## IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

# IN AND FOR KENT COUNTY

TORINA A. COLLIS,	) ) C A No	V11C 04 007 ITV
	) C.A. No.	K11C-04-007 JTV
Plaintiff,	)	
	)	
V.	)	
	)	
TOPPER'S SALON AND HEATH	)	
SPA, INC., & TINA CASEY,	)	
	)	
Defendants.	)	

Submitted: July 12, 2013 Decided: August 29, 2013

Torina A. Collins, Pro Se..

Douglas T. Walsh, Esq., Marshall, Dennehey, Warner, Coleman & Goggin, Wilmington, Delaware. Attorney for Defendants.

Upon Consideration of Plaintiff's Motion for Summary Judgment -**DENIED** 

Defendants' Motion for Summary Judgment - **GRANTED** 

VAUGHN, President Judge

#### **OPINION**

This is a professional negligence action. The *pro se* plaintiff, Torina Collis ("Ms. Collis"), alleges that she was injured while receiving a massage from Tina Casey ("Ms. Casey"), a licensed massage therapist employed by Topper's Salon & Health Spa, Inc. ("Topper's") (collectively, "Defendants"). All of the parties have now moved for summary judgment.

### **FACTS**

On April 5, 2009, Ms. Collis received the massage in question at Topper's location in Dover. During the massage, the plaintiff alleges that Ms. Casey performed cranial therapy and other maneuvers without disclosing any of the associated risks. Additionally, she asserts that Topper's did not have her fill out any medical history at any time during the visit. Ms. Collis contends that she has sustained injuries to her head, neck and upper back as a result of Defendants' negligence, and that treatment for those injuries is ongoing.

The plaintiff filed her complaint on April 5, 2011 and the Court entered a scheduling order on August 8, 2012. The expert disclosure deadline was originally set for April 15, 2013. The parties twice stipulated to extend the expert disclosure deadline, and established June 28, 2013 as the cutoff for the plaintiff. On June 20, 2013, the Court denied Ms. Collis' motion for a new scheduling order. The trial date provided in the August 8, 2012 scheduling order has remained in place. A jury trial is scheduled to commence on September 9, 2013.

The central issue before the Court involves the plaintiff's alleged failure to

provide any expert testimony to support her negligence claim. The Court heard oral argument on the motions for summary judgment on July 12, 2013. During the motion hearing, Ms. Collis maintained that she did not need any experts to prove negligence in this case. However, she alternatively claimed that she had, in fact, emailed a list of experts to Defendants' counsel on June 28, 2013, in compliance with the expert disclosure date. She provided the list to the Court at the hearing. Four days after the hearing, on July 16, 2013, the plaintiff submitted a letter to the Court wherein she requested yet more time to submit an expert report in the event that she had misinterpreted the applicable law.

The plaintiff's Motion for Summary Judgment does not have any merit. Ms. Collis has not proved essential elements of her negligence case as a matter of law. Therefore, for the same reasons discussed later in this opinion, the plaintiff's Motion for Summary Judgment is *denied*. However, at Ms. Collis' request, and in accordance with the leniency this Court provides to *pro se* litigants, I will consider the more expansive arguments contained in the plaintiff's briefing in support of her motion as part of her response to Defendants' motion.

### **CONTENTIONS**

Generally, Defendants contend that summary judgment is warranted for two reasons: (1) because Ms. Collis has failed to obtain competent expert testimony regarding the standard of care applicable to a professional massage therapist and (2) because Ms. Collis has failed to offer any expert opinion causally relating the plaintiff's injuries to the alleged negligence. Defendants contend that the allegations

Ms. Collis raises in her complaint regarding the standard of care—*i.e.*, the scope of massage therapy, the techniques and maneuvers a professional massage therapist may use and the manner in which the techniques are implemented—are not within the common knowledge of a layperson and must be established through expert testimony. Additionally, Defendants contend that none of the plaintiff's proposed experts offer a causation opinion. Lastly, Defendants contend that the settlement offer from their insurer to Ms. Collis is inadmissible at trial to prove liability pursuant to Delaware Rule of Evidence 408.<sup>1</sup>

Ms. Collis contends that reasonable jurors of ordinary experience and intelligence can understand whether a massage therapist was negligent without the aid of an expert. She argues that the fact that Ms. Casey made a mistake is so apparent that a layperson is competent to determine whether there was negligence. Ms. Collis further contends that expert testimony is not required to establish causation in this case because she was in good health before the massage, but afterwards, her neck became stuck, causing severe pain and headaches. She suggests that the connection between Defendants' actions and her injuries is obvious and within the common knowledge of a layperson. Alternatively, she contends that she has disclosed expert opinions in compliance with the stipulated deadline. Finally, she contends that Defendants' insurer admitted to liability and the validity of her claim when it made a settlement offer on January 11, 2011.

