IN THE SUPERIOR COURT OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

BENJAMIN WING,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. N12C-01-135 WCC
	)	
JOSE BICHACO and SPALLCO ENTERPRISES, INC.,	)	TRIAL BY JURY OF TWELVE DEMANDED
	)	
Defendants.	)	

Submitted: July 23, 2014
Decided: October 30, 2014

Defendants' Motion for Summary Judgment - GRANTED

ORDER

Benjamin Wing, Howard Young Correctional, Wilmington, DE 19809. *Pro se* Plaintiff

George T. Lees, Esquire, Kaan Ekiner, Esquire, Rawle & Henderson, LLP, 300 Delaware Avenue, Suite 1105, Wilmington, DE 19899. Attorneys for Defendants.

CARPENTER, J.

Upon consideration of Defendants' Motion for Summary Judgment, it appears to the Court that:

1. Plaintiff brought this personal injury action in January 2012, alleging injuries arising out of an automobile accident that occurred on June 18, 2010. On May 30, 2012, this Court issued a trial scheduling order giving Plaintiff until October 26, 2012 to produce Plaintiff's expert reports. Plaintiff failed to meet this deadline.

2. In January 2013, Plaintiff's counsel withdrew from the case. In allowing Plaintiff to proceed *pro se*, the Court cautioned that Plaintiff would be held to the same standard as counsel and that failure to meet deadlines would be inexcusable.

3. On June 19, 2013, the Court issued a new trial scheduling order setting a new trial date of September 8, 2014. This order gave Plaintiff until December 20, 2013 to produce an expert. On December 2, 2013 Defendants' counsel sent a letter to Plaintiff requesting a response to their discovery requests filed in January 2013. Defense counsel's letter further reminded Plaintiff of the impending expert report deadline of December 20, 2013. Again, Plaintiff failed to meet this deadline.

4. On December 26, 2013 Defendants filed a Motion to Compel Plaintiff to respond to their discovery requests and to identify any expert to be used by

Plaintiff in this litigation. The Court granted the Motion to Compel on January 29, 2014, giving Plaintiff until February 10, 2014 to produce the reports of any experts and provide a date for the discovery deposition of such experts. Plaintiff failed to meet this deadline as well.

5. Defendant moved to dismiss on March 25, 2014, arguing that Plaintiff failed to produce discovery responses, expert reports, or schedule discovery depositions pursuant to the Court's December 26, 2013 order and his failure to obey the order should be sanctioned by dismissal under Superior Court Civil Rules 37(b)(2)(C) and Rule 41(b). On May 12, 2014, at oral argument on Defendants' Motion, the Court held that Plaintiff would be limited to the treating physicians he identified during the hearing in establishing his case because he did not comply with the time frame previously ordered by the Court. Also, the Court directed Defendants to subpoena and review all of Plaintiffs' medical records and submit a status report to the Court.

6. On May 23, 2014, Defendants filed a status update informing the Court that they were content with the medical records provided by Plaintiff's former counsel. Defendants also informed the Court that they had not received any updated records since Plaintiff became *pro se*, placing Plaintiff in contempt of the Court's January 29, 2014 order compelling him to respond to Defendants' Supplemental Request for Production of Documents No. 2, served on January 11,

2013. In their status update, Defendants offered to obtain the records sought in response to their Request for Production of Documents No. 2, if Plaintiff identified the facilities where repair estimates were obtained after the July 3, 2010 accident.

7. On May 28, 2014, the Court wrote to Plaintiff again ordering him to produce updated medical records from the date he proceeded *pro se*, and estimates of the repairs made to his vehicle as a result of the accident by June 30, 2014. The Court informed Plaintiff that if he did not provide updated medical records by June 30, 2014, he would be limited to the medical records previously provided to the Defendants.

8. On June 8, 2014, Plaintiff responded to the Court advising the Court that the Defendants had all of his medical records. Plaintiff further stated in his letter that Defendants should contact his State Farm agent regarding estimates and repairs following the July 3, 2010 accident. As a result of this information Defendants noticed a Records Only Deposition of State Farm for June 27, 2014 on June 12, 2014.

9. Defendants moved for summary judgment on June 19, 2014, arguing that pursuant to this Court's order Plaintiff is precluded from presenting expert medical testimony at trial beyond his treating physicians and without such expert testimony, Plaintiff's claim fails as a matter of law. On July 23, 2014, at oral argument on Defendants' Motion, the Court reserved decision.

