

STATE OF IDAHO)
County of KOOTENAI)^{ss}

FILED 01/16/2024

AT 7:45 O'clock a M
CLERK OF DISTRICT COURT


Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

JEN HARTLEY, a married woman,)	Case No. CV28-22-3067
)	
<i>Plaintiff,</i>)	MEMORANDUM DECISION AND
vs.)	ORDER ON DEFENDANT’S MOTION
)	IN LIMINE AND MOTION FOR
)	ORDER FOR POTENTIAL THIRD-
JEREMY BORGES, et. al.)	PARTY AT FAULT TO BE ON
)	VERDICT
<i>Defendant.</i>)	

This matter is in front of the Court today on a Motion in Limine to Exclude Plaintiff’s Expert Witnesses. Additionally outstanding in this matter is defendant’s Pre-Trial Motion for Order for Potential Third-Party At Fault to be on Verdict, in which no oral argument was requested. The Court will address these two Motions in turn.

Plaintiff, Jen Hartley (“Hartley”), is represented by Aaron Crary. Defendant, Jeremy Borges (“Borges”) is represented by Kent Doll and Katie L. Merrill.

Borges’ Motion requests that this Court “exclud[e] Plaintiff’s experts and evidence based upon Plaintiff’s failure to comply with the expert witness disclosure requirement of the Court’s Scheduling Order and I.R.C.P. 26(b)(4) and 26(e)(1)-(3).” Mot. in Limine. 1.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The Court has set forth some of the factual background and procedural history of this case in its November 21, 2023, Memorandum Decision and Order Denying Defendant's Motion for Summary Judgment, Denying Plaintiff's Motion for Order to Continue Trial, and Granting Plaintiff's Motion for Attorney Fees and Costs. This case involves an incident occurring on or about April 16, 2022, wherein Hartley claims that Borges' dog bit her at a gathering that occurred at Matthew Rude's ("Rude") home.

Relevant to this Motion in Limine, Borges propounded discovery on Hartley on December 7, 2022. Pl.'s Resp. to Mot. in Limine. 2. On February 2, 2023, Hartley provided Borges her responses, wherein she claims that these responses, "contain[ed] the non-retained expert disclosure along with medical records, chart notes and summaries." Crary Decl. 1, ¶ 2.

The parties do not dispute that the following interrogatories and responses were given:

INTERROGATORY NO. 4: Set forth the names and addresses of all doctors or other medical providers who have given you physical examination, treated or provided you medical evaluation during the seven (7) years prior to and since the accident which is the subject of this lawsuit, including the date and place of said examination.

ANSWER:

Kootenai Medical Center
2003 Kootenai Way
Coeur d'Alene, ID 83818

Christopher Covert-Bowlds
Kaiser Permanente
Northgate Medical Center
9800 4th Avenue NE Seattle, WA 98115

Edward [Chor-Ying] Tay, MD
Sabina Sandhu, MD
Kaiser Permanente
Federal Way Medical Center
301 S. 320th Street Federal WA 98003

Alan Leung, MD
Paul Thottingal, MD
Jeremy Benedetti, MD
Kaiser Permanente
Capitol Hill Campus
125 16th Avenue
Seattle, WA 98112

Deekash Reddy, MD
Kaiser Permanente
Capitol Hill Medical Center
201 16th Avenue Seattle, WA 98122

Rory Cavaille, PAC
Ngu Thien Nguyen
Kaiser Permanente
Renton Medical Center
275 Bronson Way, NE
Renton, WA 98056

Sharon Ebelt, PT
Judy Thomas, RN
Megan King, RN
Kaiser Permanente
Tacoma Medical Center
209 Martin Luther King Jr. Way
Tacoma WA 98405

Natalie Meyer, RN
Telehealth Medical Center

.....

INTERROGATORY NO. 15: With respect to any person whom you expect to call as an expert witness at trial, please state his/her name, address and occupation; his/her qualifications; the matters concerning which he/she will testify.

ANSWER:

All medical providers both lay and expert witnesses will express opinions regarding the nature and extent of injuries, causal relation, diagnosis, prognosis, and expenses relating to the treatment provided. See medical records for details. Also family and friends.

This answer will be supplemented. Experts will be disclosed pursuant to the civil case scheduling order.

INTERROGATORY NO. 16: State the substance of the facts and opinions to which each expert identified in your answer to the preceding interrogatory is expected to testify and summary of the grounds for each opinion.

ANSWER:

All medical providers both lay and expert witnesses will express opinions regarding the nature and extent of injuries, causal relation, diagnosis, prognosis, and expenses relating to the treatment provided. See medical records for details. Also family and friends.

This answer will be supplemented. Experts will be disclosed pursuant to the civil case scheduling order.

Id. at Ex 1; Pl.'s Resp. to Mot. in Limine 2-4; Mot. in Limine 2-3. According to Hartley, she "responded to [Borges'] discovery requests identifying all providers as witnesses, and attached 244 pages of medical records that were referenced in these responses." Pl.'s Resp. to Mot. in Limine 4. (emphasis added).

