

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURT HOUSE
500 N. KING STREET, SUITE 10400
WILMINGTON, DELAWARE 19801
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BY FACSIMILE

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**Re: *Vilma Drysdale v. Raymond R. Noble, M.D. and Christiana
Care Health Services, Inc.*
C.A. No. 02-04-235 RRC**

Submitted: May 1, 2003
Decided: May 12, 2003

**Upon Defendant Christiana Health Services, Inc.’s “Motion for
Reconsideration of Commissioner’s Order.” DENIED.**

**Upon Plaintiff’s “Partial Appeal from Commissioner’s Report....”
GRANTED.**

Dear Counsel:

Currently before the Court are two motions requesting relief relative to an order entered by a Superior Court Commissioner on March 18, 2003. That order was entered in response to Plaintiff’s Third Motion to Compel directed towards defendant Christiana Care Health Services, Inc. (“CCHS”).

CCHS now moves this Court to vacate the commissioner's March 18, 2003 Order and to thereafter conduct an *in camera* review of those documents that were the subject of Plaintiff's third (and earlier) motions to compel.

Plaintiff, in her appeal, moves the Court to compel CCHS to produce all exhibits utilized by its fact witnesses during their recent depositions held on January 22, 2003, as well as the awarding of costs and attorneys' fees; Plaintiff also moves for an extension of the expert discovery cutoff date following CCHS's production of said exhibits.

Because CCHS failed to timely file and serve written objections to the commissioner's earlier (*i.e.*, January 17, 2003) order concerning the subject matter of the various motions to compel, this Court will not now conduct an *in camera* review of those documents previously ordered to be produced, as such action would essentially vitiate the Superior Court Commissioner's earlier rulings in contravention of established rules of procedure contained within the Superior Court Civil Rules. Accordingly, CCHS's motion is **DENIED** and Plaintiff's "appeal" is **GRANTED**.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff claims that during gallbladder surgery performed on her on April 29, 2000 by Defendant Raymond R. Noble, M.D. at Christiana Care, her bile duct was stapled shut, in breach of the appropriate standard of care. Also, it is undisputed that a sponge was left inside her body during the

surgery, and that the sponge was located and removed from Plaintiff's body before she was transported from the operating room. Plaintiff asserts that Defendants failed to properly disclose the sponge incident, and that such nondisclosure was in contravention of established CCHS policy.

Shortly after the Scheduling Conference held on September 5, 2002 in this matter, Plaintiff filed a Motion to Compel CCHS to answer interrogatories she had propounded, such interrogatories having included the following objected-to question:

43. Identify each and every protocol, policy, procedure or memorandum concerning your care of [P]laintiff (*e.g.*, admission, discharge, documentation) for each admission and each procedure performed on the [P]laintiff.¹

At the Scheduling Conference, in response to Plaintiff's Motion to Compel and CCHS's response thereto, this Court entered an Order of Reference pursuant to Superior Court Civil Rule 132(a)(3),² thereby transferring jurisdiction over this discovery dispute to a designated Superior Court Commissioner.³

¹ Def.'s Supp'l Ans. to Pl.'s First Interrogs. (Ex. "A" to Def.'s Mot. "for Reconsideration...").

² Superior Court Civil Rule 132(a)(3) provides that a Superior Court Commissioner shall have "[t]he power to conduct non case-dispositive hearings, including evidentiary hearings, and the power to hear and determine any pretrial or other non case-dispositive matter pending before the Court."

³ See Dkt. #66.

After holding a hearing on December 12, 2002, the Superior Court Commissioner orally granted in part and denied in part Plaintiff's Motion to Compel.⁴ However, a Second Motion to Compel was soon filed thereafter, and the commissioner again held a hearing.

