IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STEVEN MCLEOD	)	
	)	
Plaintiff,	)	
	)	
v.	)	**C.A. No. N11C-03-111 MJB**
	)	
HUGHEY F. MCLEOD	)	
	)	
	)	
Defendant.	)	

Submitted: September 4, 2014
Decided: December 20, 2014

Upon Plaintiff's Motion to Disqualify Counsel,
DENIED.
Upon Plaintiff's Motion for an Evidentiary Hearing and Telephonic Conference,
DENIED.
Upon Plaintiff's Motion to Exclude Defendant's Expert,
DENIED.
Upon Plaintiff's Motion for Order to Transport,
DENIED.

OPINION

Steven A. McLeod, *pro se*, 1050 Big Joe Road, Monticello, Florida 32344.

Cynthia H. Pruitt, Esq., Doroshow, Pasquale, Krawitz & Bhaya, Attorney for Defendant.

Brady, J.

I. INTRODUCTION

This is a personal injury case. Plaintiff Steven A. McLeod ("Plaintiff") alleges that he was sexually abused as a child by his father Defendant Hughey F. McLeod ("Defendant") from approximately December 1967 through January 1972. Both parties were domiciled in Delaware at the time of the alleged abuse, but both now reside in Florida. Plaintiff is incarcerated in Florida. On April 29, 2011, Plaintiff filed the instant action under 10 *Del. C.* § 8145.

There are presently four Motions before the Court: (1) Plaintiff's Motion to Disqualify Counsel (submitted 9/30/14), (2) Plaintiff's Motion for an Evidentiary Hearing and Telephonic Conference on the Motion to Disqualify Counsel (submitted 9/20/14), (3) Plaintiff's Motion to Exclude Defendant's Expert Dr. Kaye (submitted 9/16/14), and (4) Plaintiff's Motion for Order to Transport (submitted 9/29/14). For the reasons outlined below, all four of these motions are hereby **DENIED**.

II. PLAINTIFF'S MOTION TO DISQUALIFY COUNSEL

A. Plaintiff's Motion

On August 20, 2014, Plaintiff filed his Motion to Disqualify Defendant's Counsel.[1] Plaintiff argues that counsel should be disqualified because lead attorney Robert Pasquale ("Pasquale") will be a material witness at trial concerning the alleged sexual abuse of Plaintiff's sister, Cynthia McLeod Pitcher ("Pitcher"), by Defendant. Pitcher currently denies any sexual abuse by Defendant. Plaintiff says he intends to call Pasquale to impeach Pitcher if she will not admit sexual abuse at trial as allowed by D.R.E. 613.

[1] Motion, Docket Item 181.

Plaintiff says that Pitcher worked for the Prothonotary's office and several Wilmington attorneys in the late 1970s and early 1980s. During this time, Pitcher allegedly became friends with Pasquale. Plaintiff alleges that, because of the friendship between Pasquale and Pitcher, Pasquale is aware of the sexual abuse and mental health treatments that Pitcher received relating to the abuse, and Plaintiff intends to call Pasquale to impeach Pitcher and to testify that Pitcher admitted to Pasquale that the Defendant sexually abused her. Plaintiff says that he informed Defendant's counsel of this potential conflict in a letter dated February 10, 2014, but waited to file the Motion to Disqualify in the hopes that an alternative witness could be located. As Plaintiff has been unable to locate an alternate witness, Plaintiff plans to call Pasquale in the event that Pitcher will not admit sexual abuse by Defendant.

Plaintiff argues that these prior, bad acts, ie., the alleged sexual abuse of Pitcher, by Defendant are admissible under D.R.E. 404(b), citing *Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247 (Del. 2011); *Anker v. Wesley*, 789 F.Supp.2d 487, 502-503 (D. Del. 2001); and *Getz v. State*, 538 A.2d 726, 730 (Del. 1988). Plaintiff argues that witness testimony is admissible to impeach Pitcher's denial of sexual abuse under D.R.E. 613. Plaintiff further argues that any communication between Mr. Pasquale and the Defendant concerning Ms. Pitcher's denial of abuse would be admissible under D.R.E. 502(d)(1). Plaintiff says that the fact that Pasquale would be called to give testimony that would be harmful to Defendant represents an ethical conflict of interest. Plaintiff also maintains that this ethical conflict would be imputed to other members of Pasquale's law firm, citing the Restatement (Second) of Agency §272 and *U.S. v. Giglio*, 92 S.Ct. 763 (1972).

B. Defendant's Response

On September 11, 2014, Defendant filed a combined Response to this Motion and to Plaintiff's Motion for an Evidentiary Hearing Regarding this Motion.[2] Defendant's arguments concerning the Motion for an Evidentiary Hearing on this matter are addressed in the corresponding section below.

