CHRISTIAN, HILL, ADAMS AND KEENER: KEY LITIGATION DECISIONS OF 2013

Douglas J. Cummings, Jr., Johnna M. Darby, Mary F. Dugan*

On January 2, 2013, the Delaware Supreme Court issued four decisions in which it dealt with the trial court's dismissal of a plaintiff's claims that were not heard on their merits.[1]

I. SUPREME COURT DECISIONS OF JANUARY 2, 2013

A. *Christian v. Counseling Resource Associates, Inc.*

In *Christian v. Counseling Resource Associates, Inc.*,[2] the Delaware Supreme Court was faced with balancing the "strong policy in favor of deciding cases on the merits against the need to resolve the trial court's high volume of cases in a timely manner."[3] As it did in *Hill* and *Keener* (both discussed below), relying on *Drejka v. Hitchens Tire Service, Inc.*,[4] the Court reversed the trial court's dismissal.

Plaintiff Joann Christian ("Christian"), individually and on behalf of the estate of her deceased husband, Bruce, filed suit in October 2009 against mental health counselor J. Roy Cannon and his professional practice, Counseling

* Douglas J. Cummings, Jr. is an associate with Wilks, Lukoff & Bracegirdle, LLC and focuses his practice on complex civil litigation, which includes the resolution of corporate governance, securities and contract disputes, before all Delaware state and federal courts. Johnna M. Darby is the Co-Founder and Managing Partner of DARBY | BROWN-EDWARDS LLC and heads its Business and Corporate Litigation Department. She represents various entities in corporate bankruptcy/restructuring matters, as well as complex commercial litigation matters, before all of Delaware's state and federal courts. Mary Dugan is an associate at Young Conaway Stargatt & Taylor, LLP, where she focuses on complex commercial litigation. Mary has represented entities and individuals in matters before all of Delaware's state and federal courts.

1. Christian v. Counseling Resource Assoc., Inc., 60 A.3d 1083 (Del. 2013); Hill v. DeShuttle, 58 A.3d 403 (Del. 2013); Adams v. Aidoo, 58 A.3d 410 (Del. 2013); Keener v. Isken, 58 A.3d 407 (Del. 2013) (collectively referred to hereinafter as *"Christian"*). Of these four decisions, *Adams* is the only case where the Supreme Court affirmed the lower court's dismissal. This may be due, in part, to the degree of detail in which the Court directly communicated with a *pro se* plaintiff to encourage meaningful participation in discovery and compliance with scheduling deadlines. Conversely, the three remaining decisions were reversed, in part, to the Court's desire to preserve the plaintiff's claims because they were not heard on the merits. Notwithstanding, *Hill*, *Christian* and *Keener* each were reversed for different reasons.

2. 60 A.3d 1083 (Del. 2013).

3. *Id.* at 1085. As the Court noted, *Christian* was one of four cases it considered together.

4. 15 A.3d 1221 (Del. 2010). In *Christian*, the Court noted that it held in *Drejka* that a trial court should balance six factors when confronted with the issue of dismissing a case other than on its merits:

> (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 conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal…; and (6) the meritoriousness of the claim or defense.

Christian, 60 A.3d at 1087.

Resource Associates, Inc. ("Cannon"). In March 2010, Christian filed a separate suit against Dr. Arlen Stone and his professional practice, The Family Practice Center of New Castle, P.A., ("Stone," with Cannon, collectively "Defendants"). Both cases alleged claims for failure to timely diagnose, treat and monitor Bruce Christian, which allegedly caused his death by suicide on January 8, 2008.

Prior to Christian's filing of suit against Stone, the trial court entered a trial scheduling order setting an August 1, 2011 trial date, with a December 3, 2010 deadline for producing expert reports. By order dated June 24, 2010, the trial court consolidated the two cases, but did not issue a new scheduling order.[5] As discovery progressed, Christian's counsel became aware that he had a conflict in continuing to represent her and, in September 2010, notified defense counsel that substitute counsel was reviewing the case to take over Christian's representation. Before incoming counsel appeared and the deadline for Christian to produce expert reports expired, Christian's counsel requested and was granted an extension of that deadline until January 3, 2011. The parties memorialized this extension in an amended scheduling order entered by the Court. On December 20, 2010, Christian's counsel requested that Defendants further extend the deadline for the production of expert reports until January 31, 2011, and Defendants agreed. This time, however, the parties did not take steps to amend the trial scheduling order to reflect this second extension or otherwise notify the court. Just days later, Christian's new counsel entered his appearance.

