

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

J.A.W.,)	
)	
Plaintiff,)	
v.)	Cause No. 3:18-cv-37-WTL-MPB
)	
EVANSVILLE VANDERBURGH SCHOOL)	
CORPORATION,)	
Defendant.)	

DEFENDANT’S MOTION TO MODIFY CASE MANAGEMENT PLAN

The Evansville Vanderburgh School Corporation (“EVSC”), submits this Motion to Modify Case Management Plan.

Background

1. This Court entered its Order on Case Management Plan (“CMP”) on May 10, 2018. Dkt. No. 27.
2. Pursuant to the CMP, the parties were to file their final witness and exhibit lists on or before April 22, 2019.
3. Also pursuant to the CMP, the parties were to complete discovery relating to damages by May 22, 2019, and all remaining discovery was to be completed by June 22, 2019.
4. On April 15, 2019, while EVSC’s motion to dismiss and the parties’ cross-motions for summary judgment remained pending, the parties filed a Joint Motion to Extend Deadline for Service of Final Witness and Exhibit Lists. Dkt. No. 100. In this motion, the parties noted that if the pending motions did not fully resolve the case, “that a resolution of the motions may radically alter the witnesses they would call and the exhibits they would offer in this case.” *Id.* at ¶ 4.

5. The court granted the joint motion to extend on April 16, 2019, and ordered the parties to serve their final witness and exhibit lists “on or before 30 days after the Court’s last ruling on the pending motion to dismiss and dispositive motions.” Dkt. No. 101.

6. The court entered its ruling on the relevant motions on June 7, 2019. Dkt. No. 103.

7. The parties participated in a telephonic status conference on June 17, 2019, at which the parties agreed that the original three-day trial setting in October 2019 was no longer appropriate, and instead requested a two-day trial setting in January 2020. Dkt. No. 106.

8. The parties also agreed to participate in a settlement conference on October 9, 2019. *Id.* At plaintiff’s request and without objection from EVSC, the settlement conference was later rescheduled for November 1, 2019. Dkt. Nos. 107 and 108.

9. Because the trial date was rescheduled and in light of the upcoming settlement conference, EVSC believed the previously scheduled deadline for serving its final witness and exhibit list was no longer applicable.

10. On July 30, 2019, EVSC’s counsel contacted plaintiff’s counsel by email and inquired as to whether plaintiff would object to EVSC’s filing its final witness and exhibit list. Plaintiff’s counsel indicated that he would not agree to such filing.

11. EVSC’s counsel also inquired as to whether Plaintiff’s counsel would agree to limited additional discovery on damages; specifically, EVSC requested to depose Wyatt Squires, who is listed on plaintiff’s final witness list, and Tammy Work, who was listed on plaintiff’s preliminary witness list. EVSC also requested to reopen plaintiff’s deposition for the limited purpose of inquiring into his updated damages. Plaintiff’s counsel responded that he would not agree to any additional discovery on damages.

12. Thereafter, pursuant to S.D. Ind. L.R. 37-1, EVSC's counsel requested a conference with the magistrate, which was scheduled for Monday, August 5, 2019.

13. Prior to this conference, plaintiff's counsel submitted a statement of plaintiff's position on the dispute in which plaintiff asserted for the first time that it would not object to EVSC filing a final witness and exhibit list, provided that EVSC identified only previously designated witnesses and exhibits. Plaintiff's counsel reiterated that plaintiff would not agree to reopen discovery for any purpose.

14. The parties participated in a telephonic conference with the magistrate as scheduled, but the magistrate ultimately concluded that a written motion to the court was required because the parties' dispute was not within the magistrate's authority to resolve in a S.D. Ind. L.R. 37-1 conference.

Legal Standard

15. The district court has discretion to set and to reopen discovery deadlines. Fed. R. Civ. P. 16(b)(3)(A). Where a party seeks an extension after a deadline has passed, a party must show that he failed to act because of excusable neglect. Fed. R. Civ. P. 6(b)(1). "Neglect is excusable . . . if there is a reason, which needn't be a compelling reason, to overlook it." *United States v. McLaughlin*, 470 F.3d 698, 700 (7th Cir. 2006).

16. In determining whether excusable neglect exists, courts consider the following factors identified by the Supreme Court: (1) the danger of prejudice to the non-movant; (2) the length of the delay and its impact on the judicial proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith. *Raymond v. Ameritech Corp.*, 442 F.3d 600, 606 (7th Cir. 2006).

17. “Moreover, context matters in determining excusable neglect, including whether the movant was previously dilatory.” *McCann v. Cullinan*, No. 11 CV 50125, 2015 U.S. Dist. LEXIS 91362, at *20 (N.D. Ill. July 14, 2015) (citing *Blue v. Hartford Life & Accident Ins. Co.*, 698 F.3d 587, 593 (7th Cir. 2012)).

