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

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| PATRICIA MENZEL and, | ) | |
| MICHAEL MENZEL, her husband, | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| v. | ) | C.A. No. 08C-12-149 PLA |
| | ) | |
| CALVIN T. WILSON, II, M.D., and | ) | |
| WILSON GYNECOLOGY & | ) | |
| FITNESS, P.A., | ) | |
| | ) | |
| Defendants. | ) | |

UPON PLAINTIFFS' MOTION *IN LIMINE*
**GRANTED IN PART and DENIED IN PART**

Submitted: February 7, 2011
Decided: February 22, 2011

Kara A. Hager, Esq., LAW OFFICES OF PETER G. ANGELOS, P.C., Wilmington, DE, Attorney for Plaintiffs.

Bradley J. Goewert, Esq., and Monica A. Horton, Esq., MARSHALL, DENNEHEY, WARNER, COLEMAN & GOGGIN, Wilmington, DE, Attorneys for Defendants.

**ABLEMAN, J.**

## I.

In September 2006, Plaintiff Patricia Menzel began treatment for a pelvic mass with Defendant Dr. Calvin T. Wilson, a gynecologist and gynecological surgeon.[1] Dr. Wilson performed a total abdominal hysterectomy and bilateral salpingo-oophorectomy in January 2007. Following the surgery, Menzel began experiencing gastrointestinal and urinary symptoms, including urinary leakage and decreased renal function, which required additional imaging and procedures. In October 2007, Menzel's urologist performed surgery, during which he found that her right ureter had been transected. He reimplanted the injured ureter into the bladder. Menzel instituted this medical malpractice action against Dr. Wilson and his practice on December 16, 2008, alleging that the injury to her ureter occurred during her hysterectomy and salpingo-oophorectomy in Janaury 2007, and that Dr. Wilson was negligent in failing to diagnose and correct the injury.

The motion *in limine* before the Court concerns the admissibility of the October 2010 discovery deposition of Dr. Richard L. Stokes, III, as well as the propriety of references to Dr. Stokes's opinions. Dr. Stokes is an obstetrician-gynecologist who works in Virginia. Plaintiffs designated Dr. Stokes as a testifying standard-of-care expert in their answers to interrogatories and provided

[1] Michael Menzel, Patricia's husband, is also a plaintiff in this case, having brought a loss of consortium claim against Defendants. For clarity, the Court will refer to Patricia Menzel as "Menzel."

Defendants with Dr. Stokes's expert report. In addition, Plaintiffs designated three other expert witnesses, including one other obstetrician-gynecologist.

Defendants conducted a discovery deposition of Dr. Stokes on October 15, 2010, during which Plaintiffs' counsel did not question their witness. In his deposition and report, Dr. Stokes attributed Menzel's ureter injury to the January 2007 surgery with Dr. Wilson; however, Dr. Stokes's opinion regarding the location of the ureter injury apparently differed from the opinions offered by Plaintiffs' other designated experts. Plaintiffs deposed four experts proffered by Defendants, each of whom commented upon Dr. Stokes's opinions during his or her testimony.

Plaintiffs decided—apparently after deposing Defendants' experts—that they would not call Dr. Stokes to testify at trial. By their motion *in limine*, they ask the Court to preclude Defendants from making any reference during trial to Dr. Stokes's testimony and opinions. Plaintiffs contend that because Dr. Stokes will not testify at trial, his opinions and deposition testimony are irrelevant to the case. In response, Defendants contend that Dr. Stokes's discovery deposition should be admitted pursuant to Superior Court Civil Rule 32(a). Defendants argue that their Rule 26(b)(4) expert disclosure reserved the right to call any expert identified by Plaintiffs. Defendants' disclosure was filed August 6, 2010, at which time Defendants understood that Plaintiffs intended to call Dr. Stokes at trial.

Defendants contend that because Plaintiffs did not object to Defendants' reservation, they are entitled to utilize Dr. Stokes's deposition at trial.

## II.

Superior Court Civil Rule 32(a) provides in part as follows:

> At trial . . . any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:
> (3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the Court finds: . . . (B) that the witness is out of the State of Delaware, unless it appears that the absence of the witness was procured by the party offering the deposition[.]