In contrast, Borges claims that:

Despite indicating that "Experts will be disclosed pursuant to the civil case scheduling order" Plaintiff did not file any such disclosure by the deadline of March 13, 2023. Plaintiff served Supplemental Responses to Interrogatories and Requests for Production, supplementing only Interrogatory No. 1 detailing lay witnesses and their anticipated testimony.

Mot. in Limine 3. (citing to Merrill Decl., Ex. H.)

Borges provides that counsel for Hartley was aware of the deficiencies in the disclosure of her experts as early as May 23, 2023, when counsel for Borges, Katie Merrill, e-mailed Hartley's counsel, Aaron Crary. Merrill Decl., Ex. D.

[Plaintiff's] deadline, under the current case scheduling order, for disclosure of expert witnesses was March 13, 2023. You did not file any disclosure of expert witnesses, despite indicating in your discovery responses dated February 2, 2023, that "expert witnesses will express opinions regarding the nature and extent of injuries, causal relation, diagnosis, prognosis, and expenses... Experts will be disclosed pursuant to the civil case scheduling order." Our ongoing discovery depositions, occurring after your disclosure deadline, have not limited your ability to disclose experts, as you have not even timely identified or disclosed your client's treatment providers or other expert witnesses.

Id.

Hartley did not file anything supplementary regarding expert witnesses until November 9, 2023, when she filed a Notice of Compliance Expert Witnesses, stating that she, "hereby notifies the court that on the 2nd day of February, 2023, pursuant to IRCP 26(b)(4)(A)(ii), Plaintiff disclosed all non-retained experts at the time in her discovery responses." Not. of Compliance 1. Then, on November 28, 2023, Hartley filed Plaintiff's Non-Retained Expert Witness Supplemental Disclosure. In such document, Hartley provides each of the providers she listed in Interrogatory 4, along with the following regarding what each provider will testify to:

As previously disclosed, [] will testify regarding the nature and extent of the injuries sustained, causal relation, diagnosis, prognosis, and expenses related to the dog bite.

At this time, it is expected that [] will be able to testify regarding the current status of the injuries, any possible future treatment, and the extent of the permanence of the injuries from the dog bite in the face, mouth and nerves.

Id. at 2-5.

On December 11, 2023, Hartley filed a "Plaintiff's Non-Retained Expert Witness Second Supplemental Disclosure." This supplemental disclosure added a new expert, and included the same information on what this expert was going to testify to that was previously used in the previous disclosure:

Jimmy B. Young, MD
Kaiser Permanente
301 S. 320th Street
Federal Way, WA 98003

Dr. Jimmy Young of Kaiser Permanente will testify regarding the nature and extent of the injuries sustained, causal relation, diagnosis, prognosis, and expenses related to the dog bite.

At this time, it is expected that Dr. Young of Kaiser Permanente will be able to testify regarding the current status of the injuries, any possible future treatment, and the extent of the permanence of the injuries from the dog bite in the face, mouth and nerves.

See attached medical records.

Pl.'s Non-Retained Expert Witness Second Suppl. Disclosure. 1-2. No medical records were attached.

The Court's Scheduling Order, Notice of Trial Setting and Initial Pretrial Order ("Scheduling Order"), issued October 7, 2022, set the deadline for the plaintiff to disclose expert witnesses for 182 days before trial:

No later than **one hundred eighty-two (182) days (26 weeks) before trial**, plaintiff(s) shall disclose all experts to be called at trial. No later than **one hundred forty-seven (147) days (21 weeks) before trial**, defendant(s) shall disclose all experts to be called at trial. Such disclosure shall consist of **at least** the information required to be disclosed pursuant to IRCP 26(b)(4)(a)(i). Notice of Compliance of all disclosures shall be filed with the Clerk of the Court. Absent good cause, an expert may not testify to matters not included in the disclosure. A party may comply with the disclosure by referencing expert witness depositions, without restating the deposition testimony in the disclosure report.

Court Scheduling Or. 4, ¶ 4 (emphasis in original). After the trial was continued twice, it was reset for March 11, 2024, extending the deadline for plaintiff's disclosure to September 11, 2023. This new deadline is reflected in the Court's Order Continuing Trial Date, issued on June 6, 2023, wherein this Court Ordered that the, "September 23, 2023 [trial] is hereby struck and a new trial of March 11, 2024 be set. All discovery disclosure deadlines will be reset in accordance with the new trial date." *Id.*

On December 6, 2023, Borges filed a Motion in Limine and Memorandum in Support, as well as a Declaration of Karie Merrill. On December 12, 2023, Hartley filed her second supplemental non-retained expert disclosure. Then, on December 27, 2023, Hartley filed her Response to Defendant's Motion in Limine, and a Declaration of Aaron Crary. On January 5, 2024, Borges filed his Reply in Support of Motion in Limine.

On December 18, 2023, Borges filed his Pre-Trial Motion and Memorandum in Support for Order for Potential Third-Party at Fault to Be on Verdict Form. Hartley filed her Response to Defendant's Pre-Trial Motion on December 27, 2023.

