SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

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Re: James Hill, Jr. v. Richard P. DuShuttle, M.D., Richard P. DuShuttle, M.D., P.A., Kahn Professional Properties, LLC, Ronald Kahn, Dover Medical Center Condominium Association of Owners, Inc., William M. Kaplan, M.D., Central Delaware Gastroenterology Associates, P.A., and Central Delaware Endoscopy
C.A. No. N10C-05-178 RRC

Submitted: June 16, 2011
Decided: July 5, 2011

On Defendants' Motion *in Limine* to Preclude Plaintiff From Calling an Expert Witness at Trial.
GRANTED.

On Defendants' Motion to Dismiss for Failure of Plaintiff to Have Timely Produced an Expert Opinion.
GRANTED.

Dear Counsel:

INTRODUCTION

In this slip and fall case, Defendants Richard P. DuShuttle, M.D., Richard P. DuShuttle, M.D., P.A., Kahn Professional Properties, LLC, Ronald Kahn, Dover Medical Center Condominium Association of Owner, Inc., William M. Kaplan, M.D., Central Delaware Gastroenterology Associates, P.A., and Central Delaware Endoscopy ("Defendants") have moved to preclude Plaintiff from calling an expert witness at trial and, in turn, to dismiss Plaintiff's claims because Plaintiff has not produced an expert opinion that Defendants' alleged negligence was the cause of his alleged injuries. Defendants' motion is predicated on Plaintiff's failure to adhere to the terms of this Court's Trial Scheduling Order with respect to expert discovery deadlines.

FACTUAL AND PROCEDURAL HISTORY

The Trial Scheduling Order entered by this Court on December 15, 2010 set a trial date of December 5, 2011 and, *inter alia*, required Plaintiff to produce his expert reports or make Rule 26(b)(4) disclosures on or before February 22, 2011.[1] By email of February 22, Plaintiff's counsel advised Defendants' counsel as follows:

> [T]his is the date to id. Experts. The only experts for plaintiff are treating physicians who will testify consistent with their treating records, which you have.[2]

By responsive email of that same date, Defendants' counsel advised Plaintiff's counsel that this disclosure was insufficient:

> As for your expert disclosures, please accept this email as notice of defendants' position that your expert disclosure is deficient and not in compliance with Superior Court Civil 26. Simply citing to the medical records is insufficient to meet the requirements of Superior Court Civil Rule 26. Attached are Superior Court decisions supporting defendants' position in this regard.

[1] Trial Scheduling Order of Dec. 15, 2010 (Lexis Transaction I.D. 35260185).
[2] Defs.' Mot. to Preclude Plaintiff from Calling an Expert Witness at Trial and Motion to Dismiss Ex. B.

> Defendants request plaintiff provide expert disclosures in accordance with Super Court Civil 26 that provide the expert's identity, the expert's qualifications, the expert's opinions and the bases for those opinions as soon as possible. Defendants also request an extension of time to file their expert disclosures to correspond with the amount of time it takes plaintiff to file his supplemental expert disclosures (i.e. if plaintiff produces its expert disclosures two weeks past the expert deadline, then defendants request a two week extension to file their expert disclosures).[3]

Plaintiff's counsel responded by email: "Ok you win. 2 weeks works and I'll go through the exercise but you won't learn anything new."[4]

Notwithstanding the foregoing exchange, Plaintiff's counsel did not produce any further expert discovery. On March 10, Defendants filed a motion to compel Plaintiff to produce adequate expert discovery disclosures; Plaintiff did not oppose this motion.[5] As a result, on March 28, this Court entered an unopposed order requiring Plaintiff to produce expert disclosures within seven days; the order stated that Plaintiff would be barred from providing expert testimony at trial if his expert discovery was not so produced, and that Defendants' expert discovery deadline was extended to July 3.[6] Despite this order, Plaintiff did not produce complete expert disclosures by April 4, or at any time since, and, on April 29, Defendants accordingly filed the instant motion to preclude Plaintiff from calling an expert witness at trial and to dismiss Plaintiff's case on the grounds that Plaintiff has violated both the scheduling order and the order compelling discovery, and that, without a medical causation expert, Plaintiff cannot establish a *prima facie* case against Defendants.[7]

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[3] *Id.*
[4] *Id.*
[5] *See* Defs.' Mot. to Compel (Lexis Transaction I.D. 36389275)
[6] *Hill v. DuShuttle, et al.,* Del. Super., C.A. No. 10C-05-178, Cooch, R.J. (Apr. 4, 2011) (ORDER).
[7] Defs.' Mot. to Preclude Plaintiff from Calling an Expert Witness at Trial and Motion to Dismiss.

