IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

ROSLYN HEYWARD,	:	
	:	
Plaintiff,	:	C.A. No. 09C-05-046 WLW
v.	:	
	:	
CAROL WEBER and	:	
KIMBERLEE E. NOBLE,	:	
	:	
Defendant.	:	

Submitted: December 2, 2011
Decided: December 5, 2011

ORDER

Upon Defendant Noble's Motion for Reargument.
Granted.
Upon Defendant Noble's Motion to Limit the Testimony
of Plaintiff's Medical Provider at Trial.
Denied.

Douglas B. Catts, Esquire of Schmittinger & Rodriguez, P.A., Dover, Delaware; attorneys for the Plaintiff.

Jeffrey A. Young, Esquire of Young & McNelis, Dover, Delaware; attorneys for the Defendant Carol Weber.

Daniel P. Bennett, Esquire of Mintzer Sarowitz Zeris Ledva & Meyers, LLP, Wilmington, Delaware; attorneys for the Defendant Kimberlee Noble.

WITHAM, R.J.

In consideration of the motion for reargument and response thereto, it appears to the Court that:

1. On January 4, 2011, Defendant Noble filed a motion to limit the testimony of the Plaintiff's medical providers at trial. A portion of that motion was devoted to the exclusion of Dr. Richard DuShuttle's opinion with respect to future surgery for Plaintiff. Defendant Noble's basic argument was that a change in Dr. DuShuttle's opinion on the necessity of surgery was untimely as the new disclosure came on December 15, 2010, after the pre-trial stipulation deadline of December 13, 2010 and Plaintiff's expert report deadline of July 1, 2010. Defendants both claimed surprise as to the assertion of a need for surgery, and Defendant Noble stated that such late notice of Dr. DuShuttle's revised opinion left Defendants without the opportunity to defend or cross-examine the opinion at trial.

2. Plaintiff responded that her supplemental discovery disclosure stated that Dr. DuShuttle would testify in accordance with his medical records, and Dr. DuShuttle's opinion as to surgery is contained in the medical records. Therefore, stated Plaintiff, the opinion should be admissible.

3. On January 18, 2011, the Court ruled on the motion, ultimately finding that Dr. DuShuttle was qualified to testify based on Delaware Rule of Evidence 702. Defendant Noble filed a motion for reargument pursuant to Superior Court Civil Rule 59(e), which was filed timely on January 20, 2011. Plaintiff responded in a timely manner on January 26, 2011. In Defendant Noble's motion for reargument, she notes that she did not dispute Dr. DuShuttle's qualifications or the reliability of his

testimony. Rather, she objects to the timing of Dr. DuShuttle's opinion as to Plaintiff's necessity for surgery.

4. Generally, a Superior Court Civil Rule 59(e) motion for reargument will only be granted if it is shown that the Court overlooked a precedent or legal principle that would have controlling effect, or that it has misapprehended the law or the facts such as would affect the outcome of the decision.[1] Motions for reargument should not be used merely to rehash the arguments already decided by the court.[2] Upon proper application, a court may clarify its order.

5. The Delaware Supreme Court noted in *Sammons v. Doctors for Emergency Services, P.A.*, "The purpose of the Rule 16 scheduling order and discovery deadlines are to improve the efficiency of trials. . . . Pursuant to Rule 26, the expert disclosure statements should identify the expert's opinions and the basis for those opinions so that the opposing party can properly prepare for depositions and trial."[3]

6. The Court notes that Superior Court Civil Rules 16 and 26 may have been the more appropriate legal standards to apply to the original motion rather than the analysis under Delaware Rule of Evidence 702 and *Daubert.* In brief summary, the original motion pertained to a modification of Dr. DuShuttle's opinion with regard to whether Plaintiff needs surgery. Dr. DuShuttle's original opinion indicated that

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[1] *Woodward v. Farm Family Cas. Ins. Co.*, 2001 WL 1456865 (Del. Super. Aug. 24, 2001).

[2] *Id.*

[3] 913 A.2d 519, 530 (Del. 2006).

no surgery was necessary. He changed his opinion as a result of the Plaintiff's December 9, 2010 office visit to the following: "It is my option [sic] that more likely then [sic] not she will require surgery for the lumbar spine." Defendants claim that this change in opinion is not timely and would be prejudicial to them on the basis of surprise.

