IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

FAYE BUMGARNER and :

PAMELA BUMGARNER, : C.A. No. K12C-04-012 WLW

:

Plaintiffs, :

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V.

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VERIZON DELAWARE, LLC and :

JAMES E. BOWDEN,

:

Defendants. :

Submitted: January 10, 2014 Decided: January 14, 2014

ORDER

Upon Defendants' Motion to Continue Trial. *Granted*.

Douglas B. Catts, Esquire of Schmittinger & Rodriguez, P.A., Dover, Delaware; attorney for Plaintiffs.

R. Stokes Nolte, Esquire of Reilly Janiczek & McDevitt, P.C., Wilmington, Delaware; attorney for Defendants.

WITHAM, R.J.

ISSUE

The Court heard arguments of counsel on Defendants' Motion to Continue Trial on the basis that two fact witnesses are unable to testify at trial and counsel has been unable to agree on deposition dates.

BACKGROUND

The trial in this negligence action is currently scheduled to begin on February 10, 2014. Defendants do not contest liability, but challenge whether a rear-end collision which occurred on April 20, 2010 was the proximate cause of the Plaintiffs' injuries.

On December 16, 2013 Plaintiffs filed ten motions *in limine* to exclude certain evidence or references to certain evidence. In the sixth motion *in limine*, Plaintiffs move to exclude a statement contained in the medical records of Dr. Rachel Smith (hereinafter "Dr. Smith"), the physician who treated Plaintiff Pamela Bumgarner (hereinafter "Pamela") soon after the accident. The parties dispute whether this statement is merely a factual record or a medical opinion that would require Dr. Smith to testify as an expert. In the tenth motion *in limine*, Plaintiffs move to exclude any reference to visits Pamela made to her family doctor, Dr. Sharrad Patel (hereinafter "Dr. Patel") regarding alleged neck and back pain. As with Dr. Smith, Defendants characterize Dr. Patel as a fact witness.

Plaintiffs' sixth motion *in limine* indicates that Plaintiffs have no intention to call Dr. Smith as a witness at trial, and states that Defendants only intend to call Dr. Smith as a fact witness. Plaintiffs' tenth motion *in limine* also indicates no intention on the part of Plaintiffs to call Dr. Patel as a witness, and states "it is anticipated that

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Defendants will not call Dr. Patel to testify."

In the Pretrial Stipulation filed by the parties on January 7, 2014, in the list "of all witnesses to be called at trial," Plaintiffs list both Dr. Patel and Dr. Smith as expert witnesses to testify on the Plaintiffs' behalf. Defendants list Dr. Smith and Dr. Patel as fact witnesses to testify on the Defendants' behalf.

Despite this, Defendants received confirmation from Plaintiffs that Plaintiffs did not intend to call either Dr. Smith or Dr. Patel at trial. It appears Defendants had taken no previous steps of their own to secure either doctor's attendance at the trial. Upon attempting to secure the doctors' attendance following this revelation, Defendants were informed that neither doctor was available to testify at trial.

Defendants then attempted to schedule deposition dates for Dr. Smith and Dr. Patel before the February 10 trial date. Defendants presented Plaintiffs with two deposition dates for Dr. Smith and one deposition date for Dr. Patel; Defendants were advised that counsel for Plaintiffs was unavailable on all three proposed dates.¹ Based on the failure of the parties to agree upon pretrial deposition dates for the two doctors, Defendants filed the instant Motion to Continue Trial on January 8, 2014. The Pretrial Conference in this case was scheduled for Monday, January 13–less than a week from when Defendants filed the instant motion. Plaintiffs oppose the Motion on the grounds that Defendants have waited until "the eve of trial" to request a continuance when Defendants had ample opportunity to depose both doctors long

¹ One of the proposed dates for Dr. Smith's deposition conflicted with Plaintiffs' counsel's schedule because the deposition of one of Plaintiffs' witnesses had already been scheduled for that date, and Dr. Smith was unavailable for an earlier time that day.

before the scheduled trial date.