Delaware courts have repeatedly confronted the question of when a party may introduce the deposition of an adverse party's non-testifying witness at trial.[2] The resulting decisions are often highly fact-specific, and none directly address the precise combination of circumstances here. Based upon the principles expressed in the rules and the existing body of case law, the Court concludes that Plaintiffs' motion must be granted in part to prohibit Defendants from introducing Dr. Stokes's discovery deposition as substantive evidence; however, Defendants may be entitled to use Dr. Stokes's testimony and opinions for impeachment purposes, depending upon the testimony offered by Plaintiffs' trial experts.

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[2] *See, e.g.*, *Barrow v. Abramowicz*, 931 A.2d 424 (Del. 2007); *Green v. Alfred A.I. DuPont Inst. of Nemours Found.*, 759 A.2d 1060 (Del. 2000); *Hambleton* ex rel. *Estate of Albanese v. Christiana Care Health Servs., Inc.*, 2002 WL 183851 (Del. Super. Jan. 31, 2002).

In reaching this conclusion, the Court necessarily finds that Plaintiffs have not consented to Defendants' calling Dr. Stokes as a trial witness, notwithstanding Defendants' reservation of the right to call Plaintiffs' designated experts. In *Barrow v. Abramowicz*, the Delaware Supreme Court addressed the enforceability of a party's reservation of the right to rely upon the deposition of an adversary's witness in a pretrial order that was signed by both parties and the Court.[3] *Barrow* was a medical malpractice case in which the plaintiffs alleged that the defendant physician caused Robert Barrow's death by failing to identify abnormalities on a chest X-ray that were allegedly indicative of lung cancer. Causation was central to the parties' dispute, and the defendant initially designated two trial experts to testify on the issue. Both of the defense experts were deposed, and a final pretrial order was signed by the parties and entered by the trial judge. In the pretrial order, each party reserved the right to call the opposition's designated expert witnesses, and the plaintiffs "also expressly reserved the right to introduce the pretrial discovery deposition of witnesses who could not attend the trial."[4] The defendant did not object to either reservation of right. After the pretrial order was entered, the trial was continued. A brief time before the rescheduled trial date, the defendant notified the plaintiffs that he no longer intended to call one of his

[3] 93 A.2d at 429-31.

[4] *Id.* at 427.

causation experts, Dr. Krasnow. Dr. Krasnow's opinion that the initial chest X-ray at issue showed a primary cancerous lesion in the upper lobe of Barrow's left lung directly contradicted the testimony of the remaining defense expert, who opined that no primary tumor was identifiable in the initial X-ray and that the left upper lobe abnormalities were benign. The plaintiffs attempted to designate portions of Dr. Krasnow's pretrial discovery deposition for use at trial. The trial judge excluded the introduction of the non-testifying expert's deposition, noting that the deposition was conducted for discovery purposes and that Delaware policy weighs heavily against permitting parties to call their opponents' standard-of-care experts.[5]

On appeal, the Supreme Court reversed, holding that "the pretrial order is tantamount to a contract between the parties," and that the trial judge erred in failing to enforce it by giving effect to the plaintiffs' unopposed reservation of the right to introduce Dr. Krasnow's discovery deposition.[6] The *Barrow* Court emphasized that Dr. Krasnow's testimony "went to 'the very heart' of the Barrows' case," and was potentially more persuasive than similar testimony from the Barrows' experts, since Dr. Krasnow had initially been retained by the defense. As a result, "it appear[ed] . . . inconceivable that [the defendant] would think that the Barrows would not affirmatively elicit opinions from Dr. Krasnow on favorable

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[5] *Id.* at 428 & n.3.

[6] *Id.* at 431.

matters, particularly on the important issue of causation"[7] when he acquiesced to the "common practice" of parties' designating the testimony each other's witnesses for use at trial. Although the Supreme Court agreed with the defendant that it "makes practical sense in the abstract" to draw a distinction between the introduction of a discovery deposition and a trial deposition, it found the distinction "superfluous" on the particular facts before it, because the Barrows had specifically reserved the right to introduce discovery depositions in the pretrial order without a defense objection.[8]

The situation now before the Court departs significantly from *Barrow*, and the differences are instructive. First and foremost, the reservation of right upon which Defendants rely in this case was made in their own Rule 26(b)(4) disclosure, not a jointly submitted pretrial stipulation. While Defendants make much of Plaintiffs failure to object to their reservation of right, there is not generally an avenue by which a party "objects" to their opponent's initial expert disclosures and designations.[9] A Rule 26(b)(4) disclosure places other parties on notice of the filing party's positions and reservations, but does not customarily trigger an

[7] *Id.* at 432.

