UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 31st day of May two thousand twenty-three,

Before: BARRINGTON D. PARKER,
DENNY CHIN,
RICHARD J. SULLIVAN,

Circuit Judges.

Tamara Sue Harbec,

Plaintiff - Appellant,

v.

North Country Hospital & Health Practices, United States of America,

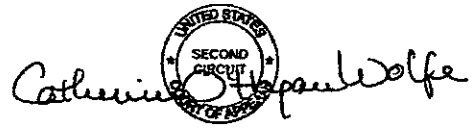
Defendants - Appellees.

ORDER
Docket No. 22-1228

Appellant, Tamara Sue Harbec having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is DENIED.

For The Court:
Catherine O'Hagan Wolfe,
Clerk of Court



22-1228
Harbec v. N. Country Hosp. & Health Pracs.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 26th day of April, two thousand twenty-three.

PRESENT:

BARRINGTON D. PARKER,
DENNY CHIN,
RICHARD J. SULLIVAN,
Circuit Judges.

TAMARA SUE HARBEC,

Plaintiff-Appellant,

v. No. 22-1228

NORTH COUNTRY HOSPITAL & HEALTH PRACTICES, UNITED STATES OF AMERICA,

*Defendants-Appellees.**

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* The Clerk of Court is respectfully directed to amend the official case caption as set forth above.

For Plaintiff-Appellant Tamara Sue Harbec:	TAMARA SUE HARBEC, pro se, Newport, VT.
For Defendant-Appellee North Country Hospital & Health Practices:	Nicole Andreson, Angela Clark, DINSE P.C., Burlington, VT.
For Defendant-Appellee United States of America:	Lauren Almquist Lively, Gregory L. Waples, Assistant United States Attorneys, *for* Nikolas P. Kerest, United States Attorney for the District of Vermont, Burlington, VT.

Appeal from a judgment of the United States District Court for the District of Vermont (Geoffrey W. Crawford, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Tamara Sue Harbec, proceeding pro se, appeals the district court's grant of summary judgment in favor of the North Country Hospital & Health Practices (the "Hospital") and the United States of America on her claims of medical malpractice and lack of informed consent under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346 and 2671 *et seq.*, and Vermont law. We assume the

parties' familiarity with the underlying facts, procedural history, and issues on appeal.

We review a district court's grant of summary judgment de novo, *Kee v. City of New York*, 12 F.4th 150, 157–58 (2d Cir. 2021), and will affirm when there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(a). When considering claims involving medical malpractice and lack of informed consent under the FTCA, we apply the substantive "law of the place" where the "alleged tort occurred" – here, Vermont. *Guttridge v. United States*, 927 F.2d 730, 731–32 (2d Cir. 1991) (citing 28 U.S.C. § 1346(b)). Under Vermont law, claims of medical malpractice and lack of informed consent must be supported by expert opinions and testimony, unless the medical issues are within the common knowledge of the jury. *See White v. Harris*, 190 Vt. 647, 652 (2011) (finding that, in a medical-malpractice suit, plaintiffs must introduce expert testimony to prove (1) "the proper standard of medical skill and care," (2) that the defendant-physician "departed from that standard," and (3) that the physician's conduct was "the proximate cause of the harm" (internal quotation marks omitted)); *Mello v. Cohen*, 168 Vt. 639, 640 (1998) (finding that, in an informed-consent suit, plaintiff must introduce expert testimony to prove that the

physician provided "insufficient information" regarding "alternatives" to treatment and the "reasonably foreseeable risks and benefits involved" (quoting Vt. Stat. Ann. tit. 12, § 1909(a)(1))). The district court concluded – and Harbec does not contest – that the expert-testimony requirement amounts to a substantive rule and therefore applies in this case. Harbec argues only that she satisfied this requirement. We disagree.