Borge's Motion in Limine came for hearing in front of this Court on January 12, 2024. Thereafter, the Court announced its decision. This Memorandum Decision and Order is to further clarify the decision's set forth on the record.

II. Standard of Review

A. MOTION IN LIMINE

Trial courts have broad discretion when ruling on a motion in limine. *Gunter v. Murphy's Lounge, LLC*, 141 Idaho 16, 25, 105 P.3d 676, 685 (2005). A reviewing Court reviews a challenge to the district court's evidentiary rulings, including whether to exclude expert testimony, under an abuse of discretion standard. *Rich v. Hepworth Holzer, LLP*, 172 Idaho 696, 535 P.3d 1069, 1075 (2023), reh'g denied (Oct. 10, 2023). When reviewing a lower court's decision for an abuse of discretion, a court must analyze "[w]hether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its

decision by the exercise of reason.” *Lunneborg v. My Fun Life*, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018).

B. MOTION FOR ORDER FOR POTENTIAL THIRD-PARTY AT FAULT TO BE ON VERDICT

The decision whether the special verdict shall inquire as to the alleged negligence of a non-party raises a question of law, namely whether evidence exists which warrants submission of the matter to the jury. *Van Brunt v. Stoddard*, 136 Idaho 681, 687, 39 P.3d 621, 627 (2001).

III. ANALYSIS

In front of the Court is a Motion in Limine, brought by Borges, to exclude Hartley’s expert witnesses “based upon [her] failure to comply with the expert witness disclosure requirement of the Court’s Scheduling Order and I.R.C.P. 26(b)(4) and 26(e)(1)-(3).” Mot. in Limine. 1. Additionally, Borges has an outstanding Motion to Include Third-Party on the Verdict form, in which no oral argument was requested. The Court addresses these motions in turn.

A. MOTION IN LIMINIE

Borges claims that Hartley should be barred from presenting expert testimony because she “failed to comply with expert disclosure requirements of the Court’s scheduling order,” (Mot. in Limine 5, ¶ A) (capitalization altered), and that she “failed to duly supplement discovery responses and expert disclosure and the court may exclude such evidence.” *Id.* at 9 ¶ B (capitalization altered). In response, Hartley alleges that she did comply with the disclosure requirements, because “[a]pproximately 244 records and chart notes were produced in the discovery response that contained the facts,

opinions, and summaries of those non-retained experts.” Pl.’s Resp. to Mot. in Limine.

11.

Expert witness disclosures are governed by Idaho Rule of Civil Procedure 26.

Herrett v. St. Luke's Magic Valley Reg'l Med. Ctr., Ltd., 164 Idaho 129, 133, 426 P.3d

480, 484 (2018). In relevant part, Idaho Rule of Civil Procedure 26 provides that:

(b) Discovery Scope and Limits.

(4) Trial Preparation: Experts.

(A) Discovery of an Expert Expected to Testify. A party must disclose to the other parties by answer to interrogatory, or if required by court order, the identity of any witness it expects to ask to present evidence under Rule 702, 703 and 705, Idaho Rules of Evidence.

(i) What Must be Disclosed: Retained Experts. For individuals retained or specially employed to provide expert testimony in the case or who are employees of the party:

- a complete statement of all opinions to be expressed and the basis and reasons for the opinion must be disclosed;
- the data or other information considered by the witness in forming the opinions;
- any exhibits to be used as a summary of or support for the opinions;
- any qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years;
- the compensation to be paid for the testimony; and
- a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(ii) What Must be Disclosed: Non-Retained Experts. For individuals with knowledge of relevant facts not acquired in preparation for trial and who have not been retained or specially employed to provide expert testimony in the case:

- a statement of the subject matter on which the witness is expected to present evidence under Rule 702, 703 or 705, Idaho Rules of Evidence, and

- a summary of the facts and opinions to which the witness is expected to testify.

I.R.C.P. 26(b)(4)(A)(i)-(ii).

“The timing for [expert witness] disclosures shall be set in the district court's scheduling order.” *Rich v. Hepworth Holzer, LLP*, 172 Idaho 696, 535 P.3d 1069, 1085–86 (2023), reh'g denied (Oct. 10, 2023) (quoting *Easterling v. Kendall*, 159 Idaho 902, 910, 367 P.3d 1214, 1222 (2016)); *see also* I.R.C.P. 16(a)(2)(B).

This Court's October 7, 2022, Scheduling Order provides that:

No later than **one hundred eighty-two (182) days (26 weeks) before trial**, plaintiff(s) shall disclose all experts to be called at trial . . . Such disclosure shall consist of **at least** the information required to be disclosed pursuant to IRCP 26(b)(4)(a)(i). Notice of Compliance of all disclosures shall be filed with the Clerk of the Court. Absent good cause, an expert may not testify to matters not included in the disclosure. A party may comply with the disclosure by referencing expert witness depositions, without restating the deposition testimony in the disclosure report.