DISCUSSION

Motions for a continuance are effectively motions to amend the trial scheduling order.² Based upon a previous version of Superior Court Civil Rule 16(b), this Court, in past cases, has held that a scheduling order shall not be modified unless there is a showing of good cause.³ To establish good cause, the party requesting the modification/continuance must show that "he has made diligent efforts to meet the trial scheduling deadlines."⁴ Rule 16 provides that if a party seeks to modify the scheduling order *after* the Pretrial Conference, such modification will only be granted in order to prevent manifest injustice.⁵

Based on the foregoing, the Court is compelled to grant Defendants' Motion and continue the trial date so that Doctor Smith and Doctor Patel may be deposed as fact witnesses before trial. While Defendants are not entirely without blame for waiting this long before realizing that the doctors would not be called by the Plaintiffs, the Court notes that Defendants' confusion was created at least in part by Plaintiffs having listed both doctors as expert witnesses in the Pretrial Stipulation.

² Meck v. Christiana Care Health Servs., Inc., 2011 WL 1226456, at *2 (Del. Super. Mar. 29, 2011).

³ Brewington-Carr v. Univ. and Whist Club, 2009 WL 924533, at *1 (Del. Super. Apr. 6, 2009).

⁴ *Id.* (citing *Candlewood Timber Group LLC v. Pan Am. Energy LLC*, 2006 WL 258305, at *4 (Del. Super. Jan. 18, 2006)).

⁵ Del. Super. Ct. Civ. R. 16(e).

The Stipulation was filed after the motions in limine in which Plaintiffs seem to indicate that they would not be calling either doctor. Defendants cannot be blamed for the confusion such an apparent change in position may cause. Without deciding the motions in limine at this time, the Court notes that the testimony of both doctors may be highly relevant to Defendants' case, and that the issues raised in the motions in limine may be resolved by depositions before trial. Thus, the Court finds good cause to grant the continuance.

However, this continuance is conditional on the parties' failure to reach a compromise on deposing Doctor Smith and Doctor Patel before the February 10 trial date. The Court respectfully urges counsel to continue to make their best attempts to schedule depositions for both witnesses before the current trial date. The Court is troubled by on-the-record comments made by Plaintiffs' attorney of record. When asked by the Court during the hearing on the instant Motion why the attorney simply could not have another attorney from his law firm attend one of the proposed deposition dates that did not work with his schedule, the attorney responded "I don't want to do that." Such uncooperative behavior is, at best, an example of sharp practice and at worst unbecoming of an experienced member of the Delaware Bar.

It seems that counsel for Plaintiffs does not want to have another member of his firm attend the depositions of either doctor because Plaintiffs want to be ready to object to certain portions of their testimony-namely, Dr. Smith's notation in her

⁶ Upon counsel's request, this Court has reviewed the transcript which indicates that this comment is what was stated in open court. However, regardless of what counsel said, the intonation remains the same. The Court's comments regarding such behavior remain the same.

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medical records that Plaintiffs construe as an expert opinion. However, Defendants

are seeking to admit the deposition testimony of both doctors as factual testimony.

The Court is confident that any of the other attorneys at counsel's law firm are

competent to recognize any potential issues regarding expert testimony veiled as

factual testimony and raise an objection accordingly. The Court would then decide

on the admissibility of that testimony at trial. Thus, counsel's concerns regarding his

belief that only he may be at these depositions instead of another attorney at this law

firm are unfounded.

In any event, the Court finds good cause to grant the continuance. The Court

bases this decision on the apparent lack of cooperation on Plaintiffs' side in attempts

to schedule depositions of these witnesses before the trial date, and the preexisting

confusion regarding whether the doctors would be called as Plaintiffs' witnesses at

trial, as well as the diligent efforts made by Defendants after it was realized that the

doctors would not be testifying at trial.

CONCLUSION

Defendants' Motion to Continue Trial is hereby **GRANTED**, unless counsel

for the parties are able to schedule depositions for Dr. Smith and Dr. Patel prior to the

February 10, 2014 trial date, in which case the trial date shall remain as scheduled.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.

Resident Judge

RJW/dmh

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