

September 7, 2023

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Attn: Hon. Christine M. Vanek, J.S.C.



Gerald H. Clark*
*Certified By the Supreme Court
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Civil Trial Attorney*

Re: Donald Hoiland v. AJD Construction Co., Inc; et al.
Docket No: HUD-L-2754-19
Our File No: 18-20

**Plaintiff's Opposition to Defendants' Motion to Prevent
Plaintiffs' Counsel From Conversing With Plaintiff's Expert
Over a Three Day Break in Trial**

Stephanie Tolnai
Mark W. Morris
Lazaro Berenguer
Janet S. Bayer
Jake W. Antonaccio

Dear Judge Vanek:

We represent Plaintiffs Don and Mandy Hoiland in the above matter. Please accept this letter in opposition to Defendants' motion to prevent counsel from conversing with Plaintiff's expert, Vincent Gallagher, over a three day break in trial.

On September 7, 2023, the direct examination of Plaintiff's expert witness, Vincent A. Gallagher, Jr., began and concluded. Mr. Gallagher's cross examination is expected to begin on Monday when the trial resumes. Defendants' have made a motion to the Court seeking to prevent Plaintiffs' counsel from conversing with their expert in preparation for cross-examination. There is no rule or case law which supports such a position, especially when it applies to a trial.

Although defendants may cite to R. 4:14-3(f), said Rule does not apply to trials and only applies to short deposition breaks. Said Rule specifically states:

R. 4:14-3(f) Consultation With the Deponent. Once the deponent has been sworn, there shall be no communication between the deponent and counsel during the course of the deposition while testimony is being taken except with regard to the assertion of a claim of privilege, a right to confidentiality or a limitation pursuant to a previously entered court order.

Id.

**New Jersey and
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Judges Pressler and Verniero, in the comments to R. 4:14-3, note that “since the rule speaks only to ‘while the deposition is being taken,’ it clearly does not address consultation during overnight, lunch, and other breaks” **nor during trial**. Pressler & Verniero, *Current N.J. Court Rules*, comment R. 4:14-3, paragraph (f) (Gann)[emphasis added].

The NJ Courts have unequivocally held when longer breaks exist, counsel has the ability to confer and discuss with their witnesses. See e.g. *In Re PSE&G Shareholder Litigation*, 320 N.J. Super. 112 (Ch. Div. 1998)(holding “at the conclusion of the daily deposition, counsel and the witness should be permitted to confer and to prepare for the next day’s deposition”); see also *In re Stratosphere Corp. Sec. Litg.*, 182 F.R.D. 614, 621 (D. Nev. 1998)(cited by *In re PSE&G*)(“The right to prepare a witness is not different before the questions begin than it is during (or after, since a witness may be recalled for rebuttal, etc., during trial). What this Court, and the Federal Rules of Procedure seek to prevent is coaching the witness by telling the witness what to say or how to answer a specific question. We all want the witness’s answers, but not at the sacrifice of his or her right to the assistance of counsel”). The *PSE&G* court noted the key difference was the time, as this is not a 15-minute break in the middle of a deposition but a multi-day recess—a key distinction.

Many courts have followed NJ’s lead and concluded that consultation with a witness during an overnight break should not be prohibited. See *Geders v. United States*, 425 U.S. 80 (1976). Numerous appellate courts have flatly rejected any limitations on counsel during weekend recesses. For example, in *United States v. Cobb*, 905 F.2d 784, 792 (4th Cir. 1990), the trial court’s order prohibited the defendant from discussing his cross-examination testimony with his attorney during the weekend recess. On appeal, the Fourth Circuit had “no difficulty in concluding that the trial court’s order, although limited to discussions of Cobb’s ongoing testimony, effectively denied him access to counsel.” *Id.* Other courts have reached similar conclusions. See *Mudd v. United States*, 798 F.2d 1509 (D.C. Cir. 1986) (prohibition of discussing testimony over weekend “can have a chilling effect on cautious attorneys, who might avoid giving advice on non-testimonial matters for fear of violating the court’s directive”); see also *United States v. Johnson*, 267 F.3d 376 (5th Cir. 2001) (weekend prohibition); *People v. Johnson*, 84 N.Y.2d 995 (1994) (same).

In the case *sub judice*, defendants have no right in law nor logic to support their attempt to ban plaintiffs’ counsel from speaking to their expert during a three day break when direct has concluded and cross has not yet begun. It would be one thing if there was a one hour lunch break and plaintiffs’ counsel was seeking to speak to their expert witness. That is not the case and the Court’s have acknowledged and stressed that distinction in time. Given such a length of a time, our Courts have held that the ability to converse with a witness is permitted to prepare the witness. Our NJ Courts, as well as our sister states, have highlighted numerous issues and the chilling effect if such a prohibition in properly preparing a witness over a multi day break would be allowed to be imposed.

For these reasons, it is respectfully submitted Defendants' motion should be denied in its entirety.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Steph Tolnai', with a long horizontal flourish extending to the right.

STEPHANIE TOLNAI

For the Firm

ST:jwa

cc: ALL COUNSEL (Via E-Filing)