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Case Number 357,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TRICIA MOSES,	:	
	:	No.: 357, 2014
Plaintiff below,	:	
Appellant,	:	
	:	Trial Court Below:
v.	:	Superior Court of the State of
	:	Delaware for Kent County
ARRON DRAKE,	:	
	:	C.A. No.: K13C-04-010 WLW
Defendant below,	:	
Appellee.	:	
	:	

DEFENDANT BELOW/APPELLEE'S ANSWERING BRIEF

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Dated: September 10, 2014

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NATURE AND STAGE OF PROCEEDINGS

This matter involves a claim for personal injuries arising from an April 6, 2011 motor vehicle accident.

Plaintiff Tricia Moses was pregnant at the time with Plaintiff Sa'rell Moses.

Suit was filed on April 3, 2013 and Answer was filed May 15, 2013.

On June 25, 2013, a telephone scheduling conference with the Prothonotary was scheduled for July 17, 2013.

At the July 17th scheduling conference, defense counsel requested an expedited deadline for the Plaintiff's expert reports to which Plaintiff's counsel objected. As this was outside the authority of the clerk to resolve, the scheduling conference was continued to July 19, 2013 with the Court Commissioner.

A scheduling order was issued on July 19, 2013 that included a deadline for the Plaintiff to identify their experts and produce CVs by November 29, 2013 and expert reports due December 31, 2013.

On December 11, 2013, Plaintiff had failed to identify any experts or produce any CVs and Defendant filed a Motion to Dismiss due to the lack of any experts to connect an injury to the motor vehicle accident.

On December 18, 2013, at Plaintiff's request, a stipulation to modify the scheduling order was filed extending the expert disclosure deadlines 30 days with

Plaintiff's new date to identify experts of December 31, 2013 and Plaintiff's expert reports now due January 31, 2014.

On December 18, 2014, Defendant withdrew the Motion to Dismiss without a response being filed.

On January 31, 2014, Plaintiff produced a one paragraph note from Dr. Ogden dated January 15, 2014, as to Plaintiff Tricia Moses only stating it was "feasible" that her claimed condition was a result of the motor vehicle accident.

On April 16, 2014, Defendant refiled the Motion to Dismiss as the January 15, 2014 opinion was only as to Tricia Moses, did not address any claimed injuries of the minor Sa'Rell Moses, and the expert opinion on Tricia Moses was not to a reasonable degree of probability.

On May 1, 2014, Plaintiff responded to the Motion to Dismiss and admitted that there was no longer a claim by the minor and attached a second one paragraph opinion by Dr. Ogden dated April 25, 2014, almost three months past the extended deadline for Plaintiffs' expert reports. This late opinion also did not state any opinion to a reasonable degree of probability.

At no point did Plaintiffs seek any other extension of their deadline for expert opinions.

On May 13, 2014, the Court converted the Motion to Dismiss to a Summary Judgment Motion, as there was no opposition to the dismissal of the claims by the minor Plaintiff Sa'Rell, since those claims were dismissed.

The court also noted that Dr. Ogden referenced only back pain, so all claims for pregnancy and emotional distress related to those pregnancy claims were dismissed. The court focused on the Plaintiff's remaining claims for back pain and whether Dr. Ogden's original opinion was to the correct standard for expert testimony. Having found that it was not, Plaintiff's remaining claims for back pain were dismissed.

On May 20, 2014, Plaintiff then filed a motion for reargument and attached a second late opinion from Dr. Ogden dated May 14th , one day after the case was finally dismissed.

On May 21, 2014, Defendant responded to the motion for reargument and on June 10, 2014 the Court denied the motion for reargument citing there was no good cause shown for the April 25th report filed after a Summary Judgment Motion was filed and none for the May 14th report drafted after the matter was dismissed.

Plaintiff Tricia Moses only filed her appeal on July 1, 2014 and filed her opening brief on August 15, 2014.

No appeal by the minor Sa'Rell Moses was filed.