CONTENTIONS OF THE PARTIES

A. Defendants' Contentions

Defendants assert that Plaintiff failed to produce sufficiently detailed expert discovery, as required by Rule 26 and its attendant decisional law. According to Defendants, Plaintiff's bare reference to the treating physician in an interrogatory response, coupled with the physician's narrative record indicating simply that Plaintiff "report[ed] symptoms that began a few days ago when he was walking through a parking lot where there was a pothole" that Plaintiff "stepped in it and twisted his knee" and that he "immediately experienced medial knee pain,"[8] is legally inadequate because it required Defendants' counsel to embark on a "wild goose chase" with respect to Plaintiff's expert's opinions regarding the cause and extent of Plaintiff's injuries.[9] In short, it is Defendants' position that Plaintiff has failed to comply with this Court's expert discovery orders and must now be precluded from calling an expert, thereby foreclosing Plaintiff from establishing a *prima facie* case of negligence against Defendants and warranting dismissal of Plaintiff's case.

B. Plaintiff's Contentions

Plaintiff responds that the allegedly insufficient Rule 26 expert disclosure is of no consequence because the treating physician is competent to testify, and that "the defense has not raised any questions concerning Plaintiff's injury or what caused it, has not even had plaintiff examined by a physician of their choice, nor proffered any hint of contradictory evidence."[10] Plaintiff's counsel also contends that, given the relatively distant December 15, 2011 trial date in this case, Defendants cannot show prejudice resulting from his failure to properly produce expert discovery; Plaintiff states that any alleged deficiencies occasioned by his failure to produce expert discovery may be remedied between the present time and the trial date.[11]

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[8] Excerpt of Plaintiff's Medical Record (Lexis Transaction I.D. 37997945).
[9] *Id.* at 3 (citing *Duncan v. Newton & Sons*, 2006 WL 2329278, *6 (Del. Super. Ct. 2006)).
[10] Pltf.'s Response to Defs.' Mot. to Exclude Expert Witness Testimony at 2. Plaintiff does not oppose Defendant's motion to the extent it would preclude Plaintiff from calling any liability experts or non-treating medical experts. *Id.*
[11] *Id.*

The Court held oral argument on the instant motions, at which time Plaintiff's counsel reiterated his assertion that the Court has "ample" time to resolve any alleged shortcomings in discovery since the trial date is December 5, 2011.[12] However, Plaintiff's counsel acknowledged that he did not previously request an extension of time to produce an expert report establishing the cause of Plaintiff's injuries; instead, Plaintiff's counsel relies completely on an excerpt from Plaintiff's treating physician's medical records, which he produced for the first time at oral argument (it was not included with his response). The record reads, in relevant part:

> Mr. James Hill is an established patient who is here with a new complaint of light knee pain. He reports symptoms that began a few days ago when he was walking through a parking lot where there was a pothole. He stepped in it and twisted his knee. He immediately experienced medial knee pain. He denies any instability. He reports his symptoms are improved with a compression brace.[13]

According to Plaintiff's counsel, "no reasonable person looking at this is going to be scratching their head to figure out what's going on in this case or to claim that they have been prejudiced in any way."[14] Thus, Plaintiff's counsel contended that "it is so obvious in this case that [Plaintiff does] not need an expert" and Plaintiff himself could testify that he "tore his medial meniscus as a result of this [accident]."[15] Plaintiff's counsel expounded on this assertion as follows:

> [A]ny experienced litigator looking at this medical record is going to realize what this case is all about. [A prominent Delaware civil defense lawyer] would not be here pressing me for an elaboration on this report I can assure you.[16]

In the alternative, Plaintiff's counsel stated that, if the Court deems the foregoing medical record to be insufficient for Rule 26 purposes, he requested additional time to cure the deficiency:

> Well, if what I've provided to the Court is not satisfactory for [Rule 26 purposes], then in the overall interest of justice and

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[12] Transcript of Oral Argument of June 7, 2011 at 1 [hereinafter "Tr. at __"].
[13] Excerpt of Plaintiff's Medical Record (Lexis Transaction I.D. 37997945).
[14] Tr. at 4.
[15] *Id.* at 6.
[16] *Id.* at 7-8.

