UPDATE: Seeking Truth, or Competitive Advantage? The Timing of Expert Disclosures and Depositions in Medical Negligence Cases

By:

Nick E. Abramson & Elie A. Maalouf

I. Introduction

We previously wrote about attempts by the defense bar to depose a plaintiff's expert witnesses before the defense is even required to make their own expert disclosure, which have been repeatedly precluded by the court. Although there is no clear statutory provision or court rule governing this aspect of expert discovery sequencing, "[d]ecades of accepted and respected New Hampshire practice has always followed the procedure of deposing experts after both sides [have made their expert disclosures]."[i] This discovery procedure is efficient, fundamentally fair to all parties, and has been endorsed and implemented in a series of New Hampshire Superior Court orders. This update will summarize the two most recent orders in *Gentes v. Allen*[ii] and *Souilmi v. Watson.*[iii]

II. New Hampshire Superior Courts Have Consistently Rejected Attempts by Defense Counsel to Side-Step Customary Discovery Practice

The plaintiff's position on this issue – that expert depositions should not be conducted until both parties have complied with their expert disclosure requirements – is squarely supported by New Hampshire's prevailing jurisprudence. In May 2017, the court in *McLaughlin v. Patten*[iv] unequivocally adopted this position, noting that deposing experts *after* both sides have disclosed is consistent with New Hampshire tradition and customary practice.[v] This sequence of expert discovery, the court held, is "fair and just" because it guarantees that "both parties are on equal footing during the depositions of their respective expert witnesses."[vi] Moreover, the court elaborated, "the procedure [of deposing experts after both sides have disclosed] avoids plaintiff being at a disadvantage by virtue of going first; plaintiff's expert may face complications at trial when attempting to rebut theories posited by defendants' expert of which he had no knowledge at the time of his deposition."[vii]

In granting the plaintiff's motion to prevent the defendant from prematurely deposing the plaintiff's expert, the *McLaughlin* court considered and rejected two Superior Court orders cited by defense counsel:

> In questionable support of their protest, defendants cite two superior court orders issued by a single judge over ten years ago. Neither order offers context for the

> decision or an explanation as to why standard practice was not followed in those matters. In the face of historical legal practice, defendants' so-called authority is severely lacking. The Court rejects these orders and follows instead the procedure that has been a mainstay of New Hampshire discovery practice for many decades.[viii]

The court pointedly called out defense counsel's strategy for what it was: "a deliberate attempt to gain an advantage over [the] plaintiff[,]" which "resembles archaic discovery procedures that New Hampshire courts have long-since abandoned."[ix] By contrast, the court emphasized that the traditional sequence of expert discovery would "promote the search for the truth and enhance the effectiveness of the adversary system in New Hampshire."[x]

Since *McLaughlin*, several other superior courts have followed suit. On June 27, 2017, in *Marshall v. Wilkinson,*[xi] the court issued an identical order adopting the reasoning of *McLaughlin* in full.[xii] "Upon consideration of the applicable Superior Court rules and case law," the court held, "the well-reasoned, well researched order issued [in *McLaughlin*]" to be controlling."[xiii] Similarly, the court in *Scott v. Wilbur*[xiv] expressly adopted the reasoning in *McLaughlin* without requiring a hearing, and granted the plaintiff's request for an order requiring both parties to disclose their expert witnesses prior to the start of expert depositions.[xv]

Just months later, in September 2017, the court again reached the same conclusion in *Bazzocchi v. State Farm.*[xvi] In *Bazzocchi*, defendant State Farm argued that requiring the defendant to disclose experts prior to deposing the plaintiff's expert would lead to unnecessary expenditures; the substance of the expert's testimony, they claimed, might dictate whether they even needed to retain an expert of their own.[xvii] The plaintiff countered by arguing that (1) the deposition of the plaintiff's expert would be more worthwhile if the expert had knowledge of the defense experts' opinions; and (2) that it would be unfair to subject the plaintiff to a disclosure requirement and a deposition before the defendant even decided whether to retain an expert.[xviii]

The court, thoughtfully and thoroughly, examined the practical benefits and drawbacks of the parties' divergent positions – ultimately concluding that, although theoretically possible, it is unlikely that a defendant would decline to retain an expert in the case given the fact that personal injury cases generally boil down to a "battle of the experts"; that that requiring the plaintiffs' expert to be deposed prior to learning of the defendant's expert opinions could lead to an unproductive and uninformed deposition (for explicitly elucidated reasons), which could create the need for supplemental depositions or interrogatories,

thus increasing the expense of litigation and delaying the resolution of the case; and that requiring the plaintiffs' expert to be deposed prior to learning of the defendant's expert opinions could give the defendant "an unfair advantage at the deposition" by enabling them to "blindside[]" the plaintiff's expert.[xix] The court further explained that requiring a defendant to disclose its expert before the plaintiff's expert's deposition has multiple other benefits: first, because expert depositions are not required, the parties may agree that such depositions are not necessary after exchanging disclosures; second, early expert disclosures from both parties will aid in identifying evidentiary issues so they can be resolved in advance of trial; and third, early expert disclosures may encourage settlement of the case and, by implication, avoid the unnecessary expenditure of resources on ultimately needless litigation.[xx] In light of these considerations, the *Bazzocchi* court ordered the defendant to disclose its experts prior to the plaintiff's expert's depositions.[xxi]

