IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

THOMAS J. DILLULIO and JANET DILLULIO,	:	C.A. No. K12C-04-021 WLW
Plaintiffs,	:	
v.	:	
JACOB D. REECE, TRI-STATE GROUTING, LLC, a Delaware limited liability company, and TRI-STATE GROUTING, INC., a Delaware corporation,	:	
Defendants.	:	

Submitted: April 4, 2014
Decided: April 7, 2014

ORDER

Upon Defendants' Motion for Reargument.
Granted in part; Denied in part.

Scott E. Chambers, Esquire of Schmittinger & Rodriguez, P.A., Dover, Delaware; attorney for Plaintiffs.

Michael I. Silverman, Esquire of Silverman McDonald & Friedman, Wilmington, Delaware; attorney for Defendants.

WITHAM, R.J.

The issue before the Court is whether the Court should grant Defendants' Motion for Reargument on the Court's decision granting Plaintiffs' motion *in limine* to preclude the testimony of Defendants' expert.

FACTUAL AND PROCEDURAL BACKGROUND

The Scheduling Order in this negligence case was issued on October 2, 2012. Pursuant to the Scheduling Order, the following cutoff dates were set: the deadline for Defendants' expert discovery was December 10, 2013; the date for discovery completion was January 28, 2014; and the date for "motions *in limine* to include *Daubert* motions" was March 18, 2014. The filing date for "responses to motions" was April 1, 2014.

On March 18, 2014, Plaintiffs filed a motion *in limine* seeking to: (1) preclude Defendants from offering any testimony at trial or any documentary evidence based on Defendants' failure to respond to Plaintiffs' discovery requests made on July 12, 2012; and (2) preclude Defendants from offering any expert testimony at trial, because Defendants did not identify any experts prior to the December 10 cutoff date under the Scheduling Order. It appears that Plaintiffs never filed any motion to compel discovery.

Also on March 18, Defendants' counsel submitted a letter to the Court indicating that Defendants would be unable to comply with the Scheduling Order's cutoff date for motions *in limine* and *Daubert* motions. Without providing an exact reason as to why, Defense counsel merely stated that he was not able to file a motion *in limine* to preclude Plaintiffs' expert testimony until the expert was deposed or a *Daubert* hearing was scheduled. On March 19, Plaintiffs' counsel responded via

letter to the Court indicating that he was "not consulted about any need to extend the deadlines set forth in the Court's Scheduling Order." Counsel informed the Court that he would oppose any such motions filed by Defense counsel as untimely. On March 24, 2014, Defendants noticed the video trial deposition of Dr. Richard Katz (hereinafter "Dr. Katz") for April 23, 2014.

By letter dated March 27, 2014, Plaintiffs' counsel reiterated the representations made in the motion *in limine*: that Dr. Katz was never identified as an expert by Defendants in accordance with the Scheduling Order and expert discovery was never provided by Defendants. Plaintiffs requested that this Court issue a ruling on Plaintiffs' previously filed motion *in limine* prior to the deposition date order to determine whether or not Dr. Katz's deposition would go forward.

On April 1, 2014–without any response from Defendants to either the March 18 motion *in limine* or the March 27 letter submitted by Plaintiffs' counsel–the Court issued a letter order decision granting Plaintiffs' motion in part to preclude Dr. Katz's testimony on the basis that Defendants failed to identify Dr. Katz as an expert by the Scheduling Order deadline.[1] The Court also observed that Defendants had not filed any response to the March 18 motion. The Court denied the other portion of Plaintiffs' motion seeking to prevent Defendants from presenting any testimony or documentary evidence at trial for Defendants' alleged failure to respond to Plaintiffs' discovery requests.[2] This Court reasoned that because Plaintiffs failed to file any

[1] *Dillulio v. Reece*, *et al.*, C.A. K12C-04-021 WLW, at *3 (Del. Super. Apr. 1, 2014).

[2] *Id.*

motions to compel discovery, Plaintiffs should "not be rewarded for their failure to vigorously pursue discovery by entirely preventing Defendants from putting on a case."[3]

On April 1, 2014–after the Court's letter order decision had already been e-filed–Defendants filed an opposition to Plaintiffs' motion *in limine*. Defendants allege that the parties all participated in the discovery process. Defense counsel states that he sent notification of a defense medical examination to Plaintiff's counsel on June 11, 2013–prior to the December 10 deadline for defense expert discovery. The medical examination was performed by Dr. Katz on August 1, 2013. Defense counsel claims that Dr. Katz timely issued a report based on the examination, which Defense counsel then directed his staff to mail to Plaintiff's counsel. Defendants' counsel claims he had no reason to believe Plaintiffs had not received Dr. Katz's report until March 11, 2014, when the parties appeared for mediation. Defense counsel alleges that on March 11, Plaintiffs' counsel informed Defense counsel "for the very first time" that Dr. Katz's report was never received, at which point Defense counsel provided a copy of the report "within minutes." Defense counsel claims that prior to March 11, both attorneys had been in communication and Plaintiffs' counsel never indicated that Dr. Katz's report had not been received.

