EFiled: Sep 12 2013 02:45PM EDT
Filing ID 54138522
Case Number 385,2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM DICKENSON,	*	C.A. No.: 385, 2013
	*	
Plaintiff Below, Appellant,	*	
	*	
vs.	*	
	*	
DAVID SOPA, D.O.,	*	
	*	
Defendant Below, Appellee.	*	
	*	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

PLAINTIFF BELOW, APPELLANT WILLIAM DICKENSON'S AMENDED OPENING BRIEF

YOUNG & MALMBERG, P.A.

BY: /s/Charles E. Whitehurst, Jr., Esquire
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DATE: September 12, 2013

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NATURE AND STAGE OF PROCEEDINGS

On October 22, 2010, a complaint was filed by the Appellant William Dickenson ("Appellant") against the Appellee David Sopa, D.O ("Appellee"). claiming that Appellee had committed medical malpractice when he performed a total right side hip replacement with non-cemented femoral and acetabular components, on Appellant on October 23, 2008. The complaint alleges that the Appellee breached the standard of care in that he failed to properly locate the ace tabular, shell, failed to properly place the ball head of the implant in the shell, failed to do proper follow up radiographic studies, failed to recognize that the ½ inch difference in leg length made the Appellant susceptible to dislocation of the right implant and failed to reasonably perform the surgery (A1 – A3). As a result of this negligence Appellant suffered past and future pain and suffering, past and future medical expenses and past and future loss of income.

The complaint was accompanied by an Affidavit of Merit. An Entry of Appearance was filed on December 2, 2010 by Appellee's counsel with an Answer being filed on December 23, 2010. On December 30, 2010, Appellee's counsel filed a Motion to determine if the affidavit of merit complied with Sections (a)(1) and c of Title 18 §6853. On February 23, 2011, the Superior Court determined that the Affidavit of Merit was in compliance with the Court rules but needed a few additions (A4 –A7). On March 3, 2011, Appellant filed an Amended Affidavit of

Merit correcting a misspelling, attaching compliant Curriculum Vitae and specifying proper Board certifications by the Doctor.

Subsequently, discovery commenced and the Appellee's deposition was taken (A8- A31). Dr. Wilson Choy was scheduled for a Deposition in August which was cancelled at the last minute due to the fact that he was in surgery and therefore, was unavailable. A Scheduling Order had been entered which provided that the Appellant was required to identify his expert by October 31, 2012 (A32). Appellant received a report from his expert at the end of October 2012 but, there was a question in the report which needed to be clarified (A33 – A35). Unfortunately, the Appellant's expert, a board certified orthopedic surgeon was on vacation in France. Upon his return, he provided the clarification (A36 – A37) . The initial report was sent to Defense counsel on November 14, 2012 along with curriculum Vitae. Subsequently, a letter was sent from counsel for Appellant which clarified the information that had been provided in the original report, and opined as to what the Doctor would testify.

The basis of Appellee's Motion to Dismiss was that the Appellant had failed to comply with the Court's discovery deadline. Furthermore, the Motion requested Summary Judgment in Appellee's favor on the grounds that the Appellant failed to produce an expert report identifying the proximate cause of the Appellant's alleged injuries. The Appellant filed his response to the Appellee's first Motion to Dismiss on December 4, 2012. He answered the second Motion for Summary Judgment on

February 6, 2013. The Honorable William L. Witham, Jr. entered an Opinion on June 20, 2013, denying the Motion to Dismiss based upon the Appellant's failure to timely produce an expert report. However, the Court granted the Motion for Summary Judgment in Appellee's favor on the grounds that the Appellant failed to produce any expert testimony identifying the proximate cause of Appellant's alleged injuries.

This is Appellant's opening brief in support of his appeal from the Order entered by the Superior Court granting Summary Judgment to the Appellee.

SUMMARY OF ARGUMENT

The Appellant contends that the trial Court erred when it ruled that Appellant failed to produce expert evidence as a fundamental element of his complaint (i.e. that the deviation from the standard of care caused the injuries alleged).