> accomplishing a fair result for the plaintiff I would certainly ask that the Court permit me to elaborate on what is contained in this medical record of July 18, 2008.[17]

Notably, however, Plaintiff's counsel would not specify just how he would "elaborate" on the medical record; he merely stated that language of the report "could be turned around a little bit and made slightly more explicit," but that there "isn't going to be any new information that's meaningful to anybody."[18] Following up on this, the Court inquired if "any further elaboration would not include the formal designation of an expert on causation," to which Plaintiff's counsel asserted that, given his answers to question number five on the Form 30 Interrogatory, filed with the complaint on May 21, 2010, designating Plaintiff's treating physician as expert witnesses, taken together with the medical record excerpt, "the defense has the entire case."[19] Thus, Plaintiff's counsel declined the Court's potential invitation for additional time to produce an expert's opinion to the effect that Defendants' alleged negligence caused the instant injuries, and the Court concludes that no such expert report will ever be forthcoming, even if additional time were allowed.

DISCUSSION

There are two independent bases warranting dismissal of this case. First, Plaintiff will be precluded from calling a medical expert at trial, thereby foreclosing him from establishing causation, and, in turn, a *prima facie* case of negligence, against Defendants. Second, and alternatively, Plaintiff's complaint will be dismissed as a sanction for his failure to comply with this Court's discovery orders, pursuant to Superior Court Civil Rule 37(b)(2)(C).[20]

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[17] *Id.* at 8.
[18] *Id.*
[19] *Id.* at 8-10.
[20] If a party. . .fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this Rule or Rule 35, the Court may make such orders in regard to the failure as are just, and among others the following: . . . An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."

A. Plaintiff Will be Precluded From Calling an Expert Due to the Plain Language of the Trial Scheduling Order and This Court's Order Granting Defendants' Motion to Compel.

The Trial Scheduling Order explicitly provides the possible consequences for failure to meet the applicable deadlines:

> Counsel are advised that all of the deadlines established by this Trial Scheduling Order are firm deadlines. Failure to meet these deadlines, absent good cause shown, may result in the Court refusing to allow extension s regardless of the consequences. **Any amendments to this Trial Scheduling Order must be by appropriate motion or by stipulation of the parties and ordered by the Court.**[21]

Despite this language, Plaintiff's counsel and Defendants' counsel informally agreed between themselves, via email, to extend the time for Plaintiff to provide satisfactory expert disclosures.[22] Plaintiff did not file any motions with this Court disputing Defendants' characterizations of his expert disclosures as deficient; instead, Plaintiff's counsel agreed, albeit somewhat grudgingly, to provide more detailed expert disclosures within two weeks.[23] However, and without explanation, Plaintiff's counsel failed to honor this agreement with Defendants' counsel.

Not surprisingly, Defendants filed the appropriate motion to compel; Plaintiff did not oppose this motion, so this Court entered an unopposed order which stated that, "if Plaintiff fails to provide expert disclosures within 7 days [from March 28, 2011], plaintiff is barred from providing expert testimony at trial."[24] Thus, through both the Trial Scheduling Order and the unopposed order in response to Defendants' motion to compel, Plaintiff's counsel was on notice of the consequences for failing to provide sufficient Rule 26 disclosures. Notwithstanding this procedural history, Plaintiff's counsel never produced sufficient expert discovery with the substance and bases of his expert's opinions as to the cause and extent of Plaintiff's alleged injury; this is

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[21] Trial Scheduling Order of Dec. 15, 2010 at 4-5 (Lexis Transaction I.D. 35260185) (emphasis added).
[22] *See supra* note 3.
[23] *Id.*
[24] *Hill v. DuShuttle, et al.,* Del. Super., C.A. No. 10C-05-178, Cooch, R.J. (Apr. 4, 2011) (ORDER).

a prerequisite to the admissibility of Plaintiff's expert's testimony at trial.[25] Although Plaintiff's putative expert was also his treating physician, which is potentially allowable, this does not vitiate the requirement that Plaintiff comply with Rule 26 as a prerequisite to introducing expert testimony from this witness regarding Plaintiff's alleged injuries and their cause.[26] Neither Plaintiff's moving papers nor his counsel's statements at oral argument even suggested that his failure to adhere to the deadlines was due to any cause other than Plaintiff's counsel's apparent belief that his discovery responses were legally sufficient. Plaintiff's counsel elected not to comply with the requirements of Court's orders and the case law (discussed *infra* note 27), and, now faced with the predictable consequences of this course of action, requests this Court to retrospectively reward his non-compliance with a third