On April 2, 2014, Defendants timely filed the instant Motion for Reargument. Defendants point out under the Scheduling Order, the deadline for responses to motions was April 1. Thus, Defendants contend that their opposition to Plaintiffs'

[3] *Id.*

March 18 motion *in limine* was timely filed. Defendants claim that Defense counsel has timely complied with all deadlines under the Scheduling Order and allege that "the parties have worked well together" prior to this point. Defendants reiterate the same representations made in their April 1 response. Defendants further contend that the Supreme Court's decisions in *Drejka v. Hitchens*[4] and *Christian v. Counseling Res. Assoc., Inc.*[5] are implicated by the case at bar–*i.e.*, Defendants contend that precluding them from offering expert testimony would be an overly severe discovery sanction, assuming *arguendo* the Court finds that Defendants failed to comply with the Scheduling Order.

Plaintiffs filed an opposition to Defendants' Motion for Reargument on April 4, 2014. Plaintiffs acknowledge that the deadline for responses to motions *in limine* was April 1, but point out that Defendants filed their initial response only after the Court's decision was issued. Plaintiffs contend that the Court's April 1 decision must stand because Defendants failed to timely designate their expert witness and failed to provide any expert discovery whatsoever. Plaintiffs further argue that the June 11, 2013 letter informing Plaintiffs of Defendant's medical examination does not constitute an expert disclosure, because it never identified Dr. Katz as being an expert witness who would testify at trial. Plaintiffs further contend that the report by Dr. Katz alluded to by Defendants was never in fact received by Plaintiffs' counsel. Plaintiffs acknowledge that Plaintiffs' counsel became aware of Dr. Katz' report at

[4] 15 A.3d 1221 (Del. 2010).

[5] 60 A.3d 1083 (Del. 2013).

the March 11 mediation.

STANDARD OF REVIEW

Pursuant to Civil Rule 59(e), a party may file a motion for reargument within five days after the filing of the Court's opinion or decision.[6] The motion will be granted only if "the Court has overlooked a controlling precedent or legal principles, or the Court has misapprehended the law or facts such as would have changed the outcome of the underlying decision."[7] A motion for reargument is not an opportunity for a party to rehash arguments already decided by the Court or to present new arguments not previously raised.[8] In order for the motion to be granted, the movant must "demonstrate newly discovered evidence, a change in the law, or manifest injustice."[9]

DISCUSSION

As an initial matter, the Court notes that Defendant takes exception to the Court's issuance of its decision "prior" to the April 1 deadline for responses to motions. This is not an accurate statement, as the Court issued its decision *on* the deadline of April 1, at 1:52 p.m. Defendants did not file their opposition until 7:19

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[6] Del. Super. Ct. Civ. R. 59(e).

[7] *Kennedy v. Invacare, Inc.*, 2006 WL 488590, at *1 (Del. Super. Jan. 31, 2006) (citing *Bd. of Managers of the Del. Criminal Justice Info. Sys. v. Gannett Co.*, 2003 WL 1579170, at *1 (Del. Super. Ct. Jan. 17, 2003)).

[8] *Strong v. Wells Fargo Bank*, 2013 WL 1228028, at *1 (Del. Super. Jan. 3, 2013) (citations omitted).

[9] *Brenner v. Village Green, Inc.*, 2000 WL 972649, at *1 (Del. Super. Ct. May 23, 2000) (citing *E.I. duPont de Nemours Co. v. Admiral Ins. Co.,* 711 A.2d 45, 55 (Del. Super. Ct. 1995)).

p.m. on April 1, only hours before the deadline's expiration. While filing a response on the eve of a Scheduling Order deadline is not improper *per se* under the Court's rules of procedure, such conduct arguably does not constitute best practices given the particular circumstances of this case. Plaintiffs alleged dilatory and nonresponsive behavior on the part of the Defendants in Plaintiffs' March 18 motion *in limine*, and reiterated these allegations one week later in their counsel's March 26 letter to the Court. The letter did not spur Defendants to file a prompt response. Instead, despite such allegations–allegations which Defense counsel appears to adamantly deny–Defense counsel chose to wait until nearly the end of the Scheduling Order deadline to respond.