STATEMENT OF FACTS

This is a medical malpractice case against Dr. David Sopa, D.O. a board certified orthopedic surgeon filed by the Appellant William Dickenson arising out of surgery performed on October 23, 2008(A38 – A39). This surgery involved a right sided hip replacement.

Prior to that time, Dr. Richard DuShuttle performed a left sided hip replacement in April 2008 (A40). After the surgery by Dr. DuShuttle in four weeks, Appellant was able to return to work on a limited basis and within 6-8 weeks he was back to work on a full time basis working a normal day (A4 – A42).

Mr. Dickenson was also having problems with his right hip. He went to see Dr. Somori about that problem which he thought might be related to his back and had a nerve block which was unsuccessful (A43 – A44). Dr. Somori told Appellant that the pain he was having in the right hip was caused by arthritis in the hip joint (A45).

Appellant sought treatment from Dr. Sopa. He had previously seen Dr. Sopa for hand surgery. After a discussion with Dr. Sopa, the surgery was scheduled on October 23, 2008. At that time, Appellant was back to work full time (A46). Dr. Sopa performed the right implant surgery on October 23rd. Appellant was released on October 25, 2008 from Beebe Hospital. He was seen by Dr. Sopa between the date of the surgery and date of discharge (A47). On October 31, 2008, Appellant fell on the hard wood floor of his home. Later on that evening on his way back to

the bedroom from the bathroom he stated that something separated with a very sharp pain in his leg and he then called 911 (A48 – A49).

Appellant was seen at the emergency room and claims that the ER physician stated that the prosthetic cup had separated from the hip. He was admitted to the hospital on early Saturday morning. Later that morning, Dr. Sopa came in to speak with Appellant and according to Appellant, was told that Appellee reviewed the x-rays and the CT scan and stated there was a possibility that the prosthetic cup had loosened from the pelvis. Dr. Sopa also told Appellant that he would have to remain in the hospital and he would come back to see him later on. Late Sunday morning Appellee came in and stated that he was not really sure what the problem was but that he would like to schedule surgery for Monday morning and go in and take a look around.

At that time, Appellant told the Appellee that he had made contact to receive a second opinion. According to Appellant the Appellee was irritated upon hearing this information. Prior to Appellee coming back, Appellant had spoken to Dr. Richard DuShuttle (who provided the Affidavit of Merit in this case) about this matter because Dr. DuShuttle had previously done the left implant (A50). According to Appellant Dr. DuShuttle could not transfer him to Milford but he was willing to call Dr. Wilson Choy, a board certified orthopedist) and ask him to come in and evaluate Appellant and give a second opinion. Later Appellee returned and Appellant told him of his desire to have a second opinion from Dr. Choy. He

claims that Appellee stated "just have him do it I'm not going to be a co-pilot in this".

When he met with Dr. Choy the next day, he stated that Dr. Choy opined that the prosthetic cup was loose and he was going to have to do a revision and that the surgery would be scheduled the next day. According to Appellant, after the surgery, he spoke to Dr. Choy who indicated that the ball at the top of the femur was at a 20 degree angle and that was how it had been put in during the initial surgery.

Appellant subsequently filed a medical malpractice claim. A Motion to dismiss and a Motion for summary judgment were filed by the Appellee. The Superior Court granted the Motion for summary judgment on the grounds that Appellant had not produced any expert testimony as to causation (i.e. the Appellee negligently performed the Appellant's hip replacement and the negligence caused the alleged injuries).

ARGUMENT

QUESTIONS PRESENTED:

1. Did the Court err in its determination that the Appellant failed to produce expert testimony that the negligence of Appellee in performing a total hip replacement on Appellant William Dickenson was the proximate cause of the injury to the Plaintiff. JudgeWitham's ruling on Appelle's Motion pgs. 13 – 21.

II. STANDARD AND SCOPE OF REVIEW

The reviewing Court's standard of review on appeal from a grant of summary judgment is De Novo. *Pike Creek Chiropractic Center vs. Robinson, 637 A.2d 418 (Del. 1994).*

III. MERITS OF ARGUMENT

As stated above the reviewing Court's standard of review on appeal of grant of summary judgment is De Novo. According to Black's Law Dictionary, De Novo judicial review involves the Court's non-differential review of a decision through a review of the record plus any additional record or evidence the parties present. In Judge Witham's opinion, he states that the Plaintiff has failed to offer expert medical testimony that Defendant's medical negligence proximately caused the alleged injuries (13–21). According to Judge Witham, he states Dr. Slutsky states that only the acetabular component of Plaintiff's hip is mal positioned. He goes on to state that the Defendant did not order post-operative x-rays and without these x-

rays, he cannot opine as to whether Defendant's alleged contributed to the malposition of Plaintiff's implant.

