SUPERIOR COURT OF THE STATE OF DELAWARE

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> Re: Fedena v. August, et al., C.A. No. N13C-07-270 CEB Upon Defendant's Motion to Compel. DENIED IN PART and GRANTED IN PART.

Dear Counsel,

This is a personal injury action predicated upon Plaintiff Geraldine Fedena's "slip and fall" on premises allegedly controlled by Defendants Cheryl August, Roger Lore, and SU Corporation. The complaint, as is permitted in a "notice pleading" jurisdiction such as Delaware, is a bare bones recitation of the fact that Plaintiff was injured on August 27, 2012 while on Defendants' premises and

seeking damages for same. The complaint is a modest two pages long, consisting of eight paragraphs.

On August 29, 2013, Defendants served interrogatories and requests for production upon Plaintiff seeking to put details on these bare allegations, to which Plaintiff responded. On October 29, 2013, defense counsel wrote a letter to Plaintiff's counsel requesting additional information, arguing that the answers to the interrogatories were deficient and unresponsive. After receiving what Defendants characterized as further deficient responses from Plaintiff's counsel, defense counsel filed the present motion and the Court heard oral argument on December 5, 2013.

Despite defense counsel's objection to almost all of Plaintiff's answers to the interrogatories, defense counsel's motion only moved the Court for an order compelling answers to two of the interrogatories. The motion points to these two as "examples" of Plaintiff's alleged deficiencies and asks the Court to consider further the correspondence between counsel concerning other interrogatories and to grind through each of these disputes as well. This is an invitation the Court will decline as it does not do for the parties to incorporate other disputes into the specific motion before the Court or for the Court to attempt to divine just which of these matters requires judicial determination. Having said that, we understood defense counsel at oral argument to be seeking some guidance from the Court

beyond the specific interrogatories complained of in the motion, and we will here attempt to oblige the request.

The motion complains about Plaintiff's answer to Interrogatory 22, which seeks the subject matter on which all experts are expected to testify, the substance of facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion. In response to the interrogatory, Plaintiff identified three expert witnesses. As to each, she identified the subject matter – two are medical doctors expected to testify to the nature and permanency of Plaintiff's injuries and the third is an economist expected to testify to current value of future care and past and future lost wages. Defendants complain that these answers are entirely too generic to be of any value in their preparation of the case.

As we see it, Plaintiff has answered the first half of the interrogatory (who are your experts and what is the subject matter of their testimony) but not the second half (provide the facts, opinions, and a summary for each opinion). In the Court's view, Defendants' real complaint is more about the timing inherent in the typical trial scheduling order. It is quite common, in this Court and most courts, to attach a scheduling deadline for Plaintiff to identify any expert witness and provide a report to the defense identifying the opinions held by the expert as well as the

¹ Superior Court Civil Rule 26(b)(4)(A)(i) permits a party through the use of interrogatories to require any other party "to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion."

facts relied upon as the basis for such opinions. The defense is given a period of time – usually 30 to 60 days thereafter – to identify an expert to meet Plaintiff's expert witness.

In the "real world" of personal injury litigation, the retention of experts and procurement of expert reports represent a considerable expense for both parties and, depending upon the scope of Plaintiff's injuries, these expenses become a significant cost factor interfering with the ability of the parties to reach a financial settlement. In Superior Court Civil Rule 26(b)(1), we are instructed to limit the modes of discovery if the Court determines that the discovery sought is 1) duplicative or obtainable from another source that is more convenient, less burdensome, or less expensive, 2) the party seeking the discovery has ample opportunity to access the information sought, or 3) the discovery is unduly burdensome in light of the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues in the litigation.

Here, the question is not whether the defense will ever know the specific opinions of Plaintiff's experts or the bases therefore, but when. The Court's routine Trial Scheduling Order will include a deadline for the filing of Plaintiff's expert report. If we take the defense at its word that its difficulty is in locating an expert to rebut Plaintiff within the truncated time of the Court's standard Trial Scheduling Order, then we think its recourse is an amendment to the scheduling

Order giving the defense more time to locate an expert and procure a report. Forcing Plaintiff to give by interrogatory what is in effect its expert report long before the Scheduling Order calls for it is not warranted, at least not in this particular case.

