

Clerk's Notice of Decision  
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on 09/27/2024

## THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS

SUPERIOR COURT

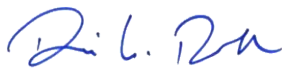
Upon review of the recently filed pleadings and attachments, the Motion is Denied. Neither side requested a hearing and Court finds the plaintiff's response more persuasive and practical. The State's claims of prejudice are overstated.

No. 215-2022-CV-00167

Steven Rand, et al.

v.

State of New Hampshire



Honorable David W. Ruoff

September 27, 2024

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**EXPEDITED MOTION TO CONTINUE TRIAL**


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The State of New Hampshire, by and through the Office of the Attorney General, files this expedited motion to continue trial to allow for appropriate discovery in relation to late-disclosed witnesses and documents. In support of this motion, the State states as follows:

1. A two-week bench trial in this matter is scheduled to begin on September 30, 2024.
2. The Court scheduled trial for this period in an April 25, 2024 order in which it lifted the stay that was then in place, denied in part the State's motion for summary judgment, and denied the plaintiffs' motion for partial judgment on the pleadings.
3. In that order, the Court lifted the stay because it found that "there are important differences between the school funding claims litigated in ConVal and those presented here." April 25, 2024 Order at 4. The Court also noted that it was "mindful that (as the plaintiffs confirmed during the March 22, 2024 hearing) discovery in this matter is already complete." *Id.* at 5.
4. Since the Court issued its order—and, in particular, in the period immediately preceding trial—the plaintiffs have identified numerous witnesses and documents they intend to

rely on at trial that were not identified or disclosed in automatic disclosures or during the discovery period.

5. On July 30—more than three months *after* the Court issued its order lifting the stay and scheduling trial for September 30—the plaintiffs propounded numerous subpoenas duces tecum on officials from the Department of Education and Department of Revenue Administration seeking to have those officials bring thousands of pages of documents to trial that were never identified in any automatic disclosure or during discovery. Many of these documents appear to be the same as, or updated versions of, documents that the parties submitted into evidence in the ConVal litigation. The plaintiffs have been inconsistent on whether they want the State to compile and produce these documents to them, at times suggesting that they do, but at the trial management conference stating that they were not expecting a production. Despite the late identification of these documents and the mixed messages the plaintiffs have sent with respect to production, the State has attempted to resolve any dispute with respect to these documents.

6. On September 3, the plaintiffs formally identified for the first time in their proposed witness list the identities of four witnesses who testified in the ConVal matter whom they intend to call as witnesses in this case. While the plaintiffs had signaled for over a year that they may attempt to call witnesses from the ConVal matter at trial, they did not disclose the identities of these witnesses to the State before including the names in their witness list despite the State asking for their identities numerous times. The State only learned of the identities of these witnesses on August 12, when they were identified in separate filings in this docket between the plaintiffs here and the plaintiffs in the ConVal case. The State moved to exclude these witnesses, and the Court denied that motion. While the State respects the Court's ruling, it

disagrees that there is no prejudice associated with failing to disclose four potential fact witnesses by name until the day before the trial management conference. This is particularly true given that the plaintiffs have indicated in their witness list that they intend to call these witnesses to testify about differentiated aid, an issue the Court did not consider during the ConVal case. Nor was the State able to depose the witnesses when it learned their identities because of the ongoing dispute between the plaintiffs here and the plaintiffs in the ConVal case about whether the four witnesses could be called at trial.

7. On September 17, after business hours and less than two weeks before trial, the plaintiffs for the first time produced to the State hundreds of pages of documents that they intend to rely on at trial. The plaintiffs indicated, when producing those documents, that some of them relate to one of their expert's opinions. That expert was disclosed 21 months ago and deposed over a year ago. The State specifically requested that the plaintiffs identify which of these documents were purportedly supplemental disclosures related to their expert. The State also asked the plaintiffs to clarify whether the plaintiff's expert would rely on these documents in support of his original opinion or if they were in service of a new or modified opinion. To date, the plaintiffs have not answered these questions. In a motion filed contemporaneously with this motion, the State is seeking to have these documents excluded, as they were disclosed on the eve of trial and the State has had no opportunity to conduct discovery in relation to these documents.

8. There can be no meaningful dispute that all of the above-referenced disclosures were untimely under the Supreme Court Rules. The plaintiffs represented at the summary judgment hearing in March 2024 that discovery had concluded, and the Court relied on that representation in lifting the stay and scheduling this matter for a two-week trial on September 30. The above disclosures all occurred months after that hearing and the Court's order.