Regarding the Motion to Disqualify, Defendant asserts that disqualification implicates Rule 3.7(a) of the Delaware Rules of Professional Conduct, which states that a lawyer "shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness…" Defendant argues that, under *In Re Appeal of Infotechnology*, 582 A.2d 215, 221 (Del. 1990), "the burden of proof must be on the non-client litigant to prove by clear and convincing evidence (1) the existence of the conflict and (2) to demonstrate how the conflict will prejudice the proceedings." Defendant further argues that, under *Estate of Waters*, 647 A.2d 1091, 1097 (Del. 1994), the language "likely to be a necessary witness" elevates the burden of proof needed to prevail on a disqualification motion. Defendant argues that "[t]he plaintiff must show at a minimum that there is reasonable probability that counsel will be a necessary witness[] and is necessary to the resolution of the suit."[3]

Defendant argues that Plaintiff has not made the requisite showing. Defendant contends that Plaintiff has not provided any factual basis for his claim that Pasquale has any knowledge concerning the alleged abuse or Pitcher's mental health, other than the fact that Pasquale knew Pitcher in the 1980s. Defendant further argues that as Plaintiff has never personally met

[2] Response, Item 188.
[3] Response, Item 188 at 2 (*citing Hull-Johnson v. Wilmington Trust*, 1996 WL 769457, *4 (Del. Super. Ct. Dec. 9, 1996)).

Pasquale, Plaintiff can have no personal knowledge of what Pasquale does or does not know regarding Pitcher.

C. Legal Standard

The Delaware Supreme Court has recognized that generally an attorney should not appear as counsel for one of the litigants and as a witness in the same matter.[4] The applicable rule is Rule 3.7 of the Delaware Rules of Professional Conduct.[5] Rule 3.7 says "A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client."

The current rule, which superseded Disciplinary Rules 5-101(B) and 5-102(A) of the former Delaware Lawyers' Code of Professional Responsibility, was intended to narrow the circumstances under which counsel will be disqualified.[6] The concern was that, under the prior provisions, "motions to disqualify [were] often disguised attempts to divest opposing parties of their counsel of choice."[7] Recognizing the potential for abuse of the disqualification rule, the Supreme Court has held that "the burden of proof must be on the non-client litigant to prove by clear and convincing evidence (1) the existence of a conflict and (2) to demonstrate how the conflict will prejudice the fairness of the proceedings."[8] Clear and convincing evidence "is evidence that produces an abiding conviction that the truth of the contentions is 'highly

[4] *Estate of Waters*, 647 A.2d 1091, 1096 (Del. 1994).
[5] *Id.*
[6] *Id.*
[7] *Id*. (*quoting Kalmanovitz v. G. Heileman Brewing Co*., 610 F.Supp. 1319, 1323 (D. Del. 1985))
[8] *In Re Appeal of Infotechnology*, 582 A.2d 215, 221 (Del. 1990).

probable.'"[9] Clear and convincing evidence is "more than a preponderance of the evidence and less than evidence beyond a reasonable doubt."[10]

A lawyer's serving as a necessary witness does not preclude other members of his firm from acting as counsel in the same matter. Rule 3.7 states that "that "[a] lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9."[11] Rules 1.7 and 1.9 concern conflicts arising from a lawyer representing a party adverse to his or his firm's current or former client. Rules 1.7 and 1.9 do not apply in the instant case as neither Plaintiff nor the witness Pitcher are claimed to be current or former clients of Pasquale or any other lawyer in his firm.

D. Analysis

Plaintiff has not met the burden of providing "clear and convincing" evidence that Pasquale will be a necessary witness in the instant case. Thus, Plaintiff has not demonstrated existence of a conflict or that the conflict will prejudice the fairness of the proceedings. For this reason, the Court must **DENY** Plaintiff's Motion to Disqualify Counsel.

In *In re Appeal of Infotechnology*, the Delaware Supreme Court found that non-client litigant had failed to prove existence of the conflict by clear and convincing evidence and failed to demonstrate how the alleged conflict would prejudice the fairness of the proceedings.[12] The plaintiff was a limited partnership that sued a corporation to challenge the fairness of a merger between the corporation and another company. The law firm representing the plaintiff had previously represented an investment banker retained by the defendant. The defendant had

[9] *In Re Bailey*, 821 A.2d 851,863 (Del. 2003).
[10] *In re Coverdale*, 1987 WL 758002, *4 (Del. Ch. Aug. 3, 1987).
[11] Del. Prof. Cond. R. 3.7.
[12] *In Re Appeal of Infotechnology*, 582 A.2d 215 (Del. 1990).

retained the investment banker to issue a fairness opinion on the disputed merger.[13] The firm had represented the investment banker in connection with the drafting and issuance of fairness opinions in at least two unrelated matters.[14] The firm's advice pertained to both the methodology and composition of these other opinions as well as the liability involved in issuing fairness opinions in general.[15] Defendant argued that there would be a conflict of interest because plaintiff might challenge the investment banker's fairness opinion and plaintiff's counsel had given the investment banker advice on fairness opinions in the past (although not on the particular fairness opinion at issue in this case).[16] The Court found that the non-client litigant had failed to prove existence of the conflict or prejudice to the proceedings.