Prior to the filing of this Answering Brief, Defendant filed a Motion to Dismiss the part of the appeal arguing that the Trial Court abused its discretion in not considering any late drafted expert "reports" as the Trial Court was never asked to do so that issue was not preserved for an appeal.

Defendant submits the only issue properly on appeal is whether the January 15, 2013 opinion by Dr. Ogden was offered to a "reasonable probability" even though the term "feasible" was actually used.

SUMMARY OF ARGUMENT

1. Denied. The trial court was correct in dismissing the Plaintiff's personal injury claims as the Plaintiff did not produce a timely medical expert opinion that related the claimed injuries to the motor vehicle accident to a "reasonable degree of probability". The reports cited by Plaintiff were produced long after the extended deadline for expert discovery, and one post dismissal.
2. Denied. The trial court properly denied Plaintiff's motion for reargument as the basis for the reargument was to present a third "report" drafted by Plaintiff's expert after the case was dismissed. A motion for reargument is not a means to present new arguments and Plaintiff never moved for an additional extension of time to produce expert reports prior to the extended deadline expiring.
3. As the Trial Court was not asked to rule on any requests to extend the time for Plaintiff's expert reports, nor was asked to retroactively allow production any late reports, this issue was not preserved below for appeal and that part of the appeal related to the Trial Court not considering the late reports should be dismissed under Supreme Court Rule 8.

STATEMENT OF FACTS

This matter involves a claim for personal injuries arising from an April 6, 2011 motor vehicle accident. *See* complaint at B1.

Plaintiff Tricia Moses was pregnant at the time with Plaintiff Sa'rell Moses. Suit was filed on April 3, 2013 in which it was alleged in the complaint that as a result of the motor vehicle accident, Plaintiff Tricia Moses claimed; Severe and serious bodily injury; Trauma induced pregnancy complications; and the premature birth of Sa'Rell Moses. B3.

It was also alleged that as a result of the motor vehicle accident, Sa'Rell Moses was born premature at 31 weeks and had multiple physical and mental deficiencies and dysfunctions. B4.

Due to the severe nature of the claimed injuries, it appeared initially that the Defendant may require multiple medical experts to address the various claims, including experts in obstetrics, orthopedics, pediatric orthopedics, pediatric neurology, and pediatric psychology. Also due to the low speed nature of the motor vehicle accident, B6 , B7, a biomechanical engineer would be also be needed to first quantify any force involved, as to be used by the subsequent medical experts.

Given the amount of defense experts anticipated, defense counsel requested at least six months for Defendant's expert reports after the Plaintiff's expert reports were due. Due to the allegations in the complaint, it was assumed

that Plaintiff already had their experts lined up and that final reports could be issued in a short time. This schedule was objected to by Plaintiff's counsel at the July 17, 2013 scheduling conference and, as the clerk did not have the authority to act, the scheduling conference was reset to July 19, 2013 with a Court Commissioner.

A full scheduling order was issued on July 19, 2013 and included a deadline for the Plaintiff to identify their experts and produce CVs by November 29, 2013 and expert reports due December 31, 2013. B8.

On December 11, 2013, Defendant filed a Motion to Dismiss as Plaintiffs had failed to identify any experts or produce any CVs by the November 29th deadline. B9.

In response to this First Motion to Dismiss, Plaintiffs' counsel contacted defense counsel as to an extension of the expert deadlines, and on December 18, 2013, a stipulation to modify the scheduling order was filed extending the expert disclosure deadlines 30 days, with Plaintiffs' new date to identify experts December 31, 2013 with Plaintiffs' expert reports due January 31, 2014, and was so ordered by the trial judge. B13.

As a result of the Stipulation, Defendant withdrew the Motion to Dismiss. B-14.

On January 31, 2014, Plaintiff produced a one paragraph opinion from Dr. Ogden dated January 15, 2014, as to Plaintiff Tricia Moses only stating it was "feasible" that her claimed condition was a result of the motor vehicle accident. A7.

On April 16, 2014, Defendant refiled the Motion to Dismiss as the "report" did not contain any expert opinion on the minor Sa'Rell Moses and the expert opinion on Tricia Moses was not being offered to a reasonable degree of probability. A10.

