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

JOANN F. CHRISTIAN, Individually and as Administratrix of the ESTATE OF BRUCE CHRISTIAN, NICOLE C. CHRISTIAN, LYNDSEY M. CHRISTIAN, and BRUCE J. CHRISTIAN, JR.,	)	
Plaintiffs,	)	C.A. No. 09C-10-202 PLA
v.	)	
COUNSELING RESOURCE ASSOCIATES, INC., a Delaware Corporation, J. ROY CANNON, LPCMH, ARLEN STONE, M.D., Individually and d/b/a Abby Family Practice, and THE FAMILY PRACTICE CENTER OF NEW CASTLE, P.A., a Delaware Professional Association, individually and d/b/a Abby Family Practice,	)	
Defendants.	)	

UPON DEFENDANTS' JOINT MOTION TO PRECLUDE EXPERT TESTIMONY
GRANTED
UPON DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT
GRANTED

Submitted: July 26, 2011
Decided: July 28, 2011

Albert M. Greto, Esquire, LAW OFFICES OF ALBERT M. GRETO, Wilmington, DE; Richard J. Heleniak, Esquire, MESSA & ASSOCIATES, Philadelphia, PA, Attorneys for Plaintiffs.

John D. Balaguer, Esquire, WHITE AND WILLIAMS LLP, Wilmington DE, Attorney for Defendants Arlen Stone, M.D., and The Family Practice Center of New Castle, P.A.

John A. Elzufon, Esquire, and Andrea C. Rodgers, Esquire, ELZUFON AUSTIN REARDON TARLOV & MONDELL, P.A., Wilmington, DE, Attorneys for Defendants J. Roy Cannon, LPCMH, and Counseling Resource Associates, Inc.

ABLEMAN, J.

I. Introduction

This medical malpractice case challenges the medical and mental health care provided to Bruce Christian ("Christian"), the deceased husband of Plaintiff Joann F. Christian. Mrs. Christian brings this lawsuit individually and as administratrix of Bruce's estate, together with Bruce's three children. Plaintiffs allege that inadequate care provided to Bruce Christian by the defendants caused his suicide by a self-inflicted gunshot wound.

Defendants are Dr. Arlen Stone, who was Christian's family practice physician; Dr. Stone's professional practice, The Family Practice Center of New Castle, P.A. (also known as Abby Family Practice); J. Roy Cannon, a mental health counselor who had an initial counseling session with Christian just prior to the suicide; and Cannon's professional practice, Counseling Resource Associates, Inc.

The Court must address two motions. The first, Defendants' Joint Motion to Preclude Expert Testimony, has already been the subject of an oral ruling granting Defendants' requested relief. That ruling was made on the record during a teleconference, which the Court convened soon after the motion and response were filed; in view of the impending pretrial conference and trial dates, the Court determined that it would assist the parties to receive its ruling and a summary of its reasoning before engaging in pretrial preparation activities that would be rendered

unnecessary by the Court's decision. This opinion will set forth with greater detail the reasons for the Court's ruling precluding Plaintiffs' experts from testifying at trial, as well as providing the salient procedural history that informed the Court's decision.

The second motion before the Court is Defendants' Joint Motion for Summary Judgment, filed after the Court held the pretrial conference. For the reasons explained herein, the Court accepts Defendants' argument that summary judgment is required as a result of the Court's decision to exclude Plaintiffs' experts' testimony. Accordingly, Defendants' Joint Motion to Preclude and Defendants' Joint Motion for Summary Judgment will both be **GRANTED**.

II. Factual History

According to Plaintiffs' Complaints, Dr. Stone first diagnosed Christian with an anxiety disorder and panic attacks in November 2007. During November and December 2007, Dr. Stone treated Christian at his office on approximately six occasions for symptoms related to anxiety, panic attacks, and depression.

When Christian was initially treated for panic attacks and anxiety in early November, Dr. Stone indicated to him that he would require mental health treatment if the symptoms persisted. Dr. Stone started Christian on an anti-anxiety medication during a subsequent appointment in mid-November. Dr. Stone also prescribed Effexor XR on November 26, at which time he diagnosed Christian

with depression in addition to his previous diagnoses. During the November 26 office visit, Dr. Stone advised Christian to seek mental health counseling and return for a follow-up visit in one month, or to call if his symptoms worsened before that time.

Christian returned to Dr. Stone on November 29 and December 7. At the December 7 appointment, Dr. Stone recommended psychiatric treatment. During a phone consultation on December 22, Christian advised Dr. Stone that he had discontinued the Effexor. Dr. Stone advised him to remain on the medication. Plaintiffs allege that Dr. Stone was unaware of Christian's Effexor dosage during this time period and did not properly manage Christian's medication regimen.

Dr. Stone's notes from Christian's final office visit on December 28 state that Christian needed to treat with a psychologist. Christian had an initial consultation with Defendant Cannon, a mental health counselor, on January 3, 2008. During the consultation, Christian revealed that he was experiencing suicidal ideation, and had contemplated shooting himself. Five days later, on January 8, 2008, Christian shot himself in his home, causing injuries that led to his death less than a week later.

On October 20, 2009, Plaintiffs filed suit against Cannon. Dr. Stone was not named as a defendant until a separate action was filed against him on March 26, 2010. Briefly summarized, the Complaints in both cases allege that Dr. Stone and

Cannon violated the standards of care applicable to their fields and caused Christian's suicide by failing to timely recognize and diagnose the severity of Christian condition, and by neglecting to arrange for appropriate treatment and monitoring.

