UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

J.A.W.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 3:18-cv-00037-TWP-MPB
	)	
EVANSVILLE VANDERBURGH SCHOOL CORPORATION,	)	
	)	
Defendant.	)	

ORDER

This matter is before the Court on Defendant's, Evansville Vanderburgh School Corp. ("EVSC"), *Motion to Modify Case Management Plan*. (Docket No. 116). The motion is opposed and fully briefed. (Docket No. 117; Docket No. 118). For the reasons that follow, the Court **GRANTS** Defendant's request to file its proposed Final Witness and Exhibit Lists, which it appended to its motion as an exhibit, and **DENIES** Defendant's request to reopen discovery as to take updated depositions regarding damages.

This matter began on February 22, 2018. (Docket No. 1). On May 10, 2018, this Court entered its Order on Case Management Plan (Docket No. 27), which set the following scheduling dates: final witness and exhibit lists were to be filed by April 22, 2019 (Docket No. 27 at ECF p. 3, ¶ III(I)) and expert witness discovery and discovery relating to damages was to be completed by May 22, 2019 (Docket No. 27 at ECF p. 4, ¶ IV(C)). By joint motion, the deadline to file final witness and exhibit lists was subsequently extended until thirty days "after the Court's last ruling on the [then-]pending motion to dismiss and dispositive motions." (Docket No. 101). The Court resolved those motions on June 7, 2019 (Docket No. 103), making the final witness and exhibit lists due July 8, 2019. Plaintiff filed final witness and exhibit lists three days prior to the

deadline, on July 5, 2019. (Docket No. 110). On July 30, 2019, EVSC's counsel contacted Plaintiff's counsel regarding whether Plaintiff would object to EVSC's belated filing of a final witness and exhibit list. (Docket No. 116 at ECF p. 2). EVSC also inquired as to whether Plaintiff would agree to limited, additional discovery on damages. (*Id.*).

Pursuant to S.D. Ind. L.R. 37-1, the parties requested a conference with the Magistrate Judge, which was held August 5, 2019. (Docket No. 115). That conference concluded without further order. (*Id.*). On August 12, 2019, EVSC filed the instant motion requesting 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.[1] (Docket No. 116 at ECF p. 7).

The Court first considers EVSC's request to file the belated witness and exhibit list. Plaintiff does not object to EVSC filing a belated final witness and exhibit list, but maintains that EVSC should only be able to list witnesses and exhibits that it previously designated with specificity. (Docket No. 117 at ECF p. 6). Plaintiff takes particular issue with EVSC's inclusion of at least one witness, Tammy Work, that EVSC did not previously identify. (*Id.* at ECF pp. 6–7).[2] EVSC replies that Ms. Work, Plaintiff's mother, was listed in its initial disclosures (i.e., "Plaintiff's parents") (Docket No. 118 at ECF p. 2). Moreover, EVSC indicates EVSC named "[a]ll witnesses designated by Plaintiff in Plaintiff's Initial Disclosures or in Plaintiff's

[1] While plaintiff was previously deposed, it does not appear that Mr. Squires or Ms. Work were previously deposed. (Docket No. 117 at ECF p. 3). Mr. Squires is listed on plaintiff's final witness list, but Ms. Work is not.

[2] Plaintiff raises issues with a second witness, Katy Elmer, but notes that Ms. Elmer was identified as a potential witness at the preliminary-injunction hearing (Docket No. 45), but that she was not called to testify at that hearing. (Docket No. 117 at ECF p. 3).

Preliminary Witness List" (Docket No. 43 at ECF p. 2) and Plaintiff listed Ms. Work in both Plaintiff's initial disclosures and preliminary witness list. (Docket No. 118 at ECF p. 2).[3]

Ms. Elmer was previously disclosed by EVSC on its Preliminary Witness List (Docket No. 43).[4] The only remaining issue raised by Plaintiff, therefore, is whether Ms. Work can remain on EVSC's witness list.

Federal Rule of Civil Procedure 26(a)(1)(A)(i) provides the disclosure requirements for non-expert witnesses in a party's initial disclosures:

> [A party must, without awaiting a discovery request, provide to other parties:] the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment.

Federal Rule of Civil Procedure 26(a)(3)(A) further provides "a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment." Subsection (i) further provides that witnesses should be identified if the party expects to present or may call if the need arises. Those disclosures should be made at least 30 days before trial, unless the court orders otherwise. Fed. R. Civ. P. 26(a)(3)(B).

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[3] While the Court does not have access to the parties' initial disclosures, the Court's own review of Plaintiff's witness list does not find Ms. Work identified. (Docket No. 38).

