SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
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Re: James C. Bell v. Sheryl Winsby Associates, Sheryl J. Winsby, Ph.D., and Bayhealth Medical Center, Inc.
C.A. No. 08C-12-188 RRC

Submitted: April 29, 2010
Decided: May 28, 2010

Upon Defendants' Motion for Summary Judgment.
GRANTED.

Dear Counsel:

INTRODUCTION

This motion for summary judgment stems from a slip-and-fall accident that occurred at Defendants' medical facility in Milford, Delaware on January 8, 2007.[1] As a result of the fall, Plaintiff allegedly suffered

[1] Op. Br. at ¶ 1.

injuries to his neck, lower back, and right shoulder. Plaintiff has a prior medical history of low back and neck pain.

The only issue before the Court in this motion for summary judgment is whether a plaintiff requiring several medical procedures to repair injuries from a slip-and-fall accident and with a prior medical history of neck and back pain must produce expert medical testimony relating the causation of that plaintiff's injuries to his slip-and-fall accident.

For the following reasons, this Court holds that Plaintiff was required to produce expert medical testimony to establish the cause of his injuries. Without expert medical testimony concerning causation, Plaintiff cannot prevail at trial and the deadline to identify an expert has passed. Accordingly, Defendants' motion for summary judgment is **GRANTED**.

FACTS and PROCEDURAL HISTORY

On January 8, 2007, Plaintiff, James C. Bell, slipped and fell at Defendants' medical facility. As Plaintiff was ascending a staircase at the facility, he slipped on a wet surface and fell down the stairs.[2] As a result of this fall, Plaintiff allegedly sustained injuries to his neck, lower back, right shoulder, and legs.[3]

Plaintiff subsequently brought a negligence action against Defendants alleging that Defendants were negligent in failing to keep the premises safe from a dangerous condition (the water on the stairs).[4] Specifically, Plaintiff alleges that Defendants failed to properly inspect the area, remedy the dangerous condition, or warn business invitees of any danger.[5]

During the discovery period in this case, Plaintiff never identified any expert witness who would provide a medical opinion on causation at trial.[6] Although Plaintiff intended to call his treating physician to testify about the medical treatments he gave Plaintiff, Plaintiff never identified this physician as an expert and no expert opinion was ever given. In fact, at oral argument on this motion, Plaintiff's counsel admitted he was unsure of what the treating physician would say because he was never deposed:

> THE COURT: And did he ascribe those disc herniations to the fall?

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[2] *Id.* at ¶ 2.
[3] *Id.*
[4] Dkt. 1.
[5] *Id.*
[6] Op. Br. at ¶¶ 4-5.

> [Plaintiff's counsel]: Not in so many words. He was never deposed by anybody. They've never had my client examined. So, I just propose to have him testify.
> THE COURT: That's not the defense burden, is it?
> [Plaintiff's counsel]: No. But the treating doctor can come in and say, "This is what I understand about what happened to this man" and "This is what I diagnosed" and "This is what I treated."
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> * * *
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> [Plaintiff's counsel]: I anticipate that he's going to say that, "The only event I know about, the only trauma I know about that could possibly have caused these injuries is this fall."
> THE COURT: You say you anticipate he's going to say that. The rules require and the procedures say that an expert opinion be produced prior to trial and by the deadlines.[7]

Plaintiff's medical history indicates that Plaintiff has a prior history of low back and neck pain.[8] On May 16, 2005, Plaintiff was treated for injuries stemming from a motor vehicle accident.[9] The treatment records from this automobile accident show that Plaintiff complained of low back pain and muscle spasms.[10] Medical records from Dr. S. Imran Tirmizi make direct reference to low back pain,[11] and Dr. Sheryl Winsby's own medical records make reference to Plaintiff's ongoing low back and shoulder complaints and his inability to sleep, walk far, or lift weights.[12] Plaintiff described his back and shoulder symptoms as "bad."[13]

PARTIES' CONTENTIONS

Defendants have now moved for summary judgment,[14] arguing that Plaintiff is required to produce expert medical testimony to establish causation.[15] Specifically, Defendants argue that "[m]edical causation is not a matter of common knowledge [and requires expert medical testimony]."[16]

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[7] Trans. of April 29, 2010 Oral Arg. at 8-9.
[8] *See* Def. Supp. Exs. 1-4.
[9] *Id.* at Ex. 1.
[10] *Id.*
[11] *Id.* at Ex. 2.
[12] *Id.* at Ex. 3-4.
[13] *Id.* at Ex. 3.
[14] Defendants originally filed this motion after the deadline for the filing of dispositive motions had passed. Plaintiff did not oppose the filing of this motion after the deadline, and the Court accepted the motion for consideration.
[15] Op. Br. at ¶ 3.
[16] *Id.* at ¶ 7.