III. Procedural History

Approximately one month prior to Plaintiffs' initiating suit against Dr. Stone, the Court entered a trial scheduling order in connection with the first-filed action against Cannon. The trial scheduling order included a deadline requiring Plaintiffs to submit their expert witness reports on or before December 3, 2010, and set a trial date of August 1, 2011. In addition, the trial scheduling order provided as follows:

> Counsel are advised that all of the deadlines established by this Trial Scheduling Order are firm deadlines. Failure to meet these deadlines, absent good cause shown, likely will result in the Court refusing to allow extensions regardless of the consequences. Amendments to this Trial Scheduling Order must be by Order of the Court on appropriate motion or stipulation of the parties.

Because the alleged injury to Plaintiffs was the same in both suits, the Court consolidated the two actions by order dated June 24, 2010. No new scheduling order was entered after the consolidation, as counsel did not request one.

By e-mail dated September 2, 2010, Plaintiffs' original counsel notified defense counsel that he had advised his clients to seek different representation after he learned during Dr. Stone's deposition that Cannon was the father of a close

friend of his son. In the e-mail, Plaintiffs' original counsel indicated that a new attorney was reviewing Plaintiffs' file and that he expected Mrs. Christian to have an answer within a week as to whether the new attorney would be willing to take the case.

On December 23, 2010, new counsel for Plaintiffs, Albert Greto, entered his appearance. Joseph L. Messa and Richard J. Heleniak, additional counsel for Plaintiffs, were admitted *pro hac vice* on January 14, 2011, and February 23, 2011, respectively.

The change in counsel necessitated two extensions of the plaintiffs' expert disclosure deadlines, one formal and one informal. The Court approved the only extension of the discovery deadlines that was brought before it. This first extension was granted on November 9, 2010, after Plaintiffs' original counsel realized he would be withdrawing from the case but before replacement counsel appeared. At that time, upon Plaintiffs' request, the Court extended the plaintiffs' expert report deadline by one month, to January 3, 2011. The date for Defendants' expert disclosures was extended to March 7, 2011, and the final cut-off for discovery was set for March 22, 2011.

On December 20, 2010, Plaintiffs' original counsel emailed defense counsel to request "a few extra weeks" for Plaintiffs to complete the transition to new

counsel and provide expert disclosures.[1] Defense counsel agreed to extend Plaintiffs' expert disclosure deadline to the end of January, but suggested that Plaintiffs' original counsel should inform the new attorney that "absent extraordinary circumstances" the defendants would not authorize additional extensions, as it appeared to defense counsel that "a firm deadline will benefit everyone."[2] No motion or stipulation was filed with the Court to confirm this informal agreement among the parties.

On February 4, 2011, Plaintiffs' current Delaware counsel, Mr. Greto, wrote a letter to the Court requesting a teleconference "for the purpose of introducing [Plaintiffs' new out-of-state counsel] to the Court and to address certain issues that have arisen with counsels' ability to comply with the current Amended Scheduling Order." The letter then explained that discovery was on-going in accordance with the amended trial scheduling order that had been agreed upon by the parties, that defendant Cannon's deposition was scheduled for February, and that the process was underway for scheduling Mrs. Christian's deposition. Plaintiffs' counsel indicated that a "Proposed Stipulation to Amend the Trial Scheduling Order was provided by" Plaintiffs' original counsel—although no further stipulated orders were actually submitted to the Court after it approved the initial stipulated

[1] Defs.' Joint Mot. to Preclude Expert Test. Ex. E.

[2] *Id.*

modification to its scheduling order in November 2010, three months earlier. The Court therefore understood the proposed stipulation described in the letter to be the previously approved stipulation filed by Plaintiffs' original attorney.

Mr. Greto noted that the substitution of counsel had placed Plaintiffs "in the position of non-compliance with this Proposed Stipulation and Order" and indicated that he had potential conflicts with the existing trial date. Although Plaintiffs' counsel suggested that Dr. Stone's counsel had conflicts with the trial date, he also advised that Cannon and his attorney were "opposed to rescheduling the Trial Date but are not otherwise opposed to modifying the present Scheduling Order." While it appears in retrospect that the parties apparently operated under a revised schedule throughout this period, at no time was a second "Proposed Stipulation and Order" submitted to the Court for approval. Plaintiffs' counsel's letter did not request a further extension of the expert report disclosure deadline, nor did it even mention that the Plaintiffs' "position of non-compliance" related specifically to their expert disclosures.

The Court responded by letter to notify counsel that, to the extent the February 4th letter was intended as a request for a new *trial date*, the Court would not be willing to reschedule long-standing trial dates that had been allotted for this case, given that the trial scheduling order had been entered more than a year earlier, that Plaintiffs' new counsel's acceptance of the representation had to have

been premised upon knowledge of that trial date, and that four full days had been set aside on the Court's calendar for the trial.[3] Trial in the unrelated case that had created a scheduling conflict for Dr. Stone's counsel was subsequently continued by the judge presiding over that matter to enable this judge to maintain the August 1 trial date in this case.