10. In reviewing a motion for summary judgment pursuant to Rule 56, the Court must determine whether any genuine issues of material fact exist.[1] Specifically, the moving party bears the burden of showing that there are no genuine issues of material fact so that he is entitled to judgment as a matter of law.[2] Further, the Court must view all factual inferences in a light most favorable to the non-moving party.[3] Therefore, summary judgment will not be granted if it appears that there is a material fact in dispute or that further inquiry into the facts would be appropriate.[4]

11. The Delaware Supreme Court has held that:

> [t]he issue of proximate cause is ordinarily a question of fact to be submitted to the jury. However, before the question of proximate cause may be submitted to the jury, the plaintiff is required to establish a *prima facie* case on that issue. It is permissible for a plaintiff to make a *prima facie* case that a defendant's conduct was a proximate cause of the plaintiff's injuries, based upon an inference from the plaintiff's competent evidence, if such a finding relates to a matter which is within a lay person's scope of knowledge. However, "[i]f the matter in issue is one within the knowledge of experts only and not within the common knowledge of laymen, it is necessary for the plaintiff to introduce expert testimony in order to establish a *prima facie* case."[5]

12. In the context of personal injury automobile accidents, it is well settled in Delaware that the issue of proximate cause "is *not* a matter of common

[1] Super. Ct. Civ. R. 56(c); *Wilm. Trust Co. v. Aetna*, 690 A.2d 914, 916 (Del. 1996).
[2] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).
[3] *Alabi v. DHL Airways, Inc.*, 583 A.2d 1358, 1361 (Del. 1990).
[4] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. Super. 1962), *rev'd in part* on procedural grounds and *aff'd in part*, 208 A.2d 495 (Del. 1965).
[5] *Money v. Manville Corp.*, 596 A.2d 1372, 1375 (Del. 1991) (internal citations omitted).

knowledge and, therefore, expert medical testimony is required."[6] In order to survive a motion for summary judgment a Plaintiff is "required to adequately establish all the essential elements to [his] case that [he] would have the burden of proving at trial…. With a claim for bodily injuries, the causal connection between the defendant's alleged negligent conduct and the plaintiff's alleged injury must be proven by the direct testimony of a competent medical expert."[7] Therefore, Plaintiff's "claim for bodily injury must be proven by expert medical opinion that causally relates [his] injuries to the alleged [first accident]."[8]

13. Although Plaintiff has identified several treating physicians and produced the medical records of such, he has failed to produce or identify a medical expert that would establish the required causal connection between his injuries and Defendants' alleged negligence. This Court has held that "[e]xpert reports are fundamentally different from medical records….[Medical reports] deal with contemporaneous treatment and do not address logical questions involving proximate cause which is not a medical concept"[9] Therefore, without expert testimony, the medical reports that Plaintiff has produced will not be sufficient to prove proximate cause.

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[6] *See Sluss v. Davis*, 2006 WL 2846387 (Del. Super. Oct. 4, 2006) (*citing Rayfield v. Power*, 2003 WL 22873037, at *1 (Del. Dec. 2, 2003)).
[7] *Rayfield v. Power*, 2003 WL 22873037, at *1 (Del. 2003).
[8] *See Harrison v. Del. Supermarkets Inc.,* 2014 WL 2718830 (Del. June 12, 2014)*, (citing Rayfield*, 2003 WL 22873037, at *1)).
[9] *Dailey v. Purse*, 06C-04-015 RFS, Dec. 30, 2008, Letter Op.

14. The Court has granted numerous opportunities for the Plaintiff to identify an expert throughout this litigation. This Court has given Plaintiff two years and several opportunities to identify experts and produce them for deposition. The Court has explained the discovery process and the need for expert testimony to Plaintiff on numerous occasions. Yet each time, Plaintiff has failed to meet the deadline provided by the Court or to take any action to correct this deficiency. Despite the Court's attempts to accommodate the *pro se* Plaintiff he has failed to comply with the Court's orders and thus does not have an expert or even a treating physician to opine as to proximate causation of his injuries. The Court and defense counsel have been more than accommodating to Plaintiff and exhibited extreme patience due to Plaintiff's self representation. However, without an expert Plaintiff is unable to establish proximate cause, one of the essential elements he has the burden of proving at trial. Accordingly, for the aforementioned reasons, Defendant's Motion for Summary Judgment is **GRANTED**.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.