

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

In re: GUIDANT CORP. IMPLANTABLE
DEFIBRILLATORS PRODUCTS
LIABILITY LITIGATION

MDL No. 05-1708 (DWF/AJB)

This Document Relates to:

Civil No. 06-28 (DWF/AJB)

Gary DeRose,

Plaintiff,

v.

ORDER

Guidant Corporation, and
Guidant Sales Corporation,

Defendants.

Michael A. Stratton, Esq., Stratton Faxon, counsel for Plaintiff.

Timothy A. Pratt, Esq., Shook Hardy & Bacon LLP; and Joseph M. Price, Esq., Faegre & Benson LLP, counsel for Defendants.

Plaintiff Gary DeRose has filed a motion entitled “Motion for Relief from Judgment/Order” pursuant to Rule 60 of the Federal Rules of Civil Procedure, seeking relief from this Court’s July 3, 2006 Order. In that Order, the Court granted Guidant Corporation and Guidant Sales Corporation’s (collectively “Guidant”) Motion to Dismiss for Failure to Comply with the Court’s January 31, 2006 Order and dismissed DeRose’s Complaint with prejudice. For the reasons set forth below, the Court grants DeRose’s Motion.

BACKGROUND

On January 31, 2006, the Court entered Pretrial Order No. 5, requiring all plaintiffs whose cases were initiated or transferred subsequent to the January 31 Order to submit a completed plaintiff's fact sheet ("PFS") no later than 30 days after their cases are filed or docketed with the Court. DeRose's case was transferred to this Court on February 2, 2006; therefore, his deadline for submitting his PFS was March 6, 2006. He failed to do so. At the April 19, 2006 Status Conference, Guidant informed Plaintiffs' Liaison Counsel ("PLC") about the failure by certain plaintiffs to complete their PFSs. On April 21, 2006, Guidant sent a follow-up letter to the PLC listing all the plaintiffs, including DeRose, who had failed to submit sufficient PFSs. On May 4, 2006, Guidant filed a Motion to Dismiss for Failure to Comply with the Court's January 31, 2006 Order. On June 21, 2006, DeRose submitted his PFS to Guidant, which he asserts was "completed" and "included signed authorizations pursuant to pretrial orders." On July 3, 2006, the Court granted Guidant's Motion to Dismiss and dismissed DeRose's Complaint with prejudice.

Three weeks later, DeRose filed a motion for relief from the July 3 Order. In that motion, he contends that he never received notice of the January 31 Order until May 2006, when a representative from the PLC contacted him. Further, he explains that he has suffered "many medical complications relating to his heart condition" that would have prevented him from completing the PFS within the 30-day period prescribed in the

January 31 Order. He did not submit his completed PFS as an attachment to his motion.¹ In response, Guidant asserts that the motion should be denied because DeRose's excuses do not justify the relief he seeks and because Guidant would be unduly prejudiced if the Court grants the motion.

DISCUSSION

DeRose makes his request pursuant to Rule 60(b). Although DeRose fails to cite the subsection of the rule he is moving under, the only subsections that may apply are (1) and (6), under which a district court may grant relief from a judgment on the grounds of "mistake, inadvertence, surprise, or excusable neglect" or for "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(1) and (6).

DeRose has not alleged any claims of mistake, inadvertence, or surprise. Therefore, the Court first focuses on whether there was excusable neglect by DeRose. The term "excusable neglect" in this context is generally "understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence." *Union Pac. R.R. v. Progress Rail Servs. Corp.*, 256 F.3d 781, 782 (8th Cir. 2001) (quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs.*, 507 U.S. 380, 394 (1993)). To be excusable, however, the neglect must be accompanied by a showing of good faith and some reasonable basis for not complying with the rules. *Ivy v. Kimbrough*, 115 F.3d 550, 552 (8th Cir. 1997). It is generally held that "excusable neglect" under Rule 60(b)

¹ The Court contacted Guidant and asked it to provide the Court with a copy of DeRose's PFS. Guidant did so by e-mail on August 15, 2006. Guidant correctly did not file DeRose's PFS on CM/ECF because it contained indentifying personal information.