By Order dated January 17, 2003, the commissioner granted Plaintiff's Second Motion to Compel, the pertinent part of which provided that CCHS was to "forthwith provide access [to Plaintiff]...to...all [h]ospital [p]olicy [p]rotocal and [p]rocedure manuals[][,]" *i.e.*, "all documents which...[CCHS] relies upon for determination of its policies and procedures."⁵ Neither party filed and served written objections to this order,⁶ and CCHS thereafter "produced [to Plaintiff] those policies relevant to Plaintiff's claims, but declined to produce the remaining documents, which [CCHS believed] clearly had no bearing on this lawsuit."⁷ (At the later hearing on March 18, 2003 before the Superior Court Commissioner upon Plaintiff's Third Motion to Compel, counsel for CCHS conceded that

⁴ See Dkt. #61.

⁵ Drysdale v. Noble and Christiana Care Health Servs., Inc., Del. Super., C.A. No. 02C-04-235 RRC, Vavala, Comm'r. (Jan. 17, 2003), Order ¶ 1.

⁶ Under Superior Court Civil Rule 132(a)(3)(ii), "[w]ithin 10 days after filing of a [c]ommissioner's order...any party may serve and file written objections to the [c]ommissioner's order which sets forth with particularity the basis for the objections."

⁷ Def.'s Mot. "for Reconsideration..." ¶ 6.

he “should have come to...[the commissioner]...and asked for a clarification of the [January 17, 2003] Order....”⁸)

The parties had scheduled the deposition of several of CCHS’s fact witnesses for January 22, 2003. Counsel for CCHS has since represented that he “received the...January 17, 2003 [order] on January 21, 2003, after 5:00 p.m.[.]” and that “[i]n an attempt to comply with th[at] [o]rder and...prevent the rescheduling of...[those] seven depositions [scheduled for the next day],” he began producing manuals in the above-described way.⁹ At those depositions, and in the words of Plaintiff’s counsel, “CCHS...elected...to produce certain policy and procedure notebooks throughout the [course of the] day....”¹⁰

Following the January 22, 2003 depositions, Plaintiff filed a Third Motion to Compel in which she contended that CCHS’s conduct “ha[d] been the subject of [the] two [earlier] motions to compel[.]”¹¹ At the hearing which the Superior Court Commissioner held thereon, counsel for CCHS argued that he did not think he “should [have] produce[d] the policies” before the commissioner reviewed them to “see if there [wa]s anything with

⁸ Oral Arg. Tr. of Mar. 18, 2003 at 50 (Ex. “C” to Def.’s Mot. “for Reconsideration...”).

⁹ Def.’s Resp. to Pl.’s Third Mot. to Compel ¶ 3 (Ex. “1” to Def.’s Resp. to Pl.’s “Partial Appeal from Commissioner’s Report”).

¹⁰ Pl.’s “Partial Appeal from Commissioner’s Report” ¶ 1.

¹¹ Pl.’s Third Mot. to Compel ¶ 1.

regard to disclosure in there.”¹² This argument may not have been fairly presented prior to that date, however, as indicated by the commissioner’s comment that “[i]f [he] had appreciated [CCHS’s] argument [before] today, [he] would not have ordered those documents [produced].”¹³ Nevertheless, the commissioner ordered the production of documents consistent with the January 17, 2003 Order “because that’s what [the] Order said.”¹⁴ The commissioner thereafter issued a letter opinion in which he stated that “[t]he order of January 17 [2003] was clear in that it required...[CCHS] to turn over copies of the documents Plaintiff felt w[ere] germane to her case.”¹⁵

Since the Superior Court Commissioner issued his March 18, 2003 Letter Opinion, Plaintiff’s counsel has maintained that “[w]ithout th[ose] exhibits [relied upon by CCHS’s fact witnesses at their depositions], the[ir] deposition testimony is incomprehensible.”¹⁶ Plaintiff’s counsel apparently has had limited opportunity to review those documents, both “[a]t the conclusion of th[ose] depositions shortly after 9:00 p.m. [that day],”¹⁷ and

¹² Oral Arg. Tr. of Mar. 18, 2003 at 51.