Court Scheduling Or. 4, ¶ 4 (emphasis in original).¹

Though Hartley claims that 244 pages of “attached documents contained the specific expected testimony of each treatment provider up to that date,” (Resp. to Mot. in Limine 4) the documents provided were, assumingly, medical records. (See also *Id.*: “attached 244 pages of medical records that were referenced in these responses”). As discussed at the January 12, 2024, hearing, the court's record does not contain the entirety of the records given to Borges from Hartley. However, one specific report from Dr. Edward Chor-Ying Tay is attached to the Declaration of Aaron Crary, and is referenced in Hartley's Response. Counsel for Hartley states that this is a “chart note

¹ The plaintiff attempts to argue that because the Court's Scheduling Order makes no mention of non-retained experts pursuant to IRCP 26(b)(4)(ii), and only mentions retained experts pursuant to IRCP 26(b)(4)(i), that the Court did not intend for non-retained experts to be included. Pl.'s Resp. 8. However, the Scheduling Order directs that the plaintiff “shall disclose all experts to be called at trial.” Thus, the Court's Scheduling Order clearly indicates both non-retained and retained experts shall be disclosed 182 days prior to trial.

and medical opinion of Dr. Tay of June 29, 2022.” Cray Decl., 3, ¶ 2. The first section of the document indicates, in part, the following:

 KAISER PERMANENTE.	RELEASE OF INFORMATION	Hartley, Jennifer
	GNE-D1N-02, PO Box 9812 Renton WA 98057-9054 Medical Encounter Report	MRN: 03889929, DOB: 5/31/1981, Sex: F Visit date: 6/29/2022

Visit Information			
6/29/2022	Provider	Department	Encounter #
	Edward Chor-Ying Tay, MD	FED NEUROLOGY	360152968

Diagnoses			
	Codes	Comments	
Facial neuropathy - Primary	G51.9		

Level of Service	
Level of Service	
OFFICE VISIT E&M NEW PT LOW MDM, 30-44 MINS [99203]	
Log History	
LOS History	

Vitals					Most recent update: 6/29/2022 1:34 PM
BP	Height	Weight	BMI	OB Status	
118/78 (BP Location: Right arm, Patient Position: Sitting)	5' 6.14" (1.68 m)	148 lb (67.1 kg)	23.79 kg/m ²	Having periods	
Smoking Status					
Never					

BMI and BSA Data	
Body Mass Index: 23.79 kg/m ²	Body Surface Area: 1.77 m ²

Diabetic Foot Exam	
No data filed	

All Notes

Progress Notes signed by Tay, Edward Chor-Ying, MD at 6/30/2022 10:46 AM

Author: Tay, Edward Chor-Ying, MD	Service: —	Author Type: Physician
Filed: 6/30/2022 10:46 AM	Encounter Date: 6/29/2022	Status: Signed
Editor: Tay, Edward Chor-Ying, MD (Physician)		

Id. Under the “All Notes” section of the document, the following is then stated:

HISTORY OF PRESENT ILLNESS: Jennifer Hartley is pleasant 41-year-old right-handed female who I am seeing in regard to left facial palsy. This is complicated history in the fact that she unfortunately suffered an attack from dog back in April of this year. This was back home in Idaho. The dog actually attacked her lip and mouth area and they are unclear on the exact timing of the facial droop involving both the upper and lower face, but it was either couple days after the attack or week after where they

noticed the face was drooping. just thought it would improve by now and it has not, unfortunately. Apparently, Jennifer does remember red rash in the facial nerve distribution. She also admits to some tinnitus or hearing loss in the left ear. This has not recovered.

She does not complain of any other neurological symptoms. Please see the e-consult from plastic surgery recently, but do not believe the facial bite on the lip would have affected the facial nerve on the left side from its origin. She was treated with prednisone for about month and Augmentin. She also finished her rabies treatment, as they are not sure if the dog had its rabies shots or not.

She has no other past neuro history.

She says that the left lower face, she is able to smile little, but still has the severe paralysis and slight improvement.

IMPRESSION: Left facial neuropathy or palsy involving upper and lower face. Please see documented exam.

Certainly, any physical or emotional stress on the body might have caused the Bell's palsy to trigger with the dog attack. With the red rash, do wonder whether this is Ramsay Hunt syndrome that occurred with the hearing distortion and the red rash and the Bell's palsy. There is no mention of any ear exam to see if there are any vesicles or lesions in the left ear back in April that can see.

This is either thought to be due to an infectious or inflammatory Etiology post trauma. She has completed her prednisone. There are no studies to say that giving her more prednisone will help speed up healing. did tell her that sometimes recovery from facial palsy, can be up to 12-16 months as nerve regrowth rate is about an inch month. It is still only June, so there is still some hope that with more time that the facial nerve will recover. have sent her to one of our physical therapists in Tacoma, Sharon Ebelt, who does know how to do physical therapy for facial palsy. We went over her MRI brain today which was done to make sure that there was not pontine tumor or stroke that occurred in the facial cranial nucleus in the pons.

This is normal.

No other treatment recommendations at this current time. Follow up as needed.

Id., at Ex. 2.

After such, the "All Notes" section continues for several pages:

This is normal.

No other treatment recommendations at this current time. Follow up as needed.

