

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

**ALAINE KAY, et al.,**

**Plaintiffs,**

**v.**

**Case No. 2:09-CV-351  
JUDGE SMITH  
MAGISTRATE JUDGE KING**

**AMERICAN NATIONAL RED CROSS, et al.,**

**Defendants.**

**OPINION AND ORDER**

This matter is before the Court for consideration of the Defendant American National Red Cross's *Motion to Compel Discovery and for Sanctions*, Doc. No. 28, and *Motion to Amend the Case Schedule*, Doc. No. 29; as well as Plaintiffs' *Motion for Extension of Time and to Amend the Case Schedule*, Doc. No. 42. For the reasons that follow, the motions are granted.

**I.**

Plaintiff Alaine Kay and her mother Fay Kay ["Plaintiffs"] bring this action for negligence against the American National Red Cross ["Red Cross"] and a John Doe Defendant in connection with Plaintiff Alaine Kay's blood donation during a Red Cross blood drive at the New Lexington High School, located in Perry County, Ohio. The action was originally filed in state court and was removed to this Court by the Red Cross pursuant to 36 U.S.C. § 300105(a)(5), which provides that the Red Cross has "the power to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States."<sup>1</sup>

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<sup>1</sup>In *American National Red Cross v. S.G.*, 112 S. Ct. 2465 (1992), the United States Supreme Court held that the foregoing provision authorizes the Red Cross to remove to federal court actions pending against it in state court.

In the *Complaint*, Plaintiff Alaine Kay alleges that she “suffered an injury to her right arm as a direct and proximate result of the negligence of Defendant John Doe No. 1 when said Defendant negligently attempted to draw blood from her during the Red Cross drive.” *Complaint*, Doc. No. 3 at ¶ 4. According to the *Complaint*, Alaine Kay has suffered “certain serious injuries of the mind and body, some of which may be permanent in nature and all of which have been painful and disabling.” *Id.* at ¶ 5. Plaintiff Fay Kay claims that she has incurred expenses for the care of her minor daughter as a result of the alleged negligence. *Id.* at ¶¶ 9-10.

## II.

### A. Defendant’s Motions

#### 1. *Motion to Compel Discovery and for Sanctions*

Defendant Red Cross moves to compel Plaintiffs to fully respond to its First Request for Production of Documents, served on August 10, 2009. According to Defendant, Plaintiffs have failed to produce all medical records pertaining to Alaine Kay from March 2009 to the present and have failed to execute authorization forms that would allow Defendant to obtain Plaintiffs’ education and employment records.

With respect to the requested medical records, Plaintiffs’ counsel had informed Defendant’s counsel that additional records exist for the period after March 2009. Defendant has requested production of those records on numerous occasions. *See Exhibits D and E* attached to *Motion to Compel*, Doc. No. 28. Despite assurances of production, the records have not been produced. Defendant argues that “[a] full understanding of Plaintiff Alaine Kay’s condition, including her progression under treatment, is necessary to properly defend the Red Cross in this action.” *Motion to Compel*, Doc. No. 28, at 3. Defendant therefore seeks to compel production of “all of Plaintiff Alaine Kay’s medical records after March 2009.” *Id.* Plaintiffs have made no

response to the motion.

Rule 37 of the Federal Rules of Civil Procedure permits a discovering party to file a motion for an order compelling discovery if another party fails to respond to discovery requests, provided that the motion to compel includes a certification that the movant has, in good faith, conferred or attempted to confer with the party failing to respond to the requests. The Court is satisfied that the prerequisites to a motion to compel have been met in this case.

Determining the proper scope of discovery falls within the broad discretion of the trial court. *Lewis v. ACB Business Services, Inc.*, 135 F.3d 389, 402 (6<sup>th</sup> Cir. 1998). Rule 37(a) expressly provides that “an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.” Fed. R. Civ. P. 37(a)(4). However, “[t]he proponent of a motion to compel discovery bears the initial burden of proving that the information sought is relevant.” *Martin v. Select Portfolio Serving Holding Corp.*, No. 1:05-CV-273, 2006 U.S. Dist. LEXIS 68779, at \*2 (S.D. Ohio September 25, 2006), citing *Alexander v. Fed. Bureau of Investigation*, 186 F.R.D. 154, 159 (D. D.C. 1999).

In turn, Rule 26(b) provides that “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense. . . .” Fed. R. Civ. P. 26(b)(1). Relevance for discovery purposes is extremely broad. “The test is whether the line of interrogation is reasonably calculated to lead to the discovery of admissible evidence.” *Mellon v. Cooper-Jarrett, Inc.*, 424 F.2d 499, 500-01 (6<sup>th</sup> Cir. 1970).