18. Furthermore, “[n]eglect is excusable when it is harmless.” *OneAmerica Fin. Partners, Inc. v. T-Systems N. Am., Inc.*, No. 1:15-cv-01534-TWP-DKL, 2016 U.S. Dist. LEXIS 63357, at *5-6 (S.D. Ind. May 13, 2016).

Argument

A. Witness and Exhibit List

19. Plaintiff will suffer no prejudice if EVSC is permitted to belatedly file its final witness and exhibit list. The trial on damages is currently scheduled for January 2020; plaintiff will still have ample time to prepare for trial.

20. The length of delay between the CMP deadline and EVSC’s July 30 communication with plaintiff’s counsel is approximately three weeks. Because trial is not scheduled until January 2020, the delay in disclosure will have no impact on the judicial proceedings.

21. EVSC acknowledges that the deadline to file the final witness and exhibit list has passed. Because the trial date was rescheduled and in light of the upcoming settlement conference, EVSC mistakenly believed the previously scheduled deadline for serving its final witness and exhibit list would no longer apply.

22. There is no evidence whatsoever that EVSC has not acted in good faith. EVSC has gained no strategic advantage from the delayed filing.

23. This is not a case where a party has “continually ignore[d] deadlines and s[ought] never-ending extensions without consequence[.]” *Spears v. City of Indianapolis*, 74 F.3d 153, 158 (7th Cir. 1996). EVSC has missed no other deadlines in this case. This is an isolated and entirely harmless mistake.

24. Plaintiff has suggested that EVSC should be prevented from filing a final witness and exhibit list that identifies any previously undisclosed evidence or witnesses. This court should reject plaintiff’s attempt to leverage EVSC’s delayed disclosure to gain a tactical advantage at trial. Plaintiff has not been harmed in any way; EVSC’s disclosure of new evidence and/or witnesses is no more prejudicial to plaintiff today than it would have been on the July 8, 2019 deadline.

25. For the foregoing reasons, EVSC requests leave to file its final witness and exhibit list, which is attached hereto.

B. Depositions

26. In his prior deposition on June 21, 2018, the plaintiff testified that his damages stemmed from the “emotional distress” and “health issues” he suffered as a result of his inability to use the boys’ restrooms while a student at EVSC schools. Plaintiff’s circumstances have changed drastically since that date. First, in light of the preliminary injunction entered by this court, plaintiff was permitted to access the boys’ restrooms at school during his final semester at EVSC. Furthermore, plaintiff has now graduated from high school. In light of these recent developments, it is necessary for defendant to reopen the plaintiff’s deposition for the limited purpose of inquiring into his updated damages. *See Perry v. Kelly-Springfield Tire Co.*, 117 F.R.D. 425, 426 (N.D. Ind. 1987) (“Like most discovery disputes, the availability of a second

deposition is left to the discretion of the trial court.”). Because trial will not take place until January 2020, plaintiff will not suffer prejudice.

27. Likewise, plaintiff will suffer no prejudice if the court permits EVSC to conduct depositions of Wyatt Squires and Tammy Work for the limited purpose of inquiring into plaintiff’s updated damages. Neither of these individuals are unknown to plaintiff. Squires originally acted as plaintiff’s next friend in this litigation, and he is designated as a witness on plaintiff’s preliminary and final witness and exhibit lists. Work is plaintiff’s mother; she was identified on plaintiff’s preliminary witness and exhibit list and she submitted an affidavit in support of plaintiff’s motion for preliminary injunction.

28. The reason for EVSC’s delay in conducting these depositions, and the length of such delay, is simple: in light of the course of this litigation, including the filing of multiple potentially dispositive motions which, if granted, could have made discovery on damages unnecessary, it was EVSC’s (apparently mistaken) understanding that the parties would not insist on strict adherence to the CMP discovery deadlines. EVSC acknowledges that the CMP was not formally amended. However, since the entry of the CMP, the parties have litigated a motion for preliminary injunction, EVSC filed and later dismissed an appeal of the court’s preliminary injunction ruling, EVSC filed a motion to dismiss, the parties filed cross-motions for summary judgment, the court granted summary judgment on liability, and trial on damages was reset from October 2019 to January 2020.

29. Allowing the limited depositions will not delay the judicial proceedings in this matter, and such depositions may substantially increase the chances of settlement.

30. Again, there is no suggestion that EVSC has acted in anything but good faith, and EVSC will gain no strategic advantage from conducting the depositions beyond the original discovery deadline.

31. For the foregoing reasons, EVSC requests leave to conduct depositions of plaintiff, Wyatt Squires, and Tammy Work for the limited purpose of inquiring into plaintiff's updated damages.

Conclusion

Plaintiff respectfully requests leave to belatedly file its final witness and exhibit list and to conduct depositions of plaintiff, Wyatt Squires, and Tammy Work for the limited purpose of inquiring into plaintiff's updated damages.