[4] Plaintiff raises an issue that EVSC's preliminary witness list was sealed (Docket No. 43) and a hard-copy of this list was never served on the Plaintiff's attorneys. (Docket No. 117). No party requested the document be sealed and, it appears, the document was sealed by the Court pursuant to Fed. R. Civ. P. 5.2(a) as EVSC had inadvertently included Plaintiff's first name while Plaintiff was still a minor. (Docket No. 118). Plaintiff provided no indication as to why Plaintiff did not request a hard-copy of the list from Defendant once it was learned the list was sealed. Nevertheless, the Court need not determine whether Plaintiff was prejudiced by the inaccessibility of the preliminary witness list because the only witness at issue listed therein is Ms. Elmer—who was also listed on EVSC's Preliminary Injunction Witness list. (Docket No. 45 at ECF p. 1).

Federal Rule of Civil Procedure 26(e) provides that a party who made a disclosure under Rule 26(a) must timely supplement if the party learns that the material is incomplete or incorrect or if additional or corrective information has not otherwise been made known to the parties during the discovery process.

Federal Rule of Civil Procedure 37(c)(1) describes the possible consequences of not making the disclosures required by Rule 26(a)

> (1) ***Failure to Disclose or Supplement.*** If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified *or* is harmless.

Fed. R. Civ. P. 37(c)(1) (emphasis added). Plaintiff focuses all of his reasoning as to why the failure to supplement for Ms. Work's disclosure was not substantially justified. (Docket No. 117 at ECF pp. 7–8). The Court agrees that, if Ms. Work's was not previously disclosed in any manner, EVSC's failure was not substantially justified. As to whether the disclosure was harmless, Plaintiff only contends that "the prejudice from permitting this late disclosure is obvious." (Docket No. 117 at ECF p. 8). However, given Ms. Work is the Plaintiff's mother, it is difficult to see how Plaintiff would be prejudiced by a belated disclosure, particularly where there is an indication Ms. Work was listed in the parties' initial disclosures and her declaration was listed in Plaintiff's Preliminary Injunction Exhibit List. (Docket No. 44 at ECF p. 6). Plaintiff's conclusory allegation of harm, contrasted with the evidence provided to the Court, is insufficient.

This matter is not akin to *Banerjee v. Univ. of Tenn.*, 2019 WL 1532865 (E.D. Tenn. Apr. 9, 2019), cited by Plaintiff. There, defendant filed an uncontested motion to strike plaintiff's nearly-one-year belated witness list, which listed five doctors that defendant had no previous

knowledge of, no idea what role they would play in the case, nor what discoverable information they would have. *Id.* at *1. Here, Plaintiff is aware of the witness (who is Plaintiff's mother) and, unlike the defendant in *Banerjee* has not argued he would be unaware of the role or the discoverable information Ms. Work would have. In *Sunflower Condominium Assoc., Inc. v. Owners Ins. Co.*, 2018 WL 4853341 (D. Colo. Oct. 5, 2018), defendant sought to amend a Final Pretrial Order (not a final witness list) to add two records custodians for documents nearly a year after discovery was closed. Similarly, in *Commercial Law Corp., P.C. v. Fed. Deposit Ins. Corp.*, 2015 WL 7450149, at *3 (E.D. Mich. Nov. 24, 2015), the defendant sought to name three witnesses on its Joint Final Pretrial Order that were not named on its Amended Witness List (its Amended Witness List was its final witness list, similar to EVSC's here). *Id.* at *3. Under the facts of this case, Ms. Work's disclosure in a final witness list filed several months before trial does not have the same prejudicial potential as two witnesses disclosed on the eve of trial after all trial-related motions (including motions in limine and final trial witness/exhibit lists have been filed).

Finally, in *Hansen v. Umtech Industriesservice Und Spedition*, No. 95-516 MMS, 1996 WL 732556 (D. Del. Dec. 9, 1996), the court again dealt with plaintiff's witnesses disclosed in the final pretrial order that had not been previously disclosed. *Id.* at *5–6. The court permitted a few of those witnesses to be called. *Id.* Two witnesses were not permitted because the court had "serious misgivings" as to the competency of the witnesses on the intended subjects. One witness, plaintiff's physical therapist, was never disclosed at any stage. The court found that the defendant—who had no access or personal knowledge of the therapist's proposed testimony—would be unfairly prejudiced. *Id.* Here, the witness is Plaintiff's own mother. The Court will

grant EVSC's request as to the final witness and exhibit list and allow it to belatedly file Docket No. 116-1 as a separate filing in this matter.

Next, the Court considers EVSC's request to take a second deposition of Plaintiff and to depose Wyatt Squires and Tammy Work for the limited purpose of inquiring into plaintiff's updated damages. EVSC argues that in Plaintiff's June 21, 2018, deposition he indicated his damages stemmed from "emotional distress" and "health issues" that resulted from his inability to use the boys' restrooms while enrolled at EVSC schools—but, that Plaintiff's circumstances have drastically changed since that date given the Court's preliminary injunction and given that Plaintiff has not graduated from high school. (Docket No. 116 at ECF p. 5). EVSC argues Plaintiff will suffer no prejudice as the individuals are known to him—Squires originally acted as Plaintiff's next friend in this litigation and is designated as a witness on Plaintiff's preliminary and final witness and exhibit lists and Work is Plaintiff's mother, who submitted an affidavit in support of Plaintiff's preliminary injunction motion. (*Id.*). EVSC argues the reason for its 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." (*Id.*). EVSC notes this case's litigation history—including preliminary injunction hearing, its own appeal of the same, its motion to dismiss, and the parties' cross-motions for summary judgment—as a basis for its out-of-time request. (*Id.*).