[8] *Id.* at 431.

[9] Of course, parties often challenge each other's designated witnesses—for instance, by filing *Daubert* motions—but, in addition to constituting a very different type of "objection" from the one at issue here, motions concerning an expert's qualifications or the content of his or her opinions usually do not arise until *after* discovery, and are not a direct response to the disclosure itself.

immediate response. The Court cannot conclude that the failure to "object" immediately to a reservation of right contained in a Rule 26(b)(4) disclosure is consent to the reservation. Certainly, a unilateral filing by one party is not "tantamount to a contract between the parties" in the sense that a signed pretrial order would be.

In addition, the Court does not perceive from the parties' filings that the introduction of Dr. Stokes's testimony goes to the "heart" of either side's case. The parties have done a less than thorough job presenting the relevant factual background. Nevertheless, as the Court understands it, Plaintiffs contend that Dr. Wilson failed to identify and treat a transection of Patricia Menzel's ureter that occurred during her surgery, which Defendants deny is the correct diagnosis. All of Plaintiffs' originally-designated experts agreed on the existence of an acute ureter injury that occurred during the procedure, but Dr. Stokes's opinion differed from those of her remaining experts as to the anatomical location of the injury. By contrast, Dr. Wilson's experts are expected to opine that no acute injury to the ureter occurred during the January 2007 procedure, but rather that Menzel experienced a delayed ischemic injury, which was a known post-operative complication of her surgery.

By deciding not to call Dr. Stokes, Plaintiffs have indicated that they will not be relying upon his description of the location of the alleged transection. His

opinion might therefore be useful to impeach Plaintiffs' testifying experts as to their different description of the exact injury site and the bases of their opinions, for which limited purpose it may prove admissible, but Defendants have not explained how Dr. Stokes's testimony is substantively relevant to their case-in-chief. Defendants have designated several trial experts to present their theory of the nature and cause of Menzel's injury. While portions of his opinion apparently diverge from those offered by Plaintiffs' remaining trial experts, Dr. Stokes unequivocally attributes negligence to Dr. Wilson. It therefore appears that Defendants wish to introduce Dr. Stokes's discovery deposition primarily as an avenue to present their experts' criticisms of it.

The requirements of Civil Rule 32(a) for introducing a deposition at trial are applied in conjunction with, not in lieu of, the Rules of Evidence.[10] Having now become the proponents of Dr. Stokes's expert opinion, Defendants bear the burden of proving its admissibility, which includes demonstrating its relevance. The medical issues in this case are complex, and Dr. Stokes's testimony may have greater significance to Defendants' case than has been conveyed by their response, but the information before the Court simply does not include the necessary showing. Without an explanation for the independent relevance of Dr. Stokes's

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[10] *See Hambleton*, 2002 WL 183851, at *4 ("Rule 32(a)(3) does not mean the Rules of Evidence are abrogated.").

testimony to the defense case, the Court cannot discern a permissible purpose for holding a “mini-trial” on the credibility of an expert whose opinions the Menzels are not presenting.

Furthermore, Defendants’ Rule 26(b)(4) disclosure states that “The Defendants reserve the right to call any expert identified by Plaintiff.” This reservation does *not* place Plaintiffs on notice of Defendants’ present intent, which is not to “call” Dr. Stokes to testify at trial, but rather to introduce his discovery deposition. By contrast, the pretrial order in *Barrow* expressly reserved the plaintiffs’ right to introduce *discovery* depositions of witnesses not available at trial.

Under these circumstances, the Court finds that the distinction between a discovery deposition and a trial deposition is not “superfluous,” as it was in *Barrow*. Here, neither party anticipated that Dr. Stokes’s October 2010 deposition would be offered in lieu of trial testimony when it was taken. Defense counsel noted multiple times that the proceeding was a discovery deposition.[11] Plaintiffs’ counsel did not question Dr. Stokes, stating that he would “reserve my questions for trial.”[12] Per the Supreme Court’s decision in *Barrow*, these facts would be irrelevant had Plaintiffs subsequently acceded to the introduction of the discovery

[11] Richard L. Stokes, III, M.D., Dep., vol 1, Oct. 15, 2010, at 4:25; 5:12-13.