In February 2011, Christian's new counsel wrote to the trial court requesting a scheduling conference and alerting the court to potential conflicts with the trial date. In a letter response, the trial court denied this request and notified the parties that the trial date would not be moved.[6] In May and June 2011, Christian produced disclosures and reports for four separate experts and offered dates for the depositions of these experts to occur in June and July 2011.

The Defendants filed a motion *in limine* to preclude Christian from offering expert testimony at trial based upon the argument that Christian's production of the reports in May and June was untimely. The trial court granted Defendants' motion in a telephonic hearing prior to the pretrial conference. The Defendants then moved for summary judgment because, as a matter of law, they argued, Christian could not prevail in a medical malpractice case absent the introduction of expert testimony. The trial court granted the Defendants' summary judgment motion.

In the trial court's opinion, which discussed its rulings granting Defendants' motions *in limine* and for summary judgment, the court found that Christian had "not offered an explanation amounting to good cause or excusable neglect that would justify excusing them from [the] extended scheduling order deadline" for producing expert reports.[7] The trial court further noted that the court would have granted reasonable extensions if any had been requested, but none were.[8] The trial court applied the six *Drejka* factors and found the exclusion of Christian's experts was a "proper consequence" even though it "would render summary judgment a foregone conclusion."[9] Although Christian's failure to meet the deadlines in the scheduling order appeared to be the fault of counsel rather than *Christian* herself, and notwithstanding a lack

5. Christian v. Counseling Resource Associates, Inc., C.A. No. 09C-10202, 2011 Del. Super. LEXIS 342, at *6 (Del. Super. July 28, 2011), *rev'd and remanded*, 60 A.3d 1083 (Del. 2013).

6. *Id.* at *9-10. The trial court noted that the trial date had been in place for more than a year prior to the parties' notification that there may be a conflict with the date, and that a trial pending before another Superior Court judge had been moved to a different date in order to accommodate counsel's schedules in the instant case.

7. *Id.* at *19.

8. *Id.* at *23.

9. *Id.* at *26.

of evidence of bad faith, the trial court found that the other four *Drejka* factors favored the Defendants. The trial court reasoned that Defendants would be at a severe disadvantage if Christian's experts were not excluded and the Defendants were forced to address the complexities of Christian's expert's opinions within the short time period remaining prior to trial.

On appeal, the Delaware Supreme Court reversed, holding that the trial court abused its discretion by refusing to meet with counsel or change the trial date when approached by counsel five months beforehand. While the Supreme Court agreed that, applying *Drejka*, no less appropriate sanction was available, and "dismissal was the only remaining choice" at the time when the Defendants' motions were pending and trial was imminent, dismissal could have been avoided had the trial court agreed to "step in when asked to resolve discovery difficulties."[10]

The Supreme Court noted that while trial courts apply the *Drejka* factors to determine if dismissal is warranted for an attorneys' failure to obey scheduling orders, it determined that a refinement was necessary to eliminate similar attorney failures:

> Henceforth, parties who ignore or extend scheduling deadlines without promptly consulting the trial court, will do so at their own risk. In other words, any party that grants an informal extension to opposing counsel will be precluded from seeking relief from the court with respect to deadlines in the scheduling order. By the same token, if the trial court is asked to extend any deadlines in the scheduling order, the extension should not alter the trial date…. In the unusual circumstance where the trial court does decide to postpone the trial date, litigants should expect that the trial will be rescheduled after all other trials already scheduled on the court's docket.[11]

The Court commended the tradition of civility cherished by the Delaware bar and its members who informally grant extensions without "bothering" the court.[12] However, it cautioned litigants if they do that, "they do so at their own risk," and set out the process by which counsel should address an opponent's failure to meet a discovery deadline.[13] The Court went on to further warn that parties who "choose[] not to involve the court [ ] will be deemed to have waived the right to contest any late filings by opposing counsel from that time forward."[14] This waiver would mean "no motions to compel, motions for sanctions, motions to preclude evidence, or motions to continue the trial" for the party who failed "to promptly alert the trial court when the first discovery deadline pass[ed]."[15]

B. *Hill v. DuShuttle*

In *Hill v. DuShuttle*, the Delaware Supreme Court reversed and remanded the trial court's dismissal of plaintiff's claims, relying on its earlier decision of *Drejka v. Hitchens Tire Services, Inc.*,[16] finding that, dismissal was too severe a sanction which should be imposed only as a last resort.

---

10. *Christian*, 60 A.3d at 1087.

11. *Id.* at 1085.

12. *Id.* at 1087.