Although the Court's letter emphasized the importance of retaining the dates set aside for trial, it did not address modifications or extensions of other aspects of the trial scheduling order such as the Court had already permitted. Nevertheless, in the ensuing months, no requests were made by Plaintiffs for additional time to complete discovery or for extensions of any other pretrial matters. In fact, the Court would have agreed to any unopposed extensions of discovery deadlines, as it does so frequently, provided that the two dates that most directly affect the Court and its docket—the dispositive motion deadline and the trial date—remain unchanged. Thus, the last documented extension of any expert disclosure date that was Court-approved gave Plaintiffs until January 3, 2011 to provide the defendants with their expert reports, although the Court is now aware of an informal

[3] In its letter, the Court erroneously stated that Dr. Stone's counsel had specifically selected the dates for trial (in accordance with the Court's routine practice) and chastised him for asserting a conflict. With apologies to Dr. Stone's counsel, the Court did not realize at the time it wrote the letter that the trial date had been selected in connection with the first-filed case against Cannon, prior to consolidation with the case against Dr. Stone. The Court's confusion on this point arose from the fact that the consolidation order was entered on June 24, 2010, and Dr. Stone's counsel had not informed the Court of his unavailability for seven months following that order.

agreement among the parties to extend that deadline to the end of January 2011.

Despite the fact that Plaintiffs' expert reports were due to be disclosed in January 2011, and in spite of repeated requests from defense counsel, Plaintiffs did not make any expert disclosures until May 4, 2011, when Plaintiffs submitted a report by Dr. Samuel Romirowsky, an expert psychologist who had been involved in the case since before it was filed in October 2009, having provided the Affidavit of Merit against Defendant Cannon.

Almost two weeks later, on May 17, 2011, Plaintiffs provided a second expert report by internist Dr. Terrance L. Baker, which discusses at great length thirteen separate ways in which Dr. Stone allegedly deviated from the standard of care and thereby, in Dr. Baker's opinion, "contributed to the cause of the deterioration and death of Bruce J. Christian." On May 27, Plaintiffs provided their third expert disclosure, an economist's report by Andrew C. Verzilli. Finally, on June 9, Plaintiffs filed a fourth expert disclosure, that of psychiatrist Dr. Avram H. Mack, which sets forth in detail the actions and omissions of the defendants that Dr. Mack opines contributed to or caused Bruce Christian's suicide. This last disclosure was filed five-and-one-half months late, and only seven weeks before the trial was scheduled to begin. All of the expert disclosures submitted by Plaintiffs were filed more than three months after the parties' informally-extended January 31, 2011 deadline, and more than four months after the expert deadline

extension that had been specifically approved by the Court. Based upon these circumstances, Defendants requested and were granted leave to file a joint motion *in limine* to preclude Plaintiffs' experts from testifying after receiving the last of the Plaintiffs' disclosures, despite the fact that the deadline for filing motions *in limine* had been set for June 6, 2011.

IV. Parties' Contentions

Defendants' joint motions seek preclusion of the testimony of Plaintiffs' late-disclosed experts and summary judgment in their favor. Defendants contend that they have been "severely and unduly prejudiced by the late identification of [Plaintiffs'] experts in a complex medical negligence matter involving multiple theories of liability against four different defendants."[4] Defendants allege that they made repeated requests for Plaintiffs to identify their experts after the expiration of the parties' informal January 31, 2011 deadline. After the late disclosures in May and June, Defendants claim that the plaintiffs further refused to respond to requests for deposition dates for their experts until the day Defendants filed the motion to preclude, at which time Plaintiffs provided dates for Dr. Baker only, with the offered dates falling after the pretrial conference. Defendants argue that Plaintiffs' conduct placed them in the position of being unable to prepare to rebut Plaintiffs'

[4] Defs.' Joint Mot. to Preclude Expert Test. ¶ 12

experts at trial and deprived them of any opportunity to file motions *in limine* or *Daubert* motions challenging the experts' testimony.

In response, Plaintiffs deny that any prejudice arises from the delayed disclosures, because Defendants "clearly anticipated the expert disclosures of Plaintiffs, . . . having themselves proposed experts in each of the areas of expertise identified by Plaintiffs" and "will have had in hand comprehensive and detailed disclosures of all expert opinions . . . for months prior to trial."[5] Plaintiffs state that Defendants agreed to the late disclosures during an April 29, 2011 teleconference with Plaintiffs' counsel, when the parties agreed that the disclosures would be provided within two weeks, with depositions to occur in June and July. Furthermore, Plaintiffs argue that the defendants were aware of the identities and general opinions of Drs. Baker and Romirowsky, who had previously provided Affidavits of Merit. Plaintiffs therefore submit that their "comprehensive and detailed disclosures were provided in accordance with the informal agreement of counsel to cooperate to overcome the discovery obstacles which had been created" by Plaintiffs' loss of their original trial counsel.[6]

[5] Pls.' Resp. to Defs.' Joint Mot. to Preclude Expert Test. ¶ 12.

[6] *Id.* ¶ 10.

V. Analysis

Delaware's Health Care Malpractice Act provides that in a health care malpractice case, liability cannot be imposed unless "expert medical testimony is presented as to the alleged deviation from the applicable standard of care in the specific circumstances of the case and as to the causation of the alleged personal injury or death."[7] The statute provides certain exceptions, none of which apply here. The testimony in contention, particularly that of Drs. Romirowsky, Mack, and Baker, is necessary for Plaintiffs to meet the statutory requirement; in effect, exclusion of Plaintiffs' experts renders dismissal "inevitable."[8] For the reasons discussed during the Court's July 8, 2011 teleconference with counsel and explored further herein, the Court finds that excluding the testimony of Plaintiffs' experts is the most appropriate remedy for Plaintiffs' production of expert disclosures months past both their Court-ordered and informal deadlines. In the absence of expert testimony to support Plaintiffs' medical negligence claims, summary judgment must be granted in Defendants' favor.