Defendants argue that a layman cannot discern which of Plaintiff's injuries, if any, were caused by the fall, and, without expert medical testimony, Plaintiff cannot establish a critical element of his *prima facie* case (causation).[17] Defendants also argue that Plaintiff's prior medical history makes expert medical testimony particularly necessary in the present case because only expert medical testimony can establish which injuries were caused by the fall and which injuries were caused by pre-existing conditions.[18]

In response, Plaintiff argues that expert medical testimony is unnecessary to establish causation under the particular facts of this case. Plaintiff argues that injuries sustained as a result of a fall down a flight of stairs are "hardly an issue that is beyond the comprehension of a lay jury."[19] Plaintiff asserts that the treating physician can testify about the treatments he gave Plaintiff and that that testimony is all that is necessary to establish causation.[20]

THE BURDEN OF PROOF

In a motion for summary judgment, the moving party bears the burden of proving "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[21] Summary judgment is only appropriate when, after viewing all the evidence in a light most favorable to the nonmoving party, the Court finds no genuine issue of material fact.[22]

DISCUSSION

Although the issue of proximate causation is usually a question of fact to be submitted to the jury, before any issue of proximate causation can reach the jury, a plaintiff must establish a *prima facie* case.[23] "If the matter in issue is one within the knowledge of experts only and not within the

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[17] *Id.*
[18] Reply Br. at ¶ 7.
[19] Ans. Br. at ¶ 8.
[20] *Id.*
[21] Sup. Ct. Civ. R. 56; *see also Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).
[22] *Gill v. Nationwide Mut. Ins. Co.*, 1994 WL 150902, at * 2 (Del. Super.).
[23] *Money v. Manville Corp. Asbestos Disease Co. Trust Fund*, 596 A.2d 1372, 1375 (Del.1991).

common knowledge of laymen, it is necessary for the plaintiff to introduce expert testimony in order to establish a *prima facie* case."[24]

The Delaware Supreme Court has previously held in *Rayfield v. Power* that expert medical testimony is necessary in a negligence action stemming from an automobile accident.[25] In *Rayfield*, "[t]he [plaintiffs] filed a complaint seeking damages for personal injuries allegedly caused by an automobile accident in which [the defendant] struck the [plaintiffs'] automobile after [the defendant] allegedly failed to yield the right of way while making a left-hand turn."[26] The Supreme Court stated that "[w]ith a claim for bodily injuries, the causal connection between the defendant's alleged negligent conduct and the plaintiff's alleged injury must be proven by the direct testimony of a competent medical expert."[27]

In the present case, this Court holds that expert medical testimony is necessary for Plaintiff to establish a *prima facie* case. Although Plaintiff argues that injuries from a slip-and-fall are within the knowledge of a lay jury, Plaintiff is not simply seeking damages for "bumps and bruises." Plaintiff is seeking damages for several medical procedures that may or may not have been a result of the fall. Expert medical testimony is necessary to establish that Plaintiff's surgeries were caused by the fall.

Particularly significant to this Court's holding is Plaintiff's own medical history of pre-existing low back and neck pain. Plaintiff's records show that Plaintiff had previously been injured in an automobile accident and complained of back pain in numerous medical visits.[28] Without the aid of expert medical testimony, it would be impossible for a lay jury to determine whether Plaintiff's injuries were caused by his fall or by his pre-existing conditions.[29]

Although Plaintiff proposes to have the treating physician testify, this testimony is not properly labeled expert medical testimony because Plaintiff never identified the treating physician as an expert witness in pretrial discovery. Plaintiff never produced an expert report or identified the treating physician as an expert in response to Defendant's discovery requests.[30]

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[24] *Id.* (citations omitted).
[25] *Rayfield v. Power*, 2003 WL 22873037 (Del. Supr.)
[26] *Id.* at * 1.
[27] *Id.*
[28] Def. Supp. Exs. 1-4.
[29] *Rayfield*, 2003 WL 22873037.
[30] Op. Br. Ex 2.

Finally, this Court will not grant any additional time for Plaintiff to identify an expert witness. Allowing additional time for Plaintiff to identify an expert would have required that this Court reschedule the May 10, 2010 trial. "This Court has previously recognized the importance of adherence to the trial scheduling order. The trial scheduling order reinforces the Court's ability 'to manage its own affairs and to achieve the orderly and expeditious disposition of its business.'"[31] Plaintiff had sufficient time during the discovery period to secure an expert opinion on causation and failed to do so. This Court will not grant additional time.

Therefore, for all the reasons stated above, Defendants' motion for summary judgment is **GRANTED**.

Richard R. Cooch

oc: Prothonotary

[31] *Peak Property and Cas. Ins. Co. v. Speed*, 2010 WL 530072, at * 4 (Del. Super.) (citations omitted).