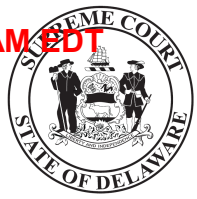

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM DICKENSON, Plaintiff Below, Appellant, v. DAVID SOPA, D.O., Defendant Below, Appellee.	))))))))	Case No. 385,2013 On Appeal from the Superior Court of the State of Delaware in and for Kent County C.A. No.: K10C-10-035 WLW

ANSWERING BRIEF OF APPELLEE DAVID SOPA, D.O.

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Dated: October 4, 2013

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NATURE OF PROCEEDINGS

This is an appeal by Plaintiff Below William Dickenson ("Plaintiff") of an Order (the "Order") entered by the Superior Court of the State of Delaware in and for Kent County (the "Superior Court") granting Defendant Below David Sopa, D.O.'s ("Dr. Sopa") Motion for Summary Judgment. Plaintiff initiated the underlying medical malpractice action on October 22, 2010, alleging that the injuries sustained by Plaintiff when he fell while walking with the aid of his crutches were the result of a hip replacement surgery performed by Dr. Sopa a few days prior to the fall.

The Superior Court issued a Scheduling Order on April 24, 2012, which established, *inter alia*, October 15, 2012,[1] as the deadline by which Plaintiff was to identify experts. (A-32). Three days prior to the October 15th deadline, a representative of Plaintiff's counsel contacted Dr. Sopa's counsel asking to extend the deadline to October 31, 2012 for the identification of liability experts, and to November 15, 2012 for the identification of economic experts. Dr. Sopa's counsel granted these requests.

However, when Plaintiff failed to identify his experts and made no additional contact with Dr. Sopa's counsel for more than two weeks beyond the

[1] Although Plaintiff's Opening Brief (as defined below) identifies October 31, 2012 as the deadline set forth in the Scheduling Order (Plaintiff's Opening Brief, p. 2), the Scheduling Order set the deadline as October 15, 2012. (A-32).

agreed extension, Dr. Sopa filed a Motion to Dismiss on November 16, 2012 (the "Motion to Dismiss"). Later that day,[2] Plaintiff faxed a copy of a letter (the "Dr. Slutsky Letter") addressed to Plaintiff's counsel from Bradford A. Slutsky, M.D. ("Dr. Slutsky"), containing an opinion from Dr. Slutsky regarding whether there were any breaches of the standard of care. (Letter and opinion attached as Exhibit A). In the cover letter to the facsimile, Plaintiff's counsel noted that he was "in the process of clarifying a few things" and was "awaiting [Dr. Slutsky's] supplemental report." (Exhibit A). However, as of the date of this filing, Dr. Sopa's counsel still has not received the specifically promised supplemental report.

Plaintiff claims he provided the awaited "clarification" by way of a letter drafted by Plaintiff's counsel on or about November 29, 2012 (the "Whitehurst Letter"). (A-36, A-37). The Whitehurst Letter begins: "As I have previously indicated, I have been waiting for clarification from Dr. Slutsky regarding his report. Please take note that it is Dr. Slutsky's opinion that, according to his review of the medical records, although he cannot say with 100% certainty, he believes it is more likely than not that the acetabular implant was malpositioned." (A-36). Following this statement, there are a number of remarks which read as

[2] Contrary to Plaintiff's assertion that the Dr. Slutsky Letter was sent to Dr. Sopa's counsel on November 14, 2012 (Plaintiff's Opening Brief, p. 2), the time stamp on the fax reveals that the Dr. Slutsky Letter was not sent until November 16, 2012 at approximately 6:24 p.m. (Exhibit A). As noted on the cover letter to the fax, the Dr. Slutsky Letter was delivered by facsimile only, making the 6:24 p.m. time stamp its exclusive arrival time. *Id.*

observations by Plaintiff's counsel (e.g., "A review of Dr. Choy's report indicates...," "A review of his record indicates...," "This essentially means..."). *Id.* The only other reference to Dr. Slutsky's opinion presents at the conclusion of the single, block paragraph of text on the first page of the Whitehurst Letter, and states that, due to the unavailability of the same information which was a concern in the Dr. Slutsky Letter, "Dr. Slutsky cannot say with 100% certainty that [the acetabular implant] was malpositioned, but he believes it is highly likely, to a reasonable degree of medical probability, that it was placed in the wrong spot." *Id.*

Nothing in the Whitehurst Letter identified whether Plaintiff's counsel spoke with Dr. Slutsky again regarding the Dr. Slutsky Letter, and if so, when such conversation took place and what new and/or additional information (if any) Dr. Slutsky reviewed prior to such conversation. Curiously, the observations in the heart of the one-paragraph discussion focus exclusively on Dr. Choy's reports, all of which had been available to Plaintiff from the inception of the case more than two years prior to the delivery of the Dr. Slutsky Letter. (A-36).