13. *Id.* at 1087-88.

14. *Id.* at 1088.

15. *Id.*

16. 15 A.3d 1221 (Del. 2010).

Hill allegedly injured his left knee when he stepped into a pothole located in a parking lot owned by the Defendants. In December 2010, the trial court issued a trial scheduling order setting forth various deadlines, including the deadline by which expert reports were due. On the date that Hill was required to provide expert disclosures in accordance with Rule 26, his counsel sent an email to defense counsel identifying Hill's treating physician as his only expert and referenced the medical records that had already been produced. After defense counsel objected to Hill's counsel's failure to provide any further disclosure or report, Hill's counsel conceded that, within two weeks, he would "go through the exercise."[17] Despite Hill's counsel's acquiescence that he would supplemental his expert discovery, he never did. Defendants then filed a motion to compel Hill to provide an expert report. The trial court granted Defendants' motion after Hill failed to respond. Despite the trial court's order specifically warning Hill that he "would be barred from providing expert testimony at trial if his expert discovery was not so produced,"[18] he never complied. Approximately two weeks after the court-ordered date to produce an expert report had passed with no response, Defendants filed a motion (1) to preclude Hill from introducing expert testimony at trial and (2) to dismiss because, without a medical expert to opine about the cause of Hill's injuries, he could not establish a *prima facie* case against Defendants as a matter of law. At oral argument on the Defendants' motion, Hill's counsel argued that in a straightforward slip and fall case like Hill's, additional expert discovery was not warranted, and that Hill's discovery responses, coupled with the production of his medical records, were legally sufficient.[19] Indeed, Hill's counsel stated that he "never ended up fussing about these issues."[20]

The trial court granted the Defendants' motion to preclude Hill from introducing expert testimony at trial. Relying on Superior Court Rule of Civil Procedure 26, the trial court concluded that Hill was required to produce an expert disclosure, but that he would be precluded from doing so due to his repeated failure to "comply with the requirements of Court's orders and the case law."[21] The trial court refused to "retrospectively reward [Hill's] non-compliance with a third extension of his expert discovery deadline." Hill's subsequent inability to call an expert to establish causation entitled Defendants to judgment as a matter of law.[22]

The trial court also granted Defendants' motion to dismiss the Plaintiff's complaint as a sanction for failure to comply with discovery obligations.[23] Applying the *Drejka* factors, the trial court noted that although dismissal was an "extreme remedy," it was warranted.[24] The trial court emphasized Hill's counsel's "conscious disregard" for discovery deadlines and court orders, noting that Hill had not offered any explanation and, therefore, no "good cause" could be

---

17. Hill v. DuShuttle, C.A. No. N10C-05-178, 2011 Del. Super. LEXIS 285, at *3 (Del. Super. July 5, 2011) *rev'd and remanded*, 58 A.3d 403 (Del. 2013).

18. *Id.* at *4.

19. *Id.* at *7-9, 12.

20. 58 A.2d at 405.

21. *Hill*, 2011 Del. Super. LEXIS 285, at *12.

22. *Id.* at *16.

23. *Id.* at *18.

24. *Id.* at *21. Similar to the trial court's analysis in *Christian*, the result reached by the trial court in *Hill* rested upon its application of the *Drejka* factors.

established.[25] Even though there was no evidence of bad faith by either Hill or his counsel, and responsibility for the dilatory behavior fell to Hill's counsel (rather than Hill), the trial court concluded that no less severe sanction was appropriate.

The Delaware Supreme Court disagreed and reversed on appeal.[26] Relying on its opinion in *Drejka,* the Court held that the trial court had abused its discretion by precluding expert testimony and dismissing Hill's complaint. It reasoned that the trial court could have imposed a less severe sanction, and there still was time before the scheduled trial date for the parties to complete expert discovery.[27] The Court acknowledged the trial court's "frustration over [Hill's] counsel's cavalier attitude" but declined to punish Hill for his counsel's inadequacies.[28] While Hill's "counsel's conduct was unacceptable" and he "should be severely sanctioned," the case "should not have been dismissed."[29]

C. *Adams v. Aidoo*

On the same day it issued its opinion in *Hill*, the Supreme Court decided the case of *Adams v. Aidoo*.[30] Dissimilarly, however, the Supreme Court concluded that the trial court did not abuse its discretion by dismissing with prejudice plaintiff's complaint for failure to provide discovery and comply with court orders.

