

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR KENT COUNTY

CHRISTOPHER E. HELMICK	:	
and JESSICA HELMICK,	:	C.A. No. K11C-01-043 WLW
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
JAMES A. MILLER,	:	
	:	
Defendant.	:	

Submitted: May 15, 2012  
Decided: June 13, 2012

**ORDER**

Upon Defendant's Motion to Preclude Plaintiffs' Expert,  
Dr. Eva Dickinson. *Denied.*

Upon Plaintiffs' Motion for a Continuance. *Deferred.*

Nicholas H. Rodriguez, Esquire of Schmittinger and Rodriguez, P.A., Dover,  
Delaware; attorney for the Plaintiffs.

Reneta L. Green-Streett, Esquire of Young & McNelis, Dover, Delaware; attorney for  
the Defendant.

WITHAM, R.J.

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**FACTS**

This case arose out of personal injuries from an automobile accident that occurred at the intersection of U.S. Route 113 and Johnson Road. A southbound vehicle driven by James A. Miller (hereinafter “Defendant”) struck a westbound vehicle driven by Christopher Eugene Helmick (hereinafter “Plaintiff”). Defendant does not contest liability. Plaintiff’s wife, Jessica Helmick (collectively “Plaintiffs”), also brings a claim for loss of consortium.

At the pretrial conference held on May 8, 2012, an issue was raised regarding the lateness of Plaintiffs’ expert report from Dr. Eva Dickinson (hereinafter “Dr. Dickinson”). Defendant wishes to preclude Dr. Dickinson’s report as it was completed five months<sup>1</sup> after Plaintiffs’ expert discovery cutoff. Plaintiff opposes this motion and requests a continuance of the trial scheduled for June 25, 2012.

***Standard of Review***

The Delaware Supreme Court stated in *Sammons v. Doctors for Emergency Services, P.A.*, “The purpose of the Rule 16 scheduling order and discovery deadlines are to improve the efficiency of trials. . . . Pursuant to Rule 26, the expert disclosure statements should identify the expert’s opinions and the basis for those opinions so that the opposing party can properly prepare for depositions and trial.”<sup>2</sup> The *Superior*

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<sup>1</sup>Defendant states that the report is six months late. Plaintiffs’ expert discovery deadline was December 1, 2011. The report in question was provided to Defendant on May 4, 2012. This time period is slightly over five months.

<sup>2</sup>913 A.2d 519, 530 (Del. 2006).

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*Court Kent County Civil Case Management Plan* states in pertinent part, “Extensions of time limits . . . may be granted only upon a showing of good cause . . . . Requests for extensions of time limits set forth in a scheduling order must be made at least 10 days prior to the expiration of time.”<sup>3</sup> “The sanction of dismissal is severe and courts are and have been reluctant to apply it except as a last resort.”<sup>4</sup>

In *Drejka v. Hitchens Tire Service Inc.*,<sup>5</sup> the Delaware Supreme Court noted that before a trial court effectively grants a default judgment as a sanction for violating a scheduling order, the trial court must balance the following six factors:

(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>

Superior Court Civil Rule 16(f) states:

If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially

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<sup>3</sup>SUPERIOR COURT KENT CNTY. CIVIL CASE MGMT. PLAN, SUPERIOR COURT OF KENT CNTY. 7 (2006).

<sup>4</sup>*Hoag v. Amex Assurance Co.*, 953 A.2d 713, 717 (Del. 2008).

<sup>5</sup>15 A.3d 1221 (Del. 2010).

<sup>6</sup>*Id.* (citing *Minna v. Energy Coal S.p.A.*, 984 A.2d 1210, 1215 (Del. 2009)).

unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party, or both, to pay the reasonable expenses incurred because of any noncompliance with this Rule, including attorneys' fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

### DISCUSSION

The Court notes that the Scheduling Order contains a dispositive motion deadline of April 2, 2012 and a motion *in limine* deadline of April 23, 2012, but the report in question was provided to Defendant on May 4, 2012 after all of these deadlines had passed. Therefore, Defendant's motion was timely as the parties alerted the Court to the disagreement between them at the pretrial conference on May 8, 2012, roughly four days after Defendant received the report. Pursuant to an expedited briefing schedule issued by the Court, Plaintiffs filed their position on May 9, 2012, and Defendant filed his position on May 15, 2012.

As the issue of Plaintiffs' expert is potentially case dispositive, the Court examines it first.<sup>7</sup> Plaintiffs' May 9, 2012 letter first refers to their letter to the Court on April 20, 2012, which outlines the problems encountered by Plaintiffs in attempting to obtain an expert report from Dr. Dickinson. In that letter Plaintiffs'

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<sup>7</sup>Expert medical testimony is required to establish causation of injuries in a negligence case. *Rayfield v. Power*, 840 A.2d 642, 2003 WL 22873037 (Del. Dec. 2, 2003) (TABLE).

