SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
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Re: Louise Galmore v. St. Francis Hospital, et al.
C.A. No. N09C-11-020 RRC

Submitted: April 26, 2011
Decided: April 27, 2011

On Plaintiff's Motion in Limine.
DENIED.

Dear Counsel:

In this medical malpractice case, the parties completed a pretrial conference with this Court on April 19. In the Pretrial Stipulation filed March 31, Plaintiff's counsel, for the first time, asserted an objection to the presentation of "cumulative" expert testimony by Defendants. Thereafter, at the pretrial conference, Plaintiff argued that Defendants should be precluded from calling two experts to testify on the same issue, based on the alleged cumulative nature of such testimony.

This case is scheduled for trial on May 9. This Court ordered an expedited briefing schedule for the parties to set forth their positions on the issue of Defendants' testifying experts. On April 21, Plaintiff filed a "memorandum in support of Plaintiff's position that the Defendants should be precluded from calling two experts to testify regarding the same opinion as cumulative evidence." Although Plaintiff, in that letter memorandum, does not characterize her application as a "motion *in limine*," it is effectively a motion *in limine*, and will be analyzed as such by this Court.[1] Indeed, in the Pretrial Stipulation, Plaintiff has effectively conceded that the instant motion is a motion *in limine*; in Section 12 of the Pretrial Stipulation, a section that is otherwise designated for "Other Matters," the parties designated the caption as "Motions in Limine," and Plaintiff therein asserted that "Defendant should not be permitted to present cumulative expert testimony."[2]

A. <u>Plaintiff's Motion *in limine* is Denied as Untimely.</u>

Plaintiff's motion must be denied as untimely; the Trial Scheduling Order executed by this Court on May 13, 2010 provides that all motions *in limine* must be filed by February 28, 2011, with responses due by March 14, 2011.[3] The Trial Scheduling Order stated that any motions *in limine* would be argued at the pretrial conference.[4] As stated, Plaintiff first raised the instant issue to the Court in the March 31 pretrial stipulation, approximately one month past the established deadline. Plaintiff's letter does not address, much less explain or mitigate the failure to file to this motion within the prescribed time.

Trial Scheduling Orders are governed by Superior Court Civil Rule 16.[5] Significantly, such orders "are not merely guidelines but have full force

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[1] *See, e.g.*, *Hercules Inc. v. AIU Ins. Co.*, 784 A.2d 481, 500 (Del. 2001) ("A motion in limine typically concerns the admissibility of evidence and is a preliminary motion directed at establishing the 'ground rules applicable at trial.'") (citation omitted).

[2] Pretrial Stipulation at 13 (Lexis I.D. 36789533).

[3] *See* Trial Scheduling Order of May 13, 2010 (Lexis I.D. 31110453).

[4] *Id.*

[5] Although Rule 16(c)(4) states that the participants in a pretrial conference "may consider and take action with respect to. . .the avoidance of unnecessary proof and cumulative evidence," Rule 16(b)(5) provides that a Trial Scheduling Order may set forth "[a]ny other deadlines or protocols appropriate in the circumstances of the case including, but not limited to, appropriate sanctions for failure to meet the deadlines and requirements established by the scheduling order to include, in the Court's discretion, dismissal of the action or default judgment." The instant Trial Scheduling Order

and effect as any other order of the [Superior] Court."[6] Plaintiff's motion was not in compliance with the Trial Scheduling Order, and the Trial Scheduling Order unequivocally advised that all deadlines were "firm" and that any amendments must be by appropriate motion; therefore, Plaintiff's motion *in limine* must be denied on procedural grounds.[7]

B. Plaintiff's Motion *in limine* is Denied on the Merits.

Alternatively, and independently, Plaintiff's motion *in limine* must be denied on the merits. Plaintiff argues that Defendants are proffering two experts to testify to the same opinion.[8] Plaintiff submits that such testimony would be "cumulative and prejudicial."[9]

Defendants note that Plaintiff herself initially identified two standard of care experts.[10] Defendants also apparently encountered some difficulty in scheduling the deposition of Dr. Borow, one of Plaintiff's original standard of care experts.[11] Ultimately, Defendants have identified three trial experts: two

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unequivocally states all deadlines are firm, any amendments must be by appropriate motion, and that "failure to meet these deadlines, absent good cause shown, may result in the Court refusing to allow extensions regardless of the consequences." *See supra* note 3. Thus, Plaintiff's failure to meet the motion *in limine* deadline, with no "good cause" shown, has appropriately resulted in the denial of Plaintiff's motion on timeliness grounds.

[6] *Sammons v. Doctors for Emergency Servs., P.A.*, 913 A.2d 519, 529 (Del. 2006) (citation omitted).

[7] *See supra* note 5. Had Plaintiff's motion *in limine* been timely filed and responded to, it could have been maturely considered at the pretrial conference and decided at that time, thereby obviating the need for the accelerated briefing and this written decision.

[8] Pltf.'s Memorandum of Apr. 21, 2011 at 1 (Lexis I.D. 37163093). *See also id.* ("The Defendants' experts essentially give the same opinion and defense counsel agrees. There is nothing new to be offered by two experts providing the same opinion.").

[9] *Id.* at 2.

