g)(3) was filed in the consolidated case. Therefore, even if subdivision (g)(3) applies to this type of situation where the party who was the subject of an expert's testimony is dropped from the case, it is not clear that the subdivision was triggered in this action because Dr. Wazaz was never in it in the first place.

The court also does not read subdivision (g)(3) as exempting a party from a preexisting court order on disclosure deadlines. Subdivisions (g)(1) and (g)(3) both begin with "[u]nless otherwise ordered by the court ...." That order in this case set a deadline of January 31, 2024 for disclosure.

The language at the beginning of subsection (e) begins: "[i]f any party expects to call as an expert witness at trial any person previously disclosed by any other party ...." Based on the statements at oral argument by defense counsel that the defense aggressively questioned Dr. Weiner in a manner that suggested that they would be using his testimony to implicate Dr. Wazaz, it appears that the defendants did plan for some time to lay the blame on Dr. Wazaz and to use Dr. Weiner's testimony to do so. The remainder of subsection (e) uses mandatory language – the "newly disclosing party shall file a notice of disclosure .... Such notice shall be filed within the time parameters set forth in subsection (g)." Those parameters include the scheduling order with the January 31, 2024 deadline.

Although the defendants argue that they could not disclose Dr. Weiner as an expert until they filed their notice of apportionment because they previously had no claim filed against Dr. Wazaz, they cite no authority for that proposition. Nothing prevented the defendants from adopting the plaintiffs' expert and disclosing him as their own expert prior to filing a notice of apportionment.

The court also needs to consider the overall context. This case was filed in 2017. The anesthesia defendants were named in the original complaint. This disclosure of Dr. Weiner, even if timely under Section 13-4(g)(3), was made on May 24, 2024. Jury selection began four days later on May 28, 2024. That jury selection date was scheduled on December 19, 2023, at the same time the expert disclosure deadline was set. No. 255.00. The court concludes that the disclosure was not timely.

The plaintiff also argues that he is prejudiced by this disclosure because he had no idea that the defense would rely on Dr. Weiner's testimony implicating Dr. Wazaz until the first disclosure of expert, no. 285.00, was filed on May 16, 2024. The plaintiff also argues that in this case, the plaintiff only disclosed Dr. Weiner on the issue of causation, and not on the issue of standard of care. See no. 203.00. Although the plaintiff concedes that he disclosed Dr. Weiner on both the standard of care and causation in the other action against Dr. Wazaz, he maintains, correctly, that that was a separate case. The plaintiff argues that this prejudice is compounded by the late date of the disclosure and the threat that Dr. Weiner will have to be deposed in Florida during the presentation of evidence at trial. Evidence is scheduled to begin on June 11, 2024.

The defendants counter that Dr. Weiner was the plaintiff's own expert and that he knew all along what Dr. Weiner's opinions are on standard of care and causation as to Dr.

Wazaz. As noted above, they argued at oral argument that their own questions during depositions made it obvious that they were seeking to blame Dr. Wazaz. They also argue that because Dr. Weiner already has been deposed, the videotaped deposition they now seek will just be to better present his testimony to the jury. Although the court agrees that the prejudice is not as serious as when an unknown expert is disclosed on the eve of trial, the court finds that the plaintiff is prejudiced because he would have to recast his case during the trial.

The plaintiff argues that because the expert disclosure did not comply with the court's scheduling order, the court should impose the sanction of preclusion. He relies upon the three-prong test of *Millbrook Owners Assn., Inc. v. Hamilton Standard*, 257 Conn. 1, 17-18, 776 A.2d 1115 (2001). That test requires that:

1. "The order to be complied with must be reasonably clear."
2. "The record must establish that the order was in fact violated."
3. "The sanction must be proportional to the violation."

The court finds that the scheduling order was reasonably clear that the expert disclosure deadline was January 31, 2024, and that the May 24, 2024 expert disclosure violated the terms of that order. Before the court addresses whether the proposed sanction of preclusion is proportional, the court considers Practice Book § 13-4(h), which specifically addresses that sanction for a violation of the expert disclosure requirements:

> "A judicial authority may, after a hearing, impose sanctions on a party for failure to comply with the requirements of this section. An order precluding the testimony of an expert witness may be entered only upon a finding that: (1) the sanction of preclusion, including any consequence thereof on the sanctioned party's ability to prosecute or to defend the case, is proportional to the noncompliance at issue, and (2) the noncompliance at issue cannot adequately be addressed by a less severe sanction or combination of sanctions."

There is no question that if the court precludes the testimony of Dr. Weiner, the defendants will not be able to proceed with any effort to apportion some or all of the verdict to Dr. Wazaz. A medical malpractice claim must be supported by expert testimony that the practitioner breached the standard of care and that that breach caused the plaintiff's injury or death. If the court grants this motion to preclude, there can be no apportionment.

At this point in this litigation, it is too late for any alternative. If the defendants had not waited until four days before the commencement of jury selection to disclose this expert, the court might not have imposed the sanction of preclusion because the deposition of Dr. Weiner could have been accommodated prior to trial and the plaintiff could prepared his defense.

The court grants the motion to preclude the testimony of Dr. Weiner.

BY THE COURT,

Stewart, J.

Hon. Elizabeth J. Stewart