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counsel reported, “[W]e have called the physician’s office on many occasions and I have personally gone over to meet with the physician without success in obtaining the narrative report.” Plaintiffs’ counsel also reported that he notified the business manager for Dr. Dickinson that unless Plaintiffs received the narrative report in the week following the April 20, 2012 letter, Dr. Dickinson’s testimony beyond her medical records would likely not be permitted due to noncompliance with the Scheduling Order. Finally, in the April 20, 2012 letter, Plaintiffs’ counsel argued that the issue with obtaining a report from Dr. Dickinson was not caused by his client or by his law firm and that his client would be seriously disadvantaged if the report was not admitted.

Plaintiffs’ May 9, 2012 letter notes that they first ordered a report from Dr. Dickinson in November of 2011. The Court notes that this was roughly a month before Plaintiffs’ expert discovery cutoff of December 1, 2011. The letter explains that without Dr. Dickinson’s narrative report and testimony Plaintiffs would not be able to prove causation. Plaintiffs’ letter concludes by stating again that their failure to obtain Dr. Dickinson’s expert report was due to no fault of Plaintiffs or their law firm. They argue that they requested the report three months before the deadline<sup>8</sup> and that they should not be punished for something they have no control over.

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<sup>8</sup>This assertion is somewhat confusing as Plaintiffs earlier stated that the initial ordering of the report was in November 2011 and the Plaintiffs’ expert discovery cutoff was December 1, 2011. This would make the request one month before the deadline, not three months. Nonetheless, even if the request were three months before the deadline, that fact would not affect the ruling of the Court.

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Defendant argues several key points. Scheduling orders are orders of the Court. According to the Scheduling Order, Plaintiffs' expert discovery cutoff was December 1, 2011. Defendant did not receive Dr. Dickinson's report until May 4, 2012 – roughly five months late, and four days before the pretrial conference. Defendant claims that Dr. Dickinson's bills were not produced to the defense until May 7, 2012. Defendant notes that Dr. Dickinson's late report is not the only expert report in the case. Dr. Stephen G. Manifold (hereinafter "Dr. Manifold"), Plaintiff's original treating physician, rendered an expert opinion on behalf of Plaintiffs. According to Defendant, Dr. Manifold issued an opinion to Plaintiffs that Plaintiff Christopher Helmick's knee injury was not caused by the accident. Defendants believe that this unfavorable expert report from Dr. Manifold led to the expert report from Dr. Dickinson. Defendant argues that he has been prejudiced by the delay present throughout the case. Defendant concludes that the admission of Dr. Dickinson's report at this late date would violate the letter and spirit of the Superior Court's rules and procedure.

The Court notes that it has dealt with this very issue, breaches of the expert discovery deadline, two other times in the past six months. In *Heyward v. Weber*, an expert's opinion with respect to future surgery changed roughly five months after Plaintiff's expert discovery cutoff as a result of further medical examination.<sup>9</sup> In that case, this Court found that all elements of good cause were satisfied: Plaintiff's counsel was diligent, he had no way of foreseeing the expert's change in opinion, and

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<sup>9</sup>2011 WL 7063363, at \*1 (Del. Super. Dec. 5, 2011).

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failure to admit the alteration would have resulted in a substantial risk of unfairness to Plaintiff.<sup>10</sup> Furthermore, Defendants had experienced counsel who cross-examined Plaintiff's expert on his change of opinion at a deposition.<sup>11</sup>

*Jefferson v. Helgason* did not involve a sudden change in an expert opinion.<sup>12</sup> Instead, Defendant Helgason simply provided his expert disclosure over a month after his expert discovery cutoff date.<sup>13</sup> The Court found that good cause for disregarding the Scheduling Order was not satisfied as Defendant's need for an expert was foreseeable, and he bore responsibility for the delay in obtaining the expert report.<sup>14</sup> The Court excluded the report, but allowed the expert to testify utilizing a report he had prepared prior to litigation for Plaintiff's insurance carrier.<sup>15</sup>

Moving back to the current case, since Plaintiffs state that they will not be able to prove causation without Dr. Dickinson, the Court would essentially be entering a default judgment for Defendant if the Court prohibits her report and testimony due to Plaintiffs' breach of the Scheduling Order. Therefore, the Court must apply the

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<sup>10</sup>*Id.* at \*3.

<sup>11</sup>*Id.*

<sup>12</sup>2012 WL 1413674 (Del. Super. Feb. 13, 2012).

<sup>13</sup>*Id.* at \*2.