The Court concludes that Defendant is entitled to discovery of all medical records with respect to the treatment of Plaintiff Alaina Kay from March 2009 to the present. These medical records are clearly relevant to the claims asserted in this case and Plaintiffs have failed to come forward with any reason as to why these records have not been produced. Defendant’s motion to

compel production is well-taken and is therefore granted. Plaintiffs must produce the requested medical records no later than October 9, 2010.

Defendant also seeks to compel Plaintiffs to execute release authorizations, as attached to Defendant's request for production of documents, so that Defendant may obtain employment and educational records of Plaintiffs. According to Defendant, Plaintiffs have made no response to Defendant's request for executed releases.

The records sought by this request are relevant to the issues presented in this case; since Plaintiffs have not provided the actual records, Defendant is entitled to the authorizations that will permit Defendant to obtain for itself Plaintiffs' educational and employment records. Thus, as it relates to this request, the motion to compel is meritorious. Plaintiffs must produce the requested executed authorizations no later than October 9, 2010.

Defendant also moves for sanctions for Plaintiffs' apparent failure to comply with these discovery requests. Defendant seeks to recover expenses and reasonable attorney's fees incurred in preparing the *Motion to Compel*, pursuant to Fed. R. Civ. P. 37(a)(5).

Rule 37 requires the payment of reasonable expenses associated with the grant of a motion to compel, including attorney's fees, unless the "opposing party's nondisclosure, response, or objection was substantially justified; or . . . other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(a)(5)(ii),(iii). Neither of these provisions applies in this case since Plaintiffs have failed to come forward with any explanation whatsoever as to why medical records relating to the period after March 2009 have not been produced and why the authorizations sought have not been executed. Consequently, pursuant to Rule 37(a)(5), Defendant is entitled to an award of reasonable expenses, including attorney's fees, associated with filing the *Motion to Compel*. The motion for sanctions is granted.

## ***2. Motion to Amend Case Schedule***

Under the current case schedule, the discovery cut-off date was April 1, 2010 and motions for summary judgment were to have been filed by April 30, 2010. *Preliminary Pretrial Order*, Doc. No. 9. Defendant seeks to extend the discovery completion date to October 31, 2010. Doc. No. 29. In its motion, Defendant also sought to extend the dispositive motion to November 30, 2010; however, Defendant actually filed a motion for summary judgment on June 30, 2010. Doc. No. 37.

Rule 16 permits the modification of a scheduling order “only for good cause and with the judge’s consent.” Rule 16(b)(4). A court considering a request to modify the schedule may do so only “‘if it cannot reasonably be met despite the diligence of the party seeking the extension.’” *Leary v. Daeschner*, 349 F.3d 888, 906 (6th Cir. 2003)(citing Fed. R. Civ. P. 16, 1983 Advisory Committee Notes). “Another important consideration for a district court deciding whether Rule 16’s ‘good cause’ standard is met is whether the opposing party will suffer prejudice by virtue of the amendment.” *Id.* (citing *Inge v. Rock Fin. Corp.*, 281 F.3d 613, 625 (6th Cir. 2002)).

Defendant seeks to amend the case schedule, arguing that substantial discovery remains to be completed in this case. In particular, Defendant have established that there was great difficulty in scheduling the depositions of Plaintiffs and other witnesses. *See Exhibits* attached to Doc. No. 29.

It appears that the depositions of Plaintiffs have now been completed, *see Notice*, Doc. No. 43; *Notice*, Doc. No. 44, as has the deposition of Jessica Covert, *see Notice*, Doc. No. 46. However, with the grant of Defendant’s *Motion to Compel*, some additional discovery remains. Because Defendant has established good cause for the requested extension, Defendant’s motion is granted. The discovery completion date is extended to November 12, 2010.

## B. Plaintiffs' Motion for Extension of Time and to Amend Case Schedule

Plaintiffs have filed a motion for an extension of time to respond to Defendant's *Motion for Summary Judgment*, to identify an expert witness and to amend the case schedule to permit the depositions of certain witnesses identified by Defendant. Doc. No. 42. Defendant opposes the motion.

Plaintiffs identified Michael Stanton-Hicks, M.D., the treating physician for Plaintiff Alaine Kay, as their expert witness, although they did not obtain a report from him. However, during his deposition, Dr. Hicks declined to offer an opinion on whether Defendant's conduct deviated from the standard of care. *Deposition of Michael Stanton-Hicks, M.D.*, at 9-11, *Exhibit B* attached to *Motion for Summary Judgment*, Doc. No. 37. Defendant's *Motion for Summary Judgment* is based on Plaintiffs' failure to offer expert testimony regarding this issue as well as the issue of proximate causation. *Id.* Plaintiffs filed no response to the motion. On July 29, 2010, Defendant filed a notice suggesting that the Motion for Summary Judgment was ripe for resolution. *Notice*, Doc. No. 41. Plaintiffs filed their motion for an extension of time on August 3, 2010.