Following delivery of the Whitehurst Letter, on December 4, 2012, Plaintiff filed his Response to the Motion to Dismiss (the "Motion to Dismiss Response") (attached as Exhibit B), wherein Plaintiff claims for the first time that delivery of the Dr. Slutsky Letter was delayed because "Dr. Slutsky left, upon information and belief, for Europe for vacation on October 23rd, thereby delaying this clarification."

Plaintiff does not claim in the Motion to Dismiss Response that the vacation delayed delivery of the report altogether – to the contrary, he admits therein to receiving the Dr. Slutsky Letter on October 22, 2012, over a week prior to the expiration of the extended deadline. (Exhibit B). Notwithstanding the timely delivery of the report to Plaintiff, Plaintiff provided no indication in the Motion to Dismiss Response as to why Plaintiff had not contacted Dr. Sopa's counsel to request a further extension of time upon discovering that Dr. Slutsky was on vacation (notwithstanding Dr. Sopa's previous courtesy in granting such a request), why Plaintiff did not timely provide a copy of the Dr. Slutsky Letter with a notation that Plaintiff was awaiting further clarification and a supplemental report when Dr. Slutsky returned from vacation, or why Plaintiff did not inform Dr. Sopa's counsel of the reason for the delay on the cover letter to the November 16th facsimile containing the untimely Dr. Slutsky Letter or in the November 29th Whitehurst Letter. Instead, there was no communication from Plaintiff to Defendant regarding the expert identification deadline from the date of confirmation of the extension of the deadline through November 16, 2012, the date on which Dr. Sopa filed the Motion to Dismiss.

In a supplemental memorandum authorized by the Superior Court,[3] Dr. Sopa explained that the case should either be dismissed under Superior Court Civil Rule 41(b), which allows a defendant to move to dismiss an action for a plaintiff's failure to prosecute or comply with the Court's rules (specifically as to Plaintiff, for Plaintiff's repeated discovery violations), or that summary judgment was appropriate due to Plaintiff's failure of proof regarding an essential element of Plaintiff's claim (specifically, due to Plaintiff's failure to produce an expert report identifying the cause of Plaintiff's injury with the requisite degree of certainty). Plaintiff responded to the supplemental memorandum on February 6, 2013.

On June 20, 2013, the Superior Court denied the Motion to Dismiss, but granted Dr. Sopa's Motion for Summary Judgment, reasoning that: (i) in a case for medical negligence, a plaintiff must present expert medical testimony on, among other things, the cause of the alleged personal injury; (ii) there had been adequate time for discovery; and (iii) the letter from Dr. Slutsky opining that "there is no way to be 100% certain that the position of the cup was related to the way it was placed in by the surgeon or to the fall" failed to meet the required element of proof of causation via expert medical testimony. (Order, pp. 7-9).

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[3] This additional memorandum was authorized, at least in part, to give Dr. Sopa an opportunity to respond to the Dr. Slutsky Letter, which had only been provided to Dr. Sopa after the Motion to Dismiss was filed.

Plaintiff filed the instant appeal on July 19, 2013, filed his Opening Brief on September 5, 2013, and filed an Amended Opening Brief ("Plaintiff's Opening Brief") on September 12, 2013.

SUMMARY OF ARGUMENT

1. Denied. The Superior Court's ruling that Plaintiff failed to produce sufficient evidence to establish an essential element of his claim was supported by both the facts and the law, and the appeal on this issue should be dismissed. Despite having sufficient time to do so, Plaintiff has failed to provide the expert medical testimony required under 18 *Del. C.* § 6853 regarding the cause of Plaintiff's injuries and, accordingly, Plaintiff cannot succeed on Plaintiff's action.