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[25] *Russell v. K-Mart Corp.*, 761 A.2d 1, 3 (Del. 2000) ("In Delaware, 'the requirement of a party to comply with discovery directed to identification of expert witnesses and disclosure of the substance of their expected opinion is a pre-condition to the admissibility of expert testimony at trial.'") (citations omitted); *cf. Harriman v. Hancock* County, 627 F.2d 22, 29 (1st Cir. 2010) ("[The analogous Federal] Rule 37 authorizes district courts to sanction noncomplying parties; although sanctions can vary depending on the circumstances, the baseline rule is that the required sanction in the ordinary case is mandatory preclusion [of evidence not properly disclosed pursuant to Rule 26].") (citations and internal quotation marks omitted); *Aumand v. Dartmouth Hitchcock Med. Ctr.*, 611 F. Supp.2d 78, 90 (D. New Hampshire 2009) (noting that, although the analogous Federal Rule of Civil Procedure 26 "authorizes other sanctions 'instead of' excluding undisclosed witnesses, it nevertheless 'requires the near automatic exclusion of Rule 26 information that is not timely disclosed,' placing the burden on the non-disclosing party to show that some lesser sanction is appropriate.") (citation omitted); *LeBarron v. Haverhill Co-Op Sch. Dist.*, 127 F.R.D. 38 (D. New Hampshire 1989) (holding that, under the analogous Federal Rule of Civil Procedure 37, the sanction of excluding Plaintiff's expert witness was proper where Plaintiff failed to produce his expert's report in accordance with the discovery order).

[26] *See also Upchurch v. Hester*, 2006 WL 3020772, *2 (D. Del. 2006) (holding, under the analogous Federal Rule of Civil Procedure, "[w]hen a treating physician's proffered testimony reaches beyond the basic facts learned during the treatment of a patient, and extends to typical opinion testimony, the provisions of [Federal] Rule 26(a)(2)(B) attach, and an expert report must be provided. . . . Because Plaintiffs intend to have [his treating physician] opine as to the causation of [the plaintiff's] injuries, and his future treatment needs, the Court concludes that Plaintiffs intend to have [the plaintiff's treating physician] provide expert testimony that reaches beyond the ordinary treatment of [the plaintiff]. The Court, therefore, concludes that an expert report should have been provided to all Defendants in accordance with Rule 26(a)(2)(B).") (citations omitted). However, the *Upchurch* Court, under the distinguishable facts of that case, found that Plaintiff's failure to disclose was harmless and did not preclude Plaintiff's expert from testifying. *Id.*

extension of his expert discovery deadline, but again, without a representation than an expert opinion on causation will ultimately be produced.

This Court will not so indulge Plaintiff in what ultimately will be an exercise in futility; instead, the terms of this Court's orders will be enforced, and Plaintiff shall be precluded from calling an expert medical witness at trial. It follows then that Plaintiff will be unable, as a matter of law, to establish that Defendants' alleged negligence was the cause of his injuries.[27] On this point, Defendants have moved to dismiss, although such a motion is more accurately classified as one for summary judgment, and it will be treated as such by this Court;[28] at bottom, Defendants assert that the Plaintiff's inability to produce a testifying medical expert precludes any genuine issue as to any material fact and entitles Defendants to judgment as a matter of law.[29] Given that Plaintiff is required to proffer expert medical testimony to carry his burden of establishing causation, and he is now precluded from doing so, no remaining facts in dispute on this causation issue are material, and Defendant is entitled to judgment as a matter of law.[30]

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[27] *See, e.g.*, *Rayfield v. Power*, 840 A.2d 642, *1 (Del. 2003) ("With 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.") (citation omitted); *Perry v. Berkley*, 996 A.2d 1262, 1271 (Del. 2010) (holding that the plaintiff's failure to offer any expert testimony that the defendant's conduct caused her injuries precluded the plaintiff from establishing a *prima facie* case of negligence against the defendants); *Dailey v. Purse*, 2008 WL 4824075, *3 (Del. Super Ct. 2008) ("Since Plaintiff failed to produce any expert witnesses or reports by the deadline, he is precluded from introducing such evidence at trial. Without any expert testimony, Plaintiff cannot make out a prima facie case for negligence against Defendant, as it is not within the common knowledge of the jury to determine what caused Plaintiff's injuries. Causation is a critical material issue of this case, and without competent evidence to support it, Plaintiff cannot take his case to a jury."); *Bell v. Sheryl Winsby Associates*, 2010 WL 2179880, *3 (Del. Super. Ct. 2010) (holding, in a slip-and-fall case where Plaintiff sought damages for more than mere "bumps and bruises" but was instead, seeking damages for "several medical procedures that may or may not have been a result of the fall," the Plaintiff was required to present expert medical testimony to establish that the surgeries were caused by the fall).

[28] The Court has not "converted" Defendants' motion to dismiss into a motion for summary judgment, as may be done pursuant to Rule 12, because Plaintiff's complaint is otherwise dismissable pursuant to Rule 37.

