

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. CROIX**

**AMANDA HARTZOG, individually, )  
and as next friend of JAHMIL PEREZ, )  
a minor )**

**Plaintiffs, )**

**v. )**

**UNITED CORPORATION, d.b.a. )  
PLAZA EXTRA, )**

**Defendants. )**

**SX-04-CV-095**

**ACTION FOR: DAMAGES**

**MEMORANDUM OPINION**

This case was filed on February 29, 2004. On July 1, 2005, the Defendant served the Plaintiff with the First Demand for Production of Documents, which included requests for experts' curriculum vitae and expert reports. On June 8, 2009, the Court signed a Scheduling Order requiring the Plaintiff to file expert disclosures by November 30, 2009. The Plaintiff did not timely file said disclosures. A subsequent Order scheduled a calendar call on March 22, 2010 and jury selection and trial to begin on April 5, 2010 and April 30, 2010, respectively. On December 7, 2009, Defendant filed a Motion and Brief *In Limine* to Exclude Plaintiff from Naming Expert Witnesses

On December 16, 2009, Plaintiff served Defendant with a Notice of Expert Retention of Robert J. Anders as Retail Expert. On December 21, 2009, Plaintiff served Defendant with a Notice of Lay Expert, Olasee Davis. On December 23, 2009, Plaintiff filed the Affidavit of Melissa Miller with the Court, in which Ms. Miller states that, "The failure to timely retain an expert was a complete result of my

misunderstanding of Attorney Washburn's instruction and not in any way out of bad faith." Ms. Miller is an employee of Plaintiff's law firm, Rohn & Carpenter, and is responsible for the coordination of expert witnesses.

A March 16, 2010 Court Order rescheduled the Calendar Call for October 18, 2010 and jury selection and trial were reset to take place from November 1, 2010 through November 26, 2010.

Defendant argues for its motion based on Rule 26(a)(2)(C)(i) and Rule 37(c)(1) of the Federal Rules of Civil Procedure. Namely, that Plaintiff failed to comply with the June 8, 2009 pre-trial Scheduling Order, which ordered Plaintiff to file expert disclosures by November 30, 2009.

In support, Defendant cites *Couch v. St. Croix Marine, Inc.*, 23 V.I. 269 (D.V.I. 1987) in which the Court excluded expert witnesses' testimony because of the extreme prejudice that the Plaintiff caused the Defendant by failing to comply with Fed.R.Civ.P. 26(b)(4)(i) and the Magistrate's pre-trial order. The court<sup>1</sup> notes:

Failure to even know who your experts will be eight months after you file a case, or even fifteen months later, or within a month of trial, is not excusable. Failure of the Plaintiffs to keep in touch with counsel and cooperate in discovery is not excusable neglect. *Id.* at 272-273

Additionally, Defendant cites *Semper v. Santos*, 845 F.2d (3d Cir. 1988), in which the Court ruled that the Plaintiff failed to timely disclose its proposed expert witness when one day after jury selection the Plaintiff notified the Defendant of its intention to call a new expert witness.

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<sup>1</sup> In *Couch v. St. Croix Marine, Inc.*, there was not only a failure to timely disclose expert witnesses on the part of the Plaintiff's counsel but also a failure of the client to stay in touch with counsel for long periods of time.

Plaintiff cites to the authority of *Soufflas v. Zimmer*, 474 F.Supp.2d 737, (E.D. Pa 2007), for the proposition that excluding testimony by expert witnesses is an extreme sanction and untimely evidence after initial expert reports were due may be admitted if error is harmless. Here, however, the Court stated that the Plaintiff had acted diligently to obtain an expert witness rebuttal report and that the Defendant failed to show that the Plaintiff's explanation of the delay was unreasonable or that the Defendant's legal position would be irreparably prejudiced or that the administration of justice would be unduly burdened.