COUNTER-STATEMENT OF FACTS

On October 23, 2008, Dr. Sopa performed a hip replacement on Plaintiff. Plaintiff was discharged and began outpatient physical therapy a few days later and was making excellent progress. On October 31, 2008, while practicing walking on crutches, Plaintiff fell. As Plaintiff's support for his argument that the hip joint failed before the fall – as opposed to the more obvious and more medically likely circumstance that Plaintiff's fall dislocated the just-performed joint replacement – Plaintiff has offered a letter from Dr. Slutsky[4] to Plaintiff's counsel in which Dr. Slutsky opined that the hip replacement was out of place, but indicated that he could not "be 100% certain that the position of the cup was related to the way it was placed in by the surgeon or to the fall." (Exhibit A). Approximately two weeks after providing the Dr. Slutsky Letter to Dr. Sopa, Plaintiff sent the Whitehurst Letter, a letter drafted by Plaintiff's counsel which provides that Dr. Slutsky's opinion has changed, without identifying any intervening new or additional facts or circumstances brought to Dr. Slutsky's attention, to believing

[4] Curiously, although Plaintiff's Opening Brief offers hearsay statements from Dr. Wilson Choy regarding the surgery performed by Dr. Sopa, Plaintiff did not identify Dr. Choy as an expert or provide any potentially admissible information from Dr. Choy which might support Plaintiff's claim as to the cause of his injuries.

that "it is highly likely, to a reasonable degree of medical probability, that [the acetabular implant] was placed in the wrong spot."[5] (A-36).

As set forth in greater detail below, the Dr. Slutsky Letter is insufficient to establish the cause of Plaintiff's fall to the requisite level of medical certainty and the Whitehurst Letter should not be considered due to numerous, significant deficiencies. However, even if the Whitehurst Letter is taken into account, it, too, fails to provide expert testimony on the cause of Plaintiff's injuries and, accordingly, Plaintiff's appeal should be dismissed.

[5] The Whitehurst Letter suggests some qualification to the opinion that counsel expects from Dr. Slutsky. Such an effort is ineffective and should not distract the Court from (1) the inexcusable lateness of the original expert identification, and (2) the fact that now, ten months later, there still has been no compliance with Rule 26 in form or in substance.

ARGUMENT

I. THE SUPERIOR COURT DID NOT ERR IN GRANTING DR. SOPA'S MOTION FOR SUMMARY JUDGMENT DUE TO PLAINTIFF'S FAILURE TO ESTABLISH AN ESSENTIAL ELEMENT OF HIS CLAIM, AND THIS APPEAL SHOULD BE DISMISSED

1. Question Presented. Does Plaintiff's failure to produce an expert report identifying Dr. Sopa as the cause of Plaintiff's injuries necessitate judgment in Dr. Sopa's favor? Answer: Yes.

2. Scope of Review. The review of an appeal on a grant of summary judgment is *de novo*. *See Pike Creek Chiropractic Ctr. v. Robinson*, 637 A.2d 418 (Del. 1994).

3. Merits of Argument. Summary judgment is proper when, considering all the evidence in a light most favorable to the non-moving party, there is no genuine issue of material fact that would require a trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In medical malpractice actions, "[n]o liability shall be based upon asserted negligence unless expert medical testimony is presented as to the alleged deviation from the applicable standard of care in the specific circumstances of the case **and as to the causation of the alleged personal injury** or death[.]" 18 Del. C. § 6853 (emphasis added). Expert discovery closed on October 31, 2012, and Plaintiff has not provided any expert medical testimony that Dr. Sopa was the cause of Plaintiff's injuries to a reasonable degree of medical certainty.

In fact, the only report provided by Plaintiff, the Dr. Slutsky Letter, does not opine with any degree of certainty that Dr. Sopa was the cause of Plaintiff's injuries. Although Dr. Slutsky expresses two opinions regarding the standard of care, his opinion that the standard of care would be to obtain a post-operative x-ray following a total hip replacement (which was not done) and that he is unable to determine whether the acetabular component was malpositioned prior to the fall, are not linked in the Dr. Slutsky Letter to Plaintiff's injuries. (Exhibit A). Without this link, or some expert testimony "as to the causation of the alleged personal injury," Plaintiff cannot satisfy § 6853's requirements. 18 *Del. C.* § 6853.