[29] *See* Super. Ct. Civ. Rule 56(c).

[30] *See, e.g.*, *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991) ("The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.").

B. Plaintiff's Complaint Will be Dismissed as a Sanction, Pursuant to Rule 37(b)(2)(C).

Alternatively, but relatedly, this Court also dismisses Plaintiff's complaint as a sanction for discovery non-compliance, pursuant to Superior Court Civil Rule 37(b)(2)(C). In dismissing Plaintiff's complaint, this Court is cognizant of the applicable guidelines governing certain dismissals of civil cases set forth by the Supreme Court of Delaware in *Drejka v. Hitchens Tire Service*.[31] In *Drejka*, this court had entered a scheduling order in a personal injury case in June 2008, setting December 19, 2008 as the deadline for submission of the plaintiff's expert report, January 16, 2009 as the deadline for submission of the defendants' expert report, February 13, 2009 as the discovery end date, and July 27, 2009 as the trial date.[32] Apparently, none of the parties met the foregoing discovery deadlines; the plaintiff finally produced her expert report on May 5, 2009.[33] In turn, the defendants filed a motion *in limine* to exclude the plaintiff's medical expert testimony on the grounds that the May 5 submission of Plaintiff's expert report was "far too late" and that the defendant would be "severely" prejudiced; the trial court granted this motion, and the plaintiff was ultimately left without an expert.[34] The defendants thereupon moved for summary judgment, arguing that the plaintiff could not establish a *prima facie* case of negligence without expert testimony, and the trial court granted the defendant's motion.[35]

On appeal, the Supreme Court reiterated six factors to consider when assessing the appropriate sanction for a discovery violation: 1) the extent of the party's personal responsibility; 2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; 3) a history of dilatoriness; 4) whether the conduct of the party or the attorney was willful or in bad faith; 5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and 6) the meritoriousness of the claim or defense.[36] After applying these factors, the Supreme Court concluded that this Court should not have dismissed the plaintiff's claim

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[31] 15 A.3d 1221 (Del. 2010). The Court notes that, although Defendants, in their motion to dismiss, predicted that Plaintiff would rely on *Drejka*, Plaintiff did not cite or rely on *Drejka* in his response to the motion or during oral argument.
[32] *Drejka*, 15 A.3d at 1222.
[33] *Id.* at 1223.
[34] *Id.*
[35] *Id.*
[36] *Id.* at 1224 (citing *Minna v. Energy Coal S.p.A.*, 984 A.2d 1210, 1215 (Del. 2009)).

because the plaintiff appeared to have borne no responsibility for her attorney's conduct, the defendant had received the plaintiff's expert report months before the trial date, providing sufficient time to depose the plaintiff's expert, there had been no evidence that the plaintiff's attorney was acting in bad faith, there had been no reason to believe that lesser sanctions would be ineffective, and, on the merits, even the defendant's expert agreed that the plaintiff suffered permanent soft tissue impairment due to the accident at issue.[37]

This Court acknowledges certain potential similarities between *Drejka* and the instant case. It is not clear if Plaintiff himself bears any responsibility for Plaintiff's counsel's failure to adhere to this Court's orders, and the scheduled trial date is several months in the future. Likewise, the Court does not find that Plaintiff's counsel was acting in bad faith, but it does appear that Plaintiff's counsel consciously disregarded his obligation to propound satisfactory expert disclosures, as Plaintiff's counsel did not explain why he failed to abide by the applicable deadlines and supply sufficient expert disclosures at any point between December 15, 2010 and April 4, 2011 (the period of time between the entry of the Trial Scheduling Order and the deadline imposed by this Court in response to Defendants' motion to compel); given the notes of the treating physician, one would expect that the treating physician could offer an expert opinion on causation. While a default judgment is an extreme remedy, it is appropriate in those cases where a party "conscious[ly] disregard[s] a court order."[38] To that end, this Court's Trial Scheduling Orders "are not merely guidelines but have full force and effect as any other order of the [Superior] Court."[39] Plaintiff's counsel simply disregarded an order compelling discovery; this conduct is particularly troubling in light of the fact that Plaintiff did not oppose the motion to compel discovery.

Similarly, given Plaintiff's counsel's lack of commitment at oral argument on the issue of whether, and to what extent, he could meaningfully

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[37] *Id.*

[38] *Lehman Capital v. Lofland*, 906 A.2d 122, 132 ("We have held that entering judgment against a party as a sanction for discovery violations is an extreme remedy and generally requires some element of *willfulness or conscious disregard* of a court order before the trial judge can impose such a severe sanction.") (quoting *Sundor Elec., Inc. v. E.J.T. Constr. Co., Inc.*, 337 A.2d 651, 652 (Del. 1975)).