Judge Witham's readings of Dr. Slusky's report and the supplemental letter sent by counsel are incorrect. There is no requirement that an expert report be provided in this case. The only requirement is that expert discovery is answered. The Court rules specifically provide that when you identify an expert you must identify the substance and facts to which they will testify, the items relied upon and their opinion (D.R.C.P 26; The Plaintiff bears the burden of proving negligence and causation). The initial report plus the supplemental response provided by counsel certainly satisfies this burden.

As stated above, Judge Witham stated that the expert could not opine as to whether the Defendant's alleged negligence contributed to the malposition of the Plaintiff's implant. This is erroneous. The opinion of Dr. Slutsky clearly states that he could not state with 100% certainty that the position of the cup was related to the way it was placed in by the surgeon or to the subsequent fall. In the supplemental response filed by Plaintiff's counsel after his conversation with Dr. Slutsky upon his return from France, Dr. Slutsky opined that it is more likely than not that the acetabular implant was mal-positioned. He then goes on to state his reasoning based upon a review of Dr. Choy's report and records of the revision surgery. This clearly indicates that the acetabular implant was mal-positioned. Dr. Slutsky further opines that it was breach of the standard of care not to obtain

postoperative x-rays, if not in the operating room then in the recovery room and most definitely prior to discharge from the hospital. Subsequently, in the disclosure letter, Dr. Slutsky opines that because there is an indication based upon a review of Dr. Choy's report and his findings upon doing the revision surgery, one can conclude that it is more likely than not the implant failed and caused the necessity for the revision rather than the fall breaking the implant loose. This is furthermore confirmed according to Dr. Slutsky by Dr. Choy's notation that the right leg was one and half inches shorter than the left leg indicating that the acetabular implant on the right had been positioned above that on the left. Therefore, any suggestion has failed to meet its burden is erroneous. The standard as to both breach and causation is more likely than not (i.e. a preponderance of the evidence). There is testimony as to the breach of the standard of care by failing to take the x-ray, an explanation as to how he concludes that the acetabular implant was mal-positioned as a probability although not with 100% certainty and finally that the implant failed and caused the necessity for the revision surgery rather than the fall breaking the implant loose. This certainly satisfies the provisions of 18 Del.C. §6853. Therefore, Judge Witham erred in his determination that the Plaintiff failed to produce any expert testimony as to the breach of the standard of care and its proximate causation of the necessity for the revision surgery.

CONCLUSION

For the foregoing reasons the judgment of the Superior Court should be reversed and the case remanded for proceedings consistent herewith.

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DATE: 9/12/13

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM DICKENSON,	*	C.A. No.: 385, 2013
	*	
Plaintiff Below, Appellant,	*	
	*	
vs.	*	CERTIFICATE OF SERVICE
	*	
DAVID SOPA, D.O.,	*	
	*	
Defendant Below, Appellee.	*	

The undersigned, being a member of the Bar of the Supreme Court of the State of Delaware, hereby certifies that on September 12, 2013, he cause the Appellant's Opening Brief and Appendix to Appellant's Opening Brief to be served via Lexis-Nexis File and Serve and upon:

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EFiled: Jun 20 2013 11:08AM EDT
Transaction ID 52929203
Case No. K10C-10-035 WLW

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

WILLIAM DICKENSON,	:	
	:	C.A. No. K10C-10-035 WLW
Plaintiff,	:	
	:	
v.	:	
	:	
DAVID SOPA, D.O.,	:	
	:	
Defendant.	:	

Submitted: March 7, 2013
Decided: June 20, 2013

ORDER

Upon Defendant's Motion to Dismiss. *Denied.*
Upon Defendant's Motion for Summary Judgment.
Granted.