Most of the medical evidence relied on by Harbec merely summarizes her symptoms and recommends a course of treatment. None of the records discuss the standard of care, whether there was a departure from that standard, or whether the departure was the proximate cause of her injuries. *See White*, 190 Vt. at 652 (discussing the elements of a medical-malpractice claim). Nor do they discuss whether Harbec received the information necessary to provide informed consent. *See Mello*, 168 Vt. at 640 (discussing the elements of a lack-of-informed-consent claim). Indeed, the documents submitted by Harbec do not discuss the facts underlying Harbec's claims at all. Because the records relied on by Harbec do not include the requisite expert testimony, the district court did not err in granting summary judgment on her FTCA claim. *See Vale v. United States*, 673 F. App'x 114, 115–16 (2d Cir. 2016) (affirming grant of summary

judgment on FTCA claim where the plaintiff failed to produce the admissible expert testimony necessary to establish medical-malpractice claim).

Harbec contends that she could have survived Defendants' summary-judgment motion had the district court not excluded her proffered expert's testimony. But the district court did not abuse its discretion in concluding that Harbec failed to comply with the disclosure requirements under Rule 26 of the Federal Rules of Civil Procedure, which provides that parties must disclose their intended expert witnesses to the other side. Fed. R. Civ. P. 26(a)(2)(A); *see also Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 264–65 (2d Cir. 2002) (explaining that we review a district court's decision to exclude expert testimony for abuse of discretion). According to the rule, these disclosures must be accompanied by a written report that contains, among other things, "a complete statement of all opinions the witness will express and the basis and reasons for them," a list of other cases in which the expert has been retained, and a statement of the compensation to be paid to the expert. Fed. R. Civ. P. 26(a)(2)(B). Where, as here, a party fails to comply with these requirements, the expert testimony may not be used at trial, unless the failure was substantially justified or harmless. *See* Fed. R. Civ. P. 37(c)(1). Considering that Harbec failed

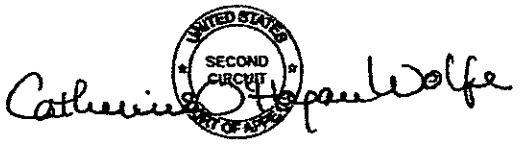
to provide any reason for not complying with this rule and that the district court repeatedly warned Harbec about the need for an expert, the district court's decision to exclude Harbec's expert evidence was not "manifestly erroneous." *Amorgianos*, 303 F.3d at 265.

We also affirm the district court's exercise of supplemental jurisdiction over, and dismissal of, Harbec's state-law medical-malpractice claim against the Hospital. We review the district court's decision to exercise such jurisdiction for abuse of discretion. *See Valencia ex rel. Franco v. Lee*, 316 F.3d 299, 305 (2d Cir. 2003). Considering that the district court judge had been presiding over the case for approximately two years, that the state-law claims presented no "novel or unsettled issues of state law," *Mauro v. S. New Eng. Telecomms., Inc.*, 208 F.3d 384, 388 (2d Cir. 2000), and that the lack of expert testimony was fatal to both the federal and state claims, *see Guttridge*, 927 F.2d at 731–32, we conclude that the district court's decision to adjudicate, and ultimately dismiss, the state-law claims on the merits was entirely appropriate. And since Harbec's failure to produce expert testimony is fatal to her state-law medical-malpractice claim, *see White*, 190 Vt. at 652, we affirm the district court's dismissal of that claim as well.

Lastly, Harbec argues that the district court erred by issuing a stay of discovery pending the outcome of the motions for summary judgment. While we generally review a district court's rulings concerning the scope of discovery for abuse of discretion, *see Goetz v. Crosson*, 41 F.3d 800, 805 (2d Cir. 1994), Harbec has waived her right to challenge the stay given that she expressly consented to it in the district court. *See* App'x at 155 ("Stay of discovery is not opposed by the plaintiffs."); *see also United States v. Olano*, 507 U.S. 725, 733 (1993); *United States v. Tartir*, 347 F. App'x 655, 657 (2d Cir. 2009) (finding waiver where appellant "consented to the admission of evidence challenged on appeal").

We have considered Harbec's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

TAMARA SUE HARBEC,

Plaintiff,

v.

UNITED STATES OF AMERICA and NORTH COUNTRY HOSPITAL & HEALTH PRACTICES,

Defendants.

