IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY a/s/o ELEANOR KOGER,	)	
Plaintiffs,	)	
v.	)	C.A. No. N09C-10-244 JRJ
STATE OF DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL (DNREC) and NOAH S. MOSS,	)	
Defendants.	)	

Date Submitted: May 13, 2011
Date Decided: May 31, 2011

Upon Defendants' Motion for Dismissal or Summary Judgment:
GRANTED.

Amanda L. H. Brinton, Esq., 521 North West Street, Wilmington, Delaware 19801, Attorney for Plaintiffs.

Marc P. Niedzielski, Esq., Deputy Attorney General, 820 N. French Street, 6th Fl., Wilmington, Delaware 19801, Attorney for Defendants.

Jurden, J.

I. INTRODUCTION

Before the Court is the State of Delaware Department of Natural Resources and Environmental Control ("DNREC") and Noah S. Moss's ("Moss") Motion for Summary Judgment. DNREC argues it is entitled Summary Judgment with regard to a subrogation action brought by State Farm Mutual Automobile Insurance ("State Farm"). The subrogation action is related to a motor vehicle accident between Eleanor E. Koger ("Koger") and Moss. For the reasons that follow, Defendants' Motion is **GRANTED**.

II. BACKGROUND

On June 26, 2006, Eleanor E. Koger, operating a vehicle insured by State Farm, was involved in a motor vehicle accident with Moss. Moss was operating a DNREC-owned vehicle in his capacity as an employee of DNREC.[1] As a result of the accident, State Farm paid out personal injury protection benefits to Kroger totaling $20,625.24.[2] These expenses were paid "in the form of medical expenses and other personal injury protection ('PIP') benefits."[3]

III. PARTIES' CONTENTIONS

DNREC argues that it is entitled to judgment as a matter of law because it is a state actor, and thus, not subject to State Farm's subrogation claim. DNREC claims that 21 *Del. C.* § 2901[4] exempts it from liability arising from a subrogation action pursuant to 21 *Del. C.* § 2118 (g),[5] the statute under which State Farm has brought this case. In the

[1] Complaint at 2, [Tran. ID 27765807].
[2] *Id.* at 4.
[3] *Id.*
[4] 21 *Del. C.* § 2901: "This chapter shall not apply with respect to any motor vehicle owned by the United States, this State or any political subdivision of this State or any municipality therein or with respect to any motor vehicle which is subject to the requirements of §§ 6101 and 6102 of this title."
[5] 21 *Del. C.* § 2118 (g): "Insurers providing benefits described in paragraphs (1) through (4) of subsection (a) of this section shall be subrogated to the rights, including claims under any workers' compensation law, of the person for whom benefits are provided, to the extent of the benefits so provided."

alternative, DNREC argues dismissal is warranted pursuant to Superior Court Rule 41(e) for failure to prosecute, contending that State Farm has failed to comply with discovery deadlines. Finally, DNREC argues that because medical testimony is required to establish that Koger's medical expenses were reasonable and necessary and plaintiffs have failed to identify an expert, the case should be dismissed.

State Farm maintains that DNREC is subject to a subrogation action under 21 *Del. C.* § 2118 (g) because 21 *Del. C.* § 2901 only applies to Chapter 29 of Title 10, and not 21 *Del. C.* § 2118 (g). Further, State Farm argues that dismissal is not an appropriate sanction for its alleged discovery violations. State Farm further contends that, pursuant to *State Farm a/s/o Vest v. Department of Corrections*,[6] expert medical testimony is not required to establish that medical expenses are reasonable and necessary.

IV. STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[7] In considering a motion for summary judgment, the Court must view the record in a light most favorable to the non-moving party[8] and the moving party bears the initial burden of establishing that material facts are not in dispute.[9] Summary judgment will not be granted if, after viewing the evidence in the light most favorable to the non-moving party, there are material facts in dispute or if judgment as a matter of law is not appropriate.[10]

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[6] *State Farm a/s/o Vest v. Department of Corrections*, C.A. No. 09C-07-030 WLW (Del. Super. March 18, 2011) (Requiring medical testimony to substantiate an Insurer's subrogation claim under 21 *Del. C.* 2118 (g) "would frustrate the policy of the statute.").
[7] Super. Ct. Civ. R. 56(c).
[8] *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).
[9] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).
[10] *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 879-80 (Del. Super. 2005).

If, however, there are no material facts in dispute, and the moving party is entitled to judgment as a matter of law, summary judgment will be granted.[11]

V. DISCUSSION

Because the Court finds the expert testimony issue dispositive, it will not address DNREC's other arguments.