In *Estate of Waters*, the second case cited by Defendant, the Supreme Court reversed the Court of Chancery's decision to allow an attorney to participate as counsel.[17] The case involved a will that was contested on the basis that the testator lacked capacity. The attorney, who was appearing on behalf of the estate against those challenging the validity of the will, had drafted the will and presented it to the decedent for her signature.[18] The Court found that "the centrality of [the attorney's] testimony to the contested issues of undue influence and testamentary capacity mandated his withdrawal as trial attorney."[19]

While there is no Delaware case precisely on point (i.e., where the party seeking disqualification asserted that the attorney may be called as a witness to impeach another witness), the Delaware Supreme Court has made clear that "clear and convincing" evidence is

[13] *Id.* at 217.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Waters*, 647 A.2d at 1097.
[18] *Id*. at 1092-93.
[19] *Id.* at 1097.

needed both of the conflict and the resulting prejudice.[20] Further, Delaware courts have consistently recognized that the testimony of the attorney must be "necessary," meaning "necessary to the resolution of the suit."[21]

There are two grounds on which the Court denies Plaintiff's Motion. First, Plaintiff has not presented clear and convincing evidence that Pasquale in fact has the information that Plaintiff claims he has, and that, therefore, he is likely to be called as a witness. There is nothing in the record, other than Plaintiff's allegation that Pitcher worked in the Delaware legal community and became friends with Pasquale, to substantiate the claim that Pasquale has this very personal information about Pitcher.

Second, even if Pasquale does have this information, Plaintiff has failed to demonstrate that this testimony will be "necessary to the resolution of the suit."[22] Unlike in *Estate of Waters*, the issue of whether Pitcher was abused is peripheral to the instant case. The permissible use of evidence of prior bad acts is limited under D.R.E. 404(b). The rule states, "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident."[23] Hence, Plaintiff could only use evidence that Defendant abused Pitcher to prove something other than that Defendant abused Plaintiff, such as motive, opportunity, or modus operandi. Plaintiff has provided the Court no factual basis on which to conclude that such

[20] *In Re Appeal of Infotechnology*, 582 A.2d at 221.
[21] *See, e.g., Hull-Johnson*, 1996 WL 769457 at *4 (finding that defendant's lawyer's testimony was not necessary in breach of contract action where lawyer had no first-hand knowledge of the facts but, acting as in-house counsel, wrote a letter to plaintiff summarizing defendant's position in response to plaintiff's pre-litigation demand for payment).
[22] *Id.*
[23] D.R.E. 404(b).

evidence is available. Further, unlike in *Waters* where the central issue was whether the testator had capacity when she signed the will, a will that was drafted and presented to testator by the attorney in question, Pasquale's testimony in the case would, at best, relate to the peripheral issue of whether Defendant abused Pitcher as well as Plaintiff, an issue which, on the record presently before the Court, would not properly be before the jury. The Motion is hereby **DENIED**.

III. PLAINTIFF'S MOTION FOR AN EVIDENTIARY HEARING

A. Plaintiff's Motion

Plaintiff also filed a Motion for an Evidentiary Hearing and Telephonic Conference on Plaintiff's Motion to Disqualify Counsel.[24] Plaintiff requests the hearing for the purpose of taking the testimony of Pasquale, Pitcher, and Defendant in relation to Plaintiff's Motion to Disqualify Counsel. Plaintiff requests that this Court (1) set a hearing date, (2) issue subpoenas for Pasquale and Pitcher to testify,[25] and (3) allow Plaintiff to appear at the hearing by telephone. Plaintiff does not identify the specific purpose or objective of the evidentiary hearing.

B. Defendant's Response

Defendant responds that the allegations are "baseless," "appear to be nothing more than harassment of defendant's chosen counsel," and "a fabricated attempt to disrupt counsel's representation of defendant."[26] Defendant says that Plaintiff's request for an evidentiary hearing is "unusual" and is essentially a request to depose Pitcher and Pasquale. Defendant suggests that Plaintiff's request to have Pitcher testify at the hearing is an attempt to depose Pitcher without

[24] Motion, Item 183.
[25] On the first page of the Motion, Plaintiff asks that Defendant also testify at the hearing. However, on the second page, Plaintiff asks only that Pasquale and Pitcher be subpoenaed to testify.
[26] Response, Item 188 at 2.

paying the deposition costs, "since [Pitcher] would have nothing to offer regarding this court's evaluation of Mr. Pasquale's knowledge or… lack thereof."[27]

C. Legal Standard

Superior Court Civil Rule 43(d) authorizes the Court to use oral testimony on motions generally. Rule 43(d) provides, "When a motion is based on facts not appearing of record the Court may hear the matter on affidavits presented by the respective parties, but the Court may direct that the matter be heard wholly or partly on oral testimony or deposition."[28] "However, whether to permit a hearing with oral testimony under Rule 43(d) is purely discretionary."[29]

D. Analysis

Based on the submissions, the Court finds no need to hold an evidentiary hearing. As the Court has explained, the issue of whether Pitcher was abused by Defendant is peripheral to the instant case, and there is no factual basis to support disqualification of counsel. Plaintiff has failed to identify any specific legal issue which would require an evidentiary hearing to resolve. The Motion is hereby **DENIED**.

