

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

GEORGIOS T. SIDERIS,	:	
	:	C.A. No. 01C-05-039 WLW
Plaintiff,	:	
	:	
v.	:	
	:	
JESSICA B. OWEN,	:	
	:	
Defendant.	:	

Submitted: October 14, 2005
Decided: November 7, 2005

ORDER

Upon Defendant's Motion in Limine.
Granted in part; Denied in part.

Benjamin A. Schwartz, Esquire of Schwartz & Schwartz Attorneys at Law, P.A.,
Dover, Delaware; attorneys for the Plaintiff.

Arthur D. Kuhl, Esquire of Reger, Rizzo, Kavulich & Damall, LLP, Wilmington,
Delaware; attorneys for the Defendant.

WITHAM, R.J.

Defendant, Jessica Owen, filed a motion in limine seeking to bar certain testimony from trial. Specifically, she requests this Court to: (1) bar the deposition of Tas Coroneos because he was not identified as a witness until November 29, 2004, and the discovery cut off date was May 3, 2002; (2) bar the deposition of Bob Petrusak because the statement produced by Mr. Petrusak was not provided to Defendant prior to the video deposition, or at least bar hearsay testimony from the deposition; (3) bar the use of the video of Mr. Petrusak's deposition because the videographer panned the restaurant during the taping of the deposition; (4) limit the use of Dr. Magee's testimony because he prepared a report containing other opinions regarding Dr. Gelman's deposition that was not provided to Defendant; and (5) bar the use of Dr. Wowk's opinions regarding areas other than Plaintiff's knees because Plaintiff has not produced any expert report or opinions other than for his knees. Plaintiff volunteered to dub a new copy of the videotaped deposition of Mr. Petrusak to remove the panned shot of the restaurant. On the other requests, Plaintiff contends that because the omissions resulted from neither wilfulness nor conscious disregard, Defendant's motion should be denied.

For the reasons set forth below, Defendant's motion in limine is *granted* in part and *denied* in part.

Discussion

Defendant seeks to have Plaintiff sanctioned for failing to comply with the discovery order by excluding or limiting testimony of Plaintiff's witnesses. In *Heiser*

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v. Department of Public Safety,¹ the Court stated:

[t]he Court’s authority to impose sanctions for violation of its orders as part of its inherent powers is well recognized as well as explicitly granted under Superior Court Civil Rule 16. The language concerning the imposition of sanctions under Rule 16 for pre-trial orders mirrors that of Rule 37. As such, this Court has the same duty as under Rule 37; to impose sanctions that are just and reasonable. This has been interpreted to mean that the imposition of sanctions by the trial court should be tailored to achieve compliance with the specific violation of the discovery order. Furthermore, “some element of wilfulness or conscious disregard of the order” must be shown before sanctions are imposed. Also to be considered is the extent, if any, to which the party seeking discovery has been prejudiced.²

Additionally, in *In Re Rinehardt*,³ the Supreme Court opined that when ordering sanctions, the decision will depend upon the facts and circumstances of a particular case and should always be viewed in light of the functions that sanctions are intended to serve, namely punishment, deterrence or coercion.

Mr. Coroneos’ Deposition:

Defendant wants to exclude the deposition of Mr. Coroneos because Plaintiff did not identify him as a witness until November 29, 2004, which was two and a half years after the discovery cut off date. However, there is no evidence of wilfulness or conscious disregard for the order. Nor would a sanction requiring the exclusion of

¹1997 Del. Super. LEXIS 443.

²*Id.* at *3-4.

³575 A.2d 1079, 1082 (Del. 1990).

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the testimony serve a legitimate function, especially in light of the fact that Defendant did not object to the testimony until ten months after the deposition was noticed and Defendant, therefore, does not appear to be prejudiced by the cut off date violation. Consequently, this part of the motion is *denied*.