A. Defendants' Motion to Preclude

Superior Court Civil Rule 16(b) contemplates that the Court's trial scheduling orders will establish deadlines for the completion of discovery, as well

[7] 18 *Del. C.* § 6853(e).

[8] *Wahle v. Med. Ctr. of Del., Inc.*, 559 A.2d 1228, 1234 (Del. 1989).

as protocols "appropriate in the circumstances of the case including, but not limited to, appropriate sanctions for failure to meet the deadlines and requirements established by the scheduling order to include, in the Court's discretion, dismissal of the action or default judgment." Rule 16(f) provides that where a party or a party's attorney fails to obey a scheduling order, the Court may "make such orders with regard thereto as are just," including imposing the discovery sanctions set forth in Rule 37(b)(2)(B) and (C), which permit the Court to prohibit the sanctioned party from introducing matters into evidence or to dismiss the action. Consistent with its rules of procedure and case law, the Court's trial scheduling order in this case emphasized that "[f]ailure to meet [the Court's] deadlines, absent good cause shown, likely will result in the Court refusing to allow extensions regardless of the consequences."[9] In this context, "good cause" has been construed to mean that the noncompliant party exercised diligent efforts to meet the scheduling deadlines.[10] Rule 6(b) similarly provides that deadlines established by

[9] The "good cause" standard is drawn from the standard for scheduling order amendments contained in a previous version of Rule 16(b), which provided that "A schedule shall not be modified except by leave of the Court upon a showing of good cause." Rule 16 no longer sets forth criteria for schedule modifications, but rather allows the Court to establish "deadlines or protocols" appropriate to the case and details the availability of sanctions for noncompliance. As such, the Court has continued to apply the "good cause" standard subsequent to the 2008 rule amendment and often utilizes the phrase in its trial scheduling orders. *See, e.g.*, *Hill v. DuShuttle*, 2011 WL 2623349, at *6 (Del. Super. July 5, 2011); *Galmore v. St. Francis Hosp.*, 2011 WL 2083888, at *1 n.5 (Del. Super. Apr. 27, 2011).

[10] *Candlewood Timber Group LLC v. Pan Am. Energy LLC*, 2006 WL 258305, at *4 (Del. Super. Jan. 18, 2006).

an order of the Court may be extended after their expiration only "upon motion . . . where the failure to act was the result of excusable neglect."

Plaintiffs' counsel has not fully explained why Plaintiffs' expert disclosures were untimely provided, other than to intimate that the situation somehow relates to the plaintiffs' need to change representation. Plaintiffs' current counsel repeatedly observes that the discovery deadlines in this case were established before their representation began. According to the Plaintiffs' response to Defendants' motion *in limine*, the parties were still discussing the timing of Plaintiffs' disclosures in late April 2011:

> In a conference call on April 29, 2011 among all counsel, it was agreed that Plaintiffs' Expert Disclosures should be provided within the coming two weeks so as to permit expert depositions in June and July. Thereafter, Plaintiffs provided detailed and comprehensive expert disclosures with respect to Samuel Romirowsky, Ph.D. on May 4, 2011 and in regards to family physician Terrance L. Baker, M.D. on May 17, 2011, both of which experts had been previously identified and disclosed to Defendants with the filing of their Affidavits of Merit.[11]

Plaintiffs have not explained the efforts, diligent or otherwise, that were made to complete their expert disclosures prior to that time. The Court has no information regarding what steps Plaintiffs' counsel took to obtain expert reports, when they contacted the experts who were ultimately identified, or what information those experts conveyed about the time it would take them to render their opinions.

[11] Pls.' Resp. to Defs.' Joint Mot. to Preclude Expert Test. ¶ 8.

The absence of explanation is notable because Plaintiffs argue that *the defendants* should have been able to complete their expert preparation and disclosures by the time of trial, notwithstanding that the defense experts would need to review and respond to reports received by the defendants less than three months before the August 1 trial date. Plaintiffs' position on this point obviously raises questions regarding why they did not *begin* to disclose crucial expert reports until more than three months after the parties' first informal deadline of January 31, and four months after the date set by the Court's extension of its scheduling order deadline. Plaintiffs have not offered an explanation amounting to good cause or excusable neglect that would justify excusing them from the extended scheduling order deadline.

The Court has discussed both the amended scheduling order and the parties' informal agreement because there is no dispute that the informal extension to January 31, 2011 existed and because *neither* deadline was met. From the Court's perspective, however, no doubt exists that the operative deadline was January 3, 2011, the date set forth in the stipulation and order amending its scheduling order. The Court's trial scheduling order expressly states that any amendments "must be by Order of the Court on appropriate motion or stipulation of the parties." As the Court of Chancery recently stated, "A reasonably prudent person . . . should know that regardless of an agreement (real or imaginary) with opposing counsel to

extend a deadline in the Order, such agreement by itself is of no effect; the extension is, quite simply, not recognized unless submitted to the Court for approval and granted by the Court."[12] Any discussions between the parties in late April regarding a May deadline that was never submitted to the Court are essentially irrelevant to the Court's evaluation of Plaintiffs' conduct, and certainly do not bar the defendants from arguing that the late disclosures caused them prejudice, particularly when several of Plaintiffs' disclosures still came more than two weeks after the parties' teleconference and the defendants did not know the *content* of the experts' reports at the time of the call described by Plaintiffs.