[27] Response, Item 188 at 3.
[28] Super. Ct. Civ. R. 43(d).
[29] *North American Phillips Corp. v. Aetna Cas. and Sur. Co.*, 1991 WL 190305, *4 (Del. Super. Ct. Aug. 30, 1991).

IV. PLAINTIFF'S MOTION TO EXCLUDE DEFENDANT'S EXPERT WITNESS, DR. KAYE

A. Plaintiff's Motion

In his Motion to Exclude Defendant's Expert Witness, Plaintiff argues that the expert, Dr. Neil Kaye, should be excluded because Defendant has failed to comply with the scheduling order and because the expert is unqualified.[30]

Plaintiff contends that, under the terms of the scheduling order entered on January 28, 2014, Defendant's expert report was to be filed by August 1, 2014 and discovery to be completed by September 19, 2014. Plaintiff says that he was served an expert report from Dr. Kaye on July 25, 2014. Plaintiff alleges that the report was six pages in length, but pages 4 and 5 were omitted in both copies served on Plaintiff on July 25, 2014. (Plaintiff says that he finally received the omitted pages on August 26, 2014.) Plaintiff also alleges that the *curriculum vitae* ("CV") of Dr. Kaye that accompanied the expert report was outdated, having no entries since 2005. Plaintiff also says that the CV demonstrates that Dr. Kaye is not qualified as an expert because, out of hundreds of entries, the CV only includes ten entries concerning post-traumatic stress disorder (PTSD) and no entries concerning expertise in treating childhood sexual abuse.[31]

Plaintiff says that he sent a letter to defense counsel on August 4, 2014 concerning the omission of the pages from the expert report. Plaintiff alleges that defense counsel failed to respond to the letter in a timely fashion and to make a "good faith effort to resolve the issue without Court intervention in accordance with Rule 37(e)(1)."[32]

[30] Motion, Item 184 at 1.
[31] Motion, Item 184 at 2.
[32] Motion Item 184 at 2.

B. Defendant's Response

Defendant asks that Plaintiff's Motion be denied.[33] Counsel, Cynthia Pruitt, contends that Dr. Kaye's report was complete when it was put into the envelope in Wilmington. Defense counsel concedes that "there is no way to know what happened to the document once it entered the prison system before being delivered to plaintiff."[34] However, Defendant argues that, as Plaintiff acknowledges that he received a complete copy of the report on August 26, 2014, there has been no prejudice to Plaintiff. Defendant cites *Drejka v. Hitchens Tire Service Inc.*, 15 A.3d 1221 (Del. 2010) in support.

Concerning Plaintiff's allegation that Dr. Kaye's CV was outdated, Defendant denies that this is the case. Defendant maintains that "the CV in question is in fact Dr. Kaye's current CV, with multiple listings that reflect his current status and experience by way of a starting time and continuing through the present."[35] Further, Defendant alleges that Plaintiff has provided no reason why a non-current CV would be reason to exclude an expert. Defendant also argues that Plaintiff has not alleged any harm from the allegedly non-current CV.

Concerning Plaintiff's allegation that Dr. Kaye is not qualified, Defendant says that Plaintiff himself points out ten entries on Dr. Kaye's CV related to PTSD.[36] As to Dr. Kaye's expertise in childhood sexual abuse, Defendant says there are four entries on Dr. Kaye's CV of articles and presentations concerning sexual abuse of children.[37] Finally, Defendant argues that Dr. Kaye "is a medically trained, licensed, and board certified psychiatrist [who] has previously

[33] Response, Item 189.
[34] Response, Item 189 at 2.
[35] Response, Item 189 at 2. The CV of Dr. Kaye is part of the record as Exhibit A to Defendant's Response.
[36] Response, Item 189 at 3.
[37] Response, Item 189 at 3.

testified in the Superior Court of Delaware as an expert on a spectrum of psychiatric issues."[38] Defendant says that Dr. Kaye will testify that Plaintiff's behaviors are consistent with Anti-Social Personality, and that "there is nothing from a psychiatric basis that substantiates plaintiff's claims of childhood abuse."[39] Defendant concludes that Plaintiff's criticisms of Dr. Kaye "at best, go to the weight the testimony will be given by a jury."[40]