On December 22, 2007, *pro se* plaintiff Ashley Adams ("Adams") filed suit against defendants, Yaw and Ninette Aidoo ("Defendants"), asserting thirty-one causes of action sounding in tort and sought $3.1 million in damages.[31] On January 28, 2008, Defendants served their answer to the complaint and included various counterclaims. On June 4, 2008, Adams served an amended complaint that asserted twenty tort claims and sought damages totaling $2.1 million.[32]

Throughout the discovery process, Adams refused to comply with basic discovery requests. On January 29, 2009, the trial court held a hearing on Defendants' motion to compel the outstanding discovery.[33] As Adams objected extensively, the trial court went through the outstanding interrogatories, number by number, and explained to Adams that her objections were overruled and why she had to respond. The trial court made like efforts regarding unanswered requests for document production before granting Defendants' motion.[34]

---

25. *Id.* at *20-21, 26-27.

26. 58 A.2d 403 (Del. 2013). While the Court noted its inability to understand "[c]ounsel's stubborn refusal to appreciate that an expert report had to be filed," it concluded that the sanction of dismissal was not warranted. *Id.* at 404.

27. *Hill*, 58 A.2d at 406.

28. *Id.*

29. *Id.*

30. 58 A.3d 410 (Del. 2013).

31. Adams v Aidoo, C.A. No. 07C–11–177, 2012 Del. Super. LEXIS 135, at *1 (Del. Super. Mar. 29, 2012), *aff'd*, 58 A.3d 410 (Del. 2013).

32. Yaw Aidoo received an unsolicited and disturbing text message, which was traced by the police to Adams' phone number. After obtaining an arrest warrant, the police confronted and handcuffed Adams. This event apparently precipitated the litigation, but the parties' relationship, despite living two doors apart in the same housing development, had become far less neighborly some time before. *See id.* at *1-6.

33. *Adams*, 58 A.3d at 412.

34. *Id.*

Adams failed to comply with that order. On April 2, 2009, the trial court held a hearing on Defendants' second motion to compel. Again, the Court explained to Adams her obligation to respond to discovery. The trial court ordered Adams to provide the outstanding discovery in 10 days, and warned that the complaint would be subject to dismissal if Adams again ignored the Court's order.[35] Still, Adams failed to meaningfully respond to the discovery.

On April 16, 2009, Defendants moved to dismiss the complaint. On May 5, 2009, the trial court held a hearing and again told Adams that she had to respond to Defendants' discovery requests. The Court then postponed consideration of the motion and allowed Adams three days to comply with outstanding discovery orders. On May 15, 2009, the Court heard from the parties on Defendants' motion. By then, Adams was represented by counsel, who agreed that Adams had been non-compliant and requested the Court enter an Order of dismissal without prejudice. The Superior Court instead dismissed the complaint *with* prejudice as a result of Adams' failure to comply with discovery.[36] In June 2010, following a trial solely on Defendants' counterclaims, the jury returned a verdict in favor of Defendants and awarded $250,000 in damages. Following the Superior Court's denial of Adams' various post-trial motions,[37] Adams raised on appeal, *inter alia*, the issue of whether dismissal of her complaint for failure to provide discovery was appropriate.

In applying the multi-factor test set forth in *Drejka*, the Supreme Court found that the trial court did not abuse its discretion in dismissing Adams' complaint.[38] The Court reasoned that Adams was personally responsible for her failure to provide discovery, because Adams, despite being *pro se*, received careful explanation from the trial court that she was not free to ignore interrogatories.[39] Also, despite receiving numerous extensions to provide discovery, Adams had no reasonable excuse for her non-compliance, which the Court found demonstrated a history of dilatoriness. Finally, after noting how Adams' refusal to provide discovery was willful, it appeared to the Court that no lesser sanction would have induced Adams' compliance.[40]

D. *Keener v. Isken*

The *Keener* matter is somewhat different from the others discussed herein.[41] The Supreme Court in *Keener* reversed and remanded a dismissal by the trial court, which was based upon non-compliance with a motion practice deadline, as opposed to a scheduling order.

---

35. *Id.*

36. Adams' interlocutory appeal of the trial court's dismissal was refused by the Supreme Court, which, in its discretion, found the appeal wanting of "exceptional circumstances." *Adams v. Aidoo*, C.A. No. 07C-11-177 (Del. June 29, 2009) (ORDER) (citing Del. Supr. Ct. R. 42(b), (d)(v)).

37. *Adams*, 2012 Del. Super. LEXIS 135, at *62-63 (denying plaintiff's motions for new trial, new trial on damages, or remittitur), *aff'd*, 58 A.3d 410 (Del. 2013).