ECT:nb 261069682

Dictated: 06/29/2022 2:19:34 PM Edward Chor-Ying Tay, MD

Transcribed:06/29/2022 2:34:52 PM Neurology

Electronically signed by Tay, Edward Chor-Ying, MD at 6/30/2022 10:46 AM

Progress Notes by Tay, Edward Chor-Ying, MD at 6/29/2022 1:40 PM

Author: Tay, Edward Chor-Ying, MD	Service: —	Author Type: Physician
Filed: 6/29/2022 3:33 PM	Encounter Date: 6/29/2022	Status: Signed
Editor: Tay, Edward Chor-Ying, MD (Physician)		

CHIEF COMPLAINT: Patient presents with:
Referral

HISTORY OF PRESENT ILLNESS:

Jennifer Hartley is a 41 year old female referred to me for facial palsy by PCP - Erin Virginia Adams, MD.

Dictated.

PHYSICAL EXAMINATION: The physical examination showed pleasant female in no apparent distress, accompanied by her husband. Her current vital information is BP 118/78 (BP Location: Right arm, Patient Position: Sitting) | Ht 5' 6.14" (1.68 m) | Wt 148 lb (67.1 kg) | BMI 23.79 kg/m².

NEUROLOGIC EXAMINATION: Her neurological examination showed the patient was alert and oriented to person, place, or time. Attention and concentration were normal. Fund of knowledge was normal via history taking. Recent and remote memories were intact. Language was normal.

Masked via COVID precautions

Her cranial nerve examination showed pupils were equal, round, and reactive to light and accommodation. Visual fields were full. Extraocular movements were intact. Facial sensation was intact.

Severe facial paralysis, left lower + upper face
Cannot hold air in cheeks and keep seal as well

Hearing was intact to bilateral finger rub. Shoulder shrug was normal.

Id.

All Notes (continued)

Progress Notes by Tay, Edward Chor-Ying, MD at 6/29/2022 1:40 PM (continued)

Her motor examination showed normal tone and bulk in all 4 extremities. Her muscle strength examination showed 5/5 strength in the bilateral upper extremities. In the bilateral lower extremities muscle strength examination was 5/5.

Her reflex examination showed 2+ reflexes in the bilateral upper and lower extremities. Plantar response was in flexion. Sensory examination showed normal light touch in all 4 extremities. Coordination testing showed normal finger to nose and heel to shin testing.

Gait examination showed a normal based gait.

IMAGING STUDIES:

MRI Brain 2022

IMPRESSION:

1. No intracranial hemorrhage, mass effect or acute infarct.
2. No IAC mass or abnormal enhancement identified.
3. Right maxillary and sphenoid sinus disease.

Signed by: Gabriel Runner

Date: 6/28/2022 3:59 PM

LABORATORY DATA:

No results found for: CK, ALDOLASE, VITB12, TSH, A1C

No results found for: WBCC

WBC

Date	Value	Ref Range	Status
04/22/2019	8.2	4.0 - 10.7 K/uL	Final

RBC

Date	Value	Ref Range	Status
04/22/2019	4.45	3.6 - 5.0 10*6	Final

HEMATOCRIT

Date	Value	Ref Range	Status
04/22/2019	41	36 - 46 %	Final

HEMOGLOBIN

Date	Value	Ref Range	Status
04/22/2019	13.4	11.4 - 15.5 GM*	Final

Id.

All Notes (continued)

Progress Notes by Tay, Edward Chor-Ying, MD at 6/29/2022 1:40 PM (continued)

PLATELET COUNT

Date	Value	Ref Range	Status
04/22/2019	281	140 - 450 10 ³	Final

Lab Results

Component	Value	Date
SOD	138	04/22/2019
POT	3.7	04/22/2019
CHLOR	102	04/22/2019
CO2	27	04/22/2019
GLU	103	04/22/2019
BUN	12	04/22/2019
CRE	0.59	04/22/2019
CALC	9.1	04/22/2019
GFRAA	above 60	04/22/2019
GFR	above 60	04/22/2019

IMPRESSION: Dictated.

Thank you for sending this nice patient.

Sincerely,

Dr. Edward Tay, M.D.
KP Neurology Department

This office visit lasted 40 minutes total time including review of old pertinent records, labs, imaging, visit encounter, orders and coordination of care.

Edward Tay, M.D.
KP Neurology

Electronically signed by Tay, Edward Chor-Ying, MD at 6/29/2022 3:33 PM

Id. Finally, the last page of the medical record provides:

All Notes (continued)

Progress Notes by Kim, Inja A, LPN at 6/29/2022 1:40 PM (continued)

Electronically signed by Kim, Inja A, LPN at 6/29/2022 3:33 PM

Patient Instructions by Tay, Edward Chor-Ying, MD at 6/29/2022 1:40 PM

Author: Tay, Edward Chor-Ying, MD	Service: —	Author Type: Physician
Filed: 6/29/2022 2:06 PM	Encounter Date: 6/29/2022	Status: Signed
Editor: Tay, Edward Chor-Ying, MD (Physician)		

Diagnosis:

Facial neuropathy

I'm going to send you to Sharon Ebelt PT, in TSC who does PT for Bell's palsy

Recovery rate is inch a month depending on how badly the nerve is damaged

So give it some more time

Follow up as needed.