Charles E. Whitehurst, Jr., Esquire of Young Malmberg & Howard, P.A., Dover, Delaware; attorney for Plaintiff.

Richard Galperin, Esquire of Morris James LLP, Wilmington, Delaware; attorney for Defendant.

WITHAM, R.J.

I. Issues

1. Whether the aforementioned action should be dismissed due to Plaintiff's failure to timely submit an expert report and seasonably supplement the tardy report; or,

2. Alternatively, whether the Court should grant summary judgment in Defendant's favor on the grounds that Plaintiff failed to produce an expert report identifying the proximate cause of Plaintiff's alleged injuries.

II. Relevant Factual and Procedural Background

This is a medical malpractice action arising out of a right hip replacement performed by Defendant David Sopa, D.O. (hereinafter "Defendant") on William Dickenson (hereinafter "Plaintiff") on October 23, 2008 at Beebe Medical Center. Plaintiff was discharged and began outpatient therapy a few days later. On October 31, 2008, Plaintiff fell while walking with the aid of his crutches. Defendant contends that, as a result of this fall, Plaintiff re-injured his right hip, requiring additional diagnostic tests and surgeries.

Plaintiff initiated the present action on October 22, 2010. His complaint alleges that Defendant breached the standard of care by improperly performing Plaintiff's surgery and failing to order follow-up radiographic studies, and that Defendant's negligence, and not the subsequent fall, was the proximate cause of Plaintiff's resulting injuries.

This Court issued a scheduling order on April 24, 2012. The scheduling order established October 15, 2012, as the deadline by which Plaintiff was to identify experts. Three days before this deadline, a representative of Plaintiff's counsel e-

mailed defense counsel asking to extend this deadline to October 31, 2012, for the identification of liability experts and November 15, 2012, for economic experts. Defense counsel granted these requests.

On November 16, 2012, over two weeks after the agreed extension and Plaintiff had yet to identify his experts and had made no additional requests for an extension of time, Defendant filed the instant motion to dismiss. Later that day, Plaintiff faxed a copy of a letter from Bradford A. Slutsky, M.D. (hereinafter "Dr. Slutsky"), addressed to Plaintiff's counsel in which Dr. Slutsky opined that the acetabular component of Plaintiff's hip replacement was out of place, but concluding that he could not "be 100 [percent] certain that the position of the cup was related to the way it was placed in by the surgeon or to the fall." Plaintiff's counsel indicated in this facsimile that he was awaiting clarification of these findings from Dr. Slutsky, but these attempts for clarification went unanswered for several weeks, as Dr. Slutsky left on vacation on October 23, 2012.

In his response to Defendant's Motion to Dismiss filed on December 4, 2012, Plaintiff claims to have sent the aforementioned clarification to defense counsel on November 29, 2012. At this time, Plaintiff claims to have also indicated to defense counsel that the report may have to be amended again after Dr. Wilson Choy, Plaintiff's treating orthopaedic surgeon, is deposed. Defense counsel claims that, to date, he has yet to receive a supplemental or revised report from Dr. Slutsky. Defendant insists that any effort by the Plaintiff to comply with the disclosure requirements set forth in Superior Court Civil Rule 26 (hereinafter "Rule 26") came too late. Therefore, Defendant moves for dismissal of the action pursuant to Superior

Court Civil Rule 41(b) on the ground that Plaintiff has contravened the rules of this court.

III. Motion to Dismiss

Superior Court Civil Rule 41(b) allows a defendant to move to dismiss an action for a plaintiff's failure to prosecute or comply with the Court's rules or any order of the Court.[1] Rule 41(b) permits the Court, *sua sponte*, to dismiss an action so long as the Court provides notice and follows the procedure set forth in 41(e).[2] Dismissal is within the sound discretion of the Court and the Court's duty is to "analyze the circumstances of each case separately and balance the need for judicial economy against Delaware's preference for affording the litigant her day in court."[3] The Court will not dismiss an action based on mere inaction; however, where there is gross neglect or lack of attention, dismissal may be proper.[4]

Dismissal is now, clearly, the disfavored sanction for discovery violations.[5] In determining whether dismissal is an appropriate discovery sanction for a party's discovery violation, this Court must balance the following six factors, first articulated

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[1] Del. Super. Civ. R. 41(b).