Backing up briefly, it seems that the crux of Defendants' complaint in connection with the experts identified in response to interrogatory 22 is really that "the injuries are not identified." We say that because at oral argument, counsel focused at some length on Plaintiff's answer to Interrogatory 10 – even though it was not subject to the motion – which calls upon Plaintiff to "state by body part or diagnosis all injuries claimed to have resulted from the accident or incident identified in the complaint. As to each body part or diagnosis, what medical provider treated you?"

Plaintiff answered this interrogatory with "see a complete copy of Plaintiff's medical records in Plaintiff's possession attached hereto." According to the defense, this response is wholly unsatisfactory, as it requires the defense to parse through voluminous documents of often complex medical history, with treatments for any number of diseases, trauma, or other matters not even germane to Plaintiff's injuries. For Defendants, this is little more than a means for Plaintiff to keep her options open as to her claimed injuries and does not answer a question to which they are entitled to an answer.

We think the defense is right on this issue. It does not seem too much to us that Plaintiff ought to identify what she hurt when she slipped and fell. It may be true that the specific nature of the injury (i.e., a sprain or a herniated disc) is unknown at the point of the interrogatory answer, but it cannot be that she does not know if the injury was to her arm or her back and who she sought treatment from. And while it may quite effortless for Plaintiff to simply tell Defendants to look in the medical records, the answer will not necessarily jump off the printed page. Plaintiff is in the best position to know the answer, answering the question directly would not be unduly burdensome, and Plaintiff therefore should answer Interrogatory 10 with specificity.

The second interrogatory to which the defense moved to compel an answer is Interrogatory 35: "If you claim that the Defendant(s) violated any statute, regulation, safety standard or ordinance not specifically identified in the complaint, identify the specific provision or citation." Plaintiff answered with "see Plaintiff's complaint" and "Plaintiff reserves the right to allege additional statutory violations in accordance with the Trial Scheduling Order."

Plaintiff's problem here is that the complaint says only that Defendants were negligent in that they "violated local and national building codes." The complaint is thus hardly a source for information as to what code Plaintiff is referring. Moreover, the Trial Scheduling Order has not even been entered in this case and

even when it is, it says nothing about amending the pleadings to alleged additional statutory violations and it therefore cannot be looked to as a source of information.

We are, of course, well aware why the defense would like to know what ordinances and the like are implicated in the lawsuit: they may serve as a basis for a negligence *per se* instruction to the jury, thus taking liability effectively out of the litigation picture. We imagine Plaintiff is also interested in whether such a claim may fairly be made out on the evidence as it will stand at the close of fact discovery.

But unlike a statement as to the nature of Plaintiff's injuries, a statement of the legal opinions of Plaintiff's counsel serves little, if any, basis for further discovery, by deposition or otherwise. Based upon the facts as developed via documents or deposition or other means, a statute or code was either violated or it was not. A code violation is not, by itself, a fact at all, but rather a legal conclusion based upon facts as developed in discovery. Thus, the Court sees no purpose served in requiring an answer to this interrogatory as it calls for legal conclusions (or, at least, opinions) of Plaintiff's counsel that are based, at best, on a theory of the case that has not yet been tested by the facts as developed by depositions or other discovery.

A delineation of what statutes or regulations the facts may show were violated suffers not only from its timeliness and relatively little evidentiary (as

opposed to legal) value, but it also calls upon Plaintiff's counsel to disclose his legal theories to the defense, as stated, often before those theories are even crystallized. We think the proper answer to the question put is that an answer to this interrogatory, at least at this stage of the litigation, is premature.

Superior Court Civil Rule 33 provides us with a route through this issue. Rule 33(c) says that "[a]n interrogatory otherwise proper is not necessarily objectionable merely because [it] involves an opinion or contention that relates to fact or application of law to fact, but the Court may order the such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time."

This Court believes there is indeed a place and time by which Plaintiff ought to come out with her theory of "negligence per se" liability or, as some cases hold, a code violation as evidence of negligence but perhaps not negligence per se. But that time is not with the first set of interrogatories filed by the parties, at least not in this case. If Plaintiff had identified a building or maintenance expert or perhaps an expert in building codes, thus signifying that code enforcement may be an issue in the case, then the result may well be different. But the Court sees no value in forcing Plaintiff to commit to theories at this stage of the litigation, understanding that the Court may do so at some later point. We think Plaintiff has done what

needs to be done for now: answered that it may supplement this answer at a later time.

For the foregoing reasons, Defendant's Motion to Compel is **DENIED IN**PART and GRANTED IN PART.

Very truly yours,

Charles E. Butler