7. Defendants' have a strong argument on the alteration of Dr. DuShuttle's opinion with regard to the Plaintiff's future need for surgery. Expert reports were required by July 1, 2010. Dr. DuShuttle did not produce an expert report. Instead, the Plaintiff simply stated that Dr. DuShuttle would testify consistently with his medical records. Plaintiff's Supplemental Answers to Defendants' Interrogatories state, "Dr. Richard DuShuttle will testify in accordance with his medical records and the opinions stated therein. He will testify that the Plaintiff has suffered permanent disability and impairment directly related to the vehicular collisions and that the medical bills submitted are directly related to the vehicular collisions and that the bills are reasonable and necessary."[4] To allow medical records to evolve through additional permutations such that the expert's opinion about surgery changed completely over the course of several office visits, after the discovery deadline, and roughly 40 days before trial, certainly strains, if not breaks, the confines of procedural fair play.

8. Although this case certainly does not rise to such a level, this Court recently

[4]It is somewhat distressing that the change in Dr. DuShuttle's opinion was not noted to Defense counsel, nor were expert interrogatories updated.

dismissed a case for a serious breach of timeliness in discovery.[5] In that case, plaintiff's counsel wrote to defendants' counsel, "The only experts for plaintiff are treating physicians who will testify consistent with their treating records, which you have."[6] Defendants' counsel responded advising that plaintiff's counsel's expert disclosure was insufficient.[7] Plaintiff's counsel stated that he would remedy the disclosure but never did.[8] The Court noted, "Plaintiff's counsel never produced sufficient expert discovery with the substance and bases of his expert's opinions as to the cause and extent of the Plaintiff's alleged injury; this is a prerequisite to the admissibility of the Plaintiff's expert's testimony at trial."[9] This is all to say that simply noting one's expert will testify consistently with medical records can be a surreptitious and underhanded backdoor tactic in discovery. Counsel could utilize such a statement as a tool to easily spring new opinions on opposing counsel based on recent doctor's visits that occur close to trial.

9. Although the Court firmly believes that Plaintiff did not have such a tactical intention in mind, the Court does note that Trial Scheduling Orders are firm deadlines. The *Superior Court Kent County Civil Case Management Plan* states in

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[5] *Hill v. DuShuttle*, 2011 WL 2623349, Cooch, R.J. (Del. Super. July 5, 2011).

[6] *Id.* at *1.

[7] *Id.*

[8] *Id.*

[9] *Id.* at *4.

pertinent part, "Extensions of time limits . . . may be granted only upon a showing of good cause . . . . Requests for extensions of time limits set forth in a scheduling order must be made at least 10 days prior to the expiration of time."[10] Because Dr. DuShuttle's opinion regarding the need for surgery was formed after the deadline for expert discovery, Plaintiff must demonstrate "good cause" for the Court to disregard its deadline. The Delaware Supreme Court noted, "Good cause is likely to be found when the moving party has been generally diligent, the need for more time was neither foreseeable nor its fault, and refusing to grant the continuance would create a substantial risk of unfairness to that party."[11]

10. In this case, the Court will allow Dr. DuShuttle to testify that Plaintiff needs surgery for the lumbar spine. First, all aspects of good cause are satisfied. Plaintiff's counsel has been generally diligent, he could not foresee Dr. DuShuttle's change in opinion, and not allowing this alteration of opinion would certainly create a substantial risk of unfairness to Plaintiff. Second, any prejudice suffered by Defendants has been extinguished. Defendants' counsel are experienced attorneys. According to representations before the Court, at Dr. DuShuttle's deposition, Defendants cross-examined him on his change in opinion as to surgery, and they will be able to present this change to the jury. Also according to representations before

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[10]SUPERIOR COURT KENT COUNTY CIVIL CASE MANAGMENT PLAN, SUPERIOR COURT OF KENT COUNTY, 7 (2006).

[11]*Coleman v. PricewaterhouseCoopers, LLC*, 902 A.2d 1102, 1107 (Del. 2006) (*quoting* 3 James Wm. Moore, et al., *Moore's Federal Practice* § 16.14(1)(b) (3d ed. 2004)).

the Court, Defendants' counsel objected to the alteration in Dr. DuShuttle's opinion on the record at the deposition. Thus, their objections are preserved on the record for appeal if necessary. Therefore, the Court finds that on grounds of good cause and a lack of prejudice to Defendants, Plaintiff will be allowed to present Dr. DuShuttle's current opinion that Plaintiff needs surgery on the lumbar spine.

Now, therefore, Defendant Noble's motion to exclude Dr. Dushuttle's opinion on Plaintiff's need for lumbar spine surgery is hereby denied.

IT IS SO ORDERED.

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

WLW/dmh
oc: Prothonotary
xc: Counsel