[39] *Sammons v. Doctors for Emergency Servs., P.A.*, 913 A.2d 519, 529 (Del. 2006) (citation omitted).

supplement his expert disclosures,[40] this Court concludes that any lesser sanction, such as a monetary sanction, will not be effective; under Rule 26, Defendants have a right to "the substance of [Plaintiff's expert's] expected opinions as a precondition to the admissibility of expert testimony at trial."[41] Plaintiff cannot "require Defendants' counsel to go on a wild goose chase with Plaintiff's experts or to depose Plaintiff's experts without the benefit of having the opinions and the medical or scientific reasoning for those opinions."[42] Here, Plaintiff seeks to rely on a medical record that provides merely a brief narrative history suggesting that Plaintiff informed his treating physician that he stepped into a pothole, twisted his knee, and "immediately experienced medial knee pain."[43] The report is devoid of any opinions or commentary with regard to the extent and permanency of Plaintiff's alleged injury, much less any "medical or scientific reasoning" for Plaintiff's expert's opinions; Plaintiff cannot simply disclose the identity of his treating physician and designate that physician as his medical expert, cite to a narrative treatment report (rather than an report or disclosure that comports with Rule 26) prepared by that physician, and require Defendants to learn that physician's opinions (including his opinions on causation) via deposition testimony.[44] Thus, Defendants were prejudiced to the extent that they could not complete expert discovery within the agreed-upon parameters of the Trial Scheduling Order; although the trial date is not impending, this does not

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[40] *See supra* note 18.
[41] *Sammons*, 913 A.2d at 528.
[42] *Id.*
[43] Excerpt of Plaintiff's Medical Record (Lexis Transaction I.D. 37997945).
[44] *See supra* note 41 and accompanying text; *Duncan v. O.A. Newton & Sons Co.*, 2006 WL 2329378, *6 (Del. Super. Ct. 2006) ("Plaintiff argues that she does not need to do anything more than identify her expert witnesses and then Defendants can take depositions to learn what those opinions might be. This is contrary to the scheduling order and this Court's practice. **Plaintiff was to identify her experts and provide their reports as to their expert opinions**.") (emphasis added); *Crookshank v. Bayer Healthcare Pharmaceuticals*, 2009 WL 1622828, *3(Del. Super. Ct. 2009) ("The purpose of identifying and providing expert reports is to provide the opposing side with notice of the basis for the opinion, and to allow them to respond in kind.") (citing *Duncan*, 2006 WL at *6). *Cf. Dyson Technology Ltd. v. Maytag Corp.*, 241 F.R.D. 247, 250 (D. Del. 2007) (noting that the analogous Federal Rule of Civil Procedure 26 "exists to avoid expert disclosure that is "sketchy and vague," so that litigants can be prepared for trial.") (citation omitted); *Aumand*, 611 F. Supp.2d at 89 ("[I]t cannot be seriously disputed that a treating physician's diagnoses, prognoses, or similar conclusions as to the patient's condition are 'based upon scientific, technical, or other specialized knowledge,' and, as such, are outside the scope of [Federal] Rule 701-and inside the scope of [Federal] Rule 26(a)(2)(A).") (citation omitted).

obviate the need for the orderly pretrial administration of cases, nor does it nullify Defendants' right to rely on timely receipt of necessary discovery, in accord with the "firm" deadlines established in this Court's orders.[45] As noted by the Supreme Court, "[t]he rights of litigants who in good faith comply with the court's pretrial discovery procedures should not be jeopardized by litigants who disregard such rules."[46]

The six factors enumerated above are to be weighed and balanced; it is not necessary that all six factors be satisfied.[47] After considering each of the factors, as applied to this case, and taking due regard for the severity of the sanction of dismissal, this Court concludes that, under the circumstances, dismissal is the appropriate sanction.[48]

Further, this case implicates broader administrative and policy concerns. The standard for amending scheduling order deadlines is "good cause." In effect, Plaintiff is requesting that this Court retroactively amend its scheduling orders and provide Plaintiff with an extension of time to produce sufficient expert disclosures, though Plaintiff's counsel has not established, nor even addressed, the cause for his failure to abide by the twice-extended deadlines. As explained by the Supreme Court, "good cause" may be found "when the moving party has been generally diligent, the need for more time was neither foreseeable nor its fault, and refusing to grant the continuance would create a substantial risk of unfairness to that party."[49] Put another way,

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[45] *See, e.g.*, *Wahle v. Med. Ctr. of Del.*, 559 A.2d 1228, 1234 (Del. 1989) (affirming this Court's imposition of the sanction of dismissal and noting that the defendants were "entitled to timely discovery of [an] essential ingredient to plaintiff's suit.").

