

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

CLIFTON L. SYKES and LISA SYKES,	:	
Husband and Wife,	:	
Plaintiffs,	:	
v.	:	C.A. No. N11C-01-033 PLA
NTB-NATIONAL TIRE & BATTERY,	:	
Defendant.	:	

**UPON DEFENDANT NTB-NATIONAL TIRE & BATTERY'S
MOTION FOR SUMMARY JUDGMENT - DENIED**

Submitted: February 21, 2012

Decided: April 12, 2012

I. Introduction

The Court has before it a motion for summary judgment filed by Defendant NTB-National Tire & Battery (“NTB”). NTB asserts that it is entitled to judgment as a matter of law because there is no genuine issue of material fact in the record based on the allegations in the Complaint. NTB further argues that it is not now possible for the plaintiffs to amend the Complaint because the deadline for amendments under the Trial Scheduling Order has passed. Furthermore, since the proposed amendment would not relate back to the original filing date of the Complaint under Superior Court Civil Rule 15(c), this action is therefore barred by the statute of limitations.

After reviewing the record and the applicable law in this matter, the Court concludes that the proposed amendments would relate back to the original filing

date of the Complaint. The Court must reconcile the possibility of amendment with the fact that the plaintiffs have disregarded the Court's scheduling order and have not shown good cause for doing so. In light of Delaware's public policy in favor of resolving disputes on their merits, the Court will allow the plaintiffs the opportunity to amend their complaint. The motion for summary judgment is therefore DENIED. As a sanction for their complete disregard of the Court's scheduling order, however, Plaintiffs' counsel must pay the costs of this summary judgment motion.

II. Facts

This is a personal injury case arising from an automobile accident. The Complaint alleges that Clifton L. Sykes ("Sykes") was driving on Kirkwood Highway near Wilmington, Delaware on January 13, 2009 when a tire fell off his vehicle and caused him to lose control of the car. Sykes and his wife, Lisa Sykes, (collectively, "Plaintiffs") filed a complaint in this Court on January 5, 2011, wherein they alleged that NTB had negligently attached the tire to their vehicle after performing repair work, which resulted in this injury-causing accident.

In response to a discovery request, Plaintiffs admitted on April 4, 2011 that they could produce no documentation supporting their assertion that NTB had performed work on Sykes' car on or before the date of the alleged incident. Approximately one month later, on May 5, 2011, Plaintiffs' counsel e-mailed

NTB's counsel with a proposed stipulation to amend the complaint and a proposed draft of an amended complaint. The proposed amended complaint, which is attached as an exhibit to NTB's motion for summary judgment, alleged that on January 9, 2009, Sykes was in the parking lot of NTB's store on Kirkwood Highway when a piece of wheel alignment equipment fell from another vehicle in the lot and struck Sykes' car, causing him to lose control of the vehicle. The proposed amended complaint alleged that NTB negligently installed the wheel alignment equipment on the other vehicle, thereby causing injury to Sykes, who was a business invitee on NTB's premises at the time of the incident. By e-mail dated May 10, 2011, NTB's counsel notified Plaintiffs that that NTB would not agree to the stipulation.

On May 18, 2011, the Court issued a Trial Scheduling Order ("Order") for this case, setting the case for a three-day jury trial on January 7, 2013 and establishing June 17, 2011 as the deadline for filing motions to add or amend. The Order required the completion of discovery by July 6, 2012. Plaintiffs have not filed a motion to amend the Complaint at any time before or after the deadline established in this Order.

III. Parties' Contentions

NTB has now moved for summary judgment, asserting that there is no genuine issue of material fact in the record and it is entitled to judgment as a matter of law.

Furthermore, NTB asserts that no genuine issue of material fact could arise because, under the Scheduling Order, Plaintiffs cannot now amend the Complaint. NTB further contends that Plaintiffs cannot file a motion to amend the Complaint because they have not shown good cause for not timely filing a motion to amend, even though there was a full month between the time Plaintiffs learned that NTB would not agree to a stipulation and the Court-ordered deadline for motions to amend. Similarly, NTB argues that Plaintiffs have made no showing that their failure to comply with the Order is the result of excusable neglect. Furthermore, NTB asserts that, even if the Court were to allow NTB to file a motion to amend the complaint, the amendments would not relate back to the date of filing of the original complaint and would therefore be time-barred.