On May 1, 2014, Plaintiff responded to the Motion to Dismiss, conceded that there was no longer a claim by the minor Sa'Rell Moses, A28, but attached a new one paragraph report by dated April 25, 2014, A8, almost three months past the extended deadline for Plaintiffs' expert reports, which also did not state an opinion to a reasonable degree of probability. A27.

As no reply briefs are permitted, there was no response filed by Defendant to the Plaintiff's Answer.

At no point did Plaintiff seek any other extension of their deadline for expert reports nor seek leave to file supplemental reports. *See* Superior Court docket A1.

ARGUMENT

I. THE TRIAL COURT PROPERLY DISMISSED PLAINTIFFS' CLAIMS AS PLAINTIFFS' MEDICAL EXPERT COULD NOT OFFER AN OPINON TO A REASONABLE DEGREE OF PROBABILITY

A. Question Presented

Did the Superior Court err in granting the Defendant's Motion to Dismiss due to the insufficiency of the Plaintiffs' expert opinion?

B. Standard and Scope of Review

Generally, the standard of review of a Superior Court decision granting Summary Judgment is reviewed *denovo*. *Gunzl v. Chadwick*, 2 A.3d 74 (Del. 2010). In the case at bar, the trial court's decision that an expert's opinion stating it was "feasible" that a motor vehicle accident caused the alleged injury was not to the correct standard for expert testimony.

To the extent the dismissal was based on Plaintiff's expert deadline not being extended, it is reviewed as an abuse of discretion. *Christian v. Counseling Resource Assoc.* 60 A. 3d 1083 (Del. 2013). "This court reviews a trial court's decision refusing to modify a trial scheduling order for abuse of discretion."

Once the trial court concluded that "feasible" was not sufficient standard for the expert to testify, the decision to dismiss the case is reviewed as an abuse of discretion. *Hill v. Dushuttle*, 58 A.3d 403 (Del. 2013). "In this appeal we consider

whether the Superior Court abused its discretion by dismissing a . . . case because appellant failed to file an expert report." *Id.* at 403.

C. Merits of Argument

1. Plaintiff's Produced Expert Report was not to the Appropriate Standard

In early January 2013, the Delaware Supreme Court issued a series of opinions addressing dismissals due to the lack of a medical expert to correlate the claimed injuries to the Defendant's alleged negligence. *Christian v. Counseling Resource Assoc.* 60 A. 3d 1083 (Del. 2013); *Hill v. Dushuttle*, 58 A.3d 403 (Del. 2013); *Adams v. Aidoo*, 58 A.3d 410 (Del. 2013). In those cases, a dismissal was entered due to the Plaintiff failing to meet the deadlines to produce any expert report.

The case at bar is quite different from this line of cases. In the case at bar, counsel obtained a negotiated scheduling order allowing the Plaintiff more than five months after the scheduling conference to produce a report. Plaintiff sought and obtained a Stipulation, signed by the Court, extending the Plaintiff's expert deadline an additional 30 days.

Plaintiff met that deadline and timely produced a one paragraph opinion from the treating physician. The only issue is whether that timely produced opinion is sufficient to allow the matter to proceed to trial.

It is well settled law that a medical expert opinion that seeks to relate a claimed injury to a Defendant's alleged negligence must be to a reasonable probability. *Mammarella v. Evantash,* 93 A.3d 629 (Del. 2014).

In the case at bar, the expert opinion produced was a single short paragraph, which took six months to obtain, and was the sole expert report in a lawsuit alleging a variety of injuries ranging from soft tissue to premature birth and birth defects.

Dr. Ogden's report did not contain any opinions as to Trisha Moses' claims that motor vehicle accident resulted in a premature birth, or was the cause of any prenatal or fetal testing following the motor vehicle accident.

Dr. Ogden's report only addressed her soft tissue injury claim by stating the Plaintiff complained of back pain and that it was *"feasible that the complaints she presented with are causally related to her motor vehicle accident . . . ."*

Dr. Ogden specifically used the term "feasible" and deliberately avoided the term "reasonable probability".