Respectfully submitted,

Patrick A. Shoulders

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CERTIFICATE OF SERVICE

I certify that on the 12th day of August, 2019, a copy of the foregoing document was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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Patrick A. Shoulders

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EVANSVILLE VANDERBURGH SCHOOL)	
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DEFENDANT’S FINAL WITNESS AND EXHIBIT LISTS

The Defendant, Evansville Vanderburgh School Corporation, by counsel, submits its final witness and exhibit lists for the trial of this case:

I.

FINAL WITNESS LIST

1. Plaintiff. The plaintiff will be called to testify concerning the damages he claims to have suffered as a result of his inability to use the boys’ restrooms while a student at EVSC.
2. Tammy Work, plaintiff’s mother. Ms. Work will testify as to the damages suffered by plaintiff as a result of his inability to use the boys’ restrooms while a student at EVSC.
3. David B. Smith, EVSC Superintendent. Dr. Smith will testify as to the history of the plaintiff’s requests for access to the boys’ restrooms while a student at EVSC and EVSC’s response to those requests.
4. John Skinner, Principal at North High School. Mr. Skinner will testify concerning the history and timing of plaintiff’s requests for access to the boys’ restrooms while at North High School and the school’s response to those requests.

5. Jolayne Haller, EVSC Counselor at North High School. Ms. Haller will testify concerning the history and timing of plaintiff's requests for access to the boys' restrooms while at North High School and the school's response to those requests.

6. Michelle Donovan, EVSC Nurse at North High School. Ms. Donovan will testify concerning the availability of a gender-neutral restroom in the nurse's office at North High School and whether plaintiff or other students took advantage of that option.

7. Vikki Newman, EVSC Secretary at North High School. Ms. Newman will testify concerning the availability of a gender-neutral restroom in the nurse's office at North High School and whether Plaintiff or other students took advantage of that option.

8. Elizabeth Wells, Principal at Harrison High School. Ms. Wells will testify concerning whether and when plaintiff requested access to the boys' restrooms while at Harrison High School and the school's response to any such requests.

9. Chad Fetscher, teacher at Harrison High School. Mr. Fetscher will testify concerning whether and when plaintiff requested access to the boys' restrooms while at Harrison High School and the school's response to any such requests.

10. Heather Coy, teacher at Harrison High School. Ms. Coy will testify concerning whether and when plaintiff requested access to the boys' restrooms while at Harrison High School and the school's response to any such requests.

11. Megan Parker, EVSC Nurse at Harrison High School. Ms. Parker will testify concerning the availability of a gender-neutral restroom in the nurse's office at Harrison High School and whether Plaintiff or other students took advantage of that option.

12. Katy Elmer, EVSC Director of Student Supports. Ms. Elmer will testify concerning the history of plaintiff's requests for access to the boys' restrooms while a student at EVSC and EVSC's response to those requests.

13. Dionne Blue, EVSC Diversity Officer. Dr. Blue will testify concerning plaintiff's inquiry into EVSC's restroom policy and her response thereto.

14. Any and all persons on the plaintiff's final witness list.

15. Any and all persons necessary for impeachment or rebuttal or for the authentication of documents.

16. Plaintiff will be notified of any additional persons in a timely fashion as allowed by the Court.

II.

FINAL EXHIBIT LIST

1. Medical records from Within Sight.
2. Medical records from Echo Community Health Care.
3. Plaintiff's EVSC student records.
4. The deposition of David Smith of June 22, 2018, with exhibits.
5. The deposition of J.A.W. of June 21, 2018, with exhibits.
6. The transcript of the preliminary injunction hearing in this case.
7. Any and all exhibits on plaintiff's Final Exhibit List.
8. Any and all documents necessary for impeachment or rebuttal.
9. Plaintiff will be notified of any additional exhibits in a timely fashion as allowed by the Court.

Respectfully submitted,

s/ Patrick A. Shoulders

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**CERTIFICATE OF SERVICE AND
COMPLIANCE WITH ADMINISTRATIVE RULE 9(G)**

The undersigned hereby certifies that on this 12th day of August, 2019, a copy of the foregoing was filed electronically with the Clerk of this Court. A copy will be served by the Court's electronic filing system upon:

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s/ Patrick A. Shoulders
Patrick A. Shoulders

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ORDER ON DEFENDANT’S MOTION TO MODIFY CASE MANAGEMENT PLAN

This matter having come before the Court on Defendant’s Motion to Modify Case Management Plan, and

The Court, having considered the motion and being duly and sufficiently advised in the premises, hereby **GRANTS** said motion.

Defendant’s Final Witness and Exhibit List is hereby accepted for filing.

Defendant is hereby granted leave to conduct depositions of Plaintiff, Wyatt Squires, and Tammy Work, for the limited purpose of inquiring into Plaintiff’s updated damages.

SO ORDERED.

DATE: _____

JUDGE, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

*Served electronically on all ECF-registered counsel of record via email
generated by the Court’s ECF System.*