C. Analysis: Tardiness and CV Issues

Superior Court Civil Rule 16 provides that a party may be sanctioned for failure to obey scheduling deadlines.[41] However, absent evidence of bad faith, extreme carelessness, or substantial prejudice to the opposing party, courts are hesitant to impose the sanction of excluding the expert testimony.[42] Courts are particularly hesitant to exclude expert testimony when the exclusion is dispositive of the case.[43] However, even when the exclusion of testimony is not dispositive, less extreme sanctions are preferred when there is no evidence of bad faith or prejudice to the other party.[44]

In *Drejka*, the Delaware Supreme Court reversed the trial court's grant of summary judgment for defendant.[45] The trial court granted summary judgment to the defendant on the grounds that the plaintiff could not establish proximate cause without an expert.[46] The plaintiff did not have an expert because the court had excluded her proposed expert when the expert

[38] Response, Item 189 at 3.
[39] Response, Item 189 at 3.
[40] Response, Item 189 at 3-4.
[41] Super. Ct. Civ. R. 16(f); *see Helmick v. Miller*, 2012 WL 2833057 (Del. Super. Ct. June 13, 2012) (applying Rule 16(f) to a late expert report).
[42] *Helmick v. Miller*, 2012 WL 2833057 at *4.
[43] *Drejka v. Hitchens Tire Service Inc.*, 15 A.3d 1221 (Del. 2010).
[44] *See, e.g., Helmick v. Miller*, 2012 WL 2833057 at *1, 4 (ordering plaintiff only to pay defendant's reasonable attorney's fees in connection with deposing the expert when the expert report was five months late).
[45] *Drejka*, 15 A.3d at 1221.
[46] *Id.* at 1223.

disclosure was filed several months late.[47] The Court held that excluding the expert, resulting in summary judgment against the plaintiff, was inappropriate as a sanction for the tardiness of plaintiff's counsel in producing the expert report.[48] The Court reasoned that dismissal of a case is "the ultimate sanction"[49] and should not be imposed unless lesser measures, such as monetary sanctions, have proven ineffective.[50] The Court articulated six factors to consider in determining whether the trial court's dismissal on the basis of excluding the expert was proper.[51] The factors are (1) the extent of the party's personal responsibility; (2) the prejudice caused to the opposing party; (3) whether there is a "history of dilatoriness"; (4) whether there was bad faith; (5) the effectiveness of sanctions other than dismissal; and (6) the meritoriousness of the claim or defense.[52] The Court found a lack of bad faith in the plaintiff's tardiness and no prejudice to the defendants as they received the expert report two months before trial.[53]

In *Dillulio v. Reece*, the court relied on *Drejka* to deny the plaintiffs' motion to preclude the defendants' expert.[54] The defendants mailed the plaintiffs a notice of a defense medical examination by the expert but failed to provide an expert disclosure to the plaintiff prior to the cutoff date for doing so.[55] The expert prepared a report based on the medical examination and directed his staff to send it to plaintiffs' counsel, but plaintiffs' counsel claimed he never received the report.[56] Defendants' counsel said that he was never contacted by plaintiffs' counsel but learned in mediation that plaintiffs had not received a copy.[57] Upon learning this,

[47] *Id.*
[48] *Id*. at 1224.
[49] *Id*. at 1222.
[50] *Id.* at 1224.
[51] *Drejka*, 15 A.3d at 1224.
[52] *Id.*
[53] *Id.*
[54] *Dillulio v. Reece*, 2014 WL 1760318 (Del. Super. Ct. Apr. 23, 2014).
[55] *Id.* at *1.
[56] *Id.*
[57] *Id.* at *1-2.

defense counsel immediately provided plaintiffs' counsel with a copy.[58] Seven days after receiving the copy, the plaintiffs filed their motion to exclude the expert testimony.[59] When the defendants failed to respond by the deadline for responses to motions, the court granted the motion to exclude.[60] The defendants filed a motion for reargument, and the court granted the motion.[61]

Upon reargument, the *Dillulio* court denied to motion to exclude the testimony. The court found that although *Drejka* implies that the balancing of the "*Drejka* factors" is only necessary when the "ultimate sanction" of dismissal is threatened, the factors could still be applied to a case where dismissal was not a risk.[62] Despite a history of dilatoriness on the part of defendants' attorney in this case, the court refused to exclude the expert on the grounds that the defendants had no personal responsibility for the dilatoriness of their attorney, there was likely no prejudice to the plaintiff, there was no indication of bad faith, and alternative sanctions would likely be effective.[63]

In *Helmick v. Miller*, the court declined to exclude the plaintiffs' expert when the expert report was provided five months late.[64] The plaintiffs had ordered a report from the expert between 1-3 months before the deadline, but the expert did not submit her report until roughly five months after the deadline.[65] The court accepted the representations of plaintiffs' counsel that he had made various attempts to contact the expert and expedite the submission of the expert's report. The court ordered, as a sanction, that the plaintiffs pay defendant's cost of