does not include ignorance or carelessness on the part of an attorney. *Hunt v. City of Minneapolis*, 203 F.3d 524, 528 n.3 (8th Cir. 2000). Neither a mistake of law nor the failure to follow the clear dictates of a court rule constitutes excusable neglect. *See Ceridian Corp. v. SCSC Corp.*, 212 F.3d 398, 404 (8th Cir. 2000). In deciding whether to set aside a judgment for “excusable neglect,” a district court makes an equitable decision taking into account all the relevant circumstances surrounding the party’s omission. *Id.*

Here, the Court’s January 31 Order clearly required DeRose to file a PFS within 30 days of his being transferred to the District of Minnesota. He failed to do so. Although DeRose claims that he had no notice of this requirement until May 2006, he did have access to the Court’s website (www.mnd.uscourts.gov), which has a page dedicated to the Guidant MDL and on which all of the Court’s Guidant MDL Orders have been posted. Moreover, the Court’s records indicate that a copy of the Court’s Pretrial Order No. 2 was emailed to DeRose’s counsel on February 14, 2006. That Order describes procedures in place for ensuring that all plaintiffs in the MDL are apprised of the Court’s Orders and other actions occurring in the MDL. Nevertheless, at the very least, DeRose acknowledges receiving notice of the need to complete the PFS sometime in May 2006. At least a month after that, he submitted a PFS to Guidant on June 21, 2006. However, he never filed an opposition to Guidant’s Motion to Dismiss, even though there was ample time to do so before the Court entered its Order dismissing DeRose’s Complaint on July 3, 2006, and he waited nearly three weeks after that Order to file his present motion.

Having considered these facts, the parties' arguments, and all of the circumstances, including DeRose's health issues, surrounding this matter, the Court finds no grounds for excusable neglect that justify DeRose's request for relief under Rule 60(b)(1).

Second, the Court considers whether there is "any other reason justifying relief from operation of the judgment." Here, the Court's review of DeRose's June 21 PFS shows that it is substantially complete, although DeRose did fail to complete Section VII (Alleged Injuries, Illnesses, and Damages) and Section VIII (Loss of Income). The Court is sensitive to viewing each plaintiff's arguments separately while also ensuring that this MDL operates efficiently. Certain measures were enacted, including posting the Court's Orders on its website, emailing DeRose's counsel with the Court's Pretrial Order No. 2, and requiring the PLC to contact DeRose's counsel about the PFS, in an attempt to avoid the drastic measure of dismissing DeRose's Complaint with prejudice. Eventually, DeRose responded to those measures by submitting a substantially complete PFS. The Court concludes that this substantial compliance justifies relief from the July 3 Order. Accordingly, the Court grants DeRose's motion.

CONCLUSION

The Court will not tolerate any further disregard of its Orders by DeRose. DeRose will be required to submit a completed PFS to Guidant no later than August 25, 2006. In the future, DeRose and his counsel are expected to actively keep apprised of the status of the MDL and in contact with the PLC. If DeRose misses another deadline, the Court will not hesitate to dismiss his Complaint.

Federal courts possess the inherent power to sanction misconduct. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991). Although the Court has concluded that DeRose is entitled to relief under Rule 60(b)(6), that decision does not change the fact that Guidant incurred unnecessary attorney fees as a direct result of DeRose's disregard of the Court's Order and his delay in completing his PFS. For that reason and under the Court's inherent powers, the Court orders DeRose to reimburse Guidant \$1,000 for reasonable attorney fees it incurred as a result of DeRose's actions.

Therefore, for the reasons state above, **IT IS HEREBY ORDERED:**

1. Plaintiff Gary DeRose's Motion for Relief from Judgment/Order (Doc. No. 9) is **GRANTED**.
2. Civil No. 06-28 (DWF/AJB) is now **REOPENED**.
3. Plaintiff Gary DeRose is directed to contact Guidant no later than Friday, August 18, 2006, to discuss deficiencies in his PFS.
4. Plaintiff Gary DeRose shall provide Guidant with a completed PFS no later than Friday, August 25, 2006.
5. Plaintiff Gary DeRose shall pay Guidant \$1,000 no later than Friday, August 25, 2006.

Dated: August 16, 2006

s/Donovan W. Frank
DONOVAN W. FRANK
Judge of United States District Court