<sup>&</sup>lt;sup>1</sup> D.R.E. 408.

### STANDARD OF REVIEW

Summary judgment should be granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.<sup>2</sup> "[T]he moving party bears the burden of establishing the non-existence of material issues of fact." If a motion is properly supported, the burden shifts to the non-moving party to establish the existence of material issues of fact.<sup>4</sup> In considering the motion, the facts must be viewed in the light most favorable to the non-moving party.<sup>5</sup> Thus, the court must accept all undisputed factual assertions and accept the non-movant's version of any disputed facts.<sup>6</sup> Summary judgment is inappropriate "when the record reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances."

## **DISCUSSION**

"To prove negligence, [the plaintiff] is required to establish, by a

<sup>&</sup>lt;sup>2</sup> Super. Ct. Civ. R. 56(c).

<sup>&</sup>lt;sup>3</sup> Gray v. Allstate Ins. Co., 2007 WL 1334563, at \*1 (Del. Super. May 2, 2007).

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

<sup>&</sup>lt;sup>5</sup> Pierce v. Int'l Ins. Co. of Ill., 671 A.2d 1361, 1363 (Del. 1996).

<sup>&</sup>lt;sup>6</sup> Merrill v. Crothall-American, Inc., 606 A.2d 96, 99-100 (Del. 1992).

 $<sup>^7</sup>$  Mumford & Miller Concrete, Inc. v. New Castle Cnty., 2007 WL 404771, at \*1 (Del. Super. Jan. 31, 2007).

preponderance of the evidence, that the defendants failed to meet their respective legal standard of care, and that the defendants' misconduct proximately harmed her; that is; she must prove the elements of duty, breach, causation, and harm."

The plaintiff's contention that she does not need expert testimony to prove her claim for bodily injuries is contrary to Delaware law. In *Rayfield v. Power*, the Delaware Supreme Court held 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." Ms. Collis' argument that this case is distinguishable from *Rayfield* because it involves a massage rather than an automobile accident is not persuasive. Medical expert testimony regarding causation is required when there is a claim for bodily injuries, regardless of the nature of the negligence involved. Moreover, the injuries that the plaintiff allegedly suffered in this case cannot readily be observed by the naked eye and may have been caused by any number of prior activities or occurrences. It follows that expert testimony is needed to connect the alleged negligence with the injuries.<sup>10</sup>

Further, none of the alleged experts whom the plaintiff has disclosed offer

<sup>&</sup>lt;sup>8</sup> Jones v. Crawford, 1 A.3d 299, 302 (Del. 2010)

<sup>&</sup>lt;sup>9</sup> 840 A.2d 642, 2003 WL 22873037, at \*1 (Del. Dec. 2, 2003) (TABLE).

<sup>&</sup>lt;sup>10</sup> See Cann v. Dunner, 2008 WL 5048425, at \*3 (Del. Super. Nov. 13, 2008) ("Unlike a fracture or laceration, a soft tissue injury cannot be seen by the naked eye. Soft tissue injuries may be caused by a number of activities or prior occurrences. Thus, expert medical testimony is necessary to connect the defendant's negligence with the plaintiff's injuries . . . .").

opinions linking the alleged injuries to actions undertaken by Ms. Casey.

The plaintiff has produced a note from a chiropractor, Ronda Sharman, D.C., that is dated October 18, 2012. The majority of the note describes the types and frequency of chiropractic treatment received by the plaintiff. The doctor opines that "Ms. Collis will continue to have flare-ups throughout her lifetime which will require treatment." However, Dr. Sharman never connects the injury to negligence on the part of Ms. Casey or Topper's. She merely reports that at a March 30, 2011 appointment, Ms. Collis told her the pain began after receiving the massage.

On June 28, 2013, the plaintiff attempted to email a list of four expert witnesses to counsel for Defendants. In the document attached to the email, she provided witness names, contact information and a brief summary of their expected testimony. First, the plaintiff named Tracy Morris, a massage therapist who first treated Ms. Collis in 2011. Ms. Morris' proposed testimony pertains to the severity of the plaintiff's injuries and the dangers associated with cranial sacral therapy when it is performed incorrectly. Second, Ms. Collis named GiGi Leon, a Physician Assistant who treated the plaintiff after the April 5, 2009 incident. Ms. Leon is said to have stated "that cranial therapy is dangerous if the person does not know what they are doing." Additional testimony from Ms. Leon would address the plaintiff's pain and the treatment necessary to manage that pain. Third, Ms. Collis again named Dr.

<sup>&</sup>lt;sup>11</sup> Defs.' Mot. Summ. J., D.I. 43, Ex. D.

<sup>&</sup>lt;sup>12</sup> Pl.'s List of Experts, D.I. 59.

