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

STEVEN MCLEOD	)	
	)	
Plaintiff,	)	
	)	
v.	)	**C.A. No. N11C-03-111 MJB**
	)	
HUGHEY F. MCLEOD	)	
	)	
	)	
Defendant.	)	

Submitted: October 29, 2013
Decided: January 28, 2014

Upon Plaintiff's Motion In Limine to Exclude Defendant From Offering Expert Testimony,
DENIED.
Upon Plaintiff's Motion for Order for Physical Examination,
DENIED.
Upon Plaintiff's Motion for Reargument,
DENIED.

OPINION

Steven A. McLeod, *pro se*, 1050 Big Joe Road, Monticello, Florida 32344

Cynthia H. Pruitt, Esq., Doroshow, Pasquale Krawitz & Bhaya, Attorney for Defendant.

Brady, J.

I. INTRODUCTION

This is a personal injury action based upon Plaintiff Steven A. McLeod's ("Plaintiff") allegations that the named defendant, Hughey McLeod ("Defendant"), sexually abused Plaintiff as a child.[1] Plaintiff has filed three motions, currently before the Court, including (1) a Motion for Reargument,[2] filed on October 4, 2013, that contends this Court abused its discretion in a previous ruling, which denied Plaintiff's request to have the State pay costs associated with retaining Plaintiff's expert witness; (2) a Motion *In Limine* seeking to preclude Defendant from offering expert testimony into evidence, which was filed on October 4, 2013; and (3) a "Motion for Order for a Physical Examination," which Plaintiff filed on October 1, 2013. Defendant filed a response in opposition to Plaintiff's Motion for Order for a Physical Examination on October 29, 2013. Defendant did not file any opposition with regard to Plaintiff's Motion for Reargument or Motion *In Limine*. For the reasons discussed below, Plaintiff's Motion for Reargument is **DENIED**; Plaintiff's Motion *In Limine* is **DENIED**; and Plaintiff's Motion for Order for a Physical Examination is **DENIED**.

II. FACTS

On April 29, 2011, Plaintiff, who is incarcerated at the Jefferson Correctional Institutional in Monticello, Florida, filed suit in this Court under 10 *Del. C.* § 8145.[3] Plaintiff's Section 8145 lawsuit alleges that Defendant, his biological father, sexually abused him from approximately December 1967 through January 1972, while Plaintiff was a child. Relevant to the pending motions, Plaintiff's allegations of sexual abuse include, *inter alia*, that Defendant repeatedly penetrated Plaintiff's anus with Defendant's fingers and penis.

[1]Compl. at ¶¶8–12 (Apr. 29, 2011).
[2]The Court notes that Plaintiff captioned this motion as a "Motion for Rehearing."
[3]As a result of Plaintiff's incarceration, he is unable to attend any motion hearings. Therefore, this Court must enter written decisions for all motions brought in this matter.

Plaintiff contends that research he has conducted evidences "that when a small child is anally penetrated by a full grown adult male, there is specific tearing and scar tissue generated that can be technologically dated by the use of a videoscope inserted into the victim's rectum and recorded, even decades after the abuse occurred."

On August 26, 2013, Plaintiff moved the Court to enter an Order appointing an expert witness for Plaintiff with court-approved hourly rates.[4] The Court denied Plaintiff's motion on September 18, 2013, explaining that it is well-settled in Delaware that the Court does not "appoint experts to testify for either party in civil actions, and no funds are available for such appointments."[5] The Court also engaged in an *Eldridge* analysis, which balances four factors, to ascertain whether appointment of an expert witness was appropriately within the Court's discretion.[6]

III. MOTIONS BEFORE THE COURT

A. Plaintiff's Motion for Reargument

Plaintiff filed a Motion for Reargument on October 4, 2013, seeking to reargue the Court's decision that denied his motion requesting the appointment of a government-funded expert witness with court-approved hourly rates. A motion for reargument is the proper device for seeking reconsideration by this Court of its findings of fact and conclusions of law.[7] "The manifest purpose of all Rule 59 motions is to afford the . . . Court an opportunity to correct errors prior to an appeal."[8] A motion for reargument will be granted only in the event that "the Court has overlooked a controlling precedent or legal principles, or the Court has

[4]Specifically, Plaintiff sought appointment of a forensic psychologist.
[5]*McLeod v. McLeod*, No. N11C-03-111, at 2 (Del. Super. Ct. Sept. 18, 2013) (Brady, J.) (quoting *Walls v. Cooper*, 1991 WL 247806, at *5 (Del. Nov. 8, 1991) (internal quotation marks omitted).
[6]*Id*.
[7]*Hessler, Inc. v. Farrell*, 260 A.2d 701, 702 (Del. 1969).
[8]*Id*.

misapprehended the law or facts such as would have changed the outcome of the underlying decision."[9]

In moving for reargument, Plaintiff cites, and relies on, *Sheehan v. Oblates of St. Franscis de Sales*,[10] wherein the Delaware Supreme Court concluded that "[t]he trial judge erred by failing to properly balance, on the record, the probative value of admitting [an expert's] testimony against the unfair prejudice to [the plaintiff] of excluding the testimony."[11] The decision in *Sheehan* is of no moment to Plaintiff's Motion for Reargument, because, unlike the case *sub judice*, that case did not involve the appointment of a government-funded expert witness. This Court's September 18 decision made clear that Plaintiff was not precluded from retaining an expert witness, stating: "Should Plaintiff retain an expert witness, this Court will then consider Plaintiff's application for an Order for Telephonic Conference."

