

Counsel for the Commonwealth and the defendant are directed to confer with the Court Administrator and set a day certain for hearing, if necessary, and argument on the remaining counts of defendant's pre-trial motion.

Exceptions are granted the defendant.

MYERS v. WALDRON, C.P. Franklin County Branch, No. A.D. 1982-340

Medical Malpractice - Discovery - Sanctions

1. Where the plaintiff's failure to answer interrogatories is due to an extenuating circumstance beyond the control of the plaintiff, sanctions are not appropriate.

2. For sanctions to be imposed prejudice to the complaining party must be shown.

Denis M. DiLoreto, Esquire, Counsel for Plaintiffs

Kevin E. Osborne, Esquire, Counsel for Defendant

OPINION AND ORDER

KELLER, J., October 9, 1984:

On October 31, 1980, the defendant, Dr. Vincent D. Waldron, M.D. performed a total hip replacement surgery on plaintiff, Daniel M. Myers at the Waynesboro Hospital in Waynesboro, Pennsylvania. During the course of the operation the shaft of his femur was fractured. On December 23, 1982, plaintiff and his wife, Anna V. Myers filed suit in trespass against both Dr. Waldron and the Waynesboro Hospital alleging medical malpractice. Incidental to the discovery process and pursuant to Pa. R.C.P. 4003.5(a)(1) the defendant requested that plaintiffs identify the expert witness who they intended to call at trial. In addition, defendant requested answers to interrogatories propounded to that expert witness. Both requests were made on:

1. February 18, 1983
2. June 22, 1983
3. January 27, 1984
4. March 12, 1984



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LEGAL NOTICES, cont.

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Court House
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By Thomas B. Steiger, Jr.
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56 South Main Street
Mercersburg, PA 17236

7-5, 7-12, 7-19

LEGAL NOTICES, cont.

By June 21, 1984, plaintiffs had neither revealed the identity of their expert witness nor provided answers to the interrogatories. On June 23, 1984, defendant filed a motion alleging these facts and praying this Court order plaintiffs to formally identify the expert witness that they intended to have testify on their behalf at trial and to have him respond to the outstanding expert interrogatories within twenty days. In the absence of such timely response defendant requested the imposition of sanctions upon plaintiffs by preventing them from offering any expert testimony at trial of this case.

On June 28, 1984, defendant filed a praecipe listing the case for argument at the August 2, 1984 Argument Court. On July 31, 1984, plaintiffs filed an answer to defendant's motion to compel answers to expert interrogatories which admitted all allegations in defendant's motion and which also identified Dr. Tom J. Altizer of 701 East First Street, Hagerstown, Maryland as the expert witness who they expected to call and to testify on their behalf at trial, and who they expected would provide responses to defendant's interrogatories. In addition, plaintiffs requested this Court allow Dr. Altizer to postpone his response to defendant's interrogatories pending completion of a review and evaluation of hip replacement surgery performed by the defendant at the Washington County Hospital in Hagerstown, Maryland, where Dr. Altizer is Chief of Surgery. Finally, plaintiffs alleged that diligent efforts were made to retain Dr. Altizer and that repeated requests for his response to defendant's interrogatories have been made. However, due to the incomplete nature of the evaluation of defendant's hip replacement surgery at Washington County Hospital, Dr. Altizer has been unable to provide those responses. For that reason, plaintiffs requested this Court to deny defendant's motion to compel a response to expert interrogatories.

Briefs were filed and arguments heard as scheduled. The matter is now ripe for disposition.

Defendant relies upon Pa. R.C.P. 4003.5(a)(1) which provides inter alia:

A party may through interrogatories require:

(a) Any other party to identify each person whom the other party expects to call as an expert witness at trial and to state the subject matter which the expert is expected to testify and;

(b) The other party to have each expert so identified by him state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. The party answering the interrogatories may file as his answer a report of the expert or have the interrogatories answered by his expert. The answer or separate report shall be signed by the expert.

Defendant contends that application of this rule to the facts of the case entitles him to the name of plaintiffs' witness and the answers to interrogatories propounded. Upon failure of plaintiffs to comply with the rule, defendant contends that they should be precluded from using any expert testimony at trial.

Pa. R.C.P. 4003.5(b) provides:

(b) If the identity of an expert witness is not disclosed in compliance with subdivision (a)(1) of this rule, he shall not be permitted to testify on behalf of the defaulting party at the trial of the action. However, if the failure to disclose the identity of the witness is the result of extenuating circumstances beyond the control of the defaulting party, the court may grant a continuance or other appropriate relief.