[12] *Id.* at 115:6-7.

deposition, but they have not done so. Instead, they interposed an objection to Defendants' use of the discovery deposition well in advance of the pretrial order.

The Court is persuaded by *Hambleton v. Christiana Care Health Services* that Plaintiff's redesignation of Dr. Stokes as a non-testifying witness before a trial deposition was conducted and before the pretrial stipulation was filed should weigh against permitting Defendants to introduce his discovery deposition in their case-in-chief. In *Hambleton*, plaintiffs in the retrial of a medical malpractice action were prohibited from introducing the discovery deposition of a defense expert who had not been called by either party during the first trial and was not available to testify at the retrial.[13] The defendants apparently did not respond to a letter from the plaintiffs announcing their intentions, but raised an objection at the pretrial conference preceding the retrial.

The Court identified several independent grounds for excluding the deposition testimony, including that neither party had anticipated that the discovery deposition would be used at trial. The Court noted that Delaware law does not permit a party to compel an expert retained by its adversary to testify on its behalf at trial.[14] In addition, although Rule 32(a)(3) does not differentiate between

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[13] 2002 WL 183851, at *1-2.

[14] *Id.* at *3 & n.7 (citing *Schmidt v. Hobbs*, 1988 WL 31989 (Del. Super. Mar. 17, 1988)); *Starkey v. Hunt-Madani Prof'l Assoc.*, 1988 WL 33561 (Del. Super. Mar. 31, 1988)).

discovery depositions and trial depositions, the Court considered the distinction meaningful under the circumstances:

> This was a discovery deposition. If defendants wanted to rehabilitate [the witness's] competency credentials, they were not necessarily compelled to do so in this context. Nor were they necessarily compelled to ask any questions. Obviously, they had the opportunity to do so and there is a risk by not doing so in some circumstances. *The Court does not believe that opposing counsel must always realize or appreciate there is a substantial risk that every discovery deposition could be used at trial.* If so, this would result in prolonging, making more expensive and more treacherous discovery depositions.[15]

The trial judge further held that Rule of Evidence 403 was implicated, and that the relevance of the non-testifying expert's opinion was outweighed by "a substantial risk of prejudice," since "[i]t would be difficult to isolate what the plaintiffs want to read" without introducing much larger portions of the transcript.[16] A similar problem exists in this case: Defendants could not introduce only the portion of Dr. Stokes's testimony that conflicts with the opinions of both their experts and Plaintiffs' testifying experts without also reading in Dr. Stokes's extensive testimony ascribing negligence to Dr. Wilson.[17]

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[15] *Id.* at *4 (emphasis added).

[16] *Id.*

[17] *See* Super. Ct. Civ. R. 30(a)(4) ("If only part of a deposition is offered in evidence by a party, an adverse party may require the offeror to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.").

*Angstadt v. Lippman*,[18] a subsequent Superior Court case, relied upon *Hambleton* to bar the defendant in a medical malpractice action from introducing the discovery deposition of the plaintiff's expert at trial, based upon the fact that the expert's trial deposition had been completed without any questioning about the earlier discovery deposition. The Court determined that the discovery deposition was not admissible as former testimony of an unavailable witness under Rule of Evidence 804(b)(1)[19] because the party against whom the testimony would be offered at trial did not have a "similar motive to develop the testimony by direct, cross or redirect examination" during the discovery deposition. The Court noted that "a lawyer whose client or expert is being deposed for discovery purposes by the opposition has every motive *not* to ask a single question, unless drastic rehabilitation is required."[20]

The *Angstadt* decision does not explain why the trial judge considered the former testimony hearsay exception, which applies when a witness is unavailable, given that Civil Rule 32(a) calls for the introduction of depositions "so far as admissible under the rules of evidence *applied as though the witness were then*

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[18] 2006 WL 1062877 (Del. Super. Feb. 16, 2006).