Black's Law Dictionary defines *Feasible* as, "Capable of being done, executed affected or accomplished. Reasonable assurance of success. See Possible." A26

Given that feasible is not equated to "reasonable probability" and shares a definition with "possible", an expert opinion that it is only feasible that claimed

injury was accident related does not rise to the level of reasonable probability and therefore is speculation and as a matter of law is insufficient to permit any of the Plaintiff's claims to proceed to trial.

The opinion was dated January 15, 2014, thus allowing Plaintiff two weeks to assess its suitability, and if necessary, to seek any additional extensions. Despite the obvious defect, Plaintiff was apparently satisfied with its contents and sought no modification to the scheduling order, and submitted no other opinions within the deadline.

In response to Defendant's Motion to Dismiss, Plaintiff only argued that "Feasible" is sufficient to meet the minimum requirements of expert testimony. Plaintiff also included as an exhibit a second one paragraph opinion from Dr. Ogden dated April 25, 2014, less than a week before Plaintiff's response was due.

This April 25th note was apparently generated in response to the Defendant's Motion, and was not produced within the scheduling order time frame for Plaintiff's expert reports. The mere fact that Plaintiff even sought a second report supports Defendant's position that the original opinion was insufficient.

This second opinion was submitted without Plaintiff moving to extend her expert deadline and no point did the Plaintiff ever ask the Court to consider the late opinion. It was simply just submitted.

Despite the fact that a Motion to Dismiss was pending based on Dr. Ogden's opinion not being to a "reasonable probability", the second Ogden opinion of April 25th also did not state his opinion was to a "reasonable probability".

Plaintiff seems to argue that under *Diamond Fuel Oil v. O'Neal,* 724 A. 2d 1060 (Del 1999); *Anderson v. General Motors Corp.*, 442 A.2d 1359 (Del. 1982); *General Motors Corp. v. Freeman,* 164 A.2d 686 (Del. 1960); *Air Mod Corp. v. Newton*, 215 A.2d 434 (Del. 1965); *Green v. Weiner*, 776 A.2d 492 (Del. 2001), and *Flood v. Riley*, 2002 Del. Super Lexis 525 (Dec. 31, 2002), that Dr. Ogden's use of the word "feasible" in this case is the equivalent of "reasonable probability" when taken into context with the rest of the doctor's opinion.

These cases have no applicability to the case at bar as there is no other "context" in which Dr. Ogden's one paragraph opinion can to be considered.

The *Diamond Fuel Oil* decision was a worker's compensation appeal in which there appeared to be actual testimony by the expert to consider in total.

The *Anderson* case did not address the standard to which an expert must testify, and only commented that an expert's testimony using "expectation" and "suspicion" appeared to be insufficient.

The *General Motors v. Freeman* and *Air Mod Corp.* cases also involved a worker's compensation case in which the doctor appeared to testify. The Court did note that expert testimony using a term possible, needs to be considered in light of

all the evidence. However in the case at bar, there is no testimony by Dr. Ogden to look at in context with his use of the word feasible.

In *Green,* a medical malpractice case, the court found that by looking at the Plaintiff's expert deposition and report together, the Plaintiff had the minimum evidence needed to proceed to the jury. Again at bar, there was no expert deposition testimony to consider.

In *Flood,* the Superior Court followed the same logic and applied the totality of the expert's trial testimony in finding the opinion was to the proper standard.

As this case does not involve an expert testimony, there is only the one paragraph opinion to consider.

It is important to note that Plaintiff cites no case law supporting their argument that "feasible" is a sufficient standard in Delaware for an expert medical opinion in a personal injury case.

To the contrary, the recent opinions of *O'Riley v. Rogers,* 69 A.3d 1007 (Del 2013), "Our case law is clear that when an expert offers a medical opinion, it should be stated in terms of a 'reasonable medical probability' or reasonable medical certainty." *Id.* at 1011; and *Mammarella v. Evantash,* 93 A.3d 629 (Del. 2014). "This court has explained that 'when an expert offers a medical opinion it should be stated in terms of reasonable medical probability or reasonable medical certainty and a doctor cannot base his expert medical opinion on speculation or

conjecture." (citations omitted), makes it clear that any expert opinion must be to a "reasonable probability".