Perhaps in an implicit recognition of this fact, Plaintiff does not rely upon the Dr. Slutsky Letter in Plaintiff's Opening Brief. Rather, Plaintiff relies upon a letter drafted by his counsel purporting to outline a conversation between Plaintiff's counsel and Dr. Slutsky regarding Dr. Slutsky's opinion. The sufficiency of such a statement to fill the gaps in Dr. Slutsky's Letter is dubious at best for multiple reasons.

First, the Whitehurst Letter was drafted by counsel to the Plaintiff, with no indication that Dr. Slutsky reviewed the letter, much less approved of or generated its contents. Dr. Slutsky did not sign the letter, nor did he sign any statement indicating that he approved of the contents of the letter. In fact, even to date there

is no indication that Dr. Slutsky reviewed the letter and agreed with the recitation of his opinion as set forth therein.

Second, although Plaintiff's counsel originally indicated that he was awaiting "clarification" on the Dr. Slutsky Letter, the Whitehurst Letter sets forth a different opinion from the Dr. Slutsky Letter without identifying any intervening medical records reviewed or factual developments brought to Dr. Slutsky's attention. Moreover, the Whitehurst Letter sets forth the vast majority of this information in the form of observations and conclusions, with no indication that Dr. Slutsky was the source of such observations and conclusions. To the contrary, the language is formulated in a manner which implies that the observations and conclusions reflect the thoughts of Plaintiff's counsel, with sentences beginning with such phrases as "A review of Dr. Choy's report" and "A review of the record" and "This is also confirmed by Dr. Choy's notation." Considering that Plaintiff's counsel was acutely aware of Dr. Sopa's counsel's dissatisfaction with the sufficiency of the Dr. Slutsky Letter, the Whitehurst Letter is curiously thin on assurances that it is the product of Dr. Slutsky.

Third, and perhaps most importantly, even if the letter were to be taken at face value, there is nothing in its contents which states, to a reasonable degree of medical certainty, that a breach of the standard of care by Dr. Sopa caused Plaintiff's injuries. Instead, the only opinion the Whitehurst Letter identifies as

being held to the requisite "reasonable degree of medical probability" is that the acetabular component was "placed in the wrong spot." (A-36). However, there is nothing tying this alleged misplacement to the fall or the resulting injuries. In fact, there is nothing in the Whitehurst Letter opining that such misplacement was a result of negligence, rather than an accepted complication or a known consequence of the replacement. Our medical malpractice law requires a practitioner familiar with the standard of care and the effects of various circumstances to inform us as to whether a particular action was negligent or constitutes a breach from the standard of care, rather than just an unexpected outcome. *See, e.g.*, *Balan v. Horner*, 706 A.2d 518, 521 (Del. 1998) ("It is settled law that 'a plaintiff cannot use evidence that a medical procedure had an unusual outcome to create an inference that the proper standard of care was not exercised.'") (quoting *Timblin v. Kent Gen. Hosp. (Inc.)*, 640 A.2d 1021, 1024 (Del. 1994)) (additional citations omitted); *see also DiFilippo v. Preston*, 173 A.2d 333, 338 (Del. 1961) (recognizing that "[t]he doctrine of *res ipsa loquitor*... is not applicable in malpractice actions in which the only proof is the fact that the treatment of the patient terminated with poor results.") (citations omitted). The Whitehurst Letter does not state that the alleged misplacement of the acetabular component was a result of negligent care.

Moreover, even if the conclusion that the component was misplaced was, in and of itself, negligence, in neither letter was there an opinion of Dr. Slutsky as to

whether or how the misplacement caused Plaintiff's injuries. Did the placement cause the fall? Did it make Plaintiff's injuries worse than they would have been had Plaintiff fallen with a somewhat different placement? Section 6853 requires these questions to be answered by an expert and, nearly a year after the close of expert discovery, they have not been. Without an expert linking a purported breach of the standard of care by Dr. Sopa to Plaintiff's injuries, Plaintiff cannot prevail. The complete absence of the required proof for this essential element of Plaintiff's claim, despite having sufficient time to do so, cannot be overlooked. Indeed, it was precisely this failure of proof that formed the basis for the Superior Court's grant of summary judgment. *See* Order, p. 8 (concluding that Plaintiff "cannot establish causation in the manner required by the statute" because "Dr. Slutsky was the only expert that Plaintiff offered in defense of Defendants' motion for summary judgment" and "Dr. Slutsky does not opine with **any degree of certainty** that Defendant's alleged negligence was the cause of Plaintiff's injuries.") (emphasis added).