Electronically signed by Tay, Edward Chor-Ying, MD at 6/29/2022 2:06 PM

All Meds and Administrations

(There are no med orders for this encounter)

Id.

Idaho Rule of Civil Procedure 26(B)(4)(A)(ii) requires “a statement of the subject matter on which the witness is expected to present evidence under Rule 702, 703 or 705, Idaho Rules of Evidence,” and “a summary of the facts and opinions to which the witness is expected to testify.” *Id.* Here, Hartley is claiming that she satisfied these requirements for all providers by providing the medical records that included the notes made by the physicians related to her visit. However, as discussed above and at the hearing on this matter, only Dr. Edward Chor-Ying Tay’s statements were provided to this Court as being disclosed. In the notes included in Dr. Edward Chor-Ying Tay’s medical chart, are his summarization of the issue at hand. This information was provided to Hartley in February of 2023.

The parties both discuss a footnote from the Idaho Supreme Court in *Secol v. Fall River Medical, P.L.L.C.*, 168 Idaho 339, 352, 483 P.3d 396, 409, n. 5 (2021) discussing the disclosure rule: “[a] bare statement that a non-retained expert will testify ‘consistent with his medical records and depositions testimony in this case’ does not appear to satisfy either prong of this rule.” *Id.* While this footnote is not binding *per se* on this Court, it is persuasive, and the footnote is certainly consistent with the plain reading of the Rule. Hartley’s statement that, “All medical providers both lay and expert witnesses will express opinions regarding the nature and extent of injuries, causal relation, diagnosis, prognosis, and expenses relating to the treatment provided. See medical records for details” does not provide who the expert witnesses are, and to what that witness will testify.

Hartley did attempt to supplement her disclosure on November 28, 2023, with her Plaintiff's Non-Retained Expert Witness Supplemental Disclosure; however, even the supplemental disclosure does not fully comply with the Court's Scheduling Order or Idaho Rule of Civil Procedure 26. For instance, Hartley's statement that, "[a]s previously disclosed, treating providers of Kootenai Medical Center will testify regarding the nature and extent of the injuries sustained, causal relation, diagnosis, prognosis, and expenses related to the dog bite." Pl.'s Non-Retained Expert Witness Suppl. Disclosure 2. This general statement "treating providers of Kootenai Medical Center" does not identify the expert. If the defendant so chose to dispose this "witness" it would have nowhere to start to determine which one of the "treating providers" would be testifying. This type of disclosure is in direct contradiction to Hartley's claim that:

The bottom line is, on February 2, 2023, through discovery, Defendant was made aware of all Plaintiff treatment providers, was notified that they may testify at trial, was provided summary of opinions, and then provided the actual opinions that were attached. Defendant has been in possession of all information (and more) required to be disclosed through I.R.C.P. 26(b)(4)(A)(ii) for over eleven months. If the Defendant is unprepared at this point to cross-examine Plaintiffs treatment providers, then the fault lies with the Defendant.

Id. at 14.

Moreover, in a November 22, 2023, correspondence sent from Hartley's counsel to Borges' counsel, it is stated that:

I also wanted to follow up with the concerns you expressed about the prior non-retained expert disclosures. In your November 9, 2023, letter you indicated that it was unclear which of our treating physicians we may call to testify since our disclosure listed providers from before and after the accident. To the extent that was confusing, it was and is our intent to list both treatment providers from before and after the accident as possible witnesses: all of them are potential witnesses in this case. A prior treatment provider will provide helpful insight into how the injuries effected Mrs. Hartley comparing her quality of life from before the accident. To the extent we can narrow our non-retained expert testimony at this time, we

will be looking at 1-3 testifying providers, starting with the perpetuation deposition we will likely schedule with Dr. Chor-Ying.

Merrill Decl., Ex. F.² Thus, even after the deadline to disclose, it is unclear which of the 14+ names provided in her discovery response she intends to call as a witness apart from Dr. Edward Chor-Ying Tay.

Finally, Hartley filed her Notice of Compliance related to disclosure of expert witnesses on November 9, 2023, wherein she states that she disclosed all non-retained experts in her February 2, 2023, discovery requests. She did not file a Notice of Compliance prior to the September 11, 2023, deadline provided for in the Court's Scheduling Order.

Hartley did not comply with the Court's Scheduling Order, or Idaho Rule of Civil Procedure 26(b)(4)(A)(ii), because she never properly disclosed her non-retained expert witnesses or their expected testimony, apart from Dr. Edward Chor-Ying Tay. A district court has authority to sanction parties for non-compliance with scheduling orders, including prohibiting parties from introducing untimely disclosed evidence. *Rich*, 172 Idaho at 696, 535 P.3d at 1085–86 (2023), reh'g denied (Oct. 10, 2023); *see also* I.R.C.P. 16(e); I.R.C.P. 37(c)(1). "Exclusion of an expert witness is an appropriate sanction for a failure to properly disclose the expert witness' anticipated testimony." *Id.* This Court thus uses its discretion to exclude the testimony of the witnesses not disclosed properly; namely: all experts apart from Dr. Edward Chor-Ying Tay. Further, pursuant to Idaho Rule of Civil Procedure 26(e)(3), "the court may exclude the testimony of any witness or the admission of evidence not disclosed by a

² Additionally, to the extent that Hartley claims that she was unaware of the deficiencies in her expert disclosures, this letter shows otherwise. (See *also* May 13, 2023, correspondence from Attorney Merrill to Attorney Cray: "... You did not file any disclosure of expert witnesses.")

supplementation required by this rule.” Because the remainder of the experts and their testimony were not disclosed, and then not supplemented, the court may exclude the testimony.