In the case at bar, plaintiffs have now disclosed the identity of their expert witness. We consider Dr. Altizer's reluctance to answer questions concerning the facts of this case until the completion of the evaluation of defendant's hip replacement surgery at Washington County Hospital to be an extenuating circumstance beyond the control of the plaintiff which has prevented them from obtaining the requisite responses. For these reasons we do not consider the immediate imposition of the sanctions requested to be appropriate.

In *Royster v. McGowen Ford, Inc.*, 294 Pa. Super. 160 (1982), the trial court granted defendant's motion for judgment of non pros on the grounds that plaintiff failed to answer defendant's expert interrogatories. The Superior Court reversed holding:

In order for a party to obtain a sanction as a result of another party's failure reasonably to disclose the identity of an expert witness and the substance of the expert's report, prejudice to the complaining party must be shown . . .

Therefore, assuming that a party has not acted in bad faith and has not misrepresented the existence of an expert expected to be



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called at trial, no sanction should be imposed unless the complaining party shows that he has been prejudiced from properly preparing his case for trial as a result of a dilatory disclosure . . . Id. at 168-169.

None of the facts presented to this Court reveal any evidence of bad faith or misrepresentation by the plaintiffs of the existence of an expert witness. Moreover, since the matter has not been listed for trial, we do not perceive that the defendant has been prejudiced in the preparation of his case. Therefore, we are not prepared at this time to conditionally impose sanctions or determine what those requested sanctions should be.

This present decision not to impose sanctions does not, however, imply that plaintiffs may with impunity delay the disposition of this case by failing to answer the expert interrogatories addressed to plaintiffs' expert must be answered promptly or plaintiffs should without delay seek the assistance of a more cooperative expert witness.

If the plaintiffs' response is not forthcoming within thirty days, and plaintiffs have not selected another expert and provided defendant with his name and a reasonable time schedule for providing answers to the interrogatories, we will entertain a renewed motion for the imposition of appropriate sanctions.

ORDER OF COURT

NOW, this 9th day of October, 1984, the motion of Dr. Vincent D. Waldron, defendant, to compel plaintiffs' expert witness, Dr. Tom J. Altizer, to respond to defendant's interrogatories is granted, and his answers shall be filed and served within thirty (30) days of this date.

The defendant's motion for the imposition of specific automatic sanctions is denied. The Court will entertain a renewed motion for the imposition of sanctions upon plaintiffs' failure to comply with this order.

JOHNSON v. JOHNSON, C.P. Franklin County Branch, F.R.
1982 - 854-S

Support - Post-Nuptial Agreement

1. A separation agreement may terminate the obligation of support while the parties remain married.

George E. Wenger, Esquire, Counsel for Plaintiff

H. Anthony Adams, Esquire, Counsel for Defendant

OPINION AND ORDER

KELLER, J., October 18, 1984:

On November 16, 1982, the complaint for support of Judy Johnson was presented to the Court and an order signed directing the plaintiff and defendant to appear before Robert J. Woods, Domestic Relations Hearing Officer on December 20, 1982 for a conference so the officer could recommend an appropriate support order. The conference was held as scheduled and on the recommendation of the Hearing Officer an order was entered on December 22, 1982 requiring the defendant to pay to the plaintiff on December 27, 1982, and each Monday thereafter the sum of \$41.00 plus \$.50 service charge, and further the defendant was required to maintain existing medical coverage on the plaintiff. On October 27, 1983, the defendant's petition to terminate the said support order and remit arrears alleging that the defendant's expenses had increased by reason of being responsible for the three children of the marriage and a decrease in his earnings was presented to the Court, and an order signed setting December 12, 1983 at 9:00 a.m. as the date and time for hearing before the Domestic Relations Hearing Officer. The Hearing Officer found that \$1.00 per 100 lbs. of milk he is producing on his dairy farm is being deducted under a government program, and the defendant is supporting the three children of the marriage who live with him on a full-time basis. On December 21, 1983, the Court entered an order requiring the defendant to pay on December 19, 1983, and each Monday thereafter the sum of \$25.00 plus \$.50 service charge and an additional \$5.00 to be applied to the arrearage accumulated in the case. The order also noted that the defendant's weekly net income was \$120.00 and the plaintiff had a weekly earning capacity of \$50.00.

On June 14, 1984, Robert Lee Johnson filed his complaint against Judy E. Johnson for support from her for the maintenance of their three minor children. An order was signed June 14, 1984