Plaintiffs' response also suggests that because delay in producing expert reports was somehow occasioned by their change in counsel, the Court should not "start the clock" in its evaluation of their dilatoriness until the time their current out-of-state counsel was granted *pro hac vice* status in January 2011 and February 2011. Plaintiffs explain that after learning of their original attorney's conflict, "they began a months-long search for counsel, and after finding no Delaware counsel willing to become involved, expanded their search to other states and were eventually able to retain the services of counsel now admitted *Pro Hac Vice*."[13] Plaintiffs' current counsel suggest that original counsel represented to them that

[12] *Encite LLC v. Soni*, 2011 WL 1565181, at *2 (Del. Ch. Apr. 15, 2011), *reargument denied,* 2011 WL 1709850 (Del. Ch. Apr. 26, 2011).

[13] Pls.' Response to Defs.' Joint Mot. to Preclude Expert Test. ¶ 3.

"he would be able to obtain sufficient extensions of dates in the Court's Scheduling Order to permit new counsel to conduct necessary discovery and obtain necessary expert support, on which representations current counsel relied."[14]

Plaintiffs' argument ignores several crucial facts and relies upon a wholly erroneous understanding of the duties of Delaware counsel. Plaintiffs' current Delaware counsel Mr. Greto entered his appearance on December 23, 2010, and simultaneously filed an initial motion for the *pro hac vice* admission of one of his out-of-state co-counsel, who obviously must have been involved in the case by that time. The participation of out-of-state counsel in no way relieved Delaware counsel of his responsibilities to comply with this Court's rules and orders, including its trial scheduling order.[15] Similarly, Mr. Greto's candid admission during the pretrial conference in this case that he does not have experience with medical malpractice actions can neither explain nor excuse the delayed disclosures. When Mr. Greto accepted this case, Plaintiffs had found "Delaware counsel willing to become involved" with their case, whether or not he recognized the obligations that involvement entailed.

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[14] *Id.* at ¶ 4.

[15] Super. Ct. Civ. R. 90.1(a) ("The admission of an attorney pro hac vice shall not relieve the moving attorney from responsibility to comply with any Rule or order of the Court."); *see also State Line Ventures, LLC v. RBS Citizens, N.A.*, 2009 WL 4723372, at *1 (Del. Ch. Dec. 2, 2009) ("A Delaware lawyer always appears as an officer of the Court and is responsible for the positions taken, the presentation of the case, and the conduct of the litigation.").

Prior to withdrawing, Plaintiffs' original counsel requested and obtained the *only* Court-approved extension of the expert disclosure deadline to occur in this case. That extended deadline of January 3, 2011 was in place when current Delaware counsel entered his appearance. All of Plaintiffs' current attorneys knew or should have known of the scheduling order that was in effect when they agreed to assume the representation. As the Court previously explained, it would have been fully willing to approve additional stipulated extensions of the discovery deadlines. Per the trial scheduling order, upon the appropriate showing of good cause in a properly-filed motion, the Court would also have granted reasonable requests for extensions of Plaintiffs' deadlines *if any had been submitted*. None were.

Furthermore, Plaintiffs' current counsel did not have to scramble to find and vet various health-care professionals willing to testify that Defendants Stone and Cannon had breached the standards of care so as to satisfy the requirements of the Delaware Health Care Malpractice Act. Both of the experts Plaintiffs ultimately designated to testify at trial as to the central issues of standards of care and negligence were the same experts who provided Affidavits of Merits when Plaintiffs' Complaints were filed in October 2009 and March 2010, long before

Plaintiffs' current Delaware counsel entered his appearance in December 2010.[16] The Court has also been presented with no basis to conclude that Plaintiffs' original counsel—who obviously had identified and contacted these potential witnesses at the beginning of his representation—delayed the process of obtaining and disclosing expert reports so as to leave his replacements unable to meet even the informal extension to January 31, 2011 that he had already received from Defendants when Mr. Greto first appeared in this matter. If Plaintiffs' original counsel had left his replacements in an untenable position with regard to the provision of expert disclosures, it was current Plaintiffs' counsel's responsibility to bring the situation to the Court's attention by an appropriate and timely motion. Under these circumstances, the Court cannot excuse Plaintiffs' egregiously untimely disclosures of four different expert reports, nor their conscious disregard

[16] Plaintiffs suggest that the Affidavits of Merit constituted compliance with the Rule 26(b)(4) expert disclosure requirement, or at least justified the delay in their expert disclosures. Affidavits of Merit are filed under seal, per statute. Although Plaintiffs' Affidavits of Merit were apparently disclosed to the defendants in June 2010, Affidavits of Merit do not substitute in form or substance for Rule 26(b)(4) disclosures. The affidavits do not identify affiants as experts the plaintiff expects to call at trial, nor do they contain much of the specific information required by Rule 26(b)(4), such as the grounds for the expert's opinions. The Affidavits of Merit in this case do not state the relevant standards of care, identify any particular conduct of the defendants the affiants would characterize as falling below the applicable standard of care, or discuss how such conduct would have caused Plaintiffs' injury. In short, while they are perfectly adequate documents as Affidavits of Merit, the affidavits do not even provide a cursory statement of the "facts and opinions to which the expert is expected to testify" as required in a Rule 26(b)(4) expert disclosure.