[58] *Id.* at *2.
[59] *Id.*
[60] *Dillulio*, 2014 WL 1760318 at *2.
[61] *Id.* at *2-3
[62] *Id.* at *4.
[63] *Id.* at *5.
[64] *Helmick v. Miller*, 2012 WL 2833057 at *1, 4.
[65] *Id*. at *2.

deposing the expert. The court cited two reasons, both separate from tardiness of the expert report itself, for this sanction: (1) the plaintiffs attempted to obtain a second expert one month before the deadline but failed to request an extension as was proper under the Superior Court Case Management Plan; and (2) plaintiffs' counsel failed to notify the court of the issue involving the original expert until three months after the deadline.[66]

In the instant case, the Court will not impose sanctions or exclude the testimony of Dr. Kaye. While the *Drejka* factors do not strictly apply to the instant case as the exclusion of Dr. Kaye would not be dispositive, the factors still provide a good framework for considering whether fairness requires sanctions. First, there is no evidence of bad faith or carelessness on the part of Defendant's counsel. Signing counsel, Ms. Pruitt, states that she sent a complete copy of the report to Plaintiff. There is no established history of dilatoriness on the part of defense counsel. Further, even if Defendant's counsel intentionally or unintentionally omitted the pages, there was no prejudice to Plaintiff. Plaintiff confirms that he received a complete copy of the report by August 29, 2014, which is less than a month after the deadline. Even when an expert's report was five months late, the *Helmick* court declined to exclude the expert.[67] imposing lesser alternative sanctions only because of dilatoriness by counsel.[68] Like in the instant case, the exclusion of the expert in *Helmick* would not have been case dispositive. *Helmick* demonstrates the court's reluctance to exclude even a non-dispositive expert when there has been no prejudice to the opposing party.

The *Helmick* court did choose to impose sanctions, but these sanctions were imposed only because of dilatoriness by counsel, which was separate from the tardiness of the expert

[66] *Id*. at *4.
[67] *Id*.
[68] *Id*.

report itself.[69] Unlike in *Helmick*, there is no evidence of dilatoriness by Defendant's counsel in the instant case. Plaintiff argues that defense counsel failed to respond to his letter in a timely fashion, but the Court disagrees. Accounting for mail transit times, which are likely longer as Plaintiff's outgoing and incoming mail must be processed by the correctional facility, defense counsel responded within a couple weeks. Further, trial is still months away, and therefore, Plaintiff has been provided the report in plenty of time to prepare for trial.

Concerning Plaintiff's allegation that he was not provided with a current version of Dr. Kaye's CV, Defendant maintains that the CV of Dr. Kaye is current. Further, as Defendant points out, Plaintiff has not alleged that he has been prejudiced by the allegedly outdated CV. The Court finds no basis to exclude the expert's testimony based on any claims about the status of the expert's CV.

D. Analysis: Qualification Issues

The admissibility of expert testimony is governed by D.R.E. 702, which provides "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise…" The Delaware rule is analogous to the corresponding Federal Rule, and the Delaware Supreme Court has adopted the United States Supreme Court's interpretation of the rule as set forth in *Daubert*.[70] The judge acts as "gatekeeper" and "must ensure that any scientific, technical or other specialized testimony is relevant and reliable."[71]

[69] *Id.*
[70] *Daubert v. Merrell Dow Pharmaceutials, Inc.*, 509 U.S. 593-594 (1993).
[71] *Brandt v. Rokeby Realty Co.*, 2006 WL 1942314, *3 (Del. Super. Ct. July 7, 2006).

There are six "*Daubert* factors" that the court shall consider: (1) the qualifications of the witness; (2) the evidence is otherwise admissible, relevant, and reliable; (3) the expert's opinion is based upon information "reasonably relied upon by experts in the particular field"; (4) the specialize knowledge will assist the trier of fact; (5) the testimony "will not create unfair prejudice, confuse the issues or mislead the jury"; and (6) the probative value substantially outweighs the risk of prejudice.[72] However, the Delaware Supreme Court has made clear that the "factors illuminated in Daubert are meant to be helpful, not definitive, and may or may not be pertinent depending on the nature of the issue, an expert's particular expertise, and the subject of the testimony."[73] Where "the question of admissibility is a close one, exclusion of the expert evidence is not appropriate where cross-examination, the presentation of contrary evidence and careful instruction regarding the burden of proof will insure that the jury is not mislead or confused."[74]

In the instant case, Plaintiff has alleged that Dr. Kaye is not qualified because his CV does not contain adequate evidence of experience with PSTD or victims of childhood sexual abuse. However, as Defendant argues, Plaintiff himself points out ten entries on Dr. Kaye's CV related to PTSD.[75] Defendant also points out four entries related to the sexual abuse of children.[76] It is not disputed that Dr. Kaye is a licensed psychiatrist with extensive clinical experience. In this case, there are many precautions that can be taken short of exclusion, to ensure that Dr. Kaye's testimony is not misleading to a jury. Plaintiff may cross-examine the