[19] *See* D.R.E. 804(b) ("The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: (1) Testimony given as a witness . . . in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination.").

[20] 2006 WL 1062877, at *2.

*present and testifying*."[21] Arguably, Civil Rule 32(a) could prevent the application of any hearsay exceptions premised upon the declarant's unavailability. Nevertheless, *Angstadt* opinion's discussion of a party's lack of motive to "develop" the discovery deposition testimony of a retained expert is well-taken. The Court agrees with the general principle, expressed in both *Angstadt* and *Hambleton*, that the purpose of a deposition and the motive of the party against whom the deposition is offered at trial to develop the deposition testimony may be considered in applying Civil Rule 32(a) where the parties have not tacitly or expressly agreed that the deposition may be used.

Defendants suggest their position is supported by *Malcolm v. Greenspan*,[22] in which this Court permitted a medical malpractice defendant, Dr. Irwin Luy, to introduce the discovery deposition of a standard-of-care and causation expert retained by the plaintiffs. The expert had offered opinions against both Dr. Luy and a co-defendant. After settling with the co-defendant, the plaintiffs decided not to call the expert. Dr. Luy had maintained a cross-claim against the settled co-defendant which survived the settlement, and had relied solely upon the plaintiffs' expert to provide evidence regarding the co-defendant's alleged negligence.[23] Dr.

[21] Super. Ct. Civ. R. 32(a) (emphasis added).

[22] 2009 WL 5928201 (Del. Super. Feb. 13, 2009).

[23] *Id.* at *1-2.

Luy's Rule 26(b)(4) disclosure reserved the right "to call any expert and/or utilize the expert deposition of any witness designated by the plaintiffs and their codefendants on the issue of standard of care and proximate cause as well as to support [his] cross-claim."[24] Dr. Luy further incorporated by reference "as part of [his] own expert designation, the expert disclosure of plaintiffs and each of its co-defendants" that supported his defense or cross-claim.[25] The expert whose opinions were at issue indicated to the parties that he was available and willing to provide trial testimony.[26] The Court concluded that although Dr. Luy's decision to "piggy-back" his cross-claim into the case via the plaintiff's expert was "disingenuous," the expert's deposition would be admitted.[27]

Three crucial distinctions limit *Malcolm*'s applicability to this case. First, in *Malcolm*, the disputed expert testimony went to "the very heart" of Dr. Luy's cross-claim. Dr. Luy had not obtained any other expert opinion implicating the settled co-defendant, and thus his cross-claim would have been subject to summary judgment had he not been permitted to introduce the opinion of the expert plaintiffs sought to redesignate as non-testifying. The *Malcolm* Court explicitly weighed the

[24] *Id.* at *3.

[25] *Id.*

[26] *Id.* at *1.

[27] *Id.* at *6.

importance of the expert's deposition testimony to Dr. Luy's cross-claim against its conclusion that Dr. Luy's failure to name a specific expert in support of his cross-claim until a few weeks before trial "somewhat sandbagged" the plaintiffs, and found that the testimony's significance would "carr[y] the day" in favor of its admissibility.[28]

In this case, as previously discussed, the defendants have not established how Dr. Stokes's testimony is relevant to their case, let alone how it might be important. Balancing the uncertain significance of Dr. Stokes's testimony against the unfairness of introducing portions of a deposition that neither party anticipated using at trial when it was conducted would not militate in favor of the deposition's admissibility.

Dr. Luy's reservation of right in *Malcolm* arose in a Rule 26(b)(4) disclosure, but it was more specific than the reservation of the right to call Plaintiffs' experts that the defendants rely upon here. While the *Malcolm* opinion accords somewhat more weight to a unilateral reservation of right in a Rule 26(b)(4) disclosure than this trial judge would assign to it, the *Malcolm* Court was addressing reservation language that referred to the introduction of expert

[28] *Id.* at *4. The *Malcolm* Court relied upon *Green v. Alfred A.I. DuPont Institute of the Nemours Foundation* in arriving at this conclusion. *Green* held that an expert's *trial* deposition was admissible where the party which retained the expert twice entered into pretrial stipulations indicating that the deposition would be available for either party to use at trial. 759 A.2d at 1065.

