

IN THE CIRCUIT COURT OF GRANT COUNTY, WEST VIRGINIA

JERRY GOLDIZEN AND BILL GOLDIZEN
Co-Administrator of the Estate of
ELVA LEE GOLDIZEN,

Plaintiff,

v.

Case No: 07-C-36

GRANT COUNTY NURSING HOME,

Defendant.

ORDER DENYING PLAINTIFF'S MOTION TO ALTER AND AMEND
JUDGMENT

This matter came before the Court on October 17, 2008, the Honorable Phil Jordan presiding, pursuant to Plaintiff's Motion to Alter and Amend the Judgment Order filed by this Court on October 6, 2008. After considering Plaintiff's Motion, the facts and circumstances surrounding this matter, and all relevant and pertinent legal authority, this Court hereby **DENIES** Plaintiff's Motion to Alter and Amend Judgment.

Plaintiff alleges several grounds in its Motion. First, Plaintiff alleges that this Court erred in not first considering and ruling upon Plaintiff's pending "Notice of Trial Conflict" which was filed on September 15, 2008. This Court is of the opinion that it did not err in not considering the "Notice of Trial Conflict." The Scheduling Order for the matter currently before the Court was entered on October 11, 2007. In this Scheduling Order, the matter was set for trial on October 14-17, 2008. Therefore, when Counsel filed its "Notice of Trial Conflict," Counsel had been aware that the trial in this matter would be taking place between October 14-17, 2008, for over eleven months. Yet despite this knowledge, Counsel still

scheduled another trial for the same time. Therefore, because Plaintiff was aware of the scheduled trial in this matter for over eleven months, the Court is of the opinion that it did not err in not considering Plaintiff's Notice of Trial Conflict.

Second, Plaintiff alleges that this Court erred in denying Plaintiff's "Motion to Vacate Scheduling Order and Request for Continuation of Trial Date" which was filed with this Court on August 8, 2008. This Court is also of the opinion that it did not err in denying Plaintiff's "Motion to Vacate Scheduling Order and Request for Continuation of Trial Date." In this Motion, Plaintiff pointed out its need to secure additional expert testimony because of the changed views expressed by Dr. Dewey Bensenhaver during his deposition, as well as Plaintiff's inability to locate Dr. Robert Gaudet, the former emergency room physician at Grant Memorial Hospital. However, in ruling on this Motion, this Honorable Court considered the following factors: Plaintiff was aware of the deposition testimony of Dr. Dewey Bensenhaver since February 7, 2008, which was over six months before Plaintiff filed the aforementioned Motion. Plaintiff had ample time to secure additional expert testimony, yet failed to do so. Further, in the Information Age of today, this Court was not persuaded that Counsel was unable to locate Dr. Robert Gaudet. Further, after denying said Motion, Plaintiff was able to locate Dr. Gaudet in less than one month, which was further evidence to this Court that had Plaintiff diligently attempted to locate Dr. Gaudet earlier in the proceeding, that it would have been successful in doing so. Finally, the Motion to Vacate Scheduling Order and Request for Continuation of Trial Date was filed nearly two weeks after the Discovery period had ended. Prior to this time, Plaintiff had in no way brought it to the Court's attention that it was having trouble securing additional testimony or locating Dr.

Gaudet. Therefore, for the above-listed reasons, this Court believes that it did not err in denying Plaintiff's Motion.

Third, Plaintiff alleges that this Court erred in granting Defendant's "Motion to Exclude" the evidentiary deposition of Dr. Robert Gaudet. However, this Court believes that it did not err in granting Defendant's Motion. The Scheduling Order was set on October 11, 2007. At this Scheduling Conference, both parties *jointly* agreed that Discovery in the matter would be completed by no later than July 25, 2008, which allowed the parties over nine months for Discovery. During the Discovery period, Plaintiff did not provide information regarding Dr. Gaudet in its Responses to Defendant's First Set of Interrogatories. Further, Plaintiff never supplemented its filing to include this information.

During the nine month Discovery period, Plaintiff's efforts to locate Dr. Gaudet were futile at best. While Plaintiff provided this Honorable Court with a list of attempts to locate Dr. Gaudet, a closer look at this list revealed what a disappointing effort was put forth. From the time of the Scheduling Conference, Plaintiff waited four months to attempt to make a first contact with Dr. Gaudet. Further, Plaintiff became aware in February 2008 that Dr. Dewey Bensenhaver would not be providing Plaintiff-friendly expert testimony in regard to the cause of Mrs. Goldizen's death. However, despite this, Plaintiff made no significant efforts to locate Dr. Gaudet or to seek another expert to testify as to causation, nor did Plaintiff ever file a Motion to Extend Discovery with this Court.