[2] Del. Super. Civ. R. 41(e).

[3] *Gregory v. Hyundai Motor America*, 2008 WL 2601388, at *2 (Del. Super. Jul. 2, 2008).

[4] *Id.*

[5] *See Drejka v. Hitchens Tire Serv., Inc.*, 15 A.3d 1221, 1224 (Del. 2010) ("[T]he sanction of dismissal is severe and courts are and have been reluctant to apply it except as a last resort.") (citations omitted); *see also Gricol v. Sipple*, 2012 WL 5431092, at *1 (Del. Super. Oct. 22, 2012) (noting that the Superior Court has been directed to, more often than not, enforce scheduling orders by imposing monetary penalties on those attorneys who violate discovery deadlines).

in *Drejka v. Hitchens Tire Services, Inc.*:

> (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6)the meritoriousness of the claim or defense.[6]

A motion to dismiss should only be granted if no other sanction is more appropriate under the circumstances. Parties who ignore or extend scheduling deadlines without promptly consulting the trial court do so at their own peril.[7] That is, "any party that grants an informal extension to opposing parties counsel will be precluded from seeking relief from the court with respect to any deadlines in the scheduling order."[8]

In the present case, Plaintiff has failed to identify his liability experts within the time limits imposed by this court's scheduling order. The six factors set forth in *Drejka*, applied here, lead me to conclude that this failure, by itself, does not justify

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[6] *Drejka*, 15 A.2d at 1226 (citing *Minna v. Energy Coal S.p.A.*, 984 A.2d 1210, 1215 (Del. 2009)).

[7] *Christian v. Counseling Resource Assoc., Inc.*, 60 A.3d 1083, 1085 (Del. 2013). *Christian* was among a quartet of cases the Supreme Court handed down in January intended to clarify the application of the so-called *Drejka* text. *See also Hill v. DuShuttle,* 58 A.3d 403 (Del. 2012); *Keener v. Iskin,* 58 A.3d 407 (Del. 2013); *Adams v. Aidoo*, 58 A.3d 410 (Del. 2013). In *Christian,* the Supreme Court cautioned that should a party miss a discovery deadline, opposing counsel has two choices — resolve the matter informally or promptly notify the court. *Christian,* 60 A.3d at 1088. If counsel contacts the court, that contact can take the form of a motion to compel, a proposal to amend the scheduling order, or a request for a conference. *Id.* However, if the party chooses not to involve the court, that party will be deemed to have waived the right to contest any late filings by opposing counsel from that time forward. *Id.*

[8] *Christian*, 60 A.3d at 1085.

dismissal. No facts suggest that Mr. Dickenson was personally responsible for his attorney's failure to identify his liability experts within the time limits prescribed in the scheduling order.

Defendant has suffered at least some prejudice by Plaintiff's delay in identifying and rendering an expert report. Defendant is entitled to receive expert reports sufficiently in advance of trial to provide him with a reasonable opportunity to defend himself. The Court's scheduling order would have given Defendant nearly seven months to prepare its defense and depose Dr. Slutsky. By skirting discovery deadlines, Plaintiff would have left Defendant at a significant disadvantage had the parties preserved the original trial date of May 28, 2013. However, this court has continued the trial to January 27, 2014 in light of Defendant's motion. This continuance has cured any potential prejudice Defendant may have suffered as a result of Plaintiff's dilatoriness in identifying and producing his expert reports.

Turning to the third factor, Plaintiff's counsel has shown a history of dilatoriness throughout the course of this litigation. Defendant has made repeated requests for expert reports, and has, on at least one occasion, moved to compel answers to interrogatories which were overdue for several months. Plaintiff's counsel has repeatedly missed discovery deadlines and requested extensions. However, it cannot be said that the delay that is at issue here resulted from the willful misconduct of Plaintiff's counsel. Instead, the delay can be attributed to Dr. Slutsky's own dilatoriness in supplementing his own report.