*depositions* (as opposed to calling the expert to testify) and outlined the particular purposes for which the "reserving" party intended to use those depositions. Dr. Luy's reservation clearly encompassed the use of "the expert deposition of any witness designated by the plaintiffs" to support his cross-claim. The wording of this reservation bears more similarity to the precise language in the *Barrow* pretrial order than to the brief reservation of a right to "call" opposing experts contained in Defendants' Rule 26(b)(4) disclosure in this case.

Furthermore, the plaintiffs' argument under Civil Rule 32(a) in *Malcolm* focused almost exclusively on whether Dr. Luy sufficiently notified the plaintiffs of his trial strategy, and whether Dr. Luy could be deemed to have "procured" the expert's absence by failing to demonstrate diligent attempts to secure his testimony at trial.[29] Perhaps because the expert expressed a willingness to testify at trial, the plaintiffs never raised arguments regarding the parties' expectations as to how the deposition would be used, or their own motives (or disincentives) to develop the expert's testimony during the deposition.[30] Instead, the *Malcolm* plaintiffs argued that if Dr. Luy was permitted to rely upon their expert's opinion, a *de bene esse* trial deposition should occur to permit them an opportunity for cross-

[29] *See* Pls.' Mem. of Law, *Malcolm v. Greenspan*, C.A. No. 05C-12-080, at 3-7 (Del. Super. Jan. 1, 2009) (LexisNexis File & Serve Transaction ID 23449347).

[30] Notably, the trial judge in *Malcolm* had found merit to such arguments when he decided *Hambleton* several years prior.

examination.[31] The docket in *Malcolm* reflects that Dr. Luy in fact called the expert to testify at trial, in addition to introducing his deposition testimony.[32]

Here, by contrast, the parties have not been able to ascertain Dr. Stokes's willingness or availability to testify at trial. In light of Delaware's policy against compelling a retained expert to testify for an adverse party, the Court cannot assume that Dr. Stokes would be willing to testify if called by Defendants. Accordingly, the Court finds it appropriate to consider that the Menzels have not cross-examined Dr. Stokes, and should not reasonably have anticipated any need to do so during his discovery deposition. In *Malcolm*, the Court observed that the plaintiffs made a "tactical" decision not to call their retained expert, despite his availability and willingness to testify, in order to prevent Dr. Luy from "bring[ing] in his cross-claim . . . through their witness,"[33] and they were ultimately afforded the opportunity to cross-examine him when he was called by the defense at trial. At this time, the Court cannot presume that the plaintiffs here will have such an opportunity. Although the Menzels acted "tactically" in redesignating a witness whose opinion differed from those offered by its other experts, Dr. Stokes's

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[31] Pls.' Mem. of Law, *Malcolm v. Greenspan*, C.A. No. 05C-12-080, at 7 (Del. Super. Jan. 1, 2009).

[32] Civil Trial Activity Sheet, *Malcolm v. Greenspan*, C.A. No. 05C-12-080 (Del. Super. Mar. 13, 2009) (LexisNexis File & Serve Transaction ID 24196291).

[33] *Malcolm*, 2009 WL 5928201, at *5.

opinion does not seem so adverse to the plaintiffs' case that the Menzels' counsel should necessarily have anticipated a need to cross-examine him at his discovery deposition. Some re-shaping of a party's approach to their own case is a normal consequence of the discovery process, and the only negative impact to the defense that the Court can perceive from Plaintiffs' conduct relates to the time and expense involved in having the defense experts evaluate Dr. Stokes's opinion. Because the parties in *Malcolm* were so differently situated, the principles explored in that decision do not convince the Court that the defendants have established the admissibility of Dr. Stokes's testimony in this case.

**III.**

For the foregoing reasons, Plaintiffs' motion *in limine* is **GRANTED IN PART** so as to preclude Defendants from introducing the discovery deposition of Dr. Stokes in their case-in-chief. Plaintiff's Motion is **DENIED IN PART** to the extent that Defendants may demonstrate at trial that they are entitled to utilize Dr. Stokes's testimony and report for impeachment purposes. The Court will revisit the admissibility of Dr. Stokes's testimony and opinions as substantive evidence if the parties receive new information regarding his availability and willingness to provide trial testimony.

**IT IS SO ORDERED**.

/s/

**Peggy L. Ableman, Judge**