Plaintiff argues the term "reasonable probability" has a definition of "more likely than not". Plaintiff cites to *State v. Perkins*, Del. Super Lexis 375 (Nov 2005), however Perkins did not analyze the higher degree intended when linking reasonable probability with reasonable certainty.

As an example, this Court in *Mammarella,* equated the terms reasonable probability and certainty, *Mammarella,* 93 A.3d.at 635. If reasonable probability and reasonable certainty are equated, as the Court is directly stating, the expert opinion must be greater than a simple 50% plus probability and greater than a simple "more likely than not" standard.

The "more likely than not" language is the definition of preponderance of the evidence, not for expert testimony. The standard jury instruction on expert testimony actually makes no reference to "more likely than not" as a definition to be considered by a jury. A84.

It is therefore logical that expert testimony presented to a jury should be to a higher standard than an abstract mathematical calculation greater than 50%. So even if the Plaintiff's second opinion was able to be considered, the "more likely than not" standard posited by Plaintiff as a definition of "reasonable probability", is still inadequate. It is up to the expert to actually provide the necessary opinions

to a reasonable probability, assuming the expert is able in his own mind that such a reasonable probability or certainty exists.

The January 15, 2014 Ogden opinion was very short and contained no additional comments or opinions from which any other meaning could be inferred. Defendant is not pulling one word of a report and ignoring more forceful comments from which "reasonable probability" can be inferred. There is simply nothing else to consider.

In addition, Dr. Ogden only states to his knowledge the complaints were not aware of any previous injury or illness. A7. He makes no comments on whether the complaints were related to her pregnancy, (which is different from an injury or illness), and in fact does not acknowledge the pregnancy, and does not discount the pregnancy as a source of the claimed discomfort. This failure to comment on the pregnancy as an obvious source of the claimed back pain explains why Dr. Ogden carefully chose his words and elected to use the term "feasible" in trying to correlate the alleged complaints to the motor vehicle accident.

Since the purpose of the April 25th opinion was used for the sole purpose of convincing the trial court that Dr. Ogden's opinion was to a "reasonable probability", the fact that Dr. Ogden still intentionally did not state that his opinion was to a reasonable probability only undercuts the argument his first opinion was to the correct standard.

As feasible is not the correct standard, the court was correct concluding that Plaintiff did not have proper expert opinion to allow her case to proceed to trial.

Plaintiff previously requested and was granted an extension to produce expert reports. Plaintiff then met that deadline with a short opinion dated two weeks before the new deadline. Plaintiff then made no additional applications for extensions of time and did not seek leave to file any amended expert reports and only argued that the original report was sufficient.

As Plaintiff's only expert failed to offer an opinion to the appropriate standard of reasonable probability, and never asked for leave to produce additional reports, the granting of Summary Judgment and the dismissal of the remaining Plaintiff's claims was appropriate.

II. SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE PLAINTIFF'S MOTION FOR REARGUMENT

A. Question Presented

Did the Superior Court abuse its discretion in denying the motion for reargument?

B. Standard and Scope of Review

The denial of a motion for reargument is reviewed as an abuse of discretion. *Strauss v. Biggs*, 525 A.2d 992 (Del 1987).

C. Merits of Argument

Under Superior Court Rule 59, the basis for granting a motion for reargument is that the trial court overlooked controlling precedent, or legal principles, or that the court misapprehended the law or facts. *Kennedy v. Invacare Inc.* 2006 Del. Super. LEXIS 56 (Jan. 31, 2006). Exhibit "A".

In the case at bar, Plaintiff did not even argue that the court overlooked any law or facts. Instead, Plaintiff used the motion for reargument as a mechanism, now post dismissal, to put a third expert opinion before the court without seeking leave to actually do so.

Plaintiff cannot argue this was newly discovered evidence since this was a new opinion generated by the Plaintiff, one day post dismissal.