Further, counsel's own conduct gave the Court reason to believe that no response would be forthcoming. On the deadline for motions *in limine* and *Daubert* motions, Defendants' counsel simply filed a letter indicating intent to file a *Daubert* motion once Plaintiff's expert was disclosed or a *Daubert* hearing was scheduled, rather than file any actual motion. Plaintiff's counsel subsequently clarified that no agreement to extend the deadline for *Daubert* motions had been reached and indicated that any untimely motions would be opposed. While Defendant's later filing of a *Daubert* motion would have been perfectly acceptable had notice of an extension agreement between counsel or a formal request for an extension been given to the

Court,[10] none was given here.[11] When the Court is confronted with allegations of nonresponsive and noncompliant conduct on the part of an attorney, which are substantiated by counsel's own actions, the Court shall not wait with bated breath for a response up until the last minute of the deadline. Accusations of failure to participate in discovery and noncompliance with the Scheduling Order should provoke a prompt and speedy response; this should especially be true when such accusations are outright denied. A simple letter denying Plaintiffs' allegations and indicating an intent to file a response before the expiration of the filing deadline would have been sufficient.

Notwithstanding the Court's views on Defendants' reaction to Plaintiffs' filings and the Court's April 1 decision, Defendants' Motion for Reargument is granted. Counsel in this matter present two very different versions of how the discovery process unfolded in this case. Plaintiffs' counsel previously indicated to the Court that Defendants failed to provide any discovery whatsoever and failed to disclose the identity of Dr. Katz prior to the notice of deposition. Defendants' counsel denies these allegations, and indicates not only active participation in the discovery process, but claims that Dr. Katz' examination report was disclosed to Plaintiffs' counsel on

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[10] *See Christian*, 60 A.3d at 1088 ("we now advise litigants that, if they act without court approval, they do so at their own risk.").

[11] Defendants' *Daubert* motion is not currently before the Court as it has yet to be filed. However, given the lapse of the deadline for the motion, and the failure of Defendants to receive an extension of the deadline from both Plaintiffs' counsel and the Court, the Court will not accept the untimely motion should it be filed, unless Plaintiffs' counsel consents to the filing and the Court receives notice of this consent.

March 11 at mediation. Defendants' counsel also alleges that he believed that the report was promptly sent to Plaintiffs, and had no reason to believe that the report had not been received. Finally, Plaintiffs' counsel has acknowledged that he was put on notice of Defendants' intent to call Dr. Katz as an expert–and in fact received Dr. Katz's report from Plaintiffs' counsel–at the March 11 mediation. This acknowledgment is contrary to the Court's impression that such report was never in fact received.

Because of the two starkly contrasting version of events offered by counsel, and because of Plaintiffs' counsel acknowledgment that he was provided Dr. Katz's report at the March 11 mediation, the Court has reason to believe that it misapprehended the facts such that the outcome of the April 1 decision would have been different. This provides a sufficient basis to grant Defendants' Motion for Reargument. The Motion for Reargument is only granted in part as to the Court's decision precluding the testimony of Dr. Katz. The remainder of the Court's decision denying Plaintiffs' motion to prevent Defendants from offering any evidence at trial remains in effect, and the Motion for Reargument is denied in part as to that aspect of the decision.

Dr. Katz' deposition is currently scheduled for April 23, 2014. The pretrial conference in this case has been rescheduled for April15, 2014, and trial is currently scheduled to begin on May 12, 2014. The scheduled deposition will be postponed until the attorneys in this matter can address the apparent lack of cooperation and good faith compliance with the scheduling order. Thus, rather than hold oral arguments on Plaintiffs' motion to preclude Dr. Katz' testimony, the Court orders that

the attorneys shall each submit letters to the Court prior to the pretrial conference on April 15. Counsel's letters are due no later than Noon on Monday, April 14.

Specifically, counsel's letters should each provide, in detail, their account of how the discovery process unfolded in this case and the apparent lack of communication, or defects in communication, between the parties. Counsel should also address whether Defendants' June 11, 2013 letter regarding the medical examination constituted a sufficient expert disclosure under the Scheduling Order. Finally, Plaintiffs' counsel should address Defendants' arguments under *Drejka* and *Christian*, including whether those cases even apply, and should also explain what actions were taken upon receiving Dr. Katz' report on March 11, 2014. Counsel is free to make any additional arguments they deem appropriate. Once the Court receives these letters, the Court shall discuss counsel's respective positions at the April 15 conference. The Court shall thereafter promptly issue an order on the issue of whether or not Dr. Katz should be precluded from testifying, at which point his deposition can either be canceled or conducted.

Finally, the Court hopes that both attorneys in this matter display greater cooperation and communication than they have up until this point in litigation, and work together to resolve any outstanding issues.

CONCLUSION

Based on the foregoing, Defendants' Motion for Reargument is **GRANTED IN PART** as to the Court's decision precluding the expert testimony of Dr. Katz. Defendants' Motion for Reargument is **DENIED IN PART** as to the remainder of the Court's April 1 decision. Counsel for the parties shall submit letters to the Court as described *supra* by Noon or before on April 14, 2014.

IT IS SO ORDERED.

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

WLW/dmh