IV. Discussion

a. Relation Back of Proposed Amendment Under Superior Court Civil Rule 15(c)

NTB's motion for summary judgment turns on whether, at this stage of the litigation, the Complaint can be amended to reflect the plaintiffs' revised allegations as to how their injuries occurred. The Court begins its analysis with the question of whether the proposed amendment would relate back to the original filing date of the Complaint. Superior Court Civil Rule 15(a) requires that leave to

amend a pleading “shall be freely given when justice so requires.”¹ It is a matter of the Court’s discretion, however, whether a motion to amend is granted, and the Court may consider such factors as bad faith, undue delay, dilatory motive, repeated failures to cure by prior amendment, undue prejudice, and futility of amendment as reasons to deny leave to amend.² Where an amendment to a pleading would be barred by the applicable statute of limitations, however, the amendment is only permissible where the amendment relates back to the date of the original pleading.³

Here, NTB argues that any attempt to amend would be futile because the amendments are time-barred by 10 *Del. C.* §8119. Superior Court Civil Rule 15(c) provides that an amendment to a pleading relates back to the date of the original pleading when “the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.”⁴ To determine whether an amendment arises out of the same “conduct, transaction, or occurrence” set forth in the original complaint, the Court will consider whether the defendant had notice of the claims in the amendment.⁵ An amended complaint based on the same incident or injury is not sufficient.⁶

¹ Super. Ct. Civ. R. 15(a).

² *Fields v. Kent County*, 2006 WL 345014, at *4 (Del. Ch. Feb. 2, 2006).

³ *See, e.g., Mullen v. Alarmguard of Delaware, Inc.*, 625 A.2d 258, 263 (Del. 1993).

⁴ Super. Ct. Civ. R. 15(c).

⁵ *E.g., Fields*, 2006 WL 345014, at *5.

⁶ *Rodriguez v. Wiedemann*, 2007 WL 3288212, *2 (Del. Super. Oct. 24, 2007).

However, an amendment to the complaint that alters the theory of liability will relate back so long as the amendments “arise out of the specific conduct of the Defendant alleged in the original complaint.”⁷

In *Wright v. Chait*,⁸ a medical malpractice action, this Court addressed circumstances analogous to those presented here. The original complaint in *Wright* alleged that Dr. Chait had acted negligently in his medical treatment of the plaintiff on September 7, 1983. In the course of discovery, it became apparent that the plaintiff had actually been treated by a different doctor on that date, although the other doctor was an employee of the same corporation as Dr. Chait.⁹ The plaintiff also discovered that she had made a telephone call, allegedly to Dr. Chait two days earlier, on September 5, 1983, which appeared to be the date that the plaintiff first began experiencing the symptoms for which she was treated on September 7, 1983. The *Wright* plaintiff sought to amend her complaint against Dr. Chait alleging that he had acted negligently on September 5, 1983 by failing to document the phone call and failing to communicate the phone call to the other physicians in his practice. She contended that the amendment would relate back to the original filing date and was therefore not barred by the statute of limitations. The Court agreed with the plaintiff, finding that no prejudice would accrue to Dr. Chait “by

⁷ *Rodriguez* 2007 WL 3288212, at *2.

⁸ 1988 WL 67687 (Del. Super. Jun. 17, 1988).

