#### IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

# IN AND FOR KENT COUNTY

WILLIAM DICKENSON, :

: C.A. No. K10C-10-035 WLW

Plaintiff, :

:

V.

DAVID SOPA, D.O.,

.

Defendant. :

Submitted: March 7, 2013 Decided: June 20, 2013

### **ORDER**

Upon Defendant's Motion to Dismiss. *Denied*. Upon Defendant's Motion for Summary Judgment. *Granted*.

Charles E. Whitehurst, Jr., Esquire of Young Malmberg & Howard, P.A., Dover, Delaware; attorney for Plaintiff.

Richard Galperin, Esquire of Morris James LLP, Wilmington, Delaware; attorney for Defendant.

WITHAM, R.J.

C.A. No. K10C-10-035 WLW

June 20, 2013

### I. Issues

- 1. Whether the aforementioned action should be dismissed due to Plaintiff's failure to timely submit an expert report and seasonably supplement the tardy report; or,
- 2. Alternatively, whether the Court should grant summary judgment in Defendant's favor on the grounds that Plaintiff failed to produce an expert report identifying the proximate cause of Plaintiff's alleged injuries.

## II. Relevant Factual and Procedural Background

This is a medical malpractice action arising out of a right hip replacement performed by Defendant David Sopa, D.O. (hereinafter "Defendant") on William Dickenson (hereinafter "Plaintiff") on October 23, 2008 at Beebe Medical Center. Plaintiff was discharged and began outpatient therapy a few days later. On October 31, 2008, Plaintiff fell while walking with the aid of his crutches. Defendant contends that, as a result of this fall, Plaintiff re-injured his right hip, requiring additional diagnostic tests and surgeries.

Plaintiff initiated the present action on October 22, 2010. His complaint alleges that Defendant breached the standard of care by improperly performing Plaintiff's surgery and failing to order follow-up radiographic studies, and that Defendant's negligence, and not the subsequent fall, was the proximate cause of Plaintiff's resulting injuries.

This Court issued a scheduling order on April 24, 2012. The scheduling order established October 15, 2012, as the deadline by which Plaintiff was to identify experts. Three days before this deadline, a representative of Plaintiff's counsel e-

C.A. No. K10C-10-035 WLW

June 20, 2013

mailed defense counsel asking to extend this deadline to October 31, 2012, for the identification of liability experts and November 15, 2012, for economic experts. Defense counsel granted these requests.

On November 16, 2012, over two weeks after the agreed extension and Plaintiff had yet to identify his experts and had made no additional requests for an extension of time, Defendant filed the instant motion to dismiss. Later that day, Plaintiff faxed a copy of a letter from Bradford A. Slutsky, M.D. (hereinafter "Dr. Slutsky"), addressed to Plaintiff's counsel in which Dr. Slutsky opined that the acetabular component of Plaintiff's hip replacement was out of place, but concluding that he could not "be 100 [percent] certain that the position of the cup was related to the way it was placed in by the surgeon or to the fall." Plaintiff's counsel indicated in this facsimile that he was awaiting clarification of these findings from Dr. Slutsky, but these attempts for clarification went unanswered for several weeks, as Dr. Slutsky left on vacation on October 23, 2012.

In his response to Defendant's Motion to Dismiss filed on December 4, 2012, Plaintiff claims to have sent the aforementioned clarification to defense counsel on November 29, 2012. At this time, Plaintiff claims to have also indicated to defense counsel that the report may have to be amended again after Dr. Wilson Choy, Plaintiff's treating orthopaedic surgeon, is deposed. Defense counsel claims that, to date, he has yet to receive a supplemental or revised report from Dr. Slutsky. Defendant insists that any effort by the Plaintiff to comply with the disclosure requirements set forth in Superior Court Civil Rule 26 (hereinafter "Rule 26") came too late. Therefore, Defendant moves for dismissal of the action pursuant to Superior

C.A. No. K10C-10-035 WLW

June 20, 2013

Court Civil Rule 41(b) on the ground that Plaintiff has contravened the rules of this court.

### III. Motion to Dismiss

Superior Court Civil Rule 41(b) allows a defendant to move to dismiss an action for a plaintiff's failure to prosecute or comply with the Court's rules or any order of the Court. Rule 41(b) permits the Court, *sua sponte*, to dismiss an action so long as the Court provides notice and follows the procedure set forth in 41(e). Dismissal is within the sound discretion of the Court and the Court's duty is to "analyze the circumstances of each case separately and balance the need for judicial economy against Delaware's preference for affording the litigant her day in court." The Court will not dismiss an action based on mere inaction; however, where there is gross neglect or lack of attention, dismissal may be proper.