As before, Plaintiff never sought leave from the court to supplement the record with additional opinions, both during the Summary Judgment Motion process and after dismissal.

While Plaintiff's third report did include the language "reasonable probability", by then the case had been dismissed with Summary Judgment being granted.

Summary Judgment Motions and the granting of such is not intended to be a practice run in which evidence is tested and if found faulty, to allow a do over and then generate new evidence based on the court's rulings, until the minimal evidence is found to allow the case to proceed.

The Superior Court is a busy trial court and does not have the time to review a Summary Judgment Motions in order to assist a party in discovering deficiencies in the case that would be a problem at trial and allowing a party to address those deficiencies post dismissal.

Likewise, Superior Court does not seek and rule on motions that were never made. Superior Court cannot afford to waste time on reviewing and ruling on motions only to have that decision used as a template to modify the evidence and then seek post dismissal relief.

Plaintiff had every opportunity to seek additional extensions or leave to produce late supplemental reports prior to the court granting Defendant's motion

and dismissing the case. Plaintiff made the tactical decision to not do so and relied on the less than minimal opinion by Dr. Ogden in the hopes of getting to trial. Plaintiff cannot then post dismissal seek to submit new opinions under the guise of a motion for reargument.

Since Plaintiff did not even argue any of the needed requirements for the granting or a motion for reargument were present, the Superior Court did not abuse its discretion in denying that motion for reargument made for the improper purpose of putting a new expert opinion before the court.

At some point litigation must end, and this case has reached that point.

III. PLAINTIFF'S CLAIM THAT THE TRIAL COURT DID NOT CONSIDER ANY SUPPLEMENTAL EXPERT SUBMISSION IS NOT PROPERLY BEFORE THE COURT

A. Question Presented

Was this issue preserved in the trial court below?

B. Standard and Scope of Review

Under Supreme Court Rule 8, only issues fairly presented to the trial court may be raised on appeal. *See, Drejka v. Hitchens Tire Serv.*, 5 A.3d 1221 (Del. 2010).

C. Merits of Argument

As argued above, at no point did the Plaintiff make any motions or make any requests to the Superior Court for an extension of time to produce additional expert opinions, produce supplemental opinions. Plaintiff simply submitted additional reports on their own, and now argues the Superior Court failed to consider those late opinions, the last of which was produced post dismissal.

As this issue was not raised with the trial court, there was no decision allowing or denying the Plaintiff the opportunity to do so and thus there is no issue preserved for an appeal and no decision to review.

Plaintiff does not specifically list the trial court's refusal to consider the late filed opinions as an issue for appeal. Instead, Plaintiff includes both the timely filed January 15, 2013 note with the late April 25, 2013 note and the post dismissal

May 14, 2013 report, and argues that taken together that the required standard was met and that the trial court erred in not considering them.

Plaintiff ignores that neither the April 25, nor the May 14, 2013 notes, were provided in accordance with the original or the amended scheduling order. Likewise, Plaintiff ignores that the court was never asked either through a formal motion, a letter, or in a response to Defendant's Second Motion to Dismiss for leave to present supplemental submissions. Had Plaintiff bothered to take this simple action, the trial court would then proceeded through an analysis under *Drejka v. Hitchens Tire Serv.*, 5 A.3d 1221 (Del. 2010) as well as *Christian v. Counseling Resource Assoc.*, 60 A. 3d 1083 (Del. 2013); *Hill v. Dushuttle*, 58 A.3d 403 (Del. 2013) and if denied, would have issued a decision that was then reviewable.

Plaintiff recognized the need to seek an extension once the Defendant's First Motion to Dismiss was filed, but Plaintiff elected for strategic reasons to not seek any such extension after receipt of the January 15th opinion.

Plaintiff cannot now appeal the trial court's refusal to consider late reports when Plaintiff took no action to allow the trial court mechanism to do so.

As this issue was not raised below, this Court should dismiss the appeal to the extent it seeks a review of the trial court's failure to modify a scheduling order when no such request was denied or even made.