Case No. 5:19-cv-61

ORDER ON MOTIONS FOR SUMMARY JUDGMENT
(Docs. 115, 118)

On September 7, 2021—in the wake of *Corley v. United States*, 11 F.4th 79 (2d Cir. 2021)—the court determined that it was necessary to consider the impact of that decision in addition to the pre-*Corley* motion for reconsideration that was pending in this case. (*See* Doc. 85.) In an order dated November 16, 2021, after a hearing earlier that month, the court denied the reconsideration motion but granted relief from judgment because the *Corley* decision made it "highly probable that the court erred in applying the Vermont certificate of merit statute, 12 V.S.A. § 1042, in a federal lawsuit." (Doc. 97 at 1.) The court withdrew its order dismissing the United States as a defendant (Doc. 61) and the August 11, 2021 final judgment (Doc. 82), both of which were premised on the absence of a certificate of merit. (*See* Doc. 97 at 20.)

Recognizing that Ms. Harbec represents herself, the court granted her until February 7, 2022 to "submit expert report letters from qualified physicians in support of her claims of medical negligence and lack of informed consent against the United States and on her claim of medical negligence against the Hospital." (*Id.*) A Stipulated Discovery Schedule/Order dated November 29, 2021 confirmed that "Plaintiff shall submit expert witness reports on or before

02/07/2022." (Doc. 100 at 2.) Ms. Harbec filed several documents on February 1, 2022, including documentation of a June 2002 neurology consultation by Dr. Rizwan Haq, two letters from Allyson Bazarsky, D.O., some of Dr. Bazarsky's treatment notes, plus what appears to be a copy of a webpage from the National Organization for Rare Disorders with background information about trigeminal neuralgia. (Doc. 112.) Also on February 1, 2022, Ms. Harbec filed a five-page typewritten document entitled "Computation of Damages." (Doc. 113.)

Both defendants filed motions for summary judgment under Fed. R. Civ. P. 56 in mid-February 2022. They contend that Ms. Harbec lacks the expert testimony necessary to prove her claims. (Docs. 115, 118.) Ms. Harbec filed a "Sworn Affidavit of Personal Knowledge Opposition of Defendants Motion for Summary Judgment" on March 15, 2022. (Doc. 125.) Defendants have filed their replies (Docs. 126, 127) and the summary judgment motions are now ripe for decision.

Background

The defendants have filed Rule 56 statements that include recitations of the procedural history in this case (Docs. 115-1, 118-1) and Ms. Harbec has filed responses (Doc. 125 at 6–8) and her own five-page single-spaced typewritten affidavit (*id.* at 1–5). In the court's view, the only material facts here concern the presence or absence of expert report letters from qualified physicians in support of Ms. Harbec's claims of medical negligence and lack of informed consent against the United States and on her claim of medical negligence against the Hospital.[1] The court reviews below the materials that Ms. Harbec has submitted.

[1] No other claims remain in this case. Ms. Harbec's husband was a plaintiff in this case for a period of time but the court has determined that it lacks jurisdiction over his loss-of-consortium claim. (Doc. 97 at 14 n.1.) The court did not intend for its November 16, 2021 order to withdraw its prior conclusions that it lacks jurisdiction over Ms. Harbec's claims related to an alleged sedative injection in July 2016 (Doc. 61 at 10) and over her claims related to Dr.

At the request of Dr. Robert Primeau—Ms. Harbec's primary care provider at the time—neurologist Dr. Rizwan Haq examined Ms. Harbec on June 19, 2002. (*See* Doc. 112 at 1.) This examination was more than a decade before the July 13, 2016 incident that, according to Ms. Harbec, the defendant Hospital misdiagnosed, resulting in trigeminal neuralgia.[2] It was also well before Ms. Harbec's July 2016 office visits with Dr. Robert Primeau.[3] The reason for the neurology consultation with Dr. Haq is listed as "[b]ilateral lower extremity pain and hyperesthesia." (Doc. 112 at 1.)

