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

JEANETTE CHRISTINA DREJKA and JOSEPH DREJKA, w/h,	)	
Plaintiffs,	)	
	)	C.A. No. 07C-04-583 PLA
v.	)	
HITCHENS TIRE SERVICE, INC., DAVID WOOD, and ATLANTIC CONCRETE, INC.,	)	
Defendants.	)	

ON DEFENDANT HITCHENS TIRE SERVICE, INC.'S
MOTIONS *IN LIMINE*
GRANTED in part; DENIED in part

Submitted: June 4, 2009
Decided: June 24, 2009
Amended: July 13, 2009

This 24th day of June, 2009, it appears to the Court that:

1. This case arises out of a motor vehicle accident that occurred on August 24, 2005, when a loose tractor-trailer tire struck a car operated by plaintiff Jeanette Christina Drejka ("Drejka") on Route 1 in Smyrna. After the tire hit her car, Drejka lost control of her vehicle, crossed a median, and collided with another car. Apparently, the loose tire that struck Drejka's car had been attached to a tractor-trailer owned by Defendant Atlantic Concrete,

Inc. ("Atlantic Concrete"). An Atlantic Concrete employee, David Wood ("Wood"), had been driving the tractor-trailer in the opposite direction from Drejka around the time of Drejka's accident. Upon returning to the Atlantic Concrete lot, Wood discovered that the tractor-trailer was missing two tires. The tires had been installed a few days prior to the accident by Defendant Hitchens Tire Service, Inc. ("Hitchens").

2. Drejka alleges that the accident caused her to suffer permanent injury to her back and neck. On April 24, 2007, Drejka filed negligence claims against Atlantic Concrete, Wood, and Hitchens. In addition, Drejka's husband, Joseph Drejka, brought a loss of consortium claim against all three defendants.[1]

3. Now before the Court are three motions *in limine* filed by Hitchens. First, Hitchens seeks to exclude evidence regarding Drejka's out-of-pocket expenses for health-care premiums, medical expenses, and lost wages incurred from April and August 2006, on the basis that Drejka received compensation for these expenses via a PIP policy. Drejka does not contest the merits of this motion, and it will be granted.

4. Hitchens's second motion seeks a ruling to exclude photographs depicting damage to Drejka's vehicle, as well as testimony

[1] For convenience, the Court will refer only to "Plaintiff" or "Drejka."

from Drejka regarding the forces of impact she experienced during the accident. Hitchens contends that such evidence is barred by *Davis v. Maute*, in which the Delaware Supreme Court held that a party in a personal injury case generally may not directly argue that the severity of personal injuries caused by an automobile accident can be inferred from the extent of vehicle damage unless competent expert testimony is offered on the issue.[2]

5. In response, Drejka contends that *Davis* is not applicable to this case in light of *Eskin v. Carden*.[3] Drejka emphasizes statements in *Eskin* indicating that expert testimony is not required in every case to establish the admissibility of vehicle photographs. Drejka argues that the photographs of her vehicle "are relevant as to not only how the accident happened but the point of impact and what happened to plaintiff's body inside the vehicle."[4]

6. Hitchens's third motion requests that the Court exclude testimony of any medical experts whose reports or opinions were not disclosed until after discovery deadlines. In particular, Hitchens contends that the Court should exclude the expert testimony of Dr. Ganesh Balu, M.D., one of the plaintiff's treating physicians. The trial scheduling order in

[2] 770 A.2d 36, 40, 42 (Del. 2001).

[3] 852 A.2d 1222 (2004).

[4] Docket 27 (Pl.'s Resp.), ¶ 6.

this case set a deadline of December 19, 2008, for Plaintiff's expert reports or Rule 26(b)(4) disclosures. Defendants' expert reports or Rule 26(b)(4) disclosures were to be produced by January 16, 2009, and discovery was to conclude on or before February 13, 2009.[5] On October 31, 2008, in response to interrogatories requesting identification of all experts expected to be called at trial and "the substance of the facts and opinion[s] to which the expert is expected to testify," Drejka merely reserved "the right to call any and all expert witnesses, upon determination thereof."[6] Hitchens asserts that Drejka did not produce Dr. Balu's expert medical report, which was dated May 4, 2009, until May 5, 2009, more than four months after the disclosure deadline.

7. In response, Plaintiff urges that she complied with the Court's trial scheduling order by submitting copies of her medical records from Dr. Balu in October 2008. Plaintiff describes Dr. Balu's May 2009 report as a "supplemental" summary of her medical records,[7] and emphasizes that the defense medical expert was provided with Dr. Balu's records and with an opportunity to conduct an independent examination. Accordingly, Drejka

[5] Docket 11 (Trial Scheduling Order).

[6] Docket 23, Ex. B.

[7] Docket 26 (Pl.'s Resp.), ¶ 5.

suggests that Hitchens received a reasonable opportunity to defend itself in advance of trial and would suffer no prejudice if Dr. Balu is permitted to testify.