In April 2008, Dr. Gaudet was located in Clintwood, Virginia. However, no further activity in regard to Dr. Gaudet took place until August. Then, on August 7, 2008, nearly two weeks after the Discovery period for this matter ended, Plaintiff filed a Motion to Continue

with the Court citing their inability to locate Dr. Gaudet. This Court denied Plaintiff's Motion, and unsurprisingly, Plaintiff quickly located Dr. Gaudet. By finding Dr. Gaudet so quickly after the Court denied Plaintiff's Motion to Continue, Plaintiff demonstrated to this Court that had such efforts been put forth beforehand, Dr. Gaudet could have been located within the agreed parameters of the case.

Then at the eve of trial, Plaintiff filed a Motion with the Court seeking to depose Dr. Gaudet. When Plaintiff filed its Notice of Deposition, Discovery had been over in the matter for two months, and trial was less than three weeks away. This Court recognized that substantial inconvenience and prejudice would result to Defendant if such deposition were allowed to be taken. Plaintiff had ample time to prepare for this matter, and failed to do so. Plaintiff clearly failed to comply with the Scheduling Order in this matter. Additionally, Plaintiff never reported to this Court of any difficulty in locating Dr. Gaudet until nearly two weeks after Discovery ended in the matter. Therefore, taking all of these factors into consideration, the Court granted Defendant's Motion to Exclude the deposition testimony of Dr. Gaudet, and the Court is of the opinion that in light of the specific facts and circumstances of the case that it did not err in granting said Motion.

Fourth, Plaintiff alleges that this Court abused its discretion and otherwise erred in imposing upon Plaintiff's the sanction of dismissal by way of excluding the testimony of their only expert witness thereby precluding Plaintiff of presenting a defense to Defendant's Motion for Summary Judgment. An abuse of discretion occurs when: (1) a material factor deserving significant weight is ignored; (2) when an improper fact is relied upon; (3) when all proper and no improper factors are assessed but the circuit court makes a serious mistake in

weighing them. *See Gentry v. Magnum*, 195 W.Va. 512, 466 S.E.2d 176, n. 6 (1995). First, this Court did not ignore a material factor deserving significant weight. While this Court did prevent Plaintiff from deposing Dr. Gaudet, this is not a material factor because Plaintiff is unaware of the deposition testimony that Dr. Gaudet may provide. Further, this Court was not convinced by reasons put forth by Plaintiff. Pursuant to the Scheduling Order in this matter, Plaintiff had ample opportunity to secure testimony of Dr. Gaudet, or another qualified expert in the field, yet Plaintiff simply failed to do so. Second, this Court relied on no improper fact in making its decision. Third, this Court did not make a serious mistake in weighing the proper factors. While the Court did prevent the deposition of Dr. Gaudet, the Court made the proper decision considering Plaintiff sought to depose Dr. Gaudet. Plaintiff had approximately nine months to conduct Discovery in the matter. This was ample time for Plaintiff to find and depose Dr. Gaudet, or in the alternative for Plaintiff to seek other expert testimony as to the cause of Mrs. Goldizen's death. However, Plaintiff did not do this. Therefore, this Court is of the opinion that it did not make a serious mistake in weighing proper factors, but rather this Court believes it properly weighed all factors in the case and made the correct decision.

Fifth, Plaintiff alleges that this Court should alter and amend judgment because of other errors in the record. After thoroughly reviewing the record, this Court is of the opinion that no errors exist on the record of this matter.

Finally, this Court is of the opinion that had Plaintiff put the effort forth in preparing this case that Plaintiff has put forth in attempting to put off and reschedule the matter, Plaintiff would have easily been able to depose Dr. Gaudet, or in the alternative find other Plaintiff-

friendly expert testimony. Therefore, for this and all other aforementioned reasons, this Honorable Court hereby **DENIES** Plaintiff Motion to Alter and Amend Judgment Order.

The Clerk **SHALL** forward copies of this Order to Plaintiff's counsel, Frank M. Armada, at 3972 Teays Valley Road, Hurricane, West Virginia, 25526, and to Defendant's Counsel, Rita Massie Biser, at 405 Capitol Street, Suite 603, Charleston, West Virginia 25301.

DONE and **ENTERED** this 28th day of October, 2008.

ENTERED OCT 30 2008

Phil Jordan
The Honorable Phil Jordan, Circuit Judge
21st Judicial Circuit

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