Dr. Haq stated that Ms. Harbec was "vague with her complaints and she keeps on changing her history." (*Id.*) His assessment was as follows:

> The most likely possibility in this patient is psychosomatic disorder leading to pain and numbness in the limbs. Normal ankle jerks and absence of sensory deficit in her feet on examination are not suggestive of polyneuropathy. She does not have radiating lower extremity pain and tingling to suggest the possibility of radiculopathy. Normal sed rate, ANA, and RA speak against active connective tissue disorder. MS is considered in the differential, but absence of limb spasticity, clonus and Babinski speaks against this possibility. She is concerned about Parkinson's Disease, but I do not believe that is a possibility in her.

Primeau's alleged "threatening look" and his alleged conduct at the emergency room in March 2020 (*id.* at 13–14). Those conclusions are unrelated to the lack of a certificate of merit. Similarly, the court previously dismissed Ms. Harbec's informed-consent claim against the Hospital on grounds other than the certificate-of-merit requirement. (*See* Doc. 81; *see also* Doc. 97 at 16–19 (denying motion for reconsideration).) The court reaffirms those conclusions here.

[2] Trigeminal neuralgia—also known as facial neuralgia and Fothergill disease—is "severe, paroxysmal bursts of pain in one or more branches of the trigeminal nerve; often induced by touching trigger points in or about the mouth." *Stedman's Medical Dictionary* 599480 (Westlaw updated Nov. 2014). The trigeminal nerve is "the chief sensory nerve of the face and the motor nerve of the muscles of mastication." *Stedman's Medical Dictionary* 596160 (Westlaw updated Nov. 2014).

[3] Dr. Primeau worked for a federally qualified health center at the relevant times, so under the Federal Tort Claims Act, Ms. Harbec's claims arising out of his conduct are claims against the United States.

(*Id.* at 3.) Dr. Haq recommended laboratory testing to rule out Lyme disease, a psychiatric evaluation, and an MRI brain scan to rule out multiple sclerosis "[i]f the numbness progresses in the limbs or she starts to have facial numbness." (*Id.*)

In a letter on University of Vermont Medical Center letterhead dated November 11, 2021 and directed "To Whom It May Concern," Allyson Bazarsky, D.O. stated:

> Tamara S Harbec is under my care for the diagnosis of chronic daily headache and trigeminal neuralgia. Tamara S Harbec is compliant with the prescribed treatments which include botox every 3 months, amitriptyline nightly, and magnesium nightly for prevention; and electrolyte fluid, tizanidine, and ubrogepant for treatment of acute pain and nausea. In spite of these interventions, she continues to experience approximately 30 headaches per month, which is strongly associated with severe levels of disability.
>
> As is the case with most people with chronic daily headache/trige[m]inal neuralgia, Tamara's principal sources of headache-related impairment in social and workplace environments are largely related to tolerating increased cognitive demands of maintaining sustained concentration when completing tasks. She is also variably impaired by severe pain and difficulty thinking.
>
> The nature of her migraine impairments is that they are inconstant, unpredictable, and largely associated with headache/face pain attacks. This means that random assessments during clinic appointments between attacks can misleadingly yield normal examinations and an absence of significant impairments. In any event, chronic daily headache and trigeminal neuralgia is a clinical disorder diagnosed on the basis of symptoms and history, not physical signs or laboratory findings, so a normal physical and neurological examination is the rule, not the exception, with this disease.
>
> I strongly believe it is appropriate and justified that Tamara S Harbec continue to receive her long-term disability benefits.

(*Id.* at 4.)

Dr. Bazarsky wrote a similar letter dated January 21, 2022 with the following additional details:

> [Ms. Harbec] has <u>idiopathic trigeminal neuralgia</u>, meaning there is no secondary etiology to her condition and no neurovascular contact as an etiology (classical trigeminal neuralgia). In almost all cases of chronic daily headache and trigeminal neuralgia, Tamara will very likely have <u>lifelong effects from these conditions</u>. She

> has had an extensive work up in the past and there is no further work up indicated at this time for her headache/facial pain condition.

(*Id.* at 5.)