[72] *Id.*
[73] *Norwood v. State*, 813 A.2d 1141 (Table), 2003 WL 29969, *2 (Del.).
[74] *Bowen v. E.I. Du Pont De Nemours and Co.*, 2005 WL 1952859, *8 (Del. Super. Ct. June 23, 2005) (citation omitted).
[75] Motion, Item 184 at 2. *See* CV of Dr. Kaye at 16-17, 19-21, 24, 63.
[76] Response, Item 189 at 3. The Court was able to locate at least two explicit references to Dr. Kaye's work on child sexual abuse. CV of Dr. Kaye at 6, 24. However, the CV also contains numerous entries on work related to child abuse more generally as well as psychiatric disorders of children and adolescents.

witness concerning his degree of experience with PTSD and with victims of childhood sexual abuse as well as his current activity in the profession. For these reasons, the Motion to Exclude Dr. Kaye is hereby **DENIED**.

V. PLAINTIFF'S MOTION TO TRANSPORT

Plaintiff is again asking this Court to enter an Order directing that he be transported from Florida, where he is incarcerated serving a life sentence, to Delaware for the trial of this case.

On February 26, 2014, the Court received Plaintiff's letter in which Plaintiff states that this Court "will have to enter an Order to have [Plaintiff] transported up [to Wilmington] to be housed in the New Castle County Jail" during the trial.[77] On March 28, 2014, the Court responded to Plaintiff's request by denying his implied Motion for an Order to Transport.[78] In the letter, the Court explained that this Court could not require that Plaintiff be transferred to Delaware. Further, if Plaintiff were transported to Delaware, the State of Delaware would incur costs for care, food, and housing of Plaintiff. The Court stated that this Court could not require the State of Delaware to pay these expenses. Finally, the Court stated that, should the respective correctional authorities in Florida and Delaware agree to an arrangement that would permit Plaintiff to come to Delaware, the Court has no objection.

On August 20, 2014, the Court received a second letter from Plaintiff reiterating his request that he be transported for trial.[79] Plaintiff asked, rhetorically, how the Court plans to conduct a five-day trial with the Plaintiff in Florida and everyone else in Wilmington. On September 9, 2014, the Court sent Plaintiff a letter in response, explaining that it is the plaintiff's

[77] Plaintiff's Letter, February 26, 2014, Item 126.
[78] Court's Letter, March 28, 2014, Item 141.
[79] Plaintiff's Letter, August 20, 2014, Item 179.

responsibility to determine how to successfully prosecute the case. The Court noted that it is aware of the challenges that Plaintiff will face in presenting this case, but the Court cannot provide any advice on how to meet these challenges.

In Plaintiff's present Motion, Plaintiff argues that the Court's denial of his Motion for Transport was in error.[80] Plaintiff argues that while incarcerated plaintiffs do not have an absolute right to be physically present at trial, there are several factors that the Court must consider, including (1) whether the plaintiff's presence will substantially further the resolution of the case; (2) the expense and potential security risk associated with transportation and housing; and (3) the likelihood that a stay pending the plaintiff's release will prejudice the proceedings. Plaintiff cites *Hawks v. Timms*, 35 F.Supp.2d 464, 465-66 (D. Md. 1999), for these three factors.

Plaintiff further argues that Plaintiff's credibility is a critical issue in this case, and the Plaintiff's credibility can only be adequately determined by the fact finder with the help of Plaintiff's presence. Plaintiff cites *Latiolas v. Whitley*, 93 F.3d 205 (5th Cir. 1996), for the proposition that it is reversible error for a court not to weigh the importance of the plaintiff's presence for credibility assessment against the considerations of safety and expense of transport.

Plaintiff also asserts that if a court must conduct a civil trial in the absence of the plaintiff or the plaintiff's representative, the court is "required to fully inform the plaintiff as to the exact manner in which the trial will be conducted and carefully instruct the inmate as to how he may present his evidence and testimony in court. Plaintiff cites *Poole v. Lambert*, 819 F.2d 1025 (11th Cir. 1987).

[80] Motion, Item 190.

Plaintiff suggests that in enacting 10 *Del. C.* §8145, the Delaware legislature already took into account the expense of providing a remedy to plaintiffs such as himself whose causes of action were previously barred by the statute of limitations.

B. Defendant's Response

On September 29, 2014, Defendant submitted a letter saying that Defendant takes no position on Plaintiff's Motion for Transport.[81] However, Defendant points out that Plaintiff has cited no Delaware case law in support of his position. Defendant says that he has found a single Delaware case on point, *Chesapeake Utilities Corporation v. Hopkins*, 340 A.2d 154 (Del. 1975), which holds that an incarcerated felon's attendance at trial is a decision for the Court in the exercise of its discretion.

