SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

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RE: ***Dailey v. Purse v. Wooten***, C.A. No. 06C-04-015 RFS

Submitted: November 17, 2008
Decided: December 30, 2008

Dear Counsel:

In this personal injury case, summary judgment was granted against Plaintiff by a decision filed on Thursday, October 16, 2008. A Motion for Reargument was filed on Friday, October 24, 2008. The Motion is denied because it is untimely and, regardless, it is without merit.

**Timeliness**

Superior Court Civil Rule 59(e) states that "[a] motion for reargument shall be served and

filed within 5 days after the filing of the Court's opinion or decision." Under Superior Court Civil Rule 6(a), the computation of any period of time under the Rules shall not include the day of the act, event or default after which the period of time begins to run. "When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and other legal holidays shall be excluded in the computation." Super. Ct. Civil R. 6(a).

In order to meet the deadline, Plaintiff's Motion should have been filed by the end of the day, Thursday, October 23rd. Plaintiff was late, and, consequently, the present Motion can be dismissed for this reason alone.

**Applicable Standards**

The purpose of a motion for reargument is to permit correction of mistaken findings of fact or conclusions of law that would make a difference. It will be denied unless the movant demonstrates a controlling legal principle was overlooked or the law or facts were not appropriately applied to the degree that the decision would change. *Kennedy v. Invacare Corp.*, 2006 WL 488590 (Del. Super.) "A motion for reargument should not be used merely to rehash the arguments already decided by the Court." *Wilmington Trust Co. v. Nix*, 2002 WL 356371 (Del. Super.).

**This Case**

Plaintiff cannot meet this burden. The reasons for the summary judgment are set forth in this letter opinion and will not be repeated. Plaintiff's problem is simple, and one that could have been easily avoided.

Under the Court's Scheduling Order, Plaintiff had to identify all expert witnesses and to produce their related reports to the Defendant by March 7, 2008. Plaintiff did not do so.

Nonetheless, Plaintiff says his supplemental response to Form 30 Interrogatories filed on September 14, 2006 satisfied this requirement. This explanation is not persuasive.

In interrogatory number 5, the question asks: "Give the name, professional address and telephone number of all expert witnesses presently retained by the party together with the dates of any written opinions prepared by said experts. If an expert is not presently retained, describe by type the experts whom the party expects to retain in connection with this litigation." The answer says: "None at this time. However, plaintiff expects to call treating physicians as experts." The response to interrogatory number 7 listed the names, addresses, and telephone numbers of three medical providers who cared for the Plaintiff in the ten year period before the incident of April 23, 2004. It is puzzling why the "treating physicians" were not identified similarly as their medical opinions were available before the complaint was filed.

Despite the Scheduling Order - the second one in this case; a prior order having identical disclosure requirements with earlier dates - Plaintiff failed to identify his experts, doctors or others, by March 7, 2008. Nor were "related reports" provided. Medical records introduced in the arbitration would not satisfy the Scheduling Order. "Related reports" refer to the opinions held by experts upon which Plaintiff relies to take the case to trial (when expert testimony is required to determine injuries as discussed in the summary judgment opinion).

Generally, the Superior Court has viewed the subject this way:

> Plaintiff argues that she does not need to do anything more than identify her expert witnesses and then Defendants can take depositions to learn what those opinions might be. This is contrary to the scheduling order and this Court's practice. Plaintiff was to identify her experts and provide their reports as to their expert opinions. Then, Defendants would be on notice of the bases for the expert opinions, and, pursuant to the scheduling order, respond in kind as to their experts and supply the bases for their opinions by way of a report. It is not reasonable to

> require Defendants' counsel to go on a wild goose chase with Plaintiff's experts or to depose Plaintiff's experts without the benefit of having the opinions and the medical or scientific reasoning for those opinions."

*Duncan v. Newton & Sons Co.*, 2006 WL 2329378 (Del. Super.)

Certainly, this situation would not have arisen if routine medical opinions had been provided. It is common fare in the personal injury Bar to obtain reports that would opine about the necessity and reasonableness of care together with the nature and extent of the injuries caused by negligence. It is the expectation of the Scheduling Order. The need is obvious from the circumstances of this case. Plaintiff had a prior medical history, including two prior operations to areas claimed to be injured by the incident, and was seeking damages for permanent injuries.

Expert reports are fundamentally different from medical records. The latter deal with contemporaneous treatment and do not address legal questions involving proximate cause which is not a medical concept. In practically every case which presents significant pre-existing injuries - as this one does - a plaintiff must show through expert medical testimony that the injuries are related to the particular incident.

Nor should the Court have been burdened with a "wild goose chase" in the summary judgment phase because Plaintiff failed to demonstrate how his injuries were proximately caused by the accident through expert evidence. On this point, Plaintiff merely said: "20, With regard to medical treatment and the need for future treatment, Plaintiff has identified his medical experts and the medical records clearly support the mechanism of the Plaintiff's injury, the cost of treatment and the resulting limitations. 21, With regard to the issue involving medical experts and the production of expert medical reports, Plaintiff has satisfied his obligation to Defendant. As such, the granting of summary judgment must be denied." Plaintiff's Response to

Defendant's Motion for Summary Judgment filed on July 15, 2008. I disagree.

Although aware of the deficiency, Plaintiff never asked that the Scheduling Order be modified for good cause. This was an option even after the summary judgement motion was filed. Without doubt, all parties must comply "with the discovery rules by identifying expert witnesses and disclosing the substance of their expected opinions as a precondition to the admissibility of expert testimony at trial." *Sammons v. Doctors For Emergency Services, P.A., et al.,* 913 A.2d 519, 528-9 (Del. 2006). Under the state of the record, the unidentified treating physicians would not have been permitted to testify at trial.

Considering the foregoing, the Motion for Reargument is denied as untimely and, alternatively, without merit.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

Prothonotary