Analysis

I. Summary Judgment Standard

"The summary judgment standards are well established." *Lewis v. Siwicki*, 944 F.3d 427, 431 (2d Cir. 2019). Summary judgment may be granted only "if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When reviewing a motion for summary judgment, a court must "construe the record evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor." *Torcivia v. Suffolk Cnty., N.Y.*, 17 F.4th 342, 354 (2d Cir. 2021). "Where the non-movant bears the burden of proof at trial, the movant's initial burden at summary judgment can be met by pointing to a lack of evidence supporting the non-movant's claim." *Tardif v. City of New York*, 991 F.3d 394, 403 (2d Cir. 2021) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)).

II. Applicable Substantive Law; Ms. Harbec's Burden

Vermont's certificate-of-merit requirement, 12 V.S.A. § 1042, does not apply in this federal case. (*See* Doc. 97 at 10.) But Vermont substantive law does apply to Ms. Harbec's medical negligence claim against the Hospital and to her medical negligence and informed-consent claims against the United States. For the medical negligence claims, Ms. Harbec has the burden of proving:

> (1) the degree of knowledge or skill possessed or the degree of care ordinarily exercised by a reasonably skillful, careful, and prudent health care professional engaged in a similar practice under the same or similar circumstances whether or not within the State of Vermont;

> (2) that the defendant either lacked this degree of knowledge or skill or failed to exercise this degree of care; and
> (3) that as a proximate result of this lack of knowledge or skill or the failure to exercise this degree of care the plaintiff suffered injuries that would not otherwise have been incurred.

12 V.S.A. § 1908. For the informed-consent claim, Ms. Harbec is required to "adduce expert medical testimony in support of the allegation that . . . she was not provided sufficient information as required by subdivision (a)(1) of this section." 12 V.S.A. § 1909(e).

III. Ms. Harbec's Submissions

Here, as noted above, the court ordered Plaintiff to submit expert witness reports on or before February 7, 2022. (Doc. 97 at 20; Doc. 100 at 2.) Defendants contend that the materials Ms. Harbec has submitted—including the letters from Dr. Bazarsky—are insufficient. Ms. Harbec maintains that Dr. Bazarsky's letters are the expert report letters that the court ordered her to submit; she requests that the court interpret those letters. (*See* Doc. 125 at 7–8.) For the reasons discussed below, the court concludes that expert testimony is required, that Ms. Harbec's submissions do not constitute expert disclosures, and that Dr. Bazarsky's letters do not qualify as expert testimony on the subjects specified in 12 V.S.A. §§ 1908 and 1909.

A. Expert Testimony Required

Medical malpractice claims under 12 V.S.A. §§ 1908 and 1909 generally require expert testimony. *See Breer v. Gold*, No. 2:03-CV-326, 2009 WL 249648, at *7 (D. Vt. Feb. 3, 2009) ("Except where the alleged violation of the standard of care is so apparent that it can be understood by a layperson without the aid of medical experts, the burden of proof imposed by § 1908 requires expert testimony." (quoting *Provost v. Fletcher Allen Health Care, Inc.*, 2005 VT 115, ¶ 12, 179 Vt. 545, 890 A.2d 97)); *Mello v. Cohen*, 168 Vt. 639, 640, 724 A.2d

471, 473–74 (1998) (mem.) (medical issues in informed-consent case were not within common knowledge of lay factfinders and required expert testimony). This case is no exception.

Ms. Harbec's medical negligence and informed-consent claims cannot proceed without expert testimony. The court previously reached this conclusion as to Ms. Harbec's informed-consent claim against the Hospital. (*See* Doc. 81 at 8–9.) The same conclusion holds for her informed-consent claim against the United States.[4]

Similarly, expert testimony is required for Ms. Harbec's medical negligence claims. Her claims against the United States are premised mainly on Dr. Primeau's alleged failure to treat her for peripheral neuropathy and his attribution of some of her symptoms to mental health issues. (*See* Doc. 53 ¶ 6.) The court concludes that specialized medical knowledge is required to evaluate the appropriateness of Dr. Primeau's conduct, especially in light of Ms. Harbec's multiple symptoms and numerous alleged medical issues.[5]

Ms. Harbec's medical negligence claims against the Hospital arise primarily from events in July 2016 when the Hospital allegedly misdiagnosed a stroke as a tension headache. (*See* Doc. 53 ¶ 1.) Specialized medical knowledge is required to adjudicate whether the alleged misdiagnosis resulted from a failure to exercise the appropriate standard of care. Hospital