⁹ The corporation that employed both doctors was also named as a defendant in the case.

allowing an amendment that simply changes the date of the alleged negligence and a variation on the theme of negligence alleged in the original complaint.”¹⁰ In particular, the Court emphasized that Dr. Chait would have known that his alleged negligence was in issue from the date the original complaint was filed and rejected as “clearly without merit” the defendant’s argument that the doctor’s failure to document a telephone call from two days before the plaintiff was treated constituted a new transaction.¹¹ The Court described Dr. Chait’s alleged error as within the “range of matters in controversy.”¹²

In this instance, the Court is similarly satisfied that the allegations in the proposed amended complaint fall within the “range of matters in controversy” indicated by the original complaint. NTB has been on notice since January 5, 2011 that Sykes was claiming that NTB performed negligent repair work on a vehicle that ultimately caused Sykes to lose control of his car and suffer injury. While it is true that the plaintiff’s new theory of liability as expressed in the amended complaint suggests a rather more attenuated duty of care owed by NTB to Sykes, it appears that the specific conduct of NTB at issue – *i.e.*, negligent tire repair work on a vehicle – is the same under the original complaint as under the proposed

¹⁰ *Id.* at *1.

¹¹ *Id.*

¹² See *Jackson v. Airways Parking Co.*, 297 F.Supp. 1366 (N.D. Ga. 1969) (“The point of Rule 15(c) is that it is fair to have an amended complaint relate back if the initial complaint put the defendant on notice that a certain range of matters was in controversy and the amended complaint falls within that range.”)

amended complaint, regardless of the precise vehicle repaired by NTB that precipitated the incident. In other words, the proposed amended complaint offers a variation on the theme of negligence alleged in the original complaint rather than an entirely separate transaction. Furthermore, the unusual circumstances of this particular case make it somewhat difficult for NTB to claim it would be severely prejudiced by allowing the amendment because NTB has known that its negligence was in issue since the original complaint was filed in January 2011, and of the allegations in the proposed amended complaint since May 2011. Accordingly, the Court finds that the allegations in the proposed amended complaint would relate back to the original filing date of the Complaint under Rule 15(c)(2) and the proposed amendment would be permissible.

b. Plaintiffs' Failure to Comply with the Court's Scheduling Order

In light of the Court's conclusion that the proposed amended complaint would relate back to the original filing date of the Complaint, the Court must next consider whether it will allow the plaintiffs to file an untimely motion to amend the Complaint. Consistent with its rules of procedure and case law, the Court's 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." In this context, "good cause" has been construed to mean that the noncompliant party exercised diligent efforts to meet the scheduling

deadlines.¹³ Similarly, Rule 6(b) provides that deadlines established by 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 here have made no attempt to explain their failure to file a timely motion to amend after defense counsel made clear that NTB would not agree to stipulate to the proposed amended complaint. Plaintiffs knew that NTB would not accept the stipulation for more than a month before the deadline for filing motions to amend. There is nothing in the record that would allow the Court to conclude either that Plaintiffs had good cause for failing to file a timely motion to amend, or that their failure to do so was the result of excusable neglect. On more than one occasion, this Court has held that such unjustified failure to adhere to the Court’s scheduling order is sufficient reason to refuse to extend the deadlines and dismiss the case.¹⁴ The Court has good reason to enforce its scheduling orders strictly. This Court has noted that the alternative would “countenance significant disruptions to the Court’s crowded docket” or “unfairly force the defendants to proceed to trial without a reasonable opportunity to prepare their defense.”¹⁵

Moreover, it is important to note that the Court’s requirement that a party seeking a

¹³ *Christian v. Counseling Resource Assoc., Inc.*, 2011 WL 3300166, *6 (Jul. 28, 2011).

¹⁴ *See, e.g., Christian*, 2011 WL 3300166 (granting summary judgment in favor of defendants after concluding that the plaintiffs had no justification for making untimely disclosures of expert reports); *Hill v. DuShuttle*, 2011 WL 2623349 (Del. Super. Jul. 5, 2011) (granting summary judgment in favor of defendants after concluding that the plaintiffs had no justification for their failure to file timely expert disclosures that satisfied Super. Ct. Civ. R. 26).

