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

JOHN DOE 3, Plaintiff, v. COLONIAL SCHOOL DISTRICT, THE BOARD OF EDUCATION OF THE COLONIAL SCHOOL DISTRICT, DEFENDANTS DOES 1-20, all individually and in their official capacities as members of the Board of the School District at the time of the abuse; DR. GEORGE H. MENEY, in his official capacity as Superintendent of the Colonial School District; KENNETH STEWART, individually, Defendants.	)))))))))))))))))	C.A. No.: 09C-07-067 FSS **(E-FILED)**

Submitted: January 6, 2012
Decided: January 20, 2012

ORDER

Upon Plaintiff's Rule 59(e) Motion for Reargument - *DENIED.*

1. On December 27, 2011, the court granted some Defendants' Motion to Dismiss because Plaintiff failed to timely serve them under Superior Court Civil Rule 4(j). On January 4, 2012, Doe filed a Motion for Reargument,[1] alleging the court misapprehended facts. Defendants timely responded on January 6, 2012.

[1] Super. Ct. Civ. R. 59(e).

2. A motion for reargument will be granted if the court has "overlooked a controlling precedent or legal principles, or misapprehended the law or facts such as would have changed the outcome of the underlying decision."[2] Movants should not "bring up new arguments [they] could have previously addressed."[3]

3. Now, Doe's original attorney, Thomas Conaty, IV, Esquire, has submitted an affidavit to support Doe's motion. Conaty's affidavit avers he responded to the court's "tweaking" on October 30, 2009 and that he had phone message receipts from defense counsel agreeing to accept service on July 13, 2009.

4. Doe argues the court misapprehended facts because Conaty's affidavit refutes the finding that "Doe's lapse appears partly intentional" and "even after the court tweaked him, Doe did not move . . . and . . . disregard[ed] the court's rules and its warnings."

5. Doe's reargument fails. Even assuming Doe's allegation that the receipts show defense counsel would have accepted substitute service, which counsel actually denies, Doe did not make service after the court's written warning. More importantly, he failed to present these new facts before dismissal. Yet again, Doe

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[2] *Radius Services, LLC v. Jack Corrozi Const., Inc.,* 2010 WL 703051, at *1 (Del. Super. Feb. 26, 2010) (Vaughn, P.J.).

[3] *Id.*

waited until the worst happened, then he reacted.

6. Doe had approximately two and a half years after filing his complaint to marshal whatever phone messages or other evidence he had. Doe's waiting to make his record until after dismissal is inexcusable, and it underscores the reasons expressed for the court's exercising its discretion the way it did.

7. Second, Doe argues that the court did not ask him to respond to Defendants' claim that Doe failed to timely serve. This argument also fails. Doe knew on January 6, 2010 that Defendants had moved to dismiss. Without prompting, Doe should have produced his evidence. It bears mention, again, that this is not the first dismissal of this sort of claim for lack of service. *Doe v. Catholic Diocese of Wilmington, Inc.*,[4] cited in the original decision, was decided nineteen months before this case was dismissed.

8. Third, Doe argues dismissal here is unwarranted because the court granted default judgment against his attacker, Kenneth Stewart, whom Doe also admittedly served after the 120 day deadline. This argument fails because Stewart never responded to the complaint, so he deserved entry of judgment by default. In contrast, the other defendants moved to dismiss and, unlike Stewart, they have reason to be free of this litigation. The original decision explains that.

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[4] 2010 WL 2106181 (Del. Super. May 26, 2010) (Ableman, J.).

9. Last, Doe argues the Child Victim's Act is a special law, and he should have his day in court because Defendants were not prejudiced by his failure to timely serve. This merely re-presents a point considered originally. As mentioned in the dismissal, good cause, not prejudice, is the standard under Rule 4(j).[5] Doe has not shown good cause for his failure to timely serve. As the original decision reflects, the court is sensitive to the nature of the claim. But, as to the prevailing defendants, the claim is at best marginal and problematic. Besides, Doe did not act in a way that supports his demand for a "day in court."

For the foregoing reasons, Doe's motion for reargument is **DENIED**.

IT IS SO ORDERED.

/s/ Fred S. Silverman
Judge

cc: Prothonotary (Civil)
pc: Thomas P. Conaty, IV, Esquire
Raeann Warner, Esquire
David H. Williams, Esquire
James H. McMackin, III, Esquire

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[5] Super Ct. Civ. R. 4(j). *See also Dolan v. Williams,* 707 A.2d 34, 36 (Del. 1998) (quoting *Dominic v. Hess Oil V.I. Corp,* 841 F.2d 513, 517 (3d Cir. 1988)) ("Good cause is a showing of excusable neglect by 'a demonstration of good faith on the part of the party seeking an enlargement and some reasonable basis for noncompliance within the time specified in the rules.'").