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[4] The Government notes that the court's now-withdrawn August 6, 2020 Order includes analysis suggesting that Dr. Primeau's alleged conduct does not fit the definition of "lack of informed consent." (*See* Doc. 61 at 13.) Since that conclusion did not depend on the absence of a certificate of merit, the Government renews its argument that Ms. Harbec has not pleaded an informed-consent claim. (Doc. 118 at 9.) However, the court's November 16, 2021 Order allowed Ms. Harbec to submit expert reports letters to support her informed-consent claim against the United States. (Doc. 97 at 20.) As discussed below, she has failed to do so.

[5] Ms. Harbec also claims that Dr. Primeau pressed on a lesion on her scalp on February 16, 2017, causing pain. (Doc. 53 ¶ 6.) The court concludes that expert testimony is required on that issue as well, since the alleged conduct arguably could have been necessary for evaluation or diagnosis of the injury.

personnel needed to evaluate Ms. Harbec's physical condition, MRI imaging, medical records, medications, and laboratory studies. (*Id.*) Thus—as the court's November 16, 2021 Order suggests—Ms. Harbec's remaining claims in this case cannot proceed without expert testimony.

B. Expert Disclosure

Under the applicable federal rules, "a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702 [testimony by expert witnesses], 703 [bases of an expert's opinion testimony], or 705 [disclosing the facts or data underlying an expert's opinion]." Fed. R. Civ. P. 26(a)(2)(A). For retained expert witnesses, the disclosure must generally be accompanied by a written report that contains certain enumerated categories of information, including "a complete statement of all opinions the witness will express and the basis and reasons for them." Fed. R. Civ. P. 26(a)(2)(B)(i). For witnesses who are not required to provide a written report, the disclosure must state "the subject matter on which the witness is expected to present evidence" and "a summary of the facts and opinions to which the witness is expected to testify." Fed. R. Civ. P. 26(a)(2)(C). "A party must make these disclosures at the times and in the sequence that the court orders." Fed. R. Civ. P. 26(a)(2)(D).

None of the materials that Ms. Harbec has submitted contain a written report with the data required under Fed. R. Civ. P. 26(a)(2)(B). And even if Ms. Harbec seeks to disclose Dr. Bazarsky as a treating physician who might testify as a fact witness,[6] the materials submitted do

[6] Such a designation is unlikely to succeed in this case because any opinions Dr. Bazarsky might have regarding the standard of care or causation would be derived from her specialized expertise. *See Kaganovich v. McDonough*, 547 F. Supp. 3d 248, 276 (E.D.N.Y. 2021) ("In categorizing treating physicians' testimony as expert or lay, the key factor is not whether it is derived from the physician's treatment of the patient, but whether it is derived from the physician's specialized expertise.").

not meet the requirements of Fed. R. Civ. P. 26(a)(2)(C). Ms. Harbec's failure to disclose any expert as required by Rule 26(a) means that she cannot rely on any such putative expert witness to supply evidence in opposition to the summary judgment motions "unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1).

For the same reasons that the court articulated regarding "good cause" in its August 10, 2021 Opinion and Order (Doc. 81 at 10), the court concludes that Ms. Harbec's failure to disclose an expert is not substantially justified. Her "Sworn Affidavit of Personal Knowledge Opposition of Defendants Motion for Summary Judgment" (Doc. 125) does not articulate any justification for failing to comply with Rule 26(a)(2)'s disclosure requirements. The court notes that Ms. Harbec previously stated that she cannot afford an expert (Doc. 86 at 2), but that does not establish substantial justification. *See, e.g., Borg v. Chase Manhattan Bank USA, N.A.*, 247 F. App'x 627, 636–37 (6th Cir. 2007) (finding untimely disclosure was not substantially justified even though plaintiffs claimed inability to afford expert assistance).