of the deadline imposed by the Court's order and the prejudicial effect upon the defendants.[17]

B. Defendants' Motion for Summary Judgment

Having concluded that there is no basis for providing relief from the Plaintiffs' expert disclosures deadline, the Court must determine whether the exclusion of Plaintiffs' experts is a proper consequence for their delayed production when it will render summary judgment in the defendants' favor a foregone conclusion. The Court is mindful that summary judgment is a harsh outcome, particularly where it appears that the prejudice to the defendants arises from the conduct of Plaintiffs' counsel, and not Plaintiffs themselves. Nevertheless, sympathy for Plaintiffs' plight cannot, on these facts, trump the importance of adherence to the Court's deadlines and scheduling orders where the alternatives are to countenance significant disruptions to the Court's crowded docket or to unfairly force the defendants to proceed to trial without a reasonable opportunity to prepare their defense.

In determining whether dismissal constitutes an appropriate sanction for a party's discovery violation, the Court considers six factors: (1) the extent of the

[17] Plaintiffs' opposition to the Defendants' summary judgment motion faults the Court for announcing its decision granting Defendants' motion to preclude "without giving Plaintiffs any opportunity to present argument." Pls.' Resp. to Defs.' Jot. Mot. for Summ. J. ¶ 5. There is no right to oral argument on a motion except where expressly provided by statute or rule, and this Court frequently renders decisions on the papers. Del. Super. Ct. Civ. R. 78(c).

party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) any 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; and (6) the meritoriousness of the claim or defense.[18] Not all of the factors need be satisfied for dismissal to be appropriate.[19]

Here, the first and final factors favor Plaintiffs. Although the Court has not received a sufficient explanation for the delays at issue, the record before it does not suggest that the Plaintiffs, as opposed to their counsel, were personally responsible for the untimely disclosures. There is also no doubt that the Plaintiffs are injured (although their claims raise major issues regarding standards of care and causation, which the Court considers more relevant to the prejudice factor).

The fourth factor, examining the willfulness or intent of the conduct, also does not weigh significantly in favor of dismissal. Plaintiffs' counsel were inexplicably and inexcusably remiss in obtaining expert reports, but the reports they ultimately disclosed were authored near the time they were produced. Nothing before the Court convinces it that Plaintiffs' counsel were acting in bad faith, or that they were willfully attempting to withhold discoverable material.

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[18] *Minna v. Energy Coal S.p.A.*, 984 A.2d 1210, 1215 (Del. 2009).

[19] *Hoag v. Amex Assurance Co.*, 953 A.2d 713, 718 (Del. 2008).

Unfortunately for Plaintiffs, the remaining factors convince the Court that exclusion of their expert witnesses' testimony—and thus judgment in the defendants' favor—is the most appropriate and suitable remedy. Plaintiffs' counsel's history of dilatoriness spanned several months during which Defendants made repeated requests for the missing disclosures, and the resulting prejudice is significant, as explained in Defendants' motion *in limine*:

> [T]he Defendants are unable at this point to properly rebut the expected testimony of [Plaintiffs'] experts and properly prepare to crossexamine them at trial. Further, although Plaintiffs' expert disclosures raise multiple issues that might lead to motions in limine or *Daubert* motions (issues that would need to be further developed in depositions) the late disclosures have left defendants in a position where the Court's deadlines for these motions have passed.[20]

Defendants' concerns are not overinflated. Even if § 6853 of the Delaware Health Care Malpractice Act did not require Plaintiffs to present expert testimony to support their claims, major standard-of-care and causation questions readily apparent from the particular facts of this case meant it was destined to be litigated as a "battle of the experts." Defendants were entitled to receive Plaintiffs' expert disclosures "sufficiently in advance of trial to provide . . . a reasonable opportunity to defend themselves."[21] In a complex wrongful death malpractice suit involving multiple defendants from different practice areas, less than three months—

[20] Defs.' Joint Mot. to Preclude Expert Test. ¶ 12.

[21] *Wahle v. Med. Ctr. of Del., Inc.*, 559 A.2d 1228, 1233 (Del. 1989).

particularly during a timeframe when myriad other trial preparation activities would also be ongoing—was not a reasonable opportunity. By comparison, the Court's orders would have provided the defendants with close to seven months of preparation time between the plaintiffs' expert disclosure deadline and the trial date.

An alternative sanction would not redress the prejudice to the defendants. Compensating the defendants via a monetary sanction cannot create more time for them to investigate and prepare their defenses, nor does the Court consider changing the trial date to be a viable or appropriate course of action. Plaintiffs' suit against Roy Cannon has been pending for about nineteen months, and the Complaint against Dr. Stone was filed approximately sixteen months ago. More than a year ago, the Court allotted at least four days of its August 2011 calendar for this trial.[22] As is its practice with malpractice suits, which are less likely than many other types of cases to settle, the Court scheduled only a few additional trials during the same week. All of the other cases on the Court's calendar for that week have resolved. Plaintiffs' delayed production and the resulting defense motion *in limine* occurred far too late for the Court to move another trial into the August 1 slot. Furthermore, the scheduling of this case already displaced another set of

[22] The Court scheduled the case for a four-day trial, per the scheduling order entered prior to consolidation of the cases, but anticipated that trial would last at least a week after the consolidation.

litigants when another trial judge had to reschedule one of his cases to render Dr. Stone's counsel available for trial in this case on August 1. Continuing the trial date at this stage would represent a serious disservice to the defendants, the Court, and litigants in other matters.