¹³ Id.

¹⁴ Id.

¹⁵ Drysdale v. Noble and Christiana Care Health Servs., Inc., Del. Super., C.A. No. 02C-04-235 RRC, Vavala, Comm’r. (Mar. 18, 2003), Letter Op. at 2.

¹⁶ Pl.’s “Partial Appeal from Commissioner’s Report” ¶ 1.

¹⁷ Pl.’s Third Mot. to Compel ¶ 5.

“under the constant supervision of both CCHS counsel and...[a third party observer]” on the following day.¹⁸ Following this Court’s direction at oral argument on the parties’ respective motions now under consideration, Plaintiff’s counsel “again reviewed[] the small collection of documents remaining [to be produced] from those...originally designated[,]”¹⁹ although such review apparently was conducted in counsel for CCHS’s offices with no opportunity for copying.

Plaintiff’s “Partial Appeal from Commissioner’s Report Dated March 18, 2003...” and CCHS’s “Motion for Reconsideration of Commissioner’s Order” were timely filed thereafter. Trial is scheduled to begin on June 16, 2003.

CONTENTIONS OF THE PARTIES

CCHS now proposes that the undersigned judge review *in camera* those outstanding documents that have not already been produced to Plaintiff before any such further production occurs. In support thereof, CCHS contends that the commissioner “candidly admitted at the March 18 hearing that he had not appreciated the arguments made by CCHS with regard to...broadness.”²⁰ “Rather than perpetuating that initial error [by

¹⁸ Id. ¶ 7.

¹⁹ Letter from Melanie K. Sharp to the Court of 5/1/03, at 1 (Dkt. #108).

²⁰ Def.’s Mot. “for Reconsideration...” ¶ 6.

nevertheless ordering production],” CCHS argues that the commissioner “should have conducted a review of the documents in question...”²¹

In response and in support of its own motion, Plaintiff “strenuously opposes not only [CCHS’s] untimely appeal [of the January 17, 2003 Order], but also the [] submission by CCHS of documents for *in camera* review.”²² Had she understood “that this Court would conduct *in camera* review,” Plaintiff’s counsel argues that she “would have designated all documents discoverable...”²³ Additionally, Plaintiff’s counsel contends that her application for attorneys’ fees “[ha]s not [been] addressed[]” and that application “for a partial extension of expert identification and expert discovery deadlines...” remains outstanding.²⁴

DISCUSSION

When such power is conferred, a Superior Court Commissioner shall have “[t]he power to conduct non case-dispositive hearings, including evidentiary hearings, and the power to hear and determine any pretrial or other non case-dispositive matter pending before the Court.”²⁵ “Within 10

²¹ Id. ¶ 12.

²² Letter from Melanie K. Sharp to the Court of 5/1/03, at 2.

²³ Id. at 3 (emphasis in original).

²⁴ Pl.’s “Partial Appeal from Commissioner’s Report” ¶ 4.

²⁵ Super. Ct. Civ. R. 132(a)(3).

days after filing of a [c]ommissioner's order...any party may serve and file written objections to the [c]ommissioner's order which sets forth with particularity the basis for the objections."²⁶ Upon motion made after the expiration of a given time period within which to act, this Court may "permit the act to be done [only] where the failure to act was the result of excusable neglect[][.]"²⁷

At oral argument on the two motions currently under consideration, this Court considered CCHS's request that this judge review those documents outstanding *in camera* before ordering their production to Plaintiffs (in effect granting CCHS's Motion "for Reconsideration..."). The Court also indicated, however, that it would continue to consider Plaintiff's arguments against such relief since there had been no timely appeal of the commissioner's January 17, 2003 Order, as well as Plaintiff's arguments in furtherance of continued document production. This Court now concludes that CCHS's motion, essentially an appeal from the Superior Court Commissioner's January 17, 2003 Order, is untimely, given that any objection was to be filed and served within 10 days of issuance of the order,

²⁶ Super. Ct. Civ. R. 132(a)(3)(ii).