Dismissal is now, clearly, the disfavored sanction for discovery violations.<sup>5</sup> In determining whether dismissal is an appropriate discovery sanction for a party's discovery violation, this Court must balance the following six factors, first articulated

<sup>&</sup>lt;sup>1</sup> Del. Super. Civ. R. 41(b).

<sup>&</sup>lt;sup>2</sup> Del. Super. Civ. R. 41(e).

<sup>&</sup>lt;sup>3</sup> Gregory v. Hyundai Motor America, 2008 WL 2601388, at \*2 (Del. Super. Jul. 2, 2008).

<sup>&</sup>lt;sup>4</sup> *Id*.

<sup>&</sup>lt;sup>5</sup> See Drejka v. Hitchens Tire Serv., Inc., 15 A.3d 1221, 1224 (Del. 2010) ("[T]he sanction of dismissal is severe and courts are and have been reluctant to apply it except as a last resort.") (citations omitted); see also Gricol v. Sipple, 2012 WL 5431092, at \*1 (Del. Super. Oct. 22, 2012) (noting that the Superior Court has been directed to, more often than not, enforce scheduling orders by imposing monetary penalties on those attorneys who violate discovery deadlines).

C.A. No. K10C-10-035 WLW June 20, 2013

in Drejka v. Hitchens Tire Services, Inc.:

(1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6)the meritoriousness of the claim or defense.<sup>6</sup>

A motion to dismiss should only be granted if no other sanction is more appropriate under the circumstances. Parties who ignore or extend scheduling deadlines without promptly consulting the trial court do so at their own peril.<sup>7</sup> That is, "any party that grants an informal extension to opposing parties counsel will be precluded from seeking relief from the court with respect to any deadlines in the scheduling order."

In the present case, Plaintiff has failed to identify his liability experts within the time limits imposed by this court's scheduling order. The six factors set forth in *Drejka*, applied here, lead me to conclude that this failure, by itself, does not justify

<sup>&</sup>lt;sup>6</sup> *Drejka*, 15 A.2d at 1226 (citing *Minna v. Energy Coal S.p.A.*, 984 A.2d 1210, 1215 (Del. 2009)).

Thristian v. Counseling Resource Assoc., Inc., 60 A.3d 1083, 1085 (Del. 2013). Christian was among a quartet of cases the Supreme Court handed down in January intended to clarify the application of the so-called *Drejka* text. See also Hill v. DuShuttle, 58 A.3d 403 (Del. 2012); Keener v. Iskin, 58 A.3d 407 (Del. 2013); Adams v. Aidoo, 58 A.3d 410 (Del. 2013). In Christian, the Supreme Court cautioned that should a party miss a discovery deadline, opposing counsel has two choices — resolve the matter informally or promptly notify the court. Christian, 60 A.3d at 1088. If counsel contacts the court, that contact can take the form of a motion to compel, a proposal to amend the scheduling order, or a request for a conference. Id. However, if the party chooses not to involve the court, that party will be deemed to have waived the right to contest any late filings by opposing counsel from that time forward. Id.

<sup>&</sup>lt;sup>8</sup> Christian, 60 A.3d at 1085.

C.A. No. K10C-10-035 WLW

June 20, 2013

dismissal. No facts suggest that Mr. Dickenson was personally responsible for his attorney's failure to identify his liability experts within the time limits prescribed in the scheduling order.

Defendant has suffered at least some prejudice by Plaintiff's delay in identifying and rendering an expert report. Defendant is entitled to receive expert reports sufficiently in advance of trial to provide him with a reasonable opportunity to defend himself. The Court's scheduling order would have given Defendant nearly seven months to prepare its defense and depose Dr. Slutsky. By skirting discovery deadlines, Plaintiff would have left Defendant at a significant disadvantage had the parties preserved the original trial date of May 28, 2013. However, this court has continued the trial to January 27, 2014 in light of Defendant's motion. This continuance has cured any potential prejudice Defendant may have suffered as a result of Plaintiff's dilatoriness in identifying and producing his expert reports.

Turning to the third factor, Plaintiff's counsel has shown a history of dilatoriness throughout the course of this litigation. Defendant has made repeated requests for expert reports, and has, on at least one occasion, moved to compel answers to interrogatories which were overdue for several months. Plaintiff's counsel has repeatedly missed discovery deadlines and requested extensions. However, it cannot be said that the delay that is at issue here resulted from the willful misconduct of Plaintiff's counsel. Instead, the delay can be attributed to Dr. Slutsky's own dilatoriness in supplementing his own report.