With such, apart from Dr. Edward Chor-Ying Tay, the Motion in Limine is GRANTED IN PART. No non-retained expert witness, (other than Dr. Edward Chor-Ying Tay) will be allowed to testify at trial.

Dr. Edward Chor-Ying Tay and his expected testimony were properly disclosed by the plaintiff, and Hartley is able to call Dr. Edward Chor-Ying Tay to testify. However, Dr. Edward Chor-Ying Tay will only be allowed to testify as to what was disclosed in his chart notes (as set forth above) and nothing further. Thus, only as the Motion in Limine relates to Dr. Edward Chor-Yong Tay, it is DENIED IN PART.

B. MOTION FOR ORDER FOR POTENTIAL THIRD-PARTY AT FAULT TO BE ON VERDICT FORM

1. Preliminary Matter Regarding Defendant’s Intentional Omission Regarding the Appropriate Law.

Prior to the Court’s discussion related to the merits of the Pre-Trial Motion for Order for Potential Third-Party At Fault to be on Verdict, the Court first will discuss Borges’ omission regarding the applicable law.

In his Motion, Borges provides the following related to the law surrounding the inclusion of non-parties in the special verdict:

The Idaho Supreme Court has stated:

It is established without doubt that, when apportioning negligence, a jury must have the opportunity to consider the negligence of all parties to the transaction, whether or not they be parties to the lawsuit and whether or not they can be liable to the plaintiff or to the other tortfeasors either by operation of law or because of a prior release. The reason for such (a rule) is that true apportionment cannot be

achieved unless that apportionment includes all tortfeasors guilty of causal negligence either causing or contributing to the occurrence in question, whether or not they are parties to the case.

Pocatello Indus. Park Co. v. Steel W., Inc., 101 Idaho 783, 787, 621 P.2d 399, 403 (1980). This was reiterated by the Court, stating “true apportionment cannot be achieved unless it includes all tortfeasors guilty of causal negligence either causing or contributing to the occurrence in question, whether or not they are parties to the case.” *Van Brunt v. Stoddard*, 136 Idaho 681, 687, 39 P.3d 621, 627 (2001).

Pre-Trial Mot. for Order for Third-Party At Fault to be on Verdict 3.

Starting with *Pocatello Indus. Park Co. v. Steel W., Inc.*, 101 Idaho 783, 621 P.2d 399 (1980), the Idaho Supreme Court provided the following:

“It is established without doubt that, when apportioning negligence, a jury must have the opportunity to consider the negligence of all parties to the transaction, whether or not they be parties to the lawsuit and whether or not they can be liable to the plaintiff or to the other tortfeasors either by operation of law or because of a prior release.” *Connar v. West Shore Equipment of Milwaukee, Inc.*, 68 Wis.2d 42, 227 N.W.2d 660, 662 (1975).

“The reason for such (a rule) is that true apportionment cannot be achieved unless that apportionment includes all tortfeasors guilty of causal negligence either causing or contributing to the occurrence in question, whether or not they are parties to the case.” Heft & Heft, *Comparative Negligence Manual* s 8.131, at 12 (1978).

101 Idaho at 787, 621 P.2d at 403. A subsequent case discussing *Pocatello Indus.*

Park Co. is *Jones v. Crawforth*, 147 Idaho 11, 205 P.3d 660 (2009). In *Jones*, the Idaho Supreme Court provided that:

It is established without doubt that, when apportioning negligence, a jury must have the opportunity to consider the negligence of all parties to the transaction, whether or not they be parties to the lawsuit and whether or not they can be liable to the plaintiff or to the other tortfeasors either by operation of law or because of a prior release. The reason

for such (a rule) is that true apportionment cannot be achieved unless that apportionment includes all tortfeasors guilty of causal negligence either causing or contributing to the occurrence in question, whether or not they are parties to the case.

101 Idaho at 787, 621 P.2d at 403 (internal citations omitted). More recently, this Court reiterated that “true apportionment cannot be achieved unless [the jury verdict form] includes all tortfeasors guilty of causal negligence either causing or contributing to the occurrence in question, whether or not they are parties to the case.” *Van Brunt v. Stoddard*, 136 Idaho 681, 687, 39 P.3d 621, 627 (2001).

147 Idaho 11 at 18, 205 P.3d at 667. The Court notes the almost identical similarities between the Motion’s wording regarding the applicable law and the wording used in the holding in *Jones*; though Borges does not discuss or cite to *Jones* in his briefing.