This Court has previously affirmed the grant of summary judgment in similar circumstances. In particular, the instant case is strikingly similar to *Valentine v. Mark*,[6] wherein the Superior Court granted a motion for summary judgment because the plaintiff's expert admitted that he could not say to a

[6] 2004 WL 2419131 (Del. Super. Ct. Oct. 20, 2004), *aff'd*, 873 A.2d 1099 (Del. 2005).

reasonable degree of medical certainty that the defendant's actions caused the patient's death. *Id.* at *2. In *Valentine*, the patient experienced a series of seizures, leading him to seek care from Dr. Michael Mark, who diagnosed the cause as a stroke. *Id.* at *1. After suffering subsequent seizures, the patient sought medical care from a different provider, who identified a brain tumor as the cause of the seizures, and the patient passed away a few months later. *Id.*

Although the expert in *Valentine* determined that there had been a breach of the duty of care, the expert declined to opine as to whether the breach had an effect on the patient's condition due to the fact that the brain tumor was inoperable and would have led to a swift decline and, ultimately, death, even if it had been discovered at the patient's first meeting with Dr. Mark. *Valentine*, 2004 WL 2419131, at *2. Because the plaintiff's sole expert was unwilling to testify as to causation, the Court granted the motion for summary judgment. This Court subsequently affirmed that decision.

Similarly, in *Manerchia v. Kirkwood Fitness & Racquetball Clubs*,[7] the Superior Court granted a motion for summary judgment where the plaintiff produced a late, conclusory expert report which failed to explain whether or how the standard of care was breached and how such breach caused the plaintiff's illness. The plaintiff in *Manerchia* claimed that the defendant's negligence in

[7] 2009 WL 2852600, at *1-2 (Del. Super. Ct. June 23, 2009), *aff'd* 992 A.2d 1237 (Del. 2010).

maintaining its hot tub gave the plaintiff cellulitis, a serious and debilitating condition. *Id.* at *1. Following multiple delays and extensions, the plaintiff produced an expert report which concluded simply that the "cellulitis [the plaintiff] developed was a direct result of his immersion in the hot tub at [the defendant's] Health Club in February 2006." *Id.* at *2. The Court granted summary judgment, finding the report insufficient because it failed to explain "a specific way that Defendant breached the standard of care required" and offered no explanation as to how the expert determined that the hot tub caused the plaintiff's cellulitis. *Id.*

So, too, here, both the Dr. Slutsky Letter and the Whitehurst Letter fail to opine as to the cause of Plaintiff's injury. To the contrary, the Dr. Slutsky Letter does not discuss the cause of Plaintiff's injuries, and the Whitehurst Letter only opines that the component was misplaced, but does not explain whether such misplacement rose to the level of negligence or how such misplacement caused Plaintiff's injuries.

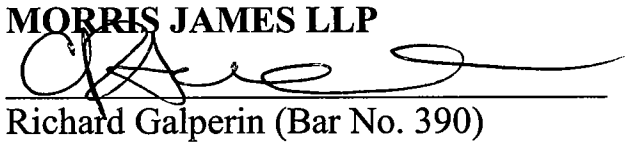
Accordingly, because Plaintiff has failed to comply with 18 *Del. C.* § 6853, summary judgment should be granted in Dr. Sopa's favor.

CONCLUSION

Section 6853 of Title 18 of the Delaware Code provides that "[n]o liability shall be based upon asserted negligence" absent expert testimony as to both negligence and causation. As set forth above, Plaintiff has not provided expert testimony as to either element. For these reasons, Dr. Sopa respectfully submits that this appeal should be dismissed, together with costs and such additional relief for Dr. Sopa as this Court deems just and proper.