In addition to the foregoing factors, the Court's decision to exclude Plaintiffs' late-identified experts and grant summary judgment is guided by *Wahle v. Medical Center of Delaware, Inc.*, in which the Delaware Supreme Court upheld the propriety of this outcome on comparable facts.[23] The plaintiff in that case, Beth Wahle, brought medical malpractice claims based upon the defendants' treatment of her broken arm. Wahle failed to provide medical records and expert reports for a then-mandatory Rule 16 arbitration hearing. After consenting to a default in the arbitration proceeding, she filed a demand for a trial *de novo* in Superior Court.[24]

In the Superior Court proceeding, Wahle disregarded the Court's trial scheduling order by failing to provide expert disclosures in response to the defendants' discovery requests. The Court granted a defense motion to compel her responses, which she still failed to provide. Wahle was provided with extensions of time to respond, which necessitated moving a pretrial conference (and possibly

[23] 559 A.2d at 1233.

[24] *Id.* at 1230-31.

an anticipated trial date) on at least one occasion.[25] When the defendants raised the issue in their pretrial stipulation, Wahle indicated for the first time that she had not designated an expert because she lacked funds to do so and requested a stay of the trial, which the Court denied. The Court established a trial date approximately two months after the pretrial conference and precluded Wahle from introducing expert medical testimony at trial. The Court then suggested that the defendants file a motion for summary judgment, which it granted.[26]

Wahle appealed, arguing that the Superior Court abused its discretion by prohibiting her from introducing expert medical testimony at trial when there had been no explicit order requiring her to identify experts and respond to defense interrogatories by a date certain. The Supreme Court held that "[i]n view of the critical nature of the medical evidence to all parties . . . the trial court was fully justified in imposing the ultimate sanction of dismissing plaintiff's suit."[27] The Supreme Court explained:

> From the outset of the lawsuit, [Wahle] was on notice as a matter of law that her case hinged on proof complying with section 5863. Defendants were entitled to a timely discovery of this essential ingredient to plaintiff's suit; and plaintiff stood in breach of three court orders relating to scheduling of trial and discovery of such information. Those orders

[25] *Id.* at 1231.

[26] *Id.* at 1231-32.

[27] *Id.* at 1233.

> were implicitly, if not explicitly, directed to section 6853; therefore, plaintiff's claim of abuse of judicial process must be rejected.[28]

The Supreme Court further emphasized that "[t]he rights of litigants who in good faith comply with the court's pretrial discovery procedures should not be jeopardized by litigants who disregard such rules," especially with regard to claims subject to the Health Care Malpractice Act's requirement that recovery be predicated upon the presentation of expert medical testimony.[29]

Although *Wahle* differs in certain particulars from this case, Plaintiffs' counsel placed the Court in a substantially similar position of having to determine the just sanction for a malpractice plaintiff's failure to provide expert discovery until between two and three months before trial, in blatant disregard of the Court's amended trial scheduling order. The principles addressed by the Supreme Court in the *Wahle* decision apply with equal force here. Defendants complied with the Court's scheduling orders to the extent possible and agreed to at least two extensions to accommodate Plaintiffs. Plaintiffs knew that the late-disclosed experts' testimony was central to their case, and certainly knew that they were in violation of the Court's amended scheduling order *and* their own informal agreement with the defendants throughout February, March, and April of 2011. The Court cannot permit the Plaintiffs' dilatory conduct, for which it has yet to

[28] *Id.* at 1234.

[29] *Id.* at 1233.

receive a cohesive explanation, imperil the rights of the defendants to adequately prepare for trial.

Plaintiffs, relying upon *Drejka v. Hitchens Tire Service Inc.*,[30] suggest that preclusion of their expert evidence where dismissal will result is a severe sanction, and that "where the Defendants have in their possession[ ] comprehensive and detailed expert disclosures, well in advance of trial," the Court should either decline to impose sanctions or impose monetary sanctions only.[31] In *Drejka*, the Supreme Court reversed the exclusion of untimely-disclosed medical expert testimony to support the claims of the plaintiff in a personal injury case arising out of an automobile accident. The *Drejka* Court concluded that there was no indication the plaintiff was personally responsible for the delay, that no lesser sanctions had been imposed before the dismissal, and that the affected defendant was provided the report two months before the trial date and could have deposed the expert prior to trial.[32] Accordingly, the Supreme Court considered monetary sanctions directed against the plaintiff's counsel appropriate in lieu of dismissal.[33]

[30] 15 A.3d 1221 (Del. 2010).

[31] Pls.' Resp. to Defs.' Mot. to Preclude Expert Test. ¶ 17.

[32] 15 A.3d at 1224.