In *Jones*, after the expert provided for above, in the very next sentence the Idaho Supreme Court provides that:

Nevertheless, before a nonparty is included on a special verdict form, “there must be a showing that the requisite elements of a cause of action against them [] have been presented at trial.” *Vannoy v. Uniroyal Tire Co.*, 111 Idaho 536, 551, 726 P.2d 648, 663 (1985) (Bistline, J., concurring). The Court in *Van Brunt* found that the district court had properly excluded a nonparty from the special verdict form because no causal connection between his actions and the injuries of the plaintiff were shown. 136 Idaho at 687–88, 39 P.3d at 627–28. In contrast, in *Le’Gall v. Lewis County*, 129 Idaho 182, 923 P.2d 427 (1996), this Court found that a nonparty actor should have been included on the special verdict form after evidence was presented that the actor had a duty, had breached that duty, and there was a causal connection between the breach and the injury. 129 Idaho at 185, 923 P.2d at 430. The Court found that, based upon that evidence, a jury could have concluded the actor had negligently contributed to the injury. *Id.* Therefore, to include a nonparty on a special verdict form the elements of the cause of action must have been presented at trial.

147 Idaho at 18, 205 P.3d at 667. (emphasis added). This additional rule is not discussed at all by Borges.

Similarly, in *Van Brunt v. Stoddard*, 136 Idaho 681, 39 P.3d 627 (2001), a case cited to by Borges, the Idaho Supreme Court provided that:

It is the general rule that before nonparties are placed on jury verdict forms, there must be a showing that the requisite elements of a cause of action against them have been presented at trial. There must have been admitted into evidence proof sufficient to make a case in negligence where applicable ... before any non-party can be included on the form.

136 Idaho 681 at 39 P.3d at 627 (quoting *Vannoy v. Uniroyal Tire Co.*, 111 Idaho 536, 551, 726 P.2d 648, 663 (1985) (Bistline J., concurring and citing *Lasselle*, 106 Idaho at 173, 677 P.2d at 486)). Again, this rule is not included in the rule statement or discussion of this case provided for by Borges.

Thus, whether Borges used the decision in *Jones* without citing to it, or Borges read *Pocatello Indus. Park Co.* and *Van Brunt* and created an almost identical rule statement on his own without seeing it in *Jones*, it is clear to the Court that the general rule discussed by these cases was omitted by Borges.

2. The Pre-Trial Motion for Order for Potential Third-Party At Fault to be on Verdict is Premature

This additional step to the analysis, not discussed by Borges, precludes ruling on the issue until after all evidence has been submitted at trial, as the Court cannot guess what evidence will be submitted at trial or what elements will be proven at trial.

In opposition to the defendant's Motion, Hartley argues that Idaho Rule of Civil Procedure 51 requires a court to wait until the close of evidence before ruling on jury instruction. Pl.'s Resp. to Mot. for Potential Third-Party at Fault to Be on Verdict. 1. Idaho Rule of Civil Procedure 51(e) provides that:

(e) Ruling on Proposed Instructions. The court must rule on the requested instructions at the close of the evidence and must either verbally state its ruling on the record or indorse on the duplicate copy of each requested instruction the court's ruling as to the request in the blanks provided.

Neither Hartley in her opposition, nor Borges in his reply brief, discuss whether the parties on a verdict form would be classified as a jury instruction.

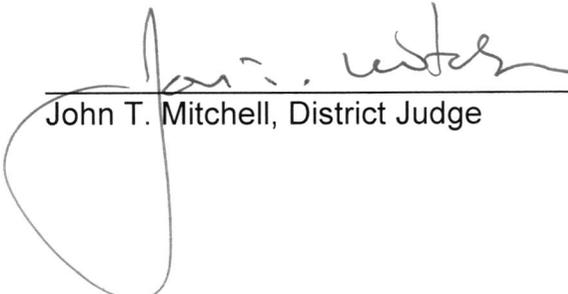
In any event, the Defendant's Pre-Trial Motion for Order for Potential Third-Party At Fault to be on Verdict is denied at this time, but can be brought again by the Defendant at the proper phase of this proceeding.

IV. CONCLUSION AND ORDER.

For the foregoing reasons, IT IS HEREBY ORDERED Defendant's Motion in Limine to Exclude Plaintiff's Expert Witnesses is **GRANTED IN PART** as to every expert except for Dr. Edward Chor-Ying Tay, and **DENIED IN PART** as it relates to Dr. Edward Chor-Ying Tay. Dr. Edward Chor-Ying Tay and his expected testimony were properly disclosed by the plaintiff.

IT IS FURTHER ORDERED Defendant's Pre-Trial Motion for Order for Potential Third-Party At Fault to be on Verdict is **DENIED** at this time as it is premature.

Entered this 12th day of January, 2024.



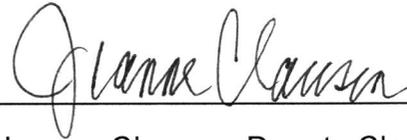
John T. Mitchell, District Judge

Certificate of Service

I certify that on the 14th day of January, 2024, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

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