C. Legal Standard

The Delaware Supreme Court has held that while incarcerated felons may pursue civil actions, "[t]he method by which [the felon] will be permitted to pursue his [civil] claim, whether by attending the trial in custody or by deposition, is for the Superior Court's decision in the exercise of its judicial discretion."[82] Federal courts have recognized that "lawful incarceration necessarily limits an inmate's right to plead and manage his own case personally," and that inmates have "no absolute right" to be present at the trial of their civil actions.[83]

The Fourth Circuit Court of Appeals has held that the court should consider, at a minimum, "(1) Whether the prisoner's presence will substantially further the resolution of the case, and whether alternative ways of proceeding, such as trial on depositions, offer an

[81] Defendant's Letter, September 29, 2014, Item 192.
[82] *Chesapeake Utilities Corporation v. Hopkins*, 340 A.2d 154, 155 (Del. 1975).
[83] *Poole v. Lambert*, 819 F.2d 1025, 1028 (11th Cir. 1987).

acceptable alternative; (2) The expense and potential security risk entailed in transporting and holding the prisoner in custody for the duration of the trial; and (3) The likelihood that a stay pending the prisoner's release will prejudice his opportunity to present his claim, or the defendant's right to a speedy resolution of the claim."[84]

D. Analysis

In *Hawks*, the plaintiff, who was incarcerated in federal prison in Pennsylvania serving a 26-year sentence, requested that he be transported to Maryland at government expense to attend his civil trial, a civil rights action in Maryland District Court against police officers who had allegedly used excessive force against him.[85]

The court analyzed the three factors recognized by the Fourth Circuit Court of Appeals.[86] With regard to the first factor, the court found that "whether [the plaintiff] has a viable claim will depend entirely on his own testimony and credibility."[87] As the defendants will be personally present in the courtroom "to tell their story and establish eye contact and rapport with the jury," the plaintiff would be at a serious disadvantage if he only "appeared" through deposition or affidavit.[88] Regarding the second factor, expense and security risk, the U.S. Marshall confirmed that it would not be excessive.[89] The court noted that the distance would be only 135 miles from Lewisburg, Pennsylvania to Baltimore, Maryland, where the trial might have been held, and that this distance is not much greater than the distance between Baltimore and the farthest point

[84] *Hawks v. Timms*, 35 F.Supp.2d 464, 465-466 (D. Md. 1999) (*citing Muhammad v. Warden, Baltimore City Jail*, 849 F.2d 107 (4th Cir. 1988)).
[85] *Id.* at 465.
[86] *Id*. at 465-466 (*citing Muhammad*, 849 F.2d 107).
[87] *Id*. at 467.
[88] *Id.*
[89] *Id*. at 467-468.

within the State of Maryland.[90] The U.S. Marshall also advised the court that there would be no special security risk as the court regularly brings prisoners to the courtroom in both civil and criminal matters.[91] Finally, concerning the third factor, the court found a stay impracticable as the plaintiff had only served 5 years of a 26-year sentence.[92]

In *Latioles*, the Fifth Circuit Court of Appeals acknowledged that it is within the discretion of the trial court to determine whether incarcerated civil litigants should be transported for trial.[93] Echoing the three factors articulated in *Hawks*, the circuit court found that the district court properly considered both the expense and security risk of transport as well as the feasibility of continuing the action pending the litigants' release.[94] However, the circuit court reversed the decision on the grounds that it was unclear from the record whether the district court had also considered "the extent to which plaintiffs' presence at trial would aid in the resolution of their case" given that the plaintiffs' 42 U.S.C. §1983 claim "turned largely on judging the credibility of the prisoners versus the prison officials" against whom the §1983 violations were alleged.[95]

This case is substantially different. The court system in which the plaintiffs in *Hawks* and *Latioles* were incarcerated was the same court system in which their civil claims were brought. If Plaintiff were incarcerated in Delaware, the situation would be different. However, this Court is without authority to require the Florida correctional system to act in any specific fashion. The transport in *Hawks* was from one federal correctional facility to another, which did not implicate questions of state sovereignty.

---

[90] *Hawks*, 35 F.Supp.2d at 468.
[91] *Id.*
[92] *Id.*
[93] *Latiolas v. Whitley*, 93 F.3d 205 (5th Cir. 1996).
[94] *Id*. at 208.
[95] *Id.*

While it is true that the case will likely turn on the credibility of Plaintiff, if Plaintiff is unable to arrange his attendance, there are sufficient alternatives available to in-person testimony. Technology would allow, and the Court would permit, participation by videoconference, if Plaintiff were to secure approval from the Florida correctional facility. Plaintiff's Motion to Transport is hereby **DENIED**.

VI. CONCLUSION

For the reasons detailed above, the Court **DENIES** Plaintiff's Motion to Disqualify Counsel, Plaintiff's Motion for an Evidentiary Hearing, Plaintiff's Motion to Exclude Dr. Kaye, and Plaintiff's Motion for Transport.

IT IS SO ORDERED.

_____/s/_____

M. Jane Brady
Superior Court Judge