Plaintiff's Motion for Reargument also asserts that this Court improperly balanced the four-part test promulgated by the United States Supreme Court in *Mathews v. Eldridge*.[12] The four-part test balances the following considerations: (1) the private interest that will be affected by the official action; (2) the risk of erroneous deprivation of such interest through the procedures used; (3) the probable value of additional or substitute procedural requirements; and (4) the government's interest including the fiscal and administrative burdens of additional procedures.[13] Plaintiff asserts that "this Court's decision is totally based on the financial aspects of retaining the expert, without considering the other factors in *Eldridge*."

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[9] *Id*.
[10] 15 A.3d 1247 (Del. 2011).
[11] *Id*. at 1254.
[12] *Mathews v. Eldridge*, 424 U.S. 319 (1976).
[13] *Eldridge*, 424 U.S. at 335 (citing *Goldberg v. Kelly*, 397 U.S. 254, 263–71 (1970)).

It is accurate that on page three of the Court's decision, the Court, quoting *Walls v. Cooper*,[14] stated: "While '[f]inancial costs alone is not a controlling weight in determining whether due process requires a particular procedural safeguard . . . the government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed.'"[15] However, the Court's analysis continued, and it found that "Plaintiff's private interest is no more compelling than that of the plaintiff in *Walls*."[16] Finally, the Court explained that its denial of Plaintiff's motion was based on "'the law, the competing policy concerns, and the facts of this case.'"[17] The record clearly reflects that the Court considered more than the financial aspects of providing a government-funded expert.

The Court did not overlook controlling precedent or legal principles, or misapprehend the law or facts such as would have changed the outcome of the underlying decision.[18] Plaintiff's Motion for Reargument is **DENIED**.

B. Plaintiff's Motion *In Limine*

On October 4, 2013, Plaintiff filed a Motion *In Limine* with the Court. Plaintiff's Motion *In Limine* was filed in response to this Court's denial of his request for a government-funded expert witness. Plaintiff contends he is indigent and cannot afford his own expert. Plaintiff seeks to preclude Defendant from retaining any expert witnesses "in order to promote fundamental fairness and to prevent the Defendant from gaining a financial advantage and

[14] *Walls v. Cooper*, 1991 WL 247806 (Del. Nov. 8, 1991).
[15] *McLeod v. McLeod*, No. N11C-03-111, at 3 (quoting *Walls*, 1991 WL 247806, at *5).
[16] *Id*.
[17] *Id*. at 4 (quoting Walls, 1991 WL 247806, at *5).
[18] *Id*.; *see also Walls v. Cooper*, 1991 WL 247806, at *5 (Del. Nov. 8, 1991); *see also Evans v. Lee*, 2010 WL 334893, at *1 (Del. Super. Ct. Jan. 13, 2010) ("An indigent person is entitled to access to the Courts without paying a filing fee. That does not mean that an indigent person has any right to ask the taxpayers to pay the other expenses of litigation. For example, if an individual had a malpractice claim against a doctor, but could not afford the expenses of an expert witness, should the State pay those expenses? The answer is 'No'."); *Ashley v. Kronfeld*, 1996 WL 944895, at *1 (Del. Super. Ct. Jan. 5, 1996).

violate the Plaintiff's due process of law rights under the 14th Amendment of the U.S. Constitution."[19] Plaintiff's Motion *In Limine* lacks merit. Plaintiff cites no law, and this Court is unaware of any, that permits the Court to preclude a litigant from utilizing and introducing expert testimony, merely because the moving party lacks comparable financial resources. As a result, Plaintiff's Motion *In Limine* is **DENIED**.

C. Plaintiff's Motion for Order for a Physical Examination

i. *Requested Relief*

Plaintiff filed a motion titled "Motion for Order for a Physical Examination." Through this Motion, Plaintiff asserts that there is specific tearing and scar tissue generated that can be technologically dated by the use of a videoscope inserted into the victim's rectum and recorded, even decades after the abuse occurred, when a small child is anally penetrated by a full-grown, adult male. Plaintiff contends that his undergoing such an examination "will provide undisputable physical evidence th[at] abuse occurred during the time period [he] allege[s] so the main issue at trial will be the identification of the Defendant as the perpetrator."

