

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION AT DAYTON**

MD ELTON R. KERR,

Plaintiff,

:

Case No. 3:07-cv-297

-vs-

:

Magistrate Judge Michael R. Merz

MD WILLIAM W. HURD, et al.,

Defendants.

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**DECISION AND ORDER**

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This case is before the Court on Plaintiff's Amended Motion for Leave to File Identification of Lay Witnesses and Extension of Discovery Deadline (Doc. No. 44). Defendant Wright State Physicians opposes the Motion (Doc. No. 45).

**Procedural History**

The Complaint was filed in this case on August 10, 2007 (Doc. No. 1). The parties gave unanimous consent to plenary magistrate judge jurisdiction in their Rule 26(f) Report (Doc. No. 5) and the case was set for scheduling conference on January 15, 2008. The conference had to be re-set because neither of Plaintiff's counsel appeared as ordered. At the re-scheduled conference on January 22, 2008, the Court set dates agreed to by counsel, including expert witness disclosure on March 7, 2008; lay witness disclosure on March 22, 2008; and a discovery cut-off of August 8, 2008 (Preliminary Pretrial Order, Doc. No. 11). The case was delayed several months because of Plaintiff's filing for bankruptcy protection. Following that substitution, the Court set a status

conference for July 7, 2008, and Plaintiff's counsel, Mr. Folkerth, again failed to appear (Minute entry for July 7, 2008).

After the re-scheduled conference, the Court entered an Amended Scheduling Order (Doc. No. 33), again adopting the dates requested by the parties in their revised Rule 26(f) Report (Doc. No. 32). These included a lay witness identification date of September 30, 2008, and a discovery deadline of April 30, 2009. On March 13, 2009, Plaintiff filed a Motion for Leave to Identify Lay Witnesses and to Extend the Discovery Deadline (Doc. No. 42). This Motion was denied for failure to comply with S. D. Ohio Civ. R. 7.2, the Court's "professionalism" rule (Notation Order). Without waiting for leave of court, Plaintiff filed a witness list on March 13, 2009 (Doc. No. 43). The instant Motion followed.

### **Analysis**

General Order No. 1 for the Dayton location of court provides in pertinent part with respect to preliminary pretrial orders:

A date will be set for filing a list of lay witnesses with the Court, together with a brief synopsis of their expected testimony. Lay witnesses who have not been timely identified will not be permitted to testify.

The purpose of this filing of witness lists is to permit timely completion of discovery. Supplementation of the lists after timely filing shall be only upon motion and for good cause shown, i.e., that the identity of the witness and/or the need for the witness's testimony could not have been previously determined upon the exercise of due diligence by counsel. These lists are not meant to be preliminary witness lists. Rather, they are to be final lists, insofar as discovery has revealed the necessity of testimony by these witnesses.

The lay witness list which Plaintiff filed lists eighty-one witnesses. As to all of those witnesses except for Elton and Marga Kerr, their expected testimony is described as "Facts within

the personal knowledge of the witness establishing the liability of Defendants as alleged in the Amended Complaint.” As if this conclusory language were not opaque enough, Plaintiff adds

The brief synopsis of anticipated testimony presented above is not intended to limit the subjects of inquiry for examination, but is provided for purposes of identifying the main subject matters upon which the respective witnesses are presently expected to testify. Depending on the discovery of additional information, and the issues developed, additional areas of inquiry may be appropriate for any particular witness.

(Doc. No. 43 at 9.)

This purported identification of witnesses is grossly deficient. It gives the reader absolutely no clue of what it is that the particular witness is expected to testify about. It completely fails to identify the witnesses in any useful sense. For example, should Defendants’ counsel wish to speak to any of these witnesses or subpoena them for a deposition, where would they be found?

Plaintiff’s instant Motion is also deficient in that it does not even attempt to show good cause for filing five and one-half months after the deadline. As General Order No. 1 provides, identification of witnesses after the set deadline will be allowed only on a showing of good cause.

Plaintiff’s counsel asserts that this late identification and two-month extension of the discovery cut-off will not threaten the trial date and that only ten depositions need to be taken. Which ten of the proposed eighty-one lay witnesses does Plaintiff suggest Defendants should be limited to? More than half of the proposed lay witnesses are medical doctors. Do Plaintiff’s counsel believe that scheduling the depositions of over forty doctors will be an easy undertaking?

Rhetorical questions aside, it is hereby ORDERED:

1. Plaintiff’s lay witness list (Doc. No. 43) is STRICKEN;
2. Plaintiff’s instant Motion is DENIED.

As the case now stands, Plaintiff will not be permitted to present any testimony besides his own at trial. Should Plaintiff seek relief from this Order, he shall do so by filing a motion

accompanied by

1. A list identifying any witness Plaintiff desires to call at trial with an address and telephone number and an actual synopsis of the facts Plaintiff expects to elicit from that witness; and
2. A showing of cause as to why each of said witnesses was not timely identified.

Defendants shall set the Plaintiff's deposition and the deposition of any Plaintiff's expert not yet depose whom they desire to depose by notice served not later than March 28, 2009, and scheduled for a date before the discovery cut-off.

Plaintiff is cautioned that failure to cooperate in completing the discovery in this case may well result in dismissal of the case with prejudice.

March 18, 2009.

s/ **Michael R. Merz**  
United States Magistrate Judge