

2024 WL 5424151

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United States District Court, N.D. Texas, Dallas Division.

CLEBURNE TRAINING & FITNESS,
INC. and North Nolan Road Holdings,
Inc. d/b/a Real Performance, Plaintiffs,
v.

CHURCH MUTUAL INSURANCE
COMPANY, Defendant.

CIVIL ACTION NO. 3:24-CV-0410-B

Signed October 25, 2024

Attorneys and Law Firms

Benjamin David Doyle, Stockard Johnston Brown & Netardus PC, Amarillo, TX, Vincent Paul Circelli, Dugas & Circelli PLLC, Fort Worth, TX, for Plaintiffs.

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ORDER

JANE J. BOYLE, UNITED STATES DISTRICT JUDGE

*1 Before the Court is Defendant, Church Mutual Insurance Company ("Church Mutual")'s Motion for Leave to Designate **Expert Witness** (Doc. 26). For the following reasons, the Court **GRANTS** Church Mutual's Motion.

This is a dispute over a property insurance claim by Plaintiffs, Cleburne Training & Fitness, Inc. and North Nolan Road Holdings, Inc. ("Cleburne") for alleged hail damages to a roof. Doc. 1-4, Pet., ¶ 11. On March 18, 2024, the Court issued a scheduling order setting the deadline for Defendant's Expert Designation to August 12, 2024. Doc. 10, Scheduling Order, 1. On July 30, 2024, the parties submitted a Joint Motion for Continuance. Doc. 24, Mot. Continuance. The Court granted the Motion and extended Church Mutual's Expert Designation to September 12, 2024. Doc. 10, Scheduling Order; Doc. 25,

Elec. Order. The trial is set for April 14, 2025; the deadline for mediation is November 11, 2024; the deadline for discovery is December 11, 2024; and the deadline for expert objections is February 9, 2025. Doc. 10, Scheduling Order, 1; Doc. 25, Elec. Order.

On September 26, 2024, Church Mutual served its Rebuttal Expert Designation. Doc. 26, Mot. Leave, 5. The designation included an expert that was designated two weeks after the deadline. *Id.* Cleburne objected to the late designation. *Id.* On October 4, 2024, Church Mutual filed a Motion for Leave to Late Designate an Expert. *Id.* Church Mutual "seeks leave to late designate **expert witness** Ronald Dutton, a metal roof design, fabrication, and installation **expert**, who will testify regarding the functionality of the roof in rebuttal to Plaintiff's expert, Jeffrey Molnar, a Failure Analyst with Element Materials Technology." *Id.*, 1. Church Mutual argues that Dutton's testimony is necessary to establish its defense that an exclusion provision applies, precluding Cleburne's claim for a complete roof replacement. *Id.*, 2. The Court considers Church Mutual's Motion below.

When deciding whether to allow late designation of an **expert witness**, four factors guide the court's analysis: "(1) the explanation for the failure to identify the witness, (2) the importance of the testimony, (3) the potential prejudice in allowing the testimony, and (4) the availability of a continuance to cure such prejudice." *Wright v. Blythe Nelson*, 2001 WL 804529, at *2 (N.D. Tex. July 10, 2001) (Fitzwater, J.) (citing *Geiserman v. MacDonald*, 893 F.2d 787, 791 (5th Cir. 1990)). The court considers the four factors holistically and "does not mechanically count the number of factors that favor each side." *EEOC v. Serv. Temps, Inc.*, 2009 WL 3294863, at *3 (N.D. Tex. Oct. 13, 2009) (Fitzwater, C.J.), *aff'd*, 679 F.3d 323 (5th Cir. 2012). The Court finds all four factors support granting Church Mutual leave to designate Dutton as an expert.

The Court finds Church Mutual has good cause for its delay. Upon receipt of Cleburne's **expert disclosures**, Church Mutual retained an engineer and construction specialist as **experts**, designating them as such on August 12. Doc. 26, Mot. Leave, 4. On August 20, the engineer determined he could not complete his investigation without the opinion of a metallurgist. *Id.* On August 30, Church Mutual granted permission for counsel to retain Dutton, a metallurgist. *Id.* On September 17, Cleburne agreed to provide the roof samples, and on September 24, Dutton received the samples. *Id.* Two days later, Church Mutual served its rebuttal expert

designation on Cleburne. *Id.* The Court finds that Church Mutual acted as promptly as it could have under the circumstances.

*2 Cleburne argues that Church Mutual should have known that it needed to designate a metallurgist much earlier on. Doc. 27, Pl.'s Reply, 8. However, Church Mutual argues that typical claim disputes require the opinion of an engineer and "usually policyholders object to metallurgical testing during the claim handling process." Doc. 30, Def.'s Reply, 1–2. The Court finds Church Mutual's justification persuasive. Moreover, the Court finds that the other three factors support granting Church Mutual leave to designate Dutton as an **expert**.

Dutton's **testimony** is critical to Church Mutual's defense that a policy exclusion applies. As Church Mutual notes, Cleburne designated a metallurgist who provided an opinion based on his "microscopic analysis of the roof samples." Doc. 30, Def.'s Reply, 3. Church Mutual cannot address this opinion without designating a metallurgist as an **expert**. *Id.* This **testimony** is needed to establish whether the hail that hit the roof caused structural or only cosmetic damages, which would directly answer whether a policy exclusion applies. Doc. 26, Mot. Leave, 3.

Cleburne argues that Dutton's testimony cannot be important because it is "wholly inadmissible." Doc. 27, Pl.'s Reply, 7. However, the Court will not consider *Daubert* factors at this stage of proceedings. Should Cleburne wish to file expert

objections, it may do so after January 10, 2025, or seek leave to do so earlier. Doc. 10, Scheduling Order, 3; Doc. 25, Elec. Order.

The potential prejudice is low, and a continuance can cure whatever prejudice exists. The deadline for discovery is December 11, 2024; the deadline to file expert objections is February 9, 2025, and the trial is not scheduled until April 14, 2025. Doc. 10, Scheduling Order, 1; Doc. 25, Elec. Order. Allowing Church Mutual leave to designate Dutton as an expert two weeks past the designation deadline will not cause prejudice to Cleburne. Cleburne still has plenty of time to conduct discovery and file *Daubert* challenges.

Cleburne argues that it will suffer prejudice because it will not have time to provide a rebuttal report or depose Dutton before the mediation scheduled for November 8, 2024. Doc. 27, Pl.'s Reply, 13. It also argues that it would have sought leave to file early *Daubert* motions prior to mediation. *Id.* However, the Court finds that a continuance for mediation, for which the parties can move, would cure any potential prejudice and would not disrupt the other dates set out in the Scheduling Order. For the foregoing reasons, the Court **GRANTS** Church Mutual's Motion for Leave (Doc. 26).

SO ORDERED.

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Not Reported in Fed. Supp., 2024 WL 5424151

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