Nonetheless, defense counsel could have brought Plaintiff's dilatoriness to the Court's attention sooner. Instead, he chose to grant Plaintiff an extension of time to

identify and produce Dr. Slutsky's report. This was extended as a courtesy which is the hallmark of civility in the Delaware Bar. The dictates of *Christian* are clear. By granting this extension, Defendant has waived his right to contest any late filings from that point forward. This includes a waiver of the right to move to dismiss the case pursuant to Rule 41(e). Accordingly, I find that dismissal of Plaintiff's complaint for failure to timely file an expert report is too harsh a sanction. Defendant's motion to dismiss is hereby **DENIED**.

IV. Defendant's Motion for Summary Judgment

Alternatively, Defendant asks the Court to grant summary judgment in his favor on the basis that Plaintiff has failed to adduce expert medical testimony opining that Defendant's alleged negligence was the proximate cause of Plaintiff's injuries. Defendant contends that because there is a complete failure of proof concerning an essential element of Plaintiff's medical negligence case, he is entitled to judgment as a matter of law.

Defendant's current motion is not in the vein of a traditional summary judgment motion. The query presented here is not whether there are genuine issues of material fact that preclude summary adjudication; but rather, whether one party failed to produce evidence to support a fundamental element of one's complaint. Where as here, there has been "adequate time for discovery [and] the nonmoving party has failed to make a sufficient showing on an essential element of the case," the standard to be employed is the same as for a directed verdict.[9] To establish liability

[9] *Burkhart v. Davies*, 602 A.2d 56, 60 (Del. 1991).

for medical negligence, plaintiff must present expert medical testimony on the physician's deviation from the standard of care and "*as to the causation* of the alleged personal injury or death."[10] Without expert medical testimony as to a breach of the standard of care and causation, the plaintiff cannot withstand a motion for summary judgment.[11]

Plaintiff has failed to offer expert medical testimony that Defendant's medical negligence proximately caused the alleged injuries. Dr. Slutsky was the only expert that Plaintiff offered in defense of Defendant's motion for summary judgment. Dr. Slutsky does not opine with any degree of certainty that Defendant's alleged negligence was the cause of Plaintiff's injuries. He states only that the acetabular component of Plaintiff's hip implant is malpositioned; that Defendant did not order post-operative x-rays of Plaintiff's right hip and; without these x-rays, he can not opine as to whether Defendant's alleged negligence contributed to the malposition of Plaintiff's implant. Plaintiff, therefore, cannot establish causation in the manner required by the statute; that is, Plaintiff cannot prove that Defendant negligently performed Plaintiff's hip replacement and that this negligence proximately caused the alleged injuries.

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[10] 18 *Del. C.* § 6853 (emphasis added).

[11] *Burkhart*, 602 A.2d at 59; *see also Crookshank v. Bayer Healthcare Pharm*, 2009 WL 1622828, at *3 (Del. Super. May 22, 2009) (finding that a conclusory expert report that stated the defendant's drug was known to cause injuries similar to the plaintiff's was insufficient to show that the drug caused the plaintiff's injuries); *Valentine v. Mark*, 2004 WL 2419131, at *2 (Del. Super. Oct. 20, 2004) (granting summary judgment in favor of defendant-doctor after finding that plaintiff's expert was unwilling to testify that defendant's misdiagnosis was the proximate cause of plaintiff's injury).

Plaintiff attempts to salvage his case by arguing that a jury could draw an inference from Dr. Slutsky's opinion that Plaintiff's injuries were more likely than not caused by the malpositioning of the acetabular component of his implant. But 18 *Del. C.* § 6853 requires a plaintiff in a medical negligence case to establish proximate cause by expert medical testimony. It does not permit a jury to connect the dots between a bare allegation of medical negligence and an injury. The expert discovery deadline has long passed, and Plaintiff has not procured an expert to testify that Defendant deviated from the standard of care while performing Plaintiff's surgery and that its breach proximately caused Plaintiffs' injuries. Where the nonmoving party bears the ultimate burden of proof and has failed to make a sufficient evidentiary showing on an essential element of his case, the moving party is entitled to judgment as a matter of law. For that reason, Defendant's Motion for Summary Judgment must be **GRANTED**.

IT IS SO ORDERED.

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

WLW/dmh