Under Federal Rule of Civil Procedure 16(b)(4), "a schedule may be modified only for good cause and with the judge's consent." Moreover, a motion that is made after the deadline has expired may only be granted if the moving party failed to act because of excusable neglect. Fed. R. Civ. P. 6(b)(1). Courts consider several factors in determining whether excusable neglect

exists, including: (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). In considering the reasons for the delay, the court should consider whether the delay was within the reasonable control of the movant. *Id.* "Neglect is generally not excusable when a party should have acted before the deadline, *see Murphy v. Eddie Murphy Prods., Inc.*, 611 F.3d 322, 324 (7th Cir. 2010), or when a party's lack of diligence is to blame for its failure to secure discoverable information, *see Grayson v. O'Neill*, 308 F.3d 808, 816 (7th Cir. 2002)." *Flint v. City of Belvidere*, 791 F.3d 764, 767 (7th Cir. 2015).

Turning to the first factor, the danger of prejudice to the non-movant, reopening discovery would prejudice the Plaintiff. Discovery closed on this matter on May 22, 2019, seventy-five days before EVSC raised these issues during the telephonic discovery conference and eighty-two days before EVSC's motion was filed. Permitting the reopening of discovery at this late stage would take away from Plaintiff's time and other resources in preparing for trial. Even if Plaintiff would not be prejudiced, the lack of prejudice "will not suffice if no excuse at all is offered or if the excuse is so threadbare as to make the neglect inexplicable." *United States v. McLaughlin*, 470 F.3d 698, 701 (7th Cir. 2006). The first factor weighs against EVSC's request.

The second factor is the length of the delay and its impact on judicial proceedings. As indicated, there was more than a two-month delay between the close of discovery and EVSC notifying the Court it sought to extend the discovery deadline. Even if EVSC's reasonings regarding the protracted litigation were good reasons (they are not), the Court entered its preliminary injunction on August 3, 2018, and ruled on the other substantive, pending motions

on June 7, 2019. (Docket No. 68; Docket No. 103). If EVSC thought the protracted litigation necessitated an extension to the discovery deadlines then one could have been requested prior to the May 22, 2019, deadline or—at the very least—sooner than two months after the substantive motions were ruled on. The second factor also weighs against EVSC's request.

The third factor, the reason for the delay, also weighs against EVSC's request. EVSC argues it thought the parties would not insist on strict adherence to the CMP discovery deadlines. However, case management deadlines are not set only for the benefit of the parties. They also enable the Court to ensure the efficient and timely disposition of cases and to manage its own, busy docket. Moreover, it is not unusual for the parties to collectively file more than one dispositive motion in a matter. The existence of dispositive motions is not a basis for requesting an extension, especially *after*, a deadline has already passed. "If the court allows litigants to continually ignore deadlines and seek neverending extensions without consequence, soon the court's scheduling orders would become meaningless." *Spears v. City of Indianapolis*, 74 F.3d 153, 158 (7th Cir. 1996). EVSC cites no case law for the proposition that neglect is "excusable" simply because a party did not think the deadline would be enforced. The final factor asks whether EVSC acted in good faith. The Court agrees that there is no suggestion that EVSC has acted in anything but good faith—but this is not enough to save EVSC's request. EVSC has not sufficiently demonstrated excusable neglect to reopen discovery in this matter. For these reasons, the Court will **deny** EVSC's request to reopen discovery for additional depositions for the limited purpose of inquiring into Plaintiff's updated damages.[5]

[5] As to reopening Plaintiff's deposition, no party cited that Fed. R. Civ. P. 26(b)(2)(C) would also apply as the parties have not stipulated to Plaintiff's deposition and the deponent has already been deposed in the case. Fed. R. Civ. P. 30(a)(2)(A)(ii). The Court would also consider reopening of his deposition for updated damages testimony as potentially unreasonably cumulative or duplicative, given Plaintiff's duty to supplement pursuant to Fed. R. Civ. P. 26(e).

In sum, Court **GRANTS in part and DENIES in part** EVSC's *Motion to Modify Case Management Plan* (Docket No. 116). EVSC **shall** file the proposed, final witness and exhibit list at Docket 116-1 within three business days of this entry.

SO ORDERED.

Dated: 8/30/2019

Matthew P. Brookman
United States Magistrate Judge
Southern District of Indiana

Distribution: Electronically distributed to all CM/ECF counsel of record.

See Hurt et al. v. Vantlin et al., No. 3:14-cv-00092-JMS-MPB (S.D. Ind. Aug. 20, 2019) (Docket No. 433 at ECF pp. 2–3).