IN THE SUPREME COURT OF THE STATE OF DELAWARE

RUDOLPH V. BAILEY, SR.,	§	
	§	No. 322, 2007
Plaintiff Below-Appellant,	§	
	§	
	§	Court Below—Superior Court
v.	§	of the State of Delaware
	§	in and for New Castle County
ACME/ASCO/ALBERTSON'S INC.,	§	C.A. No. 06C-04-129
	§	
	§	
Defendant Below-Appellee.	§	
	§	

Submitted: February 8, 2008
Decided: April 23, 2008

Before **BERGER**, **JACOBS** and **RIDGELY**, Justices.

O R D E R

This 23rd day of April 2008, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) The plaintiff-appellee, Rudolph V. Bailey, Sr., filed an appeal from the Superior Court's June 19, 2007 order granting the motion for summary judgment of the defendant-appellee Acme/Asco/Albertson's Inc. ("Acme"). We find no merit to the appeal. Accordingly, we affirm.

(2) The record reflects that Bailey, acting *pro se*, filed a tort action in the Court of Common Pleas, alleging that, on or about March 10, 2004, the Acme Supermarket in Bear, Delaware, sold him contaminated apple

juice that made him ill. The Court of Common Pleas dismissed the case on procedural grounds. Bailey then appealed to the Superior Court, which reversed the decision below. The case subsequently was transferred to the Superior Court. Following an arbitration hearing, in which Acme prevailed, a scheduling order was entered. The order set the following deadlines: March 30, 2007 for submission of plaintiff's expert report; May 1 for submission of defendant's expert report; and May 15, 2007 for completion of discovery.

(3) On May 16, 2007, Acme filed a motion for summary judgment on the ground that Bailey had failed to produce an expert report by the deadline of March 30, 2007. Bailey filed a response opposing the motion for summary judgment in part on the ground that Acme had failed to respond to his numerous attempts to obtain the test results on the allegedly contaminated apple juice.[1] In his response, Bailey stated, "Without the test results . . . , the Plaintiff cannot prove his case nor document his compensable damages."

(4) On June 18, 2007, the Superior Court held a hearing on Acme's motion. After the Superior Court judge determined that Bailey did not have a causation expert to testify on his behalf at trial, the hearing was concluded.

[1] It appears that a sample of the allegedly contaminated apple juice was picked up from Bailey's residence for testing on or about March 20, 2004.

The Superior Court did not consider several motions regarding discovery of the test results on the apple juice that Bailey had filed for presentation at the hearing. In its June 19, 2007 order granting summary judgment, the Superior Court ruled that Bailey's failure to identify an expert was fatal to his claims and that the motions he had filed for presentation at the hearing had been rendered "moot."

(5) In this appeal, Bailey asserts twelve separate claims, which may fairly be summarized as follows: a) the Superior Court "tampered with the record" and "fabricated false and . . . misleading evidence" in order to dismiss his lawsuit; and b) the Superior Court should not have granted summary judgment to Acme because, despite repeated efforts to do so, he was never able to obtain the test results for the apple juice.

(6) In order to prevail in a negligence action, a plaintiff must prove by a preponderance of the evidence that the defendant's action breached a duty of care in a way that proximately caused injury to the plaintiff.[2] Moreover, the causal connection between the defendant's alleged negligent conduct and the plaintiff's alleged injury must be proven by the direct testimony of a competent medical expert.[3]

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[2] *Rayfield v. Power*, Del. Supr., No. 434, 2003, Holland, J. (Dec. 2, 2003) (citing *Russell v. K-Mart Corp.*, 761 A.2d 1, 5 (Del. 2000)).
[3] Id. (citing *Money v. Manville Corp.*, 596 A.2d 1372, 1376-77 (Del. 1991)).

(7) This Court reviews *de novo* the Superior Court's grant of a motion for summary judgment.[4] As such, we must determine, viewing the facts in the light most favorable to the non-moving party, whether the moving party has demonstrated that there are no material issues of fact in dispute and that it is entitled to judgment as a matter of law.[5]

(8) There is absolutely no basis in the record for Bailey's first claim, which we attribute to his frustration with the discovery process. We, therefore, conclude that his first claim is without merit.

(9) As for Bailey's second claim, the record reflects that Bailey made several requests to Acme for the results of the testing of the apple juice, but did not receive a response. Later, after requesting the Superior Court to compel the production of the test results, he was informed that his request was not in conformity with the Superior Court Rules. Bailey then continued to file discovery requests for the test results, but never received a response. The record reflects that Bailey intended again to request the Superior Court to compel production of the test results at the summary judgment hearing, but did not have an opportunity to do so.

(10) Although we question whether Bailey's discovery requests were appropriately allowed by the Superior Court, it nevertheless was

[4] *Bryant v. Bayhealth Medical Center, Inc.*, 937 A.2d 118, 122 (Del. 2007).
[5] Id.

Bailey's responsibility, as the plaintiff, to arrange for whatever testing was required as the basis for his expert opinion on causation.[6] He did not do so. Moreover, Bailey may not use his inability to obtain the test results from Acme as an excuse for failing to arrange for his own testing and for failing to submit his expert opinion by the Superior Court's deadline. The Superior Court's judgment must, therefore, be affirmed.

NOW, THEREFORE, IT IS ORDERED that the Superior Court's June 19, 2007 order granting Acme's motion for summary judgment is AFFIRMED.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

[6] Id. (citing *Reybold Group, Inc. v. Chemprobe Tech, Inc.*, 721 A.2d 1267, 1270-71 (Del. 1998)).