Pursuant to 21 *Del. C.* 2118 (a)(2), an Insurance Carrier is required to compensate its insured injured as a result of an automobile accident for "reasonable and necessary" expenses. These expenses include medical expenses. "The statutory standard is reasonable and necessary, which includes reasonable medical probability."[12] Expert medical testimony is required in order to establish that medical expenses paid are reasonable, necessary and causally related to a motor vehicle accident. If the medical expenses at issue are not causally related to the motor vehicle accident, they are not reasonable.[13] "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."[14] Without direct expert testimony establishing a causal link between the accident and the insured's injuries, a jury would be left to speculate on matters beyond common knowledge.[15]

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[11] *Id.* at 879; *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. 1973); *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del.1962).
[12] *Dennis v. State Farm Mut. Auto. Ins. Co.*, 2008 WL 4409436, at *2 (Del. Super. Feb. 13, 2008).
[13] *Id.* at *3.
[14] *Rayfield v. Power*, 840 A.2d 642 (Del. 2003) (TABLE).
[15] A subrogor only has rights equal to the subrogee; *See Great Am. Assur. Co. v. Fisher Controls Int'l, Inc.*, 2003 WL 21901094, *5 (Del. Super. Aug. 4, 2003). State Farm is asserting a subrogation claim, and thus, its rights are identical to Koger's. It follows that if State Farm had no obligation to offer expert medical testimony to substantiate its claim, then the same would be true if Koger was asserting a claim against DNREC. It is well settled law that "[w]ith 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." *See Rayfield*, 840 A.2d at 642.

In this case, State Farm claims it is entitled to reimbursement of medical expenses it paid on behalf of its insured. In order to establish that the medical expenses at issue were reasonable, necessary and related to the accident, State Farm must present expert medical testimony. State Farm has failed to identify any expert witness by November 8, 2010, as required the Court's Scheduling Order.[16] Because State Farm has failed to identify a medical expert, DNREC's Motion for Summary Judgment must be granted.[17]

[16] Trial Scheduling Order [Tran. ID 30033542]; Dismissal is an appropriate sanction for State Farm's failure to identify an expert. *See Hoag v. Amex Assurance Co.*, 953 A.2d 713, 717 (Del. 2008) ("[A] motion to dismiss . . . should be granted if no other sanction would be more appropriate under the circumstances."); *Wahle v. Med. Ctr. of Delaware, Inc.*, 559 A.2d 1228, 1233 (Del. 1989) (The "trial court was fully justified in imposing the ultimate sanction of dismissing plaintiff's suit . . .."). The Court is mindful of the Supreme Court's recent holding in *Drejka*, and nonetheless believes dismissal appropriate. *Dreijka* is distinguishable because State Farm has not just missed the expert discovery deadline (which was November 8, 2010) but also the final Discovery Cut-off (which was March 7, 2011), and State Farm has manifested an intent to not call an expert at all. In State Farms' Response in Opposition to Defendants' Motion for Summary Judgment, it maintained that "a subrogated insurance carrier is not required to introduce expert medical testimony to authenticate the 'reasonable necessity of the claims when the insurer is pursuing subrogation . . .'" (*See* Plaintiffs' Response in Opposition to Defendants' Motion for Summary Judgment at 4.) During oral argument, State Farm reiterated its belief that expert medical testimony is not required. (*See* Hearing Transcript Defendant's Motion for Summary Judgment at 13 (May 13, 2011)). State Farm has not moved for a continuance, and with the trial date looming, it is clear that State Farm does not intend to offer expert testimony. Moreover, in this case State Farm has a history of dilatory conduct with respect to discovery. (*See* Defendants' Motion for Summary Judgment at 3; Defendants received no response to their First Request for Production, Second Request for Production, or an e-mail requesting the status of discovery. Plaintiffs did not produce answers to interrogatories until May 16, 2011, after the Court ordered Counsel to do so, and months after the final Discovery cutoff.).

[17] The Court respectfully declines to follow the holding in *State Farm a/s/o Vest v. Department of Corrections*. The *Vest* Court found expert medical testimony is not required in order to substantiate medical expenses as reasonable and necessary. The *Vest* Court reasoned that medical testimony was not required in order to promote the public policy regarding prompt payment of personal injury protection benefits. However, this case relates to a subrogation action after PIP payments had been paid, and thus, relieving State Farm of its obligation to provide expert testimony would not achieve the public policy promoting expeditious PIP payment.

VI. CONCLUSION

After considering the facts in the light most favorable to Plaintiff, the Court finds that there are no genuine issues of material fact in dispute and that the moving Defendants are entitled to a judgment as a matter of law. Therefore, Defendants' Motion for Summary Judgment is **GRANTED.**

IT IS SO ORDERED.

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Jan R. Jurden, Judge