CONCLUSION

The Superior Court was correct in dismissing the Plaintiff's case as the Plaintiff's expert opinion relating the claimed injury to the motor vehicle accident was not offered to a reasonable degree of probability. The expert opinion was only that it was "feasible" the complaints were related.

The Superior Court was correct in only considering the timely produced expert opinion as Plaintiff never sought leave or extensions for amended or supplemental reports.

After dismissal, the Superior Court did not abuse its discretion in denying a motion for reargument as the purpose of that motion was to put yet a second late opinion before the court.

Plaintiff's failure to seek relief from the trial court to submit late, amended or supplemental opinions, bars the Plaintiff from raising those issues on appeal.

The well reasoned decisions of the Superior Court should be affirmed.

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Dated: September 10, 2014

EXHIBIT A

*2006 Del. Super. LEXIS 56, **

Kennedy v. **Invacare** Corp. and Neighborcare, Inc.

C.A. No. 04C-06-028-RFS

SUPERIOR COURT OF DELAWARE, SUSSEX

2006 Del. Super. LEXIS 56

November 1, 2005, Submitted
January 31, 2006, Decided

NOTICE:

[*1] THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

PRIOR HISTORY: Kennedy v. Invacare Corp., 2005 Del. Super. LEXIS 317 (Del. Super. Ct., Sept. 15, 2005)

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff injured person sued defendants, the manufacturer and the installer of a motor operated bed, asserting theories of negligence, res ipsa loquitor, and strict product liability arising from injuries sustained from an alleged malfunction of the bed. The court denied a motion for summary judgment filed by the manufacturer. The manufacturer then filed a motion for reargument.

OVERVIEW: The injured person's expert stated that the bed malfunctioned in a manner that should not have occurred absent a problem with the design or manufacture of the bed or improper maintenance, set up, or handling by the installer. This was the sole expert for the injured person on the causation issue. The manufacturer argued that the court needed to exclude this expert report because it was "too speculative." If the report were excluded, there was no expert testimony which was required to support the action. The court found that the manufacturer's entire motion rested upon a disagreement with the court as to how the ruling in a Supreme Court of Delaware opinion related to the case. The court fully considered the argument made by the manufacturer in its initial decision, and a motion for reargument was not intended to rehash the arguments already decided by the court.

OUTCOME: The motion for reargument was denied.

CORE TERMS: bed, reargument, summary judgment, distinguishable, expert's report, expert testimony, admissible, knee

LEXISNEXIS(R) HEADNOTES

Civil Procedure > Pleading & Practice > Motion Practice > General Overview
Civil Procedure > Judgments > Relief From Judgment > General Overview

HN1 The standard for a Del. Super. Ct. R. Civ. P. 59(e) motion for reargument is well defined under Delaware law. A motion for reargument will be denied unless 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.

Civil Procedure > Pleading & Practice > Motion Practice > General Overview
Civil Procedure > Judgments > Relief From Judgment > General Overview
HN2 A motion for reargument is not intended to rehash the arguments already decided by the court.

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James F. Bailey, Jr., Esquire, Bailey & Associates, P.A., Wilmington, DE.

JUDGES: Richard F. Stokes, Judge.

OPINION BY: Richard F. Stokes

OPINION

This is my decision on Defendant Invacare's ("Invacare") Motion for Reargument. For the following reasons, Invacare's Motion for Reargument is denied.

STATEMENT OF THE CASE

On September 9, 2002, Jeannie and James Kennedy ("the Kennedys') were renting a motor operated bed manufactured by Invacare Inc. The bed was installed and maintained by Neighborcare Services Corporation ("Neighborcare"). Jeannie Kennedy used the bed during her recuperation from knee replacement surgery. Mrs. Kennedy injured her right knee while using the bed on September 9, 2002. The Kennedys filed suit against both Invacare and Neighborcare on theories of negligence, *res ipsa loquitor*, and strict product liability. Essentially, the Kennedys allege that the Defendants failed to provide a reasonably safe bed, failed to warn of a dangerous **[*2]** condition, and failed to properly inspect the bed.