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Sharman, whose summarized testimony appears to be consistent with what was provided in her letter of October 18, 2012. Last, the plaintiff indicated that she would call Defendants' insurer's medical expert who reviewed the plaintiff's medicals. Ms. Collis states that this person will testify that, upon review of the plaintiff's medical records, the injuries appear to be related to the incident.

Ms. Collis admits that she does not know who the insurer's doctor is, let alone what opinion he or she would be willing to offer at trial. Consequently, none of the aforementioned witnesses offers a causation opinion. The jury may not infer that the massage caused the injuries without a supporting expert's opinion to a reasonable degree of medical probability.

I further conclude that Defendants are correct in their contention that an expert is necessary to establish the professional standard of care of a massage therapist in order to determine whether a breach occurred. In *Weaver v. Lukoff*, the Delaware Supreme Court stated:

As a general rule the standard of care applicable to a professional can only be established through expert testimony. An exception to this rule exists, however, when the professional's mistake is so apparent that a layman, exercising his common sense, is perfectly competent to determine whether there was negligence.<sup>13</sup>

<sup>13</sup> Weaver v. Lukoff, 511 A.2d 1044, 1986 WL 17121, at \*1 (Del. July 1, 1986) (TABLE) (citations omitted).

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Massage therapists are required to be licensed in Delaware.<sup>14</sup> Presumably, Ms. Casey was licensed at the time of the alleged negligence. I find that a layman would not be able to determine from a description of the massage whether Ms. Casey breached the standard of care for a reasonable massage therapist. Expert testimony is necessary.<sup>15</sup> Ms. Collis did provide a potential standard of care expert in Tracy Morris, a massage therapist. However, the plaintiff has not disclosed any opinion from Ms. Morris regarding a professional standard of care beyond "Ms. Morris is familiar with cranial sacral therapy and realizes it can be dangerous if done incorrectly."<sup>16</sup> This broad statement cannot be construed as offering any opinion regarding what the standard of care was, and whether Ms. Casey breached that standard.

As to the plaintiff's contention regarding the January 11, 2011 settlement offer from Defendants' insurer, pursuant to Delaware Rule of Evidence 408,<sup>17</sup> the offer is not admissible at trial to prove liability. At the time of the offer, the claim was clearly disputed as to both validity and amount.

<sup>&</sup>lt;sup>14</sup> 24 Del. C. § 5307.

<sup>&</sup>lt;sup>15</sup> See Bickom v. Bierwagen, 852 N.Y.S.2d 542, 543 (N.Y. App. Div. 2008) (holding that the plaintiff's submission of an expert affidavit raised a triable issue of fact as to a physical therapist's alleged departure from the standard of care during a massage).

<sup>&</sup>lt;sup>16</sup> Pl.'s List of Experts, D.I. 59.

D.R.E. 408 provides: "Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible."

The Court is mindful of *Drejka*<sup>18</sup> and its progeny.<sup>19</sup> However, Ms. Collis had many opportunities during the discovery period to obtain the expert testimony necessary to support her negligence claim. The Court twice permitted an extension of the expert disclosure deadline. Despite these accommodations, the plaintiff affirmatively decided against securing competent expert testimony under the mistaken theory that it was unnecessary. Now, with the trial date imminent, it is too late to substantiate her claim. Any further delay would require the Court to reschedule trial. The comments from the persons whom Ms. Collis has identified as experts are brief and generalized. None of them have any pertinent connection to the defendants in this case, and it does not seem likely to the Court that refining those comments would lead to opinions which are required to make a *prima facie* case. The case has been pending over two years. Ms. Collis' failure to procure expert testimony means that she cannot survive summary judgment because she has not "adequately establish[ed] all the elements essential to [her] case that [she] would have the burden of proving at trial." She cannot establish a *prima facie* negligence case.

<sup>&</sup>lt;sup>18</sup> *Drejka v. Hitchens Tire Serv.*, 15 A.3d 1221 (Del. 2010).

<sup>&</sup>lt;sup>19</sup> See, e.g., Hill v. DuShuttle, 58 A.3d 403, 406 (Del. 2013) (finding dismissal of a plaintiff's case to be an inappropriate sanction for failing to comply with a court order and disclose a medical expert in a personal injury case).

<sup>&</sup>lt;sup>20</sup> Rayfield, 840 A.2d 642, 2003 WL 22873037, at \*1.

<sup>&</sup>lt;sup>21</sup> See Money v. Manville Corp. Asbestos Disease Comp. Trust Fund, 596 A.2d 1372, 1375-76 (Del. 1991) ("[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

# **CONCLUSION**

Defendants' Motion for Summary Judgment is granted.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.

oc: Prothonotary

cc: Order Distribution

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testimony in order to establish a *prima facie* case." (quoting M.S. Madden, *Products Liability* 533 (2nd ed. 1988))).