8. As to Hitchens's first motion, the Court agrees that *Davis* controls this case and, because Drejka will not present relevant expert testimony, requires exclusion of all evidence, including vehicle photographs, offered to relate vehicle damage to the extent of Plaintiff's personal injuries. *Davis* refutes that there is a commonsense connection between the extent of damage to a vehicle resulting from an accident and the severity of a vehicle occupant's personal injuries.[8]

9. Plaintiff's position that *Davis* is inapplicable misconstrues the effect of *Eskin v. Carden*. In *Eskin*, the Delaware Supreme Court observed that *Davis* did not bar the admission of photographs of damaged vehicles without expert testimony if the photographs were relevant for a purpose other than correlating personal injury to the extent of property damage and that other purpose did not require supporting expert opinion.[9] But *Eskin* merely clarifies, and does not restrict, the holding of *Davis*. In fact, the *Eskin* Court emphasizes that it "follow[s] the holding in *Davis* that, absent

[8] *See Sloan*, 2001 WL 1735087, at * 2 (quoting *Davis*, 770 A.2d at 41).

[9] 842 A.2d at 1233.

facts that are supported by competent expert testimony, counsel may not directly argue to the finder of fact that there is a correlation between the extent of the damage to the vehicles involved in an accident and the cause or severity of personal injuries alleged from that accident."[10]

10. The plaintiff lacks the knowledge and expertise to relate either the damage to her vehicle or her subjective experience of the forces of impact to her injuries. Her testimony thus cannot provide a foundation for admission of the vehicle photographs, nor can it serve as the basis for any implied or explicit argument that the extent of damage to her vehicle is probative as to the extent of her personal injuries.

11. Drejka argues that the vehicle photographs are relevant to show how the accident occurred, to identify the points of impact, and to explain the movement of her body inside the car during the accident. The parties do not dispute, however, that an accident occurred. At issue are whether any of the defendants negligently caused the accident and the severity of Plaintiff's injuries. In light of these disputed issues, the relevance of the vehicle photographs is dubious. Still photographs of Drejka's car cannot depict the sequence of events during the accident or the movements of Plaintiff's body. Plaintiff's testimony will convey this information. This Court has

[10] *Id.* at 1226.

previously observed that *Davis* does not prevent a plaintiff from describing her own physical experience of an accident and her subsequent treatment.[11] Moreover, *Davis* "does not prohibit all evidence that bears on force of impact" and will not bar Drejka from describing the forces she felt during the accident.[12] Thus, as Hitchens acknowledges, Drejka remains free to testify as to her experience of the accident, including the motion of her vehicle and her body. To the extent Hitchens's motion seeks to exclude such testimony, it must be denied.

12. Finally, turning to Hitchens's third motion, the Court concludes that Drejka failed to comply with the trial scheduling order and that exclusion of Dr. Balu's testimony is appropriate. The Court's order required the plaintiff to provide her expert report or Rule 26(b)(4) disclosure by December 19, 2008. Superior Court Civil Rule 26(b)(4) contemplates the discovery of "facts known *and opinions held* by experts."[13] As this conjunctive construction suggests, each party has the right to discover not only the facts known to the opposing side's experts, but the substance of the opposing experts' opinions. The underlying logic should be evident: a party

[11] *See Kapetanakis v. Baker*, 2008 WL 3824165, at *2 (Del. Super. Aug. 14, 2008); *Sloan v. Clemmons*, 2001 WL 1735087, at *4 (Del. Super. Dec. 19, 2001).

[12] *Garneski v. Teromina*, 2003 WL 504863, at *1 (Del. Super. Feb. 25, 2003).

[13] Del. Super. Ct. Civ. R. 26(b)(4) (emphasis added).

must respond not only to facts—which, in many cases, may be undisputed—but also to the opinions drawn by opposing experts from those facts.

13. Here, Drejka's disclosure of Dr. Balu's medical records was insufficient to satisfy her discovery obligations. The records did not contain Dr. Balu's opinions as to the causation or permanency of Drejka's injuries. Although Plaintiff has characterized Dr. Balu's May 2009 report as "supplemental," it was the first notification provided to the defendants of Dr. Balu's opinions.

14. This Court is vested with the inherent power "to manage its own affairs and to achieve the orderly and expeditious disposition of its business."[14] Trial scheduling orders are one crucial means by which this power is exercised, and violation of the discovery deadlines established in a trial scheduling order can result in sanctions.[15] In this case, Dr. Balu's report was not provided to the defendants until more than four months after the applicable expert report deadline, and more than two months after discovery was concluded. Hitchens therefore had no means to develop a rebuttal of Dr. Balu's opinions, nor to prepare adequately for cross-

[14] *Gehardt v. Ernest DiSabatino & Sons, Inc.*, 264 A.2d 153, 159 (Del. 1970).

[15] *See* Super. Ct. Civ. R. 16(f) ("If a party or party's attorney fails to obey a scheduling or pretrial order . . . the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just . . . .").

examination. Accordingly, Drejka will not be permitted to present Dr. Balu's testimony at trial.

15. For the foregoing reasons, Hitchens's Motions *in limine* to exclude evidence of special damages and to exclude the testimony of Dr. Balu are hereby **GRANTED**. Hitchens's Motion to Preclude Testimony from the Plaintiff with Regard to Force of Impact, As Well As Photographs Depicting Damage to Plaintiff's Vehicle is **DENIED in part** to the extent the motion attempts to limit the plaintiff's testimony as to her experience of the accident and the movements of her body within the vehicle during the accident; to the extent that the motion seeks exclusion of vehicle photographs and testimony relating property damage to Plaintiff's injuries, the motion is **GRANTED in part**.

IT IS SO ORDERED.

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Peggy L. Ableman, Judge

Original to Prothonotary

cc: Andrea C. Panico, Esq.
Timothy A. Rafferty, Esq.
Thomas F. Sacchetta, Esq.
William R. Stewart, III, Esq.