Plaintiffs have submitted a single expert's report in support of their claim that Invacare acted negligently. Plaintiff's expert, Robert B. Benowitz, states that the bed malfunctioned in a manner that, "should not occur absent a problem with the design or manufacture of the bed by Invacare or improper maintenance, set up or handling by Neighborcare." At this stage of the action, Mr. Benowitz is the sole expert for the Plaintiffs on the causation issue.

Invacare has filed a motion for Summary Judgment arguing that it was entitled to a decision in its favor as a matter of law under Superior Court Rule 56. Invacare argued that this Court needed to exclude Plaintiff's expert report, under Delaware Rule of Evidence 702, because it was "too speculative." Defendant asserted that an expert must prioritize the causes of the mishap. If Mr. Benowitz's report is excluded, there is no expert testimony which is required to support this negligence action. Neighborcare joined in with Invacare's motion.

This Court ruled that the Kennedys' expert report was sufficient under Delaware Rule of Evidence 702. Accordingly, with this report as admissible **[*3]** evidence, Defendant's Motion for Summary Judgement was denied.

Defendant Invacare filed this Motion for Reargument, alleging that this Court erred in ruling that, "*with respect to Invacare* the proffered expert opinion cannot be distinguished from the facts in *Phillips [v. Delaware Power and Light Co.*, 59 Del. 179, 216 A.2d 281, 9 Storey 179 (Del. 1966)]" [1]

FOOTNOTES

1 Defendant's Motion for Reargument, at 1

DISCUSSION

HN1 The standard for a Rule 59(e) motion for reargument is well defined under Delaware law. A motion for reargument "will be denied unless 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." *Board of Managers of the Delaware Criminal Justice Information System v. Gannet Co.*, 2003 Del.Super. Lexis 27 at * 4. HN2 A motion for reargument is not intended to rehash the arguments already decided by the court. *McElroy v. Shell Petroleum, Inc.*, Del.Supr., 618 A.2d 91 **[*4]** (table), No. 375, 1992, Moore, J. (Nov. 24, 1992)(Order).

Invacare argues in their motion that the Court's decision of September 15, 2005, demonstrates a misapprehension of the law and facts as it pertains to Invacare's case. However, Invacare's entire motion rests upon a disagreement with this Court as to how the ruling in *Phillips* relates to this case. In spite of this Court's ruling that the facts in *Phillips* are clearly distinguishable from the facts in this case, Defendant asserts that when Invacare is looked at as a defendant distinguishable from Neighborcare, the facts of *Phillips* are no longer distinguishable. This is not the case.

In *Phillps*, the two competing possible reasons for the bursting of the pipe were negligence of the party and cold weather. In this case, the competing possible reasons, for Mrs. Kennedy's injuries are negligence by Invacare and/or negligence by Neighborcare. Under Defendant's theory, if the court were to grant summary judgment for Invacare, it would then be forced to also grant summary judgment in favor of Neighborcare under the same argument.

This Court fully considered the argument being made by Defendant in its decision on September 15, 2005. This **[*5]** Court's decision of that date clearly explains how this case is distinguishable from *Phillips*. Accordingly, this Court believes the expert testimony of Mr. Benowitz to be admissible and therefore finds that summary judgment in favor of defendant Invacare is denied.

CONCLUSION

Considering the foregoing, Invacare's motion to reargue is DENIED.

IT IS SO ORDERED.

Judge Richard F. Stokes

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IN THE SUPREME COURT OF THE STATE OF DELAWARE

TRICIA MOSES,	:	
	:	No.: 357, 2014
Plaintiff below,	:	
Appellant,	:	
	:	Trial Court Below:
v.	:	Superior Court of the State of
	:	Delaware for Kent County
ARRON DRAKE,	:	
	:	C.A. No.: K13C-04-010 WLW
Defendant below,	:	
Appellee.	:	
	:	

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify on this 10th day of September, 2014 that a copy of **Defendant Below/Appellee's Answering Brief and Appellee's Appendix to Answering Brief** has been served electronically through File & Serve Xpress upon the following:

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Dated: September 10, 2014