[46] *Id.* at 1233.

[47] *Hoag v. Amex Assurance Co.*, 953 A.2d 713, 718 (Del. 2008) ("These factors-and all of them need not be met-are useful in evaluating a decision to dismiss for failure to prosecute or comply with its rules or orders.") (citation omitted).

[48] *See, e.g.*, *id.* at 717 ("Nevertheless, a motion to dismiss or for a default judgment should be granted if no other sanction would be more appropriate under the circumstances.") (citation omitted). Notably, this Court has very recently held that a plaintiff's failure to identify a medical expert by the date specified in the Trial Scheduling Order is sufficient to warrant the preclusion of such expert and the sanction of dismissal of the plaintiff's case. *See State Farm Mut. Auto Ins. Co. v. State Dept. of Nat'l Res. and Envtl. Control*, 2011 WL 2178676 (Del. Super. Ct. 2011) ("[The plaintiff] has failed to identify any expert witness by November 8, 2010, as required the Court's Scheduling Order. Because [the plaintiff] has failed to identify a medical expert, [the defendant's] Motion for Summary Judgment must be granted.").

[49] *Coleman v. Pricewaterhousecoopers*, *LLC*, 902 A.2d 1102, 1106 (Del. 2006) (quoting 3 James Wm. Moore, et. al., *Moore's Federal Practice* § 16.14(1)(b) (3d ed. 2004).

"[i]t has been stated that '[p]roperly construed, "good cause" means that scheduling deadlines cannot be met despite a party's diligent efforts.'"[50]

If the standard for "good cause" is to be meaningful, and if this Court's orders are to be respected, the applicable consequences must be imposed upon unexcused violations. As stated by the Supreme Court of Delaware (quoting the Supreme Court of the United States):

> But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, **not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.**[51]

Also, in evaluating "good cause," the lack of prejudice to the opposing party may be relevant, but it does not end the Court's inquiry.[52] Here, although the potential prejudice to Defendants may be somewhat mitigated due to the December 5 trial date, this factor alone does not outweigh the persistent and unexcused failure of Plaintiff to even attempt to comply with this Court's scheduling orders. Plaintiff's counsel was repeatedly apprised of the firmness of the discovery deadlines set by this Court; consequently, the resultant dismissal of Plaintiff's complaint cannot be considered to be surprising or unfair.[53]

In this case, none of the foregoing conditions to establish "good cause" have been met, nor does Plaintiff allege any such good cause.[54]

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[50] *Candlewood Timber Group, LLC v. Pan Am. Energy, LLC*, 2006 WL 258305, *4 (Del. Super. Ct. 2006) (quoting *Gonzalez v. Comcast Corp.*, 2004 WL 2009336, *1 (D. Del. 2004)).

[51] *Hoag*, 953 A.2d at 718 (quoting *Nat'l Hockey League v. Metro Hockey Club, Inc.*, 427 U.S. 639, 642-43 (1976)).

[52] *Candlewood*, 2006 WL at *4 ("The Court agrees that lack of prejudice to another party can, in appropriate cases, be a factor in the Court's determination of whether 'good cause' exists, but the Court's inquiry does not end with consideration of that one factor.").

[53] *See Wahle*, 559 A.2d at 1233 ("Litigants who continually miss discovery deadlines, both self-imposed and court-imposed, as in this case, may not claim surprise by imposition of the ultimate sanction of dismissal.").

[54] Also, Plaintiff's failure is not attributable to any of the potential causes discussed in *Drejka*; the *Drejka* Court elected to comment that it is "not uncommon for litigants to disregard Scheduling Orders" because "[b]oth parties' attorneys may be pressed for time;

Rather, Plaintiff relies solely (and erroneously) on Defendants' failure to "proffer[] any hint of contradictory [causation] evidence" and the alleged lack of prejudice to Defendants. Neither point is persuasive; Plaintiff's expert discovery obligations were not contingent on Defendants first producing rebuttal evidence. Indeed, this view turns the Trial Scheduling Order on its head; Defendants' expert reports were initially due on May 4, over two months after Plaintiff's satisfactory Rule 26 disclosures were initially due.[55] Likewise, when this Court entered an unopposed order providing Plaintiff until April 4 to produce his Rule 26 disclosures, Defendants were correspondingly extended two months, until July 3.[56] Thus, Defendants' alleged failure to have the plaintiff examined by a physician of their choosing or produce "any hint of contradictory evidence" is irrelevant to Plaintiff's obligations to comply with this Court's scheduling orders; under both scheduling orders, Plaintiff was required to produce satisfactory expert discovery two months before Defendants were required to produce their expert disclosures. Similarly, it cannot be concluded that Defendants were not prejudiced by the undue delays and needless difficulties in completing the discovery process;[57] while the extent of any such prejudice may be debatable, the combination of other relevant factors militates in favor of dismissing Plaintiff's complaint.