Nonetheless, defense counsel could have brought Plaintiff's dilatoriness to the Court's attention sooner. Instead, he chose to grant Plaintiff an extension of time to

C.A. No. K10C-10-035 WLW June 20, 2013

identify and produce Dr. Slutsky's report. This was extended as a courtesy which is the hallmark of civility in the Delaware Bar. The dictates of *Christian* are clear. By granting this extension, Defendant has waived his right to contest any late filings from that point forward. This includes a waiver of the right to move to dismiss the case pursuant to Rule 41(e). Accordingly, I find that dismissal of Plaintiff's complaint for failure to timely file an expert report is too harsh a sanction. Defendant's motion to dismiss is hereby **DENIED**.

## IV. Defendant's Motion for Summary Judgment

Alternatively, Defendant asks the Court to grant summary judgment in his favor on the basis that Plaintiff has failed to adduce expert medical testimony opining that Defendant's alleged negligence was the proximate cause of Plaintiff's injuries. Defendant contends that because there is a complete failure of proof concerning an essential element of Plaintiff's medical negligence case, he is entitled to judgment as a matter of law.

Defendant's current motion is not in the vein of a traditional summary judgment motion. The query presented here is not whether there are genuine issues of material fact that preclude summary adjudication; but rather, whether one party failed to produce evidence to support a fundamental element of one's complaint. Where as here, there has been "adequate time for discovery [and] the nonmoving party has failed to make a sufficient showing on an essential element of the case," the standard to be employed is the same as for a directed verdict. To establish liability

<sup>&</sup>lt;sup>9</sup> Burkhart v. Davies, 602 A.2d 56, 60 (Del. 1991).

C.A. No. K10C-10-035 WLW

June 20, 2013

for medical negligence, plaintiff must present expert medical testimony on the physician's deviation from the standard of care and "as to the causation of the alleged personal injury or death." Without expert medical testimony as to a breach of the standard of care and causation, the plaintiff cannot withstand a motion for summary judgment. 11

Plaintiff has failed to offer expert medical testimony that Defendant's medical negligence proximately caused the alleged injuries. Dr. Slutsky was the only expert that Plaintiff offered in defense of Defendant's motion for summary judgment. Dr. Slutsky does not opine with any degree of certainty that Defendant's alleged negligence was the cause of Plaintiff's injuries. He states only that the acetabular component of Plaintiff's hip implant is malpositioned; that Defendant did not order post-operative x-rays of Plaintiff's right hip and; without these x-rays, he can not opine as to whether Defendant's alleged negligence contributed to the malposition of Plaintiff's implant. Plaintiff, therefore, cannot establish causation in the manner required by the statute; that is, Plaintiff cannot prove that Defendant negligently performed Plaintiff's hip replacement and that this negligence proximately caused the alleged injuries.

<sup>&</sup>lt;sup>10</sup> 18 *Del. C.* § 6853 (emphasis added).

<sup>&</sup>lt;sup>11</sup> Burkhart, 602 A.2d at 59; see also Crookshank v. Bayer Healthcare Pharm, 2009 WL 1622828, at \*3 (Del. Super. May 22, 2009) (finding that a conclusory expert report that stated the defendant's drug was known to cause injuries similar to the plaintiff's was insufficient to show that the drug caused the plaintiff's injuries); Valentine v. Mark, 2004 WL 2419131, at \*2 (Del. Super. Oct. 20, 2004) (granting summary judgment in favor of defendant-doctor after finding that plaintiff's expert was unwilling to testify that defendant's misdiagnosis was the proximate cause of plaintiff's injury).

C.A. No. K10C-10-035 WLW

June 20, 2013

Plaintiff attempts to salvage his case by arguing that a jury could draw an

inference from Dr. Slutsky's opinion that Plaintiff's injuries were more likely than not

caused by the malpositioning of the acetabular component of his implant. But 18 Del.

C. § 6853 requires a plaintiff in a medical negligence case to establish proximate

cause by expert medical testimony. It does not permit a jury to connect the dots

between a bare allegation of medical negligence and an injury. The expert discovery

deadline has long passed, and Plaintiff has not procured an expert to testify that

Defendant deviated from the standard of care while performing Plaintiff's surgery and

that its breach proximately caused Plaintiffs' injuries. Where the nonmoving party

bears the ultimate burden of proof and has failed to make a sufficient evidentiary

showing on an essential element of his case, the moving party is entitled to judgment

as a matter of law. For that reason, Defendant's Motion for Summary Judgment must

be **GRANTED**.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.

Resident Judge

WLW/dmh

9