

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

David Bourke)
)
)
Plaintiff,)
)
)
-vs-) No. 20-cv-4427
)
United States of America,) (*Magistrate Judge Valdez*)
)
)
Defendants.)

**AGREED MOTION TO RESET THE
EXPERT DISCOVERY SCHEDULE**

Plaintiff, with the agreement of defendant United States, requests that the Court reset the expert discovery schedule as follows:

1. Plaintiff timely served expert disclosures, identifying Dr. Brian Grogg as a non-retained expert. Dr. Grogg treated plaintiff at the Mayo Clinic; plaintiff's recollection was that Dr. Grogg was the physician who provided him with an opinion about the care he had received at the VA Hospital.

2. Defendant deposed Dr. Grogg on October 7, 2024. This deposition left no doubt that plaintiff was mistaken about the identity of the treating physician who had provided the opinion. Based on a review of the Mayo Clinic records, counsel believes that the physician who provided the opinion is Dr. Robert A. Werners, who treated plaintiff in 2017 and diagnosed him

with steroid-induced osteoporosis. (The medical malpractice claim in this involves the improper use of steroids.)

3. Plaintiff's counsel sought to communicate with Dr. Werners by email sent on October 10, 2024. The Mayo Clinic informed plaintiff that it required a specific form of consent form before Dr. Werners may communicate with counsel; counsel promptly provided the form to plaintiff and expects to receive it in the mail on October 21, 2024. (Plaintiff has retired from his job at the Hines VA and does not have access to a fax machine or a scanner, uses a motorized scooter to ambulate, and is dependent on the United States Postal Service.)

4. Plaintiff's counsel has kept defense counsel, AUSA Nicole Flores, informed of these developments. Counsel has urged AUSA Flores to hold off on obtaining a report from her expert and has made plain that plaintiff will abandon the case if Dr. Werners does not provide the an opinion consistent with plaintiff's recollections

5. Plaintiff therefore requests that the Court reset the expert disclosure schedule, to allow plaintiff to serve disclosures of a non-retained expert by November 29, 2024.

6. If Dr. Werner's opinion is sufficient to allow the case to proceed, a further readjustment of the schedule might be necessary to allow defendant to depose Dr. Werner and obtain the opinion of its retained expert.

7. The extraordinary circumstances supporting this request are set out in the annexed affidavit of counsel, who is at home recovering from knee replacement surgery completed on October 18, 2024.

8. Defendant United States has reviewed and agrees to the relief sought in this motion.

Respectfully submitted,

/s/ Kenneth N. Flaxman
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DECLARATION OF KENNETH N. FLAXMAN

The undersigned, under penalties of perjury, certifies that the following statements are true:

1. I am the attorney with the primary responsibility for the prosecution of this case.

2. Mr. Bourke has retired from his employment at the Hines VA Hospital, does not own any valuable property, is not otherwise employed, and is financially unable to bear the expense of retaining an expert to provide opinion testimony in this case.

3. This case presents a difficult issue about the statute of repose that makes it unreasonable for an attorney to bear the expense of a retained expert.

4. Mr. Bourke has a vivid recollection of having been told by a physician at the Mayo Clinic that he would be willing to provide an opinion about the cause of Bourke's steroid induced osteoporosis and the resulting harm. I initially believed that the physician in question was Dr. Brian Groff and I identified him as a non-retained expert. I was mistaken.

5. Based on the deposition testimony of Dr. Groff and a further review of the Mayo Clinic records, I now believe that the physician who Mr. Bourke provided the opinion is Dr. Robert A. Werners, who treated

plaintiff in 2017 at the Mayo Clinic and diagnosed him with steroid-induced osteoporosis.

6. I have discussed the status of the case with plaintiff and plaintiff has authorized me to abandon the case if Dr. Werners does not provide the opinion that supports plaintiff's recollections.

7. I am facing extraordinary circumstances of personal health. I underwent knee replacement surgery on October 18, 2024. I had unrealistic expectations about the recovery period and I now believe that resume normal live activities for at least one month.

Further I state not.

Dated: October 21, 2024.

/s/ Kenneth N. Flaxman
Kenneth N. Flaxman