¹⁵ *Christian*, 2011 WL 3300166, at *8.

deadline extension must show good cause exists “not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of a deterrent.”¹⁶ Sympathy for a plaintiff’s plight, as this Court has observed, cannot be allowed to trump the importance of adherence to the Court’s deadlines and scheduling orders where failure to do so would have significant consequences for the Court and for the opposing party.¹⁷

Notwithstanding the significance of compliance with the Order, the Court nevertheless recognizes that refusing to allow the plaintiffs to file a motion to amend will necessarily result in dismissal of this case. The Delaware Supreme Court recently observed that while the “trial court must exercise control over its calendar, and attorneys who ignore deadlines should be sanctioned,” dismissal should not be used as a sanction “except in extreme cases, where other sanctions have proved ineffective.”¹⁸ Where counsel has made a procedural error that could result in dismissal of the case, the Court must weigh the following factors before making a determination:

- (1) The extent of the party’s personal responsibility;
- (2) The prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery;
- (3) A history of dilatoriness;

¹⁶ *Hill*, 2011 WL 2623349, at *7 (citations omitted).

¹⁷ *Christian*, 2011 WL 3300166, at *8.

¹⁸ *Drejka v. Hitchens Tire Service, Inc.*, 15 A.3d 1221, 1222 (Del. 2010).

- (4) Whether the conduct of the party was willful or in bad faith;
- (5) The effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and
- (6) The meritoriousness of the claim or defense.¹⁹

Applying these factors, the Supreme Court in *Drejka* concluded that dismissal was not an appropriate remedy for the plaintiff's submission of an expert report more than five months after the deadline. The *Drejka* Court emphasized the availability of monetary sanctions as a means of penalizing attorneys who disregard the Court's scheduling orders, noting, "[i]f monetary sanctions were imposed more frequently, attorneys would be far less likely to delay in obtaining (and thus having to pay) experts. Moreover, if monetary sanctions were imposed several times, and were not effective, the sanction of dismissal would be much more supportable."²⁰

In view of the dictates of *Drejka*, the Court concludes that the more appropriate remedy here is to allow the plaintiffs the opportunity to amend their complaint, but to impose a monetary sanction on Plaintiffs' counsel for their disregard of the scheduling order. There is no evidence that the plaintiffs

¹⁹ *Dishmon v. Fucci*, 32 A.3d 338, 345 (Del. 2011).

²⁰ 15 A.3d at 1224. See also *Dishmon*, 32 A.3d at 346 where the Supreme Court held that the plaintiff's failure to include an expert's curriculum vitae along with the affidavit of merit did not justify dismissal of the case, emphasizing Delaware's strong public policy in favor of permitting a litigant a right to a day in court. But see *Christian*, 2011 WL 3300166, at *10 ("An alternate 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."); *Hill*, 2011 WL 2623349, *5-*6 (noting that monetary sanctions frequently do not address the prejudice to the defendant and do not protect the Court's interest in enforcing its deadlines).

themselves are responsible for the failure to adhere to the scheduling order, nor is there any indication of a history of dilatory conduct or bad faith on the part of the plaintiffs in failing to amend the complaint. Since the Court has concluded that leave to amend will be granted, the Court notes that the trial date is still approximately nine months away, thus mitigating any prejudice to the defendants caused by the plaintiffs' failure to follow the scheduling order.

Superior Court Rules 16(f) and 37 authorize the Court to impose "the reasonable expense incurred because of any non-compliance" with a scheduling order, including the costs of motions, upon the non-compliant party or the party's attorney.²¹ Imposing monetary sanctions upon Plaintiffs' counsel addresses the Court's concern for managing its docket by signaling to counsel in this case, and others, that there are indeed consequences for plainly disregarding the Court's scheduling orders while at the same time recognizing Delaware's policy in favor of resolving disputes on their merits. Accordingly, the Court will impose on Plaintiffs' counsel all costs associated with this summary judgment motion, which would have been unnecessary had Plaintiffs filed a timely motion to amend.

²¹ *Drejka*, 15 A.3d 1221; *see also* Super. Ct. Civ. R. 16(f) and 37(a)(4)(A).

V. Conclusion

For all of the reasons set forth above, the defendant's motion for summary judgment is DENIED. Plaintiffs' counsel is ordered to pay all reasonable expenses incurred in preparing this motion, payable within ten days after submission of an affidavit by defense counsel.

IT IS SO ORDERED.

/s/ Peggy L. Ableman _____
Peggy L. Ableman, Judge

Original to Prothonotary
cc: All counsel via File & Serve