[33] *Id.*

Drejka is distinguishable from this case on several bases. First, *Drejka* was not a malpractice claim, and therefore "did not implicate the violation of a legislative mandate constituting a keystone to recovery."[34] Second, for the reasons previously discussed, the Court does not consider Defendants' receipt of Plaintiffs' expert reports to be "well in advance of trial" on the particular facts of this case. The plaintiff's medical expert testimony in *Drejka* was relevant to the extent of her injuries and their causal relationship to the litigated automobile accident—both of

[34] *Wahle*, 559 A.2d at 1234. Plaintiffs also rely upon *Rittenhouse Associates, Inc. v. Frederic A. Potts & Co.*, 382 A.2d 235 (Del. 1977), which is likewise distinguishable from the instant case on the basis that the plaintiff was not required by statute to provide expert testimony in support of its claim—and, in fact, *Rittenhouse* was distinguished on this very ground in *Wahle*. 559 A.2d at 1234. In *Rittenhouse*, as in *Drejka*, the Supreme Court reversed the Superior Court's dismissal of a plaintiff's claims as a sanction for noncompliance with discovery orders because the noncompliance was mostly or entirely the fault of the plaintiff's counsel, and not the plaintiff itself. The *Rittenhouse* plaintiff's Delaware counsel and *pro hac vice* counsel apparently came into conflict. As a result of their dispute, Delaware counsel, who did not maintain contact with the plaintiff, failed to relay discovery requests and orders to compel to *pro hac vice* counsel. 382 A.2d at 236. The parties in *Rittenhouse* disputed title to an easement, and thus there is no indication that the violations of the Court's discovery order deprived the defendants of the opportunity to assess expert opinions that were statutorily required to support the plaintiff's case. Notably, the *Rittenhouse* Court highlighted facts suggesting that the discovery violations would not have prejudiced the defendants:

> We note that five of the seven categories of documents to be produced under the Potts discovery order were matters of public record in the Office of the Recorder of Deeds, that plaintiff had arguably valid legal objections to [certain of the interrogatories not provided], and that plaintiff had filed answers to [other] interrogatories before the dismissal order was entered.

Id. at 237. Furthermore, the defendants in *Rittenhouse* filed motions to dismiss based on the plaintiff's noncompliance less than one month—and in some instances, less than one week—after the expirations of deadlines set by the trial court's orders to compel. *Id.* at 236-237 n.2. It therefore does not appear that the plaintiff's nondisclosure extended so close to the trial date that the defendants' trial preparation efforts would have been seriously hampered, as occurred in the case *sub judice*.

which were relatively straightforward issues. Here, the Plaintiffs' experts' opinions address standards of care, as well as complex questions of causation implicated by the fact that Plaintiffs' decedent's immediate cause of death was a self-inflicted wound. Defendants were entitled to more than three months' time to depose Plaintiffs' experts, have their own experts assess and respond to Plaintiffs' experts' opinions, assemble their defenses, and ready themselves for trial. A monetary sanction cannot replace or remedy their lost opportunity to prepare.

Although the Court has not previously attempted to impose lesser sanctions, that omission results in part from Plaintiffs' counsel's failure to move for relief from the Court's disclosure deadline. *Drejka* suggests that monetary sanctions should be viewed as a measure of first resort where sanctions are necessary to prod a case forward, but this Court also recognizes that "in many cases, there will not be much time available for 'prod[ding].'"[35] With Plaintiffs' expert disclosures not completed until less than two months before trial, the time for prodding had passed in this case by the time Defendants' motion to preclude was filed.

While the defendants could also have brought Plaintiffs' dilatoriness to the Court's attention sooner, they likely could not gauge how much time they would need to mount a response to Plaintiffs' experts' opinions until they had actually received the disclosures. There are medical malpractice cases in which the parties

[35] *Hill v. DuShuttle*, 2011 WL 2623349, at *7 (Del. Super. July 5, 2011).

can generally anticipate the details of their adversaries' expert opinions in advance of receiving disclosures, particularly where a plaintiff's claims center upon a single, discrete incident of alleged negligence. This case—which concerns the acceptable treatment approaches to be taken by a family physician who engaged in a continuing course of treatment for anxiety and depression and by a mental health counselor who conducted only an initial consultation—was not one of them. The Court has reviewed the reports and can readily perceive that Defendants might not have been able to anticipate the precise nature and numerosity of the specific standard-of-care violations alleged by Plaintiffs' experts. The fact that Defendants retained their own standard-of-care experts does not imply that they could sufficiently predict the identity or opinions of Plaintiffs' experts and begin building a rebuttal in advance of receiving Plaintiffs' admittedly "comprehensive and detailed" disclosures. Plaintiffs' counsel proceeded with discovery disclosures past the established deadlines at their own peril—and, unfortunately, at the peril of their clients' case.

On a final note, if the delays in obtaining and disclosing the necessary expert opinions were occasioned solely by Plaintiffs' counsel, as appears to be the case, Plaintiffs are not without recourse. While the Court is generally loathe to encourage (or even to suggest) legal malpractice filings, such litigation implicates much the same public policy concerns as do *medical* malpractice lawsuits such as

this one. Protection of the lay public from professionals who do not meet the applicable standards of care is no less important in the legal field than it is in medicine and mental health counseling.

VI. Conclusion

For the foregoing reasons, Defendants' Joint Motion to Preclude Plaintiffs' Expert Testimony and Defendants' Joint Motion for Summary Judgment are hereby **GRANTED**.

IT IS SO ORDERED.

/s/
Peggy L. Ableman, Judge

Original to Prothonotary
cc: All Counsel via File & Serve