Plaintiffs' counsel represents that he was not served a copy of the *Motion for Summary Judgment*, and was unaware of its filing until July 29, 2010, when Defendant filed its *Notice* that the motion was ripe for decision.<sup>2</sup> Plaintiffs represent that they intend to oppose the motion but that additional time is needed in order to obtain evidence that will permit them to do so..

Defendant opposes the motion as it relates to the designation of an expert witness, arguing that Plaintiffs have not provided a reasonable excuse for their failure to properly identify an expert.

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<sup>2</sup>Defendant disputes Plaintiffs' claim that there was some error in the electronic transmission of the *Motion for Summary Judgment*. The Court's docket indicates that a copy of the motion was electronically sent to the email address of Plaintiffs' counsel on June 30, 2010. The Court also notes that Defendant's *Initial Disclosure of Expert Witnesses*, Doc. No. 39, which was filed on July 6, 2010, made specific reference to its *Motion for Summary Judgment*. Doc. No. 39, at 1.

Defendant also argues that Plaintiffs should not be afforded additional time to respond to the *Motion for Summary Judgment*.

As Defendant points out, Plaintiffs have failed to comply with the requirements of Rule 56(f). That rule establishes the proper procedure where a party concludes that additional discovery is necessary in order to respond to a motion for summary judgment:

**When Affidavits Are Unavailable.** If a party opposing the motion [for summary judgment] shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the Court may:

- (1) deny the motion;
- (2) order a continuance to enable affidavits to be obtained, depositions to be taken or other discovery to be undertaken;
- (3) issue any other just order.

Rule 56(f) (2007). The affidavit required by the rule must “indicate to the district court [the party’s] need for discovery, what material facts it hopes to uncover, and why it has not previously discovered the information.” *Cacevic v. City of Hazel Park*, 226 F.3d 483, 488 (6<sup>th</sup> Cir. 2000)(citing *Radich v. Goode*, 866 F.2d 1391, 1393-94 (3d Cir. 1989)).

Although Plaintiffs have failed to provide the required affidavit in support of their request, their motion offers the substantive equivalent to the affidavit. That is, Plaintiffs have sufficiently explained why they need to obtain a new expert. The Court concludes that, to that extent, Plaintiffs’ failure to provide the affidavit required by Rule 56(f) is immaterial. Particularly is this so in light of the grant of Defendant’s request for an extension of the discovery completion date. However, Plaintiffs have failed to explain either why the depositions of Defendant’s witnesses are necessary to their response to the *Motion for Summary Judgment* or why those depositions were not completed within the original discovery period.

Plaintiffs' *Motion for Extension of Time and to Amend the Case Schedule* is therefore granted in part. Plaintiffs may have until October 18, 2010 in which to designate a new expert. By that same date, Plaintiffs must offer a date certain – no later than November 5, 2010 – for that expert's deposition. Plaintiffs may have until November 15, 2010, to make substantive response to Defendant's *Motion for Summary Judgment*.

The Court notes that, in the alternative, Plaintiffs ask that they be permitted to dismiss this action under Rule 41(a)(2). Defendants oppose this request. In light of the Court's decision to extend the discovery deadline and to allow Plaintiffs' counsel the opportunity to respond to the *Motion for Summary Judgment*, the Court declines at this time to entertain Plaintiffs' alternative request under Rule 41. Plaintiffs may renew their motion, if otherwise appropriate, at a later date.

### III.

**WHEREUPON** Defendant American National Red Cross's *Motion to Compel Discovery and for*

*Sanctions*, **Doc. No. 28**, is **GRANTED**. Plaintiffs are **ORDERED** to produce the requested medical records and the requested executed authorizations no later than October 9, 2010.

Defendant shall provide to Plaintiffs, within ten (10) days, an itemized statement of the expenses, including attorney's fees, incurred in connection with the grant of this motion. If any party wishes a hearing on the amount of the requested award, that party shall make written request for a hearing within fourteen (14) days.

Defendant's *Motion to Amend the Case Schedule*, **Doc. No. 29**, is **GRANTED**. The discovery completion date is **EXTENDED** to November 12, 2010. Any additional dispositive motions may be filed no later than December 15, 2010.

Plaintiffs' *Motion for Extension of Time and to Amend the Case Schedule*, **Doc. No. 42**, is



**GRANTED IN PART.** Plaintiffs may have until October 18, 2010 in which to designate a new expert. By that same date, Plaintiffs must offer a date certain – no later than November 5, 2010 – for that expert’s deposition. Plaintiffs may have until November 15, 2010, to make substantive response to Defendant’s *Motion for Summary Judgment*. Plaintiffs’ alternative request for leave to dismiss the action without prejudice is **DENIED** without prejudice to renewal, if otherwise appropriate, at a later date.

**October 1, 2010**  
**DATE**

**s/ Norah McCann King**  
**NORAH McCANN KING**  
**UNITED STATES MAGISTRATE JUDGE**