<sup>14</sup>*Id.*

<sup>15</sup>*Id.*

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*Drejka* factors in reaching its decision.<sup>16</sup>

The first factor is the extent of the party's personal responsibility. It appears to the Court that Plaintiffs should have attempted to obtain a second expert earlier than they did. It also appears to the Court, however, that Plaintiffs offered as much encouragement and prodding as they possibly could to have their expert complete her report. The second factor is the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery. Defendant argues that he has been prejudiced by the delay present throughout the case. After a review of the history of this case through the filings recorded on LexisNexis, this complaint is somewhat exaggerated. Other than the expert's report, the Court can find no other evidence of delay by Plaintiffs. The third factor is a history of dilatoriness. Simply put, neither Plaintiffs nor their counsel have any history of dilatoriness. The fourth factor is whether the conduct of the party or the attorney was willful or in bad faith. The Court finds no willful or bad faith conduct with regard to Dr. Dickinson's report. The fifth factor is the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions. The Court firmly believes that a sanction other than dismissal will be effective. The Court analyzes and utilizes an alternative sanction below. The sixth factor is the meritoriousness of the claim or defense. After reviewing Dr. Dickinson's report, Plaintiffs' damages claim has some merit. In sum, after reviewing the *Drejka* factors, the Court finds that precluding Plaintiffs' report, which would effectively mean a default judgment against Plaintiffs, is not warranted

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<sup>16</sup>15 A.3d at 1224.

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at this juncture.

Superior Court Civil Rule 16(f) states that when a party fails to obey a scheduling order,

In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party, or both, to pay the reasonable expenses incurred because of any noncompliance with this Rule, including attorneys' fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

The Court will not go so far as to say that noncompliance was substantially justified. Litigants choose experts at their own peril. It is unclear whether Plaintiffs' firm has utilized Dr. Dickinson before or whether Dr. Dickinson has a track record of late expert reports.

What is clear to the Court is that Defendant's attorney's fees in association with a deposition of Dr. Dickinson, should one occur, should be paid by Plaintiffs' counsel. This is clear for several reasons. First, Plaintiffs' counsel attempted to obtain a second expert, due to an unfavorable opinion by Plaintiffs' first expert, one month before the deadline and did not request an extension at the proper time pursuant to the *Superior Court Kent County Civil Case Management Plan*.<sup>17</sup> Second, although Plaintiffs' counsel engaged in a significant effort to move along the expert's report, he did not notify the Court of the issue until April 20, 2012, over three months after the deadline. Therefore, Plaintiffs' attorney will pay Defendant's reasonable

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<sup>17</sup>SUPERIOR COURT OF KENT CNTY., *supra* note 3, at 7.

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attorney's fees in deposing Dr. Dickinson, should such a deposition occur.

The second issue here is whether Plaintiffs' motion for a continuance should be granted. In *Roache v. Charney*,<sup>18</sup> the Delaware Supreme Court reviewed the factors that a trial court should consider when exercising its discretion to grant or deny a continuance. The party requesting the continuance "has the burden of establishing a clear record of the relevant facts relating to the criteria for a continuance, including the length of the requested continuance."<sup>19</sup> Additionally, the moving party must show "(a) that it was diligent in preparing for the presentation of the testimony; (b) that the continuance will be likely to satisfy the need to present the testimony; (c) that the inconvenience to the Court, opposing parties, witnesses and jurors is insubstantial in relation to the likely prejudice which would result from the denial of the continuance."<sup>20</sup>

The Court will defer embarking on this continuance analysis for two reasons. First, given the ruling of the Court admitting Dr. Dickinson's report and testimony, Defendant may amicably agree on a continuance in order to depose Dr. Dickinson.<sup>21</sup> Second, Plaintiffs did not discuss the length of the requested continuance in their letter to the Court. Therefore, the Court defers ruling on Plaintiffs' motion for a

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<sup>18</sup>38 A.3d 281, 286-88 (Del. 2012).

<sup>19</sup>*Id.* at 287 (quoting *Seacrest v. State*, 679 A.2d 58, 66 (Del. 1996)).

<sup>20</sup>*Id.* (citing *Seacrest*, 679 A.2d at 66).

<sup>21</sup>This is merely an observation and should not be construed as an order by the Court to reach an agreement on this continuance.

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continuance for one week following this Order of the Court. If the Court does not receive anything from the parties within this time period, it will engage in the necessary analysis with the information provided.

**CONCLUSION**

Defendant's motion to preclude Plaintiffs' expert is denied. Plaintiffs' attorney will pay Defendant's reasonable attorney's fees in deposing Dr. Dickinson, should such a deposition occur. The Court defers its ruling on Plaintiffs' motion for a continuance in the manner described above.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.  
Resident Judge

WLW/dmh