Plaintiff asserts that Defendant's reliance on *Couch* is misplaced because that case addressed a fact pattern in which a list of witnesses was filed only days before the trial date and where the Plaintiff had failed to disclose information required of each expert under Rule 26. Plaintiff asserts a similar claim against the use of *Semper* in which the court granted the Defendant's motion to exclude the Plaintiff's rebuttal expert witness produced just one day after jury selection.

Having reviewed the authority, this Court finds that the guideline considerations that help Courts determine whether expert testimony has been properly excluded are laid out in *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894, 904-905 (3d Cir. 1977) *overruled on other grounds*, *Goodman v. Lukens Steel Co.*, 777 F.2d 113 (3d Cir. 1977) *aff'd*, 482 U.S. 656, 107 S.Ct. 2617, 96 L.Ed.2d 572 (1987), wherein we are asked to assess:

(1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified, (2) the ability of that party to cure the prejudice, (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court, and (4) bad faith or willfulness in failing to comply with the court's order. *Jarvis v. Premuda*, 2007 U.S. Dist. LEXIS 96682 (D.V.I. 2007)

Thus an application of the four elements of *Meyers* will guide us to determine whether to grant Defendant's motion in to exclude evidence.

The first element asks us to assess the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified. The June 8, 2009 Scheduling Order scheduled the trial date to begin on April 5, 2010. Although Plaintiff did not timely file the list of witnesses, she filed on December 16, 2009. Hence, there was more than three months for Defendant to prepare its case before the trial would commence. Additionally, a March 16, 2010 court order rescheduled the trial to commence on November 1, 2010. In light of the time between the filing of the expert witnesses and the trial date being lengthy, the degree of prejudice against Defendant is not substantial. Whereas in *Semper*, the jury selection had already begun and allowing Plaintiff's new expert witness would have caused prejudice against the Defendant.

The second element directs us to assess the ability of the party to cure the prejudice. Upon learning on December 7, 2009 that the list of expert witnesses had not been obtained and filed due to a clerical error by Ms. Miller, Plaintiff filed Notice of Expert Retention on December 16, 2009. Because the Plaintiff quickly addressed and did not delay in filing the Notice of Expert Retention, the Plaintiff demonstrated an effort to rectify her error. As previously noted, the prejudice inflicted on the Defendant was slight because of the time between the filing of the expert witness and the trial date.

The third element looks to the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the Court. Because the trial date is set for November 1, 2010, we do not find that this failure to timely file expert witnesses will disrupt the orderly and efficient trial of the case or of other cases in the Court. In *Couch*, the Plaintiff asked for a continuance of the trial period. The Court found that such continuance would disrupt the orderly and efficient trial of the case and the many other cases before the court and would be an undue burden on the courts. However, in the present case, the Court has already rescheduled until November 1, 2010 to rule on the recent motions.

The fourth element looks for bad faith or willfulness in failing to comply with the court's order. Taken as true, Ms. Miller's affidavit demonstrates that bad faith was not involved in the Plaintiff's failure to timely file expert witnesses.

Rule 37 allows for untimely filed expert witness to testify if the failure was substantially justified or harmless. As demonstrated through the application of the *Meyer* basic considerations, the failure to comply with pre-trial order was harmless. Whether the failure was substantially justified is another question. Nevertheless, neither will the Defendant's legal position be irreparably prejudiced nor will the administration of justice be greatly burdened by allowing the Plaintiff to name expert witnesses.

The Court notes its discretion to exclude witnesses for failure to comply with a pre-trial order and that such exclusion will not be disturbed absent a clear abuse of discretion. Nevertheless, Defendant's Motion and Brief *In Limine* to Exclude Plaintiff

from Naming Expert Witnesses is denied. An appropriate Order of even date follows.

**DATED** this 30 day of July, 2010.

Miguel A. Camacho  
The Hon. Miguel A. Camacho, Magistrate  
of the Superior Court of the Virgin Islands

**ATTEST:**

VENETIA H. VELAZQUEZ, ESQ.  
Clerk of the Court

By: 

Court Clerk/Supervisor

Dated: 8/2/10