Plaintiff's Motion for Order for a Physical Examination explains that he will only undergo such an invasive procedure if there are very specific controls to prevent him from being traumatized further. To this end, Plaintiff moves the Court to enter an Order with specific parameters, including: (1) "the procedure can only occur once with the Plaintiff sedated during the procedure"; (2) "a neutral examiner [should] conduct the test"; (3) "the [neutral] examiner's findings [will be] conclusive evidence, subject to cross-examination only"; (4) "no other experts [can] be[] retained"; and (4) Defendant [should] be required to pay all costs associated with this procedure.

[19]Pl.'s Mot. In Limine, at 2 (Oct. 4, 2013).

ii. *Defendant's Opposition*

Defendant, in opposition, asserts that Plaintiff's Motion is without merit and should be denied for four reasons. First, Defendant contends that Plaintiff fails to provide any basis regarding why an Order from this Court is necessary for Plaintiff to undergo the proposed testing, stating "[a] review of the case law . . . [does] not [provide] a single instance of a party requesting an order compelling the same party to undergo the testing." Second, Defendant asserts that "any Order from this Court to the Florida prison system or a Florida medical provider would be advisory[,] as this Court is without authority . . . under the Full Faith and Credit Clause of the United States Constitution" to compel action by foreign parties, who are beyond this Court's jurisdiction.

Third, Defendant argues that Plaintiff's request that he pay for Plaintiff's proposed medical exam is in contravention of well-established Delaware jurisprudence, which holds that, absent limited exceptions, each party bears the costs of its litigation, including medical examination costs.[20] Defendant asserts that none of the limited exceptions apply, and Plaintiff has failed to provide any basis for deviating from Delaware's well-established law. Finally, Defendant contends that Plaintiff fails to provide any basis, legal or otherwise, for his request that Defendant be precluded from disputing the results of the proposed testing by means other than through cross-examination. Defendant asserts that if the proposed testing is performed, he would likely retain an independent expert to examine the videotape and medical report. Defendant contends that granting Plaintiff's preclusion request would "unfairly hamper [D]efendant's ability to present a defense."

[20]Def.'s Resp. in Opp. at 3 (Oct. 29, 2013) (citing *Mahani v. Edix Group*, 935 A.2d 242, 235 (Del. 2007); *eCommerce Indus. Inc. v. MWA Intelligence, Inc*., 2013 WL 5621678, at *51 (Del. Ch. 2013); *Transched Sys., LTD v. Versyss Transit Solutions, LLC*, 2012 WL 1415466 (Del. Super. 2012).

iii. *Analysis*

The Court understands, based on Plaintiff's previous representations to the Court, that Plaintiff's ability to obtain the requested medical examination is limited without an Order from this Court, because of his status as a prisoner.[21] However, as Plaintiff is aware, and concedes himself,[22] that any Order by this Court to the Florida Department of Corrections or a Florida medical practitioner would only be advisory. The Full Faith and Credit Clause of the United States Constitution does not require states "to enforce orders issued by other states commanding action or inaction where they purport to accomplish an official act within the province of the forum state, even where the decree adjudicates rights and obligations between parties to litigation in the foreign state."[23]

Further, it is well established that, "[u]nder the American Rule and Delaware law, litigants are normally responsible for paying their own litigation costs."[24] There are limited exceptions to the well-established rule, but none are applicable here.

Plaintiff's request that Defendant be precluded from retaining any independent experts or otherwise challenge the results of the proposed testing, except through cross examination, is without merit. Although the parties could stipulate and agree to make the testing results conclusive, the Court cannot force that result on Defendant, who has represented a challenge of the test results may very well be pursued. Finally, the law does not permit the Court, without adequate reason, to preclude Defendant from retaining an independent expert to

[21] See Pl.'s Mot. For Ct. Appointment of Expert Witness at Ex. 6 (Aug. 26, 2013), where an official from the Florida Department of Corrections denied Plaintiff's request to have a phone call arranged, stating "No! When we see a court order we will determine how we will proceed with it."

[22] Pl.'s Mot. For Ct. Appointment of Expert Witness at ¶7 (Aug. 26, 2013) (indicating that Plaintiff understands that this Court cannot compel a Florida correctional institution to make Plaintiff available for the requested teleconference).

[23] *McLeod v. McLeod*, 2013 WL 285715, at *2 (Del. Super. Ct. Jan. 23, 2013) (citing *Baker v. General Motors Corp*., 522 U.S. 222, 235–36 (1998)); *see also Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501 (1985).

[24] *Mahani v. Edix Media Grp., Inc*., 935 A.2d 242, 245 (Del. 2007).

examine the results of the proposed test. Plaintiff's Motion for Order for a Physical Examination fails to provide any basis for this Court to preclude Defendant from retaining an independent expert, and the Motion is **DENIED**.

IV. CONCLUSION

For the reasons stated above, Plaintiff's Motion for Reargument is **DENIED**; Plaintiff's Motion *In Limine* is **DENIED**; and Plaintiff's Motion for Order for a Physical Examination is **DENIED**.

IT IS SO ORDERED.

/s/
M. Jane Brady
Superior Court Judge