²⁷ Super. Ct. Civ. R. 6(b).

and no “excusable neglect” has otherwise been shown on CCHS’s behalf to warrant reconsideration of the commissioner’s January 17, 2003 Order.²⁸

That said, this Court does have concerns over the scope and the basis of the commissioner’s January 17, 2003 Order. CCHS represents that complying with the commissioner’s order will be burdensome.²⁹

Nevertheless, if CCHS had issues with the breadth of that order, pursuant to Superior Court Civil Rule 132, it had a duty to have appealed it earlier.

Counsel for CCHS recognized as such when he conceded at argument on Plaintiff’s Third Motion to Compel that he “should have come to...[the commissioner]...and asked for a clarification....”³⁰ While the Court

understands that the imminent depositions of CCHS’s fact witnesses may have been a factor in counsel’s post-order conduct, if the Plaintiff had not

been willing to compromise as to the production of documents, CCHS

should have sought to reschedule those depositions in order to focus on the ruling that had been made.³¹

There is merit to Plaintiff’s argument that were the Court to grant CCHS’s present requested relief, referral to a Superior Court Commissioner

²⁸ Super. Ct. Civ. R. 6(b).

²⁹ Def.’s Resp. to Pl.’s Third Mot. to Compel ¶ 3.

³⁰ Oral Arg. Tr. of Mar. 18, 2003 at 50.

³¹ The Court understands the inconvenience that such a rescheduling undoubtedly would have caused.

would be rendered ineffectual by a party choosing to seek reargument through the vehicle of an untimely appeal. And, as Plaintiff points out, were such relief to now be granted, Plaintiff would have been in a better position all along if she had simply designated all documents in CCHS's possession as having been sought for production. When concerns such as these are balanced against the reasons for commissioner-referral in the first place, *i.e.*, the number and complexity of documents with document production issues such as access and inspection, it is clear that CCHS should not now be allowed to untimely object with the attendant result of re-introducing those complications sought to be avoided by referral in the first place.

Accordingly, CCHS's motion must be **DENIED**.

With regard to Plaintiff's "appeal," the Court understands that there remains only a "small collection"³² of documents, from Plaintiff's perspective, which still needs to be produced. The Court finds persuasive counsel for Plaintiff's argument that without those documents, CCHS's fact witness testimony will be difficult to put into proper context, at least to some degree.³³ Furthermore, production of those documents is in keeping with the Superior Court Commissioner's January 17, 2003 Order that "all documents which...[CCHS] relies upon for determination of its policies and

³² Letter from Melanie K. Sharp to the Court of 5/1/03, at 1.

³³ See Pl.'s "Partial Appeal from Commissioner's Report" ¶ 1.

procedures[]”³⁴ and which Plaintiff seeks to discover should be produced to her. Plaintiff’s “Partial Appeal from Commissioner’s Report Dated March 18, 2003...” is therefore **GRANTED**.

CCHS shall promptly produce to Plaintiff all outstanding documents requested by Plaintiff consistent with the commissioner’s January 17, 2003 Order.³⁵ The Court expects counsel to agree upon a deadline date for such production and upon any confidentiality order that may be appropriate, as well as on any new deadline date for identification of experts’ opinions with regard to those documents that CCHS is now directed to produce.

IT IS SO ORDERED.

Very truly yours,

oc: Prothonotary
cc: Gilbert F. Shelsby, Jr., Esquire, Attorney for Defendant Raymond R. Noble, M.D.

³⁴ Drysdale v. Noble and Christiana Care Health Servs., Inc., Del. Super., C.A. No. 02C-04-235 RRC, Vavala, Comm’r. (Jan. 17, 2003), Order ¶ 1.

³⁵ The Court will not now act on counsel for Plaintiff’s request for costs and fees given that no affidavits or other supporting documents have been received thereon.