Mr. Petrusak's Deposition:

Defendant seeks to exclude the testimony of Mr. Petrusak because he produced a statement to Plaintiff that was not disclosed to Defendant until cross-examination of Mr. Petrusak. However, Defendant fails to show how he was prejudiced. Even if the statement was not produced prior to the deposition, there was a copy of the letter at the deposition. Further, the information from the letter was elicited on direct examination. Therefore, it appears that Defendant could have adequately cross-examined Mr. Petrusak on the statements he made in the letter. Moreover, there is no allegation by Defendant that failure to disclose the letter was wilful or the result of conscious disregard. Thus, this portion of the motion is *denied*.

Defendant also contends that the testimony from Page 12, line 7 to Page 13, line 15 is inadmissible hearsay. Mr. Petrusak testified:

He told me he had been in a car -- MR. KUHL: Objection, hearsay. BY MR. GALIHER: Q. Go ahead, sir. A. ***He told me he had been in a car accident in -- I believe he said Ocean City. But I know he later told me it was in Bethany Beach and they are right next to each other.*** I travel there myself, so . . . Q. Were you aware at that time, you said June of 1999, as to when that accident had occurred? A. ***Well, I learned from Georgios that it had occurred on -- on Memorial Day weekend of '99.*** And in the summer of '99, my daughter had summer classes at this ballet academy. So I would -- would take her here. And I would see -- I

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would come into Plato's to grab a lunch or something and then I would -- would see Georgios or Mike. Q. Was there a period of time in the summer of '99 when Mr. Sideris went to Greece? Do you recall that? A. You know, I'm pretty sure he went to Greece right around the same time me and my family went to the Outer Banks of North Carolina. I'm not positive of this. But I know we talked about our travels all the time. And I'm positive my family and myself went to the Outer Banks of North Carolina over the July 4th weekend in '99, plus the following week. It was like a eight- or nine-day trip, something like that.

The highlighted areas of the testimony are hearsay and, as such, are inadmissible. Consequently, this part of Defendant's motion, confined to those specific statements, is *granted*.

Videotape of Mr. Petrusak's Deposition:

This part of the motion may no longer be in issue because Plaintiff has agreed to dub a new copy of the video to excise the portion in which the restaurant is panned. Therefore, the Court will not address this objection at this time.

Dr. Magee's Deposition:

Defendant wants to bar the use of Dr. Magee's testimony from Page 17, line 13 to Page 21, line 13 because Plaintiff failed to provide a copy of a statement Dr. Magee made regarding Dr. Gelman's deposition.⁴ However, barring that portion of Dr. Magee's testimony would not serve any legitimate function as a sanction. It should have been apparent to Defendant that Dr. Magee would disagree with the

⁴Defendant neglected to include a copy of the relevant portion of the transcript. However, Plaintiff included a copy at Exhibit "D" of his response.

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Defense Medical Examiner. Further, the difference of opinion regarding causation of the knee injury should have been apparent based on Dr. Magee's report, which was provided to Defendant. Therefore, because there was no evidence of wilfulness or conscious disregard for the order, and it appears that Defendant was not prejudiced because she still had an adequate opportunity to cross-examine Dr. Magee, this portion of Defendant's motion is *denied*.

Dr. Wowk's Deposition:

Defendant requests that this Court exclude the testimony of Dr. Wowk relating to Plaintiff's back, neck and foot pain because nothing other than the knee injury was mentioned in any of the expert reports or opinions produced. Conversely, Plaintiff alleges that, "[t]he records are replete with references to Plaintiff's head, neck and back problems." Unfortunately, neither party produced any relevant copies of the records. However, upon reading the reproduced copy of the deposition located at Exhibit "D" of Defendant's motion, it is apparent that Dr. Wowk is referring to a report, specifically one dated October 22, 1999. Therefore, it seems as though Defendant did have notice of Plaintiff's other complaints, so this part of Defendant's motion is *denied*.

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Based on the foregoing, Defendant's motion in limine is *granted* in part and *denied* in part. **IT IS SO ORDERED.**

/s/ William L. Witham, Jr.

Resident Judge

WLW/dmh

oc: Prothonotary

xc: Order Distribution

File