III. Two More Superior Courts Have Recently Adopted the Plaintiff's Position

On August 5, 2020, Judge Tucker joined Judges Abramson, MacLeod, and Colburn in holding that expert disclosures must be made by both parties before expert depositions are taken. The court, in *Gentes v. Allen*, Sullivan Cnty. Super. Ct., No. 220-2020-CV-58 (Aug. 5, 2020) (Order, Tucker, J.), acknowledged the obvious opportunity offered by the defendant's proposed discovery sequence: to depose a plaintiff's expert before even disclosing the defendant's own expert would surely frame the plaintiff's expert for impeachment at trial; their sworn deposition testimony could be used to contradict their trial testimony addressing the defense experts' previously veiled opinions. Nevertheless, the court held, although setting up a witness for impeachment at trial is a valid goal at deposition, the defendant's proposed discovery schedule did "not put the parties on equal footing" because only the defendants would have this advantage.[xxii] Furthermore, unlike plaintiff's counsel, defense counsel would have the benefit of preparing their experts for deposition with knowledge of the plaintiff's experts' opinions.[xxiii] Because of this patent unfairness, the court declined to allow the defendant to depose the plaintiff's expert prior to the defendant's expert disclosure.[xxiv]

Even more recently, in November 2020, the court again (St. Hilaire, J.) held that expert depositions should be deferred until both parties have complied with their respective expert disclosure requirements:

> It does not make sense to require the plaintiff to disclose their expert, receive the expert's report, depose that expert and then after all that, allow the defendant to disclose their expert. This puts the

> defendant in a position of holding all the cards at this stage.[xxv]

Rather, each side "should be required to litigate the matter on a level playing field."[xxvi]

Adopting the defendant's position, the court expounded, would likely lead to the plaintiff's expert needing to be deposed twice so defense counsel could explore the plaintiff's expert's counterpoints to the defense expert's opinions.[xxvii] Not only is "[t]his second bite of the apple" unfair; it is also a waste of both clients' resources.[xxviii] On the other hand, the plaintiff's proposed discovery schedule could lead to early settlements because the plaintiff would "have the benefit of the defense expert report, which may alert them to a potential weakness" in their case.[xxix] Consistent with decades of New Hampshire tradition and recent jurisprudence, the court prohibited defense counsel from taking expert depositions prior to disclosing their experts.[xxx]

IV. Conclusion

There are, undoubtedly, circumstances which may justify the antecedent deposition of a plaintiff's expert. For example, if the parties explicitly agree to it; or if the plaintiff's failure to timely disclose an expert results in scheduling difficulties or unfair prejudice to the defendant. Discovery sequencing is a matter of judicial discretion, and as five trial court judges in five different counties have recently demonstrated, the fair and just way to conduct standard civil expert discovery is to require that the parties exchange expert disclosures before taking those experts' depositions.

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[i] *See McLaughlin v. Patten*, Hillsborough Cnty. Super. Ct. N. Dist., No. 216-2017-CV-00104 (May 5, 2017) (Order, Abramson, J.).
[ii] Sullivan Cnty. Super. Ct., No. 220-2020-CV-58 (Aug. 5, 2020) (Order, Tucker, J.).
[iii] Rockingham Cnty. Super. Ct. No. 218-2020-CV-00518 (Nov. 12, 2020) (Order, Hilaire, J.). Plaintiff's counsel who argued and won this issue is Michaila M. Oliveira, Esq. from the Law Office of Manning & Zimmerman, PLLC.
[iv] Hillsborough Cnty. Super. Ct. N. Dist., No. 216-2017-CV-00104 (May 5, 2017) (Order, Abramson, J.).
[v] *See id.* at *2.
[vi] *McLaughlin,* No. 216-2017-CV-00104 at *2.
[vii] *Id.*
[viii] *Id.* at *2-3.
[ix] *Id.* at 2.
[x] *McLaughlin*, No. 216-2017-CV-00104 at *3, (citing *Barry v. Horne*, 117 NH 693, 696 (1977)).
[xi] Grafton Cnty. Super. Ct., No. 17-CV-015 (June 27, 2017) (Order, MacLeod, J.).
[xii] *See id.*
[xiii] *Id.*

[xiv] Hillsborough Cnty. Super. Ct. N. Dist., No. 216-2017-CV-00060 (May 5, 2017) (Order, Abramson, J.)
[xv] *See id.*
[xvi] Hillsborough Cnty. Super. Ct. S. Dist., No. 2017-CV-00174 (Sept. 18, 2017) (Order, Colburn, J.).
[xvii] *See id.* at *1.
[xviii] *See id.* at *2.
[xix] *Id.* at *2-3.
[xx] *Bazzocchi*, No. 2017-CV-00174 at *2-3.
[xxi] *See id.*
[xxii] *Id.*
[xxiii] *See id.*
[xxiv] *Gentes*, No. 220-2020-CV-58 at *2.
[xxv] *Souilmi v. Watson*, Rockingham Cnty. Super. Ct. No. 218-2020-CV-00518 at *3 (Nov. 12, 2020) (Order, Hilaire, J.).
[xxvi] *Id.*
[xxvii] *See id.*
[xxviii] *Id.*
[xxix] *Souilmi*, No. 218-2020-CV-00518 at *3.
[xxx] *See id.*