

SUPERIOR COURT
of the
State of Delaware

William L. Witham, Jr.
Resident Judge

Kent County Courthouse
38 The Green
Dover, Delaware 19901
Telephone (302) 739-5332

May 11, 2005

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RE: *Fletcher v. Doe*
C.A. No. 03C-07-042 WLW

Gentlemen:

This letter order will supplement the decision of the Court announced on May 3, 2005. The scheduling order in this medical negligence case set the deadline for discovery to be on March 28, 2005. On March 24, 2005, four days prior to the mandatory deadline, Defendants filed a motion to dismiss contending that Plaintiff had failed to timely identify an expert as mandated by 11 *Del. C.* § 6853. On March 29, 2005, one day after the discovery deadline, Plaintiff identified Roberta Schussler, R.N. (“Schussler”) as his medical expert.

Defendants are seeking to exclude the testimony of Schussler because her identification was untimely. Defendants further contend that Schussler is unqualified to testify to the standard of care owed by John Doe, M.D. and Jane Doe, R.N. Defendants have also filed a motion with the Court seeking a protective order from Plaintiff’s “informal” discovery requests made on March 29, 2005.

Both parties agree that summary judgment is appropriate with respect to John Doe, M.D.; therefore, without further discussion, Defendants’ motion for summary judgment will be *granted* with respect to John Doe, M.D. This Court will briefly

discuss its decision regarding the remaining defendants.

DISCUSSION

A pre-condition to the admissibility of expert testimony at trial is that a party must comply with discovery requests directed to the identification of expert witnesses and disclosure of the substance of their expected opinions.¹ Superior Court Civil Rule 26(b)(4) provides, in pertinent part:

(4) Trial preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this Rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(I) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion....²

Rather than identify Schussler in a timely fashion, Plaintiff waited until the discovery period set by the scheduling order had expired even though Plaintiff had adequate time to make a timely identification since this case commenced nearly two years earlier. Parties must be mindful that scheduling orders are not merely guidelines but have the full force and effect as any other order of the Court. Although this Court finds Plaintiff's untimely expert identification highly vexing, this Court also recognizes that Plaintiff was only one day late in his identification and Defendants could not have been severely prejudiced as a result of this delay. Accordingly, this Court, in exercising its discretion, will not preclude Plaintiff's expert from testifying based upon Plaintiff's untimely identification. Defendants' motion for summary judgment with respect to the remaining Defendants is therefore *denied*. This ruling is not, however, a decision regarding the admissibility of such testimony. Defendants will be given ample opportunity to challenge the admissibility

¹ *Bush v. HMO of Del., Inc.*, 702 A.2d 921, 923 (Del. 1997).

² Super. Ct. Civ. R. 26.

of Schussler's testimony at a *Daubert* hearing.

Defendants have also requested a protective order from the informal discovery requests made by Plaintiff on March 29, 2005. Plaintiff's informal discovery request was untimely as it occurred after the scheduled time period for discovery had expired. This Court is unpersuaded that Plaintiff's informal discovery request was merely a second attempt or extension of Plaintiff's general request for all relevant documents. Accordingly, Defendants' motion for protection from Plaintiff's untimely and informal discovery requests contained in the letter dated March 29, 2005 is hereby *granted*.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.

WLW/dmh
oc: Prothonotary
xc: Order Distribution
File