Importantly, this Court also notes that no monetary sanctions would be effective at this juncture of the case.[58] Although, as stated in *Drejka*, monetary sanctions can sometimes be an effective mechanism to "prod[]" certain cases forward,[59] especially during the discovery phase of a case,

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they may be talking settlement; or they may be having difficulty finding or paying for an expert." In this case, there is no suggestion that Plaintiff's discovery default was at all caused by settlement discussions, and Plaintiff did not need to locate an expert, as he intended to utilize his treating physician. Likewise, while attorneys are regularly "pressed for time," this does not confer *carte blanche* to disregard unambiguous (and unopposed) Scheduling Orders.

[55] Trial Scheduling Order of Dec. 15, 2010 at 2 (Lexis Transaction I.D. 35260185).

[56] *Hill v. DuShuttle, et al.*, Del. Super., C.A. No. 10C-05-178, Cooch, R.J. (Apr. 4, 2011) (ORDER).

[57] *See supra* notes 45-46.

[58] *See*, *e.g.*, *Drejka*, 15 A.2d at 1224 ("The Superior Court Rules recognize this problem and provide what is likely to be the most effective sanction-monetary penalties to be paid by the attorneys, not their clients. If monetary sanctions were imposed more frequently, attorneys would be far less likely to delay in obtaining (and thus having to pay) experts.").

[59] *Id.*

monetary sanctions are insufficient to remedy a persistent disregard of this Court's orders. This Court also observes that, often times, "discovery periods" are not particularly lengthy, which emphasizes all the more the need for adherence to scheduling orders. Stated another way, in many cases, there will not be much time available for "prod[ding]." Indeed, Plaintiff was sufficiently "prodded" by the informal two week extension and the extension provided by virtue of this Court's motion to compel.[60] If this Court permitted its Scheduling Orders to be disregarded on the basis of "thin" excuses, it "would be hard pressed to deny almost any request to modify other scheduling orders," thereby rendering such orders "meaningless guidelines and the Court's docket would soon become chaotic."[61] Here, Plaintiff's counsel has not offered even a "thin" excuse; he has simply failed to comply with the two scheduling orders issued by this Court, and he now requests this Court to countenance this default based on irrelevant considerations, such as the alleged lack of prejudice to Defendants.[62]

Finally, this Court acknowledges that Plaintiff's counsel, rather than Plaintiff, may bear much of the responsibility for the instant discovery violations. Generally, the dismissal of a plaintiff's action is not the appropriate sanction for discovery violations that were not occasioned by the plaintiff's willful disregard of this Court's orders.[63] However, in this case, Plaintiff must be precluded from calling a medical expert, separate and apart from any sanctions imposed pursuant to Rule 37(b)(2)(C).[64] Given the preclusion of plaintiff's medical expert, it follows that Plaintiff's claim must fail, as a matter of law, and Defendants are entitled to judgment in their favor.[65] Thus, whether construed as a dismissal resulting from the preclusion of Plaintiff's medical expert, or a dismissal resulting from both the preclusion of Plaintiff's medical expert and as a sanction for repeated discovery violations, the result is unchanged.

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[60] *Id.*
[61] *Todd v. Delmarva Power & Light Co.*, 2009 WL 143169, *2 (Del. 2009).
[62] *See supra* notes 55-57.
[63] *See, e.g.*, *Lehman*, 906 A.2d at 131 ("Furthermore, although as a general rule a party is burdened with its attorney's errors, this rule is 'inappropriate in th[e] instance where there is nothing to show willfulness or conscious disregard of the [orders] by plaintiff ... except the conduct of the lawyers.' Accordingly, 'the extreme remedy of dismissal with prejudice is too punitive .... [when] counsel, not plaintiff, bears much if not all responsibility for failure to comply with the Superior Court orders.'") (citations omitted).
[64] *See supra* text accompanying notes 27-29.
[65] *See supra* note 30.

CONCLUSION

Accordingly, for the reasons stated above, Defendants' motion for *in limine* is **GRANTED.** It follows that Defendants' Motion to Dismiss is **GRANTED.**

IT IS SO ORDERED.

Very truly yours,

RRC/rjc
oc: Prothonotary