Respectfully submitted,

MORRIS JAMES LLP



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Dated: October 4, 2013

CERTIFICATE OF SERVICE

I, Courtney Hamilton, hereby certify that on this 4th day of October, 2013, I have caused the following documents to be served electronically on the parties listed below:

1. **Answering Brief of Appellee David Sopa, D.O.**
2. **Certificate of Service**

Online service to:

Charles E. Whitehurst, Esquire
Young, Malmberg & Howard, P.A.
30 The Green
Dover, DE 19901

Courtney Hamilton (#5432)

EXHIBIT A

Law Offices of
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November 16, 2012

VIA FAX ONLY
(302) 571-1750

Mr. Richard Galperin, Esquire
Morris James, LLP
500 Delaware Avenue, Suite 1500
P.O. Box 2306
Wilmington, DE 19899-2306

RE: Dickenson v. Sopa

Dear Rich:

I am in receipt of your Motion to Dismiss. Enclosed please find Dr. Bradford A. Slutsky, M.D.'s report dated October 22, 2012, along with a copy of his C.V. I had not forwarded this to you previously because I am in the process of clarifying a few things contained in the narrative and am currently awaiting his supplemental report. Thank you.

Yours truly,

CHARLES E. WHITEHURST, JR., ESQUIRE

CEW/keb
Enclosures

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1840 HIGHWAY 441 NORTH
OKEECHOBEE, FLORIDA 34972
TELEPHONE: (863) 763-6100
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October 22, 2012

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Phone: (302) 672-5600
Fax: (302) 672-7336

Dear Mr. Whitehurst,

It was a pleasure speaking to you on the phone today concerning the case of Mr. William Dickenson. After reviewing the records and x-rays that I was provided, it does appear in my opinion that the acetabular component of his right total hip replacement is not in good position. Specifically it is not fully seated and according to some of the reports may have had too much version. Unfortunately the x-rays that were provided to me are all post operative x-rays that were done after the patient apparently sustained a fall and went to the Emergency Room. Upon reviewing those x-rays I do not see any obvious loosening of the two screws that were placed. It looks like the superior aspect of the acetabulum was fully seated. If this had dislodged I would expect to possibly see this on the plain x-rays and the CT scan that was provided to me. Unfortunately, there was never a post operative x-ray taken in the Operating Room, Recovery Room, or in the hospital prior to discharge.

It is my professional opinion that the standard of care would be to obtain a post operative x-ray if not in the Operating Room, then in the Recovery Room and most definitely prior to discharge from the hospital after a total hip replacement. If one was done it would make it much easier to determine if the malposition of the cup acetabular component was related to the fall or was placed in that way. Without those x-rays to compare there is no way to be 100% certain that the position of the cup was related to the way it was placed in by the surgeon or to the fall. I would be happy to provide more detail and review any further records.

Sincerely,

Bradford A. Slutsky, M.D.
BS/hs

EXHIBIT B

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

WILLIAM DICKENSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No.: K10C-10-035 (WLW)
	)	
DAVID SOPA, D.O.,	)	
	)	TRIAL BY JURY OF 12 DEMANDED
Defendant.	)	

RESPONSE TO DEFENDANT'S MOTION TO DISMISS

COMES NOW the Plaintiff, William Dickenson, by and through his attorneys, Young, Malmberg & Howard, P.A., and responds to Defendant's Motion to Dismiss as follows, to wit:

1. Pursuant to the Scheduling Order, Plaintiff was to produce an expert report by October 12, 2012.

2. Counsel agreed to extend the time for Plaintiff to produce a liability expert until October 31, 2012.

3. Plaintiff received its expert report from Dr. Bradford Slutsky on October 22, 2012; however, the report needed to be clarified. Dr. Slutsky left, upon information and belief, for Europe for vacation on October 23rd, thereby delaying this clarification.

4. The report was sent to Mr. Galperin on November 16, 2012. The aforementioned clarification was sent to him on November 29, 2012. The report may have to be amended again after the deposition of Dr. Wilson Choy is taken. Dr. Choy was originally scheduled to be deposed in August; however, it was canceled the morning of the deposition by the doctor's office.

5. There is no prejudice to the Defendant by this short delay. Counsel will extend this same

courtesy to Defendant regarding his expert report.

WHEREFORE, the Plaintiff, William Dickenson, prays Defendant's Motion to Dismiss be DENIED.

YOUNG, MALMBERG & HOWARD, P.A.

BY: /s/ Charles E. Whitehurst, Jr., Esquire
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Attorney for Plaintiff

DATED: December 4, 2012