[10] Def.s' Letter Memorandum of Apr. 26, 2011at 1 (Lexis I.D. 37239174). By letter dated December 21, 2010, Defendant indicated that it would object to Plaintiff's identification of Plaintiff's second purported standard of care expert (Plaintiff's fourth identified expert in total) as cumulative. *Id.* Ex. D. Defendants apparently agreed to defer objecting based on grounds of cumulative testimony until the experts' depositions could be completed. *Id.*

[11] *See id.* Ex. E (an April 5, 2011 letter from Defendants' counsel indicating that Plaintiff's counsel had not provided any expert opinions from an expert scheduled to be deposed the following day; Defendants' counsel accordingly cancelled the deposition); *Id.* Ex. G (email correspondence between Plaintiff's counsel and Defendants' counsel indicates that, secondary to an expert discovery extension from Defendants' counsel, Plaintiff's counsel was nonetheless reluctant to produce Plaintiff's experts for depositions

gynecologists and a urogynecologist.[12] Although the testimony of each of these experts may be somewhat overlapping or cumulative, this does not necessarily render the testimony of any given one of these experts inadmissible.[13] Further, this Court should limit a party's presentation of evidence on the ground that it is cumulative "only sparingly."[14] Defendants note that the multiplicity of the issues herein, including the propriety of the instant surgical technique, informed consent, and credentialing protocol, coupled with the relative novelty of the "robotic" surgery procedure at issue and existence of two defendants, an institutional defendant and an individual physician, necessitates that two experts be utilized.[15] Also, Defendants represent that the two experts have "different manners of involvement with robotic surgery."[16] Defendants further note that "Plaintiff did not consider two experts to be cumulative until she realized that her non compliance with the rules would leave her with only one standard of care expert."[17] Lastly,

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until Plaintiff's counsel could be informed of "what [Defendants'] experts are saying. . . ." The issue was resolved when Plaintiff's counsel agreed to produce Plaintiff's experts for a deposition). It should also be noted that the initial expert report deadline was extended by stipulation; pursuant to the stipulation, Plaintiff's expert reports were due by November 30, 2010, and Defendants' expert reports were due by January 31, 2011. *Galmore v. St. Francis Hospital, et al.*, Del. Super., C.A. No. 09C-11-020, Cooch, R. J. (Oct. 20, 2010) (ORDER)

[12] *Id.* at 2. It should be noted that Plaintiff's counsel sent an email to Defendants' counsel, dated April 14, 2011, stating that his office's schedule did not provide for enough time to depose Defendants' experts and advised Defendants' counsel that there was "[n]o need to schedule" defense expert depositions. *Id.* Ex. I.

[13] *See Barrow v. Abramowicz*, 931 A.2d 424, 430 (Del. 2007) ("[The medical malpractice defendant] argues, and we agree, that [Plaintiff's medical expert's] causation testimony echoed the opinions of the [plaintiffs] other medical experts,[ ], and, thus, was cumulative. But, the fact that evidence may be cumulative does not render it inadmissible.").

[14] *Id.*; *see also Green v. Alfred I. duPont Inst. of Nemours Found.,*759 A.2d 1060, 1065 (holding that the trial court should erred in precluding the plaintiff from presenting the video deposition of a defense expert that the defendant opted not to call at trial and observing that "[w]hile a trial judge may limit a party's presentation of evidence on the ground that it is cumulative, such authority should be exercised sparingly so as not to deprive a litigant of the right to manage the presentation of her evidence.").

[15] Def.s' Letter Memorandum of Apr. 26, 2011at 3 (Lexis I.D. 37239174).

[16] *Id.*

[17] *Id.* This contention is based on Plaintiff's initial intention to call Dr. Lawrence Borow, an obstetrician/gynecologist, as an additional standard of care expert; given that Plaintiff's counsel did not timely furnish Dr. Borow's opinion to Defendant's counsel, Defendants' counsel cancelled Dr. Borow's deposition. *See supra* note 11. Consequently, Plaintiff may not now call Dr. Borow to testify at trial; although Dr. Borow's name

Defendants represent that they have "incurred the expense of retaining both expert witnesses based upon plaintiff's initial identification of two standard of care expert witnesses."[18]

Under the instant circumstances, Defendants should not be precluded from calling all of their duly identified experts.[19] Given the inherent complexity of Plaintiff's claims, Defendants' expert's anticipated testimony will be material to the defense case and does not appear to be inappropriately cumulative.[20] Further, given that this Court should "only sparingly" exclude evidence based on its alleged cumulative nature and that Defendants' expert's testimony is indisputably important to their case, this Court will not "deprive [Defendants] of the right to manage the presentation of [their] evidence."[21]

Accordingly, for the reasons stated above, Plaintiff's motion *in limine* is **DENIED.**

IT IS SO ORDERED.

Very truly yours,

RRC/rjc
oc: Prothonotary

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appeared on the Pretrial Stipulation, this appears to be an error, given that, at the pretrial conference, Plaintiff's counsel effectively conceded that Dr. Borow may not be called at trial.

[18] Def.s' Letter Memorandum of Apr. 26, 2011at 3 (Lexis I.D. 37239174).

[19] Notably, Plaintiff's motion does not specify which defense expert she seeks to preclude, suggesting that Plaintiff requests that either Defendants or the Court to select which experts may testify.

[20] *See Green*, 759 A.2d at 1065 (holding that the precluded expert's testimony "would have been material" to the plaintiff's case-in-chief and, consequently, should not have been excluded on the ground that it was cumulative).

[21] *Id.* Also, the singular case relied upon by Plaintiff, *Pruett v. Lewis, et al.*, 2011 WL 882102 (Del. Super. Ct. 2011) is a case which turned on the admissibility of statistical evidence via a cardiology expert; it is inapposite to the instant motion. In *Pruett*, this Court precluded one of the defendant's cardiology experts from testifying about statistical evidence regarding sudden cardiac death, because the "special nexus" between evidence of common behavior and the facts of the instant case was absent, thereby creating a danger of unfair prejudice, confusion, and misleading the jury. *Id.* at *3.