9. The plaintiffs have at various points offered two justifications for these late disclosures. Neither is persuasive.

10. First, the plaintiffs have suggested that the State agreed to allow them to disclose witnesses and documents until the eve of trial. Notably, they have not pointed to any communication in which such an agreement is reflected. For its part, the State has reiterated several times that it did not enter into such an agreement, including in its motion to reconsider the Court's April 25 order, its reply to the plaintiffs' objection to that motion, and its motion to exclude the late-disclosed ConVal witnesses, as well as at the trial management conference. Moreover, the State attached an August 1, 2023 email to its motion to exclude the ConVal witnesses in which defense counsel specifically stated to plaintiffs' counsel: "In terms of further discovery, we can't agree to continue fact depositions through August [2023]. Trial is currently scheduled for September [2023]. Our understanding is that we were going to extend discovery out so that experts could be deposed. *We did not understand the agreement to be that we would continue to conduct fact discovery until the eve of trial.*" See State's Mot. Exclude ConVal Witnesses, Ex. A at 1 (emphasis added). The suggestion that the State agreed to allow for disclosures and discovery to occur in the way they have here is not correct.

11. Second, the plaintiffs have suggested that the State is not prejudiced by these late disclosures because many of the documents are available online or otherwise in the State's possession. This argument does not apply to the ConVal witnesses or, seemingly, to the documents disclosed on September 17. In any event, the plaintiffs were obligated under Rule 22(a)(2) to provide the State with "a copy of all documents, electronically stored information, and tangible things that the disclosing party has in his or her possession, custody or control and may use to support his or her claims or defenses, unless the use would be solely for

impeachment.” “Section (a) of Rule 22 is taken largely from Rule 26(a)(1) of the Federal Rules of Civil Procedure,” Super. Ct. Civ. R. 22, cmt., and “even if a document is publicly available or in the opposing party’s possession, a party must still disclose it under Rule 26(a)(1)(A) to provide notice of evidence central to its claims or defenses,” *Martino v. Kiewit N.M. Corp.*, 600 F. App’x 908, 911 (5th Cir. 2015).

12. Under these circumstances, there is neither “good cause” for the plaintiffs’ late disclosures nor does justice require the Court to waive the application of the discovery rules to allow the plaintiffs to introduce evidence that was disclosed on the eve of trial without any ability for the State to conduct discovery related to that evidence. Super. Ct. Civ. R. 1.

13. New Hampshire courts have also “long recognized that justice is best served by a system that reduces surprise at trial by giving both parties the maximum amount of information.” *Boissy v. Chevion*, 162 N.H. 388, 396 (2011) (citing *Figlioli v. R.J. Moreau Cos.*, 151 N.H. 618, 626 (2005)).

14. The Supreme Court has further that “[i]t is important that cases be decided on their merits, that a party have his day in court and that rules of practice and procedure shall be tools in aid of the promotion of justice rather than barriers and traps for its denial.” *Am. Express Travel v. Moskoff*, 144 N.H. 190, 193 (1999).

15. To promote these interests in this case, the Court should continue trial for a reasonable period to allow the State to conduct appropriate discovery in relation to the plaintiffs’ late-disclosed evidence.

16. Such a continuance is prudent under the circumstances and promotes the interest justice by allowing the plaintiffs to seek to rely on their late-disclosed evidence at trial while also allowing the State to conduct discovery into that evidence.

17. The State has not sought the plaintiffs' assent to this motion, as it can be reasonably assumed that the State will not be able to obtain concurrence. Super. Ct. Civ. R. 11(c).

WHEREFORE, the State respectfully requests that this Honorable Court:

- A. Continue this trial in light of the late-disclosed documents and witnesses to allow a reasonable period of time for the State to take appropriate discovery; and
- B. Grant such other and further relief as justice may require.

Respectfully submitted,

STATE OF NEW HAMPSHIRE

By its attorney,

JOHN M. FORMELLA  
ATTORNEY GENERAL

Date: September 23, 2024

By: /s/ Samuel Garland  
Anthony J. Galdieri, No. 18594  
Solicitor General  
Samuel Garland, No. 266273  
Senior Assistant Attorney General  
New Hampshire Department of Justice  
1 Granite Place South  
Concord, NH 03301  
Phone: (603) 271-3658  
E-mail: Anthony.j.galdieri@doj.nh.gov  
samuel.rv.garland@doj.nh.gov

John R. Munich, (pro hac vice)  
J. Nicci Warr (pro hac vice)  
STINSON LLP  
7700 Forsyth Blvd., Suite 1100  
Clayton, MO 63105  
Phone: (314) 863-0800  
Email: john.munich@stinson.com  
nicci.warr@stinson.com

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing motion was sent via the Court's electronic filing system to all parties of record.

Date: September 23, 2024

*/s/ Samuel RV Garland*

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Samuel RV Garland.