In some cases, a pro se litigant's failure to disclose can be justified because the litigant lacks knowledge of the disclosure requirements. *See* Fed. R. Civ. P. 37(c) advisory committee's note to 1993 amendment. But exclusion can be proper "if the requirement for disclosure had been called to the litigant's attention by either the court or another party." *Id.* Here, the Hospital has previously cited Rule 26's requirements (Doc. 76 at 6), which the court also discussed in its August 10, 2021 Opinion and Order (Doc. 81 at 7). Ms. Harbec was on notice of the disclosure requirements. The court has granted her numerous opportunities to locate an expert during the course of this litigation but she has identified no one.

Ms. Harbec's failure to disclose is not harmless. The court considers a variety of factors on this issue. *See Design Strategy, Inc. v. Davis*, 469 F.3d 284, 298 (2d Cir. 2006) (these factors

include (1) the party's explanation for failing to disclose; (2) the importance of the precluded testimony; (3) prejudice suffered by the opposing party; and (4) the possibility of a continuance). Here, Ms. Harbec has offered no explanation for her failure to comply with the disclosure requirement. As noted above, expert testimony is vital to her claims. But Ms. Harbec has been on notice of that for many months. Defendants are not prejudiced by having to prepare to meet any new late-disclosed evidence, so that consideration is neutral. The court has considered the possibility of a continuance or other lesser sanction but finds no basis for those outcomes, especially in light of the age of this case, repeated warnings about the need for an expert, and the fact that—as discussed below—Ms. Harbec's filings are insufficient to meet her burden.

C. No Expert Evidence to Support Claims

Even if Ms. Harbec's February 1, 2022 filings could qualify as expert disclosures or if failure to disclose was justified or harmless, those filings do not constitute evidence sufficient to meet her burden under 12 V.S.A. §§ 1908 and 1909. Ms. Harbec asserts that Dr. Haq's June 2002 neurology report describes neuropathy and that it is a "confession." (Doc. 125 at 2.) Ms. Harbec appears to rely on Dr. Haq's report to support her claim (Doc. 4 ¶ 9; Doc. 53 ¶ 6) that Defendants had prior knowledge of her peripheral neuropathy and failed to treat her properly for that condition.

But Dr. Haq did not assess neuropathy; his findings on examination were "not suggestive of polyneuropathy." (Doc. 112 at 3.) He found that cranial nerves II–VIII and X–XII were "normal, other than light touch feels different in the left V1 distribution, but she is unable to explain the difference." (*Id.* at 2.) The absence of any notation regarding cranial nerves I and IX does not indicate a finding of injury to those nerves. In any case, Dr. Haq's June 2002 neurology report lacks any statements or opinions about the standard of care required by any of the

defendants or the cause of Ms. Harbec's alleged injuries. *See* 12 V.S.A. § 1908. It also lacks any statements or opinions that any defendant failed to supply Ms. Harbec with sufficient information to give informed consent. *See id.* § 1909(e). Notably, Dr. Haq has previously declared that he would decline to serve as an expert for Ms. Harbec. (Doc. 76-6.)

Dr. Bazarsky's November 2021 and January 2022 letters are also insufficient to meet Ms. Harbec's burden. They include opinions relevant to Ms. Harbec's disability status. But Dr. Bazarsky's letters lack any mention of causation or the standard of care that applied to Defendants. Ms. Harbec apparently concedes this point, stating that Dr. Bazarsky "cannot comment on other treatments done by other physicians." (Doc. 125 at 6.) Dr. Bazarsky's own description of Ms. Harbec's trigeminal neuralgia as "idiopathic" (Doc. 112 at 5) suggests that she cannot identify a cause—biological or otherwise.

Since Ms. Harbec bears the burden of proving the elements stated in 12 V.S.A. §§ 1908 and 1909(e), and since she has not disclosed or produced any expert witness to supply the evidence necessary to establish those elements, the court concludes that Defendants are entitled to summary judgment on all remaining claims in this case.

Conclusion

North Country Hospital's Motion for Summary Judgment (Doc. 115) and the United States of America's Motion for Summary Judgment (Doc. 118) are both GRANTED.

Dated at Burlington, in the District of Vermont, this 17th day of May, 2022.

Geoffrey W. Crawford, Chief Judge
United States District Court