SUPERIOR COURT
OF THE
STATE OF DELAWARE

FRED S. SILVERMAN
JUDGE

NEW CASTLE COUNTY COURTHOUSE
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June 23, 2009

(VIA E-FILED)

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RE: *Jack Manerchia, Jr. v. Kirkwood Fitness & Racquetball Clubs*
C.A. No. 07C-04-248 FSS

Upon Defendant's Motion For Summary Judgment – GRANTED
Upon Plaintiff's Motion For Continuance – DENIED

Dear Counsel:

This embodies the rulings leading to the court's cancelling this tort case's trial. Although Plaintiff has a significant medical problem sometimes associated with negligently maintained hot-tubs and Plaintiff briefly used Defendant's hot-tub before he got sick, Plaintiff could neither prove that Defendant was negligent nor that Defendant's hot-tub caused Plaintiff's condition. As explained below, Plaintiff has no expert on standard of care or causation. As further explained, the court gave Plaintiff ample opportunity to locate an expert, if one could be found.

On April 10, 2007, Plaintiff, through former counsel, filed a complaint charging Defendant with negligently maintaining a hot-tub that gave Plaintiff cellulitis, a serious, debilitating condition with resulting deep vein thrombosis. From the case's beginning, however, it appears that Plaintiff has struggled to find an expert who will opine that specific negligence by Defendant probably caused Plaintiff's illness. In any event, Plaintiff has not produced such an expert's opinion.

On December 19, 2007, the court issued a Case Scheduling Order requiring Plaintiff to produce expert reports by March 4, 2008. That order was superceded by the Trial Scheduling Order entered on April 4, 2008, calling for Plaintiff's expert reports on October 15, 2008. On September 5, 2008, after the Trial Scheduling Order's entry, Plaintiff's original counsel withdrew. The court believes that trial counsel's withdrawal, in large measure, was due to inability to locate an expert on negligence and causation.

In any event, when the court heard the motion to withdraw in September 2008, Plaintiff was present. Plaintiff personally agreed that, considering the case's sophistication, he would need counsel in order to prevail. The order allowing Plaintiff's original counsel to withdraw provided that the case could be dismissed if no activity happened by November. Meanwhile, on October 27, 2008, Defendant filed a motion to dismiss and for summary judgment. When the court heard the motion to dismiss on November 5, 2008, the case was already subject to dismissal because Plaintiff had violated the Trial Scheduling Order and the September 2008 bench ruling that called for activity before November.

Despite the case being subject to dismissal on November 5, 2008, the court took Defendant's motion under advisement, giving Defendant yet another 30 days to find counsel and submit an expert report. The court cautioned Plaintiff that the case would be dismissed if he missed the 30-day deadline.

On December 8, 2008, Defendant submitted a letter reminding the court that the latest "final" deadline had passed on December 5, 2008. Accordingly,

Defendant, again, asked the court to end the case as the court promised it would. On December 10, 2008, Plaintiff, still *pro se*, submitted a letter from a reputable medical expert opining:

> It is my conclusion then that with a reasonable degree of medical certainty:
>
> > 1. And following my careful evaluation of the patient's medical records, his clinical perspective, and based on his laboratory studies, the cellulitis that he developed was a direct result of his immersion in the hot tub at Kirkwood Health Club in February 2006.

The expert is a medical doctor. He does not purport to know anything about hot-tub maintenance generally, much less anything about Defendant's hot-tub, specifically. He offers no opinion about a specific way that Defendant breached the standard of care required for commercial hot-tub maintenance. The expert offers no explanation as to how Plaintiff's "medical records, clinical perspective and laboratory studies" prove that Plaintiff's cellulitis was a "direct result of the immersion in Defendant's hot-tub" 2½ years earlier. For example, the expert does not state that Plaintiff's condition amounts to a signature disease, nor does he address other possible causes of cellulitis. The court understands that the "laboratory studies" merely confirm the medical diagnosis, not causation.

Meanwhile, the medial expert does not describe the "immersion" to which he refers. It appears that the expert has assumed Plaintiff's "immersion in the infected hot-tub." As to that, Plaintiff's testimony is that the tub looked dirty to him, so he only put his legs in the water briefly. Plaintiff had little or no specific

information about the hot-tub's maintenance, such as its chlorination or temperature. Defendant, however, has an unrefuted expert opinion that a hot-tub's appearance, clean or dirty, does not reflect its bacterial condition.

The medical expert's opinion is all that Plaintiff has to prove that Defendant was negligent and the negligence caused Plaintiff's cellulitis. At best, it appears that the doctor knows Plaintiff has a condition that could have been caused by a negligently maintained hot-tub and Plaintiff had some contact with the water in Defendant's hot-tub. From that limited knowledge, the doctor seemingly has concluded that Defendant probably was liable.

In summary, viewing the record in the light most favorable to Plaintiff,[1] on the eve of trial and months after several discovery deadlines had passed, Plaintiff could only prove that he had briefly immersed his legs in Defendant's hot-tub, that the water looked dirty and later he developed a medical condition that may be associated with a negligently maintained hot-tub. Thus, Plaintiff could have shown a theoretical possibility that he was sickened by Defendant's hot-tub. Plaintiff, however, could not prove that Defendant probably was negligent and its negligence probably caused Plaintiff's condition.[2]

As presented above, the court has repeatedly impressed on Plaintiff the need to explain the basis for his medical expert's opinions on negligence and causation, or to find an expert on those points.[3] Plaintiff's response is that the

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[1] *See Merrill v. Crothall-American Inc.*, 606 A.2d 96, 100 (Del. 1992).

[2] *See Crookshank v. Bayer Healthcare Pharm*, 2009 WL 1622828, *3 (Del. Super. May 22, 2009) (finding that a conclusory expert report that stated the defendant's drug was known to cause injuries similar to the plaintiff's was insufficient to show that the drug caused the plaintiff's injuries).

[3] *Id.*; *see also Money v. Manvill Corp. Asbestos Disease Comp. Trust Fund*, 596 A.2d 1372, 1376 (Del. 1991) (expert opinion must show a "causal nexus" between plaintiff's injuries and the alleged cause).

medical expert's opinion is enough to withstand summary judgment or, alternatively, given more time, Plaintiff will find an expert. As to the former, the court has explained how the doctor cannot prove liability.[4] As to the latter, Defendant has now had more than three years to find an expert.[5] But for the court having cancelled the trial in April, Plaintiff would have relied exclusively on the doctor's opinion. Thus, the court views Defendant's empty offer to find an expert as merely a way to avoid admitting that he cannot find an expert.

The court continues to appreciate that, for some reason including Defendant's possible negligence, Plaintiff is truly sick. Accordingly, the court gave Plaintiff until the last moment before trial to find a competent expert on liability. This, despite the court's deadlines and warnings. In the end, however, Plaintiff still lacks proof and Defendant was entitled to summary judgment since last November.

For the foregoing reasons, and as further explained in its bench rulings, Plaintiff's Motion for a Trial Continuance is **DENIED**, and Defendant's Motion for Summary Judgment is **GRANTED.**

IT IS SO ORDERED.

Very truly yours,

/s/ Fred S. Silverman

FSS:mes
cc: Prothonotary (Civil)

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[4] *Crookshank*, 2009 WL 1622828 at *3.

[5] *Id*. at *1 (after four years on the court's docket and four discovery deadline extensions, the court "fear[ed] prejudice to defendants if decision [was] delayed any further").