38. *Adams*, 58 A.3d at 413-14 (citing *Drejka*, 15 A.3d at 1224).

39. The Court noted that Adams' failure to provide discovery was due to her belief that the subject matter of Defendants' interrogatories was irrelevant and personally invasive and that "this is not a situation where a *pro se* litigant did not understand what was required." *Id.* at 413.

40. "Adams simply did not think she should have to reveal information that she considered to be private and irrelevant." *Id.*

41. 58 A.3d 407 (Del. 2013). Justice Berger referred to this case as a "slight variation" on the same theme that runs through the four decisions decided by the Supreme Court on January 2, 2013. *Keener*, 58 A.3d at 409 (citing *Hill*, 58 A.3d 403; *Adams*, 58 A.3d 410; *Christian*, 60 A.3d 1083). That theme is "the strong policy in favor of deciding cases on the merits, as well as the importance of maintaining scheduled trial dates." *Id.* at 408.

On May 9, 2011, plaintiffs James H. Keener and his company, Xtreme Construction, Inc. ("Keener") filed suit against defendants Paul and Joan Isken ("Defendants").[42] Keener's complaint alleged claims of breach of contract and tortious interference with contract arising out of Defendants' failure to pay Keener for services rendered. On July 21, 2011, in lieu of an answer, Defendants moved for summary judgment on grounds that Keener's claims were barred by the applicable statute of limitations. Defendants, however, inadvertently omitted affidavit exhibits from their motion filings with the Court. On August 11, 2011, Defendants filed those exhibits. As Defendants' motion was scheduled to be heard on August 29, 2011, Keener should have filed a response by August 23, 2011, but did not.[43] On August 25, 2011, the Superior Court granted summary judgment to Defendants due to Keener's failure to respond in a timely manner.[44]

On September 2, 2011, Keener moved for reconsideration on grounds he "misapprehended the filing deadline due to receipt of supplemental exhibits on August 11, 2011," as "[c]ounsel assumed that the supplemental filing had the effect of extending the responsive pleading deadline by an additional twenty (20) days…."[45] Keener further asserted that material facts were in "sharp dispute." Along with the motion for reconsideration, Keener also attempted to file the untimely response to Defendants' motion for summary judgment.[46]

On October 10, 2011, at the hearing on the motion for reconsideration, Keener could not identify a court rule in support of the belief that Defendants' supplemental filing automatically extended the time to respond. The trial court found that Keener's belief was mistaken, there was no ambiguity in the court rules that could support Keener's position and Keener had not made a sufficient showing of excusable neglect under Superior Court Rule of Civil Procedure 60(b) that justified his late response.[47] Without considering Keener's untimely affidavit, the trial court also concluded that Keener was unable to defeat the statute of limitations defense presented in Defendants' motion for summary judgment. Following the denial of Keener's motion for reconsideration,[48] Keener appealed to the Supreme Court.

The Supreme Court began its discussion by echoing the theme set forth in *Hill, Adams* and *Christian*: a "strong policy in favor of deciding cases on the merits…."[49] Unlike *Hill*, *Adams* and *Christian*, however, Keener did not ignore

---

42. *Id.*

43. *Id.* at 409 (citing Superior Court New Castle County Civil Case Mgmt. Plan § IV(A)(3)(b)). That provision provides that "[a] [r]esponse [to a motion] is due no later than **4 days** prior to the hearing date. If no response is filed by the due date, the motion will be deemed unopposed." Superior Court New Castle County Civil Case Mgmt. Plan § IV(A)(3)(b) (emphasis in original).

44. *See* Keener v. Isken, C.A. No. N11C-05-079 (Del. Super. Aug. 25, 2011) (ORDER) (reasoning that Keener's failure to respond constituted a waiver of defense and compelled judgment in favor of Defendants pursuant to SUPER. CT. CIV. R. 56(e), 107(e)) (citations omitted) *rev'd and remanded*, 58 A.3d 407 (Del. 2013).

45. *Keener*, 58 A.3d at 409 (citations omitted). While not clear from the opinion, it appears that SUPER. CT. CIV. R. 60(b) served as the basis for his motion for reargument. *See Keener*, 58 A.3d at 409 (counsel "acknowledged that, if his motion for reconsideration **had** been filed under Rule 59…;" "The trial court … [found] no excusable neglect….") (emphasis supplied).

46. Keener's response, which included an accompanying affidavit, was rejected by the Court's electronic filing system because the case was listed as "closed."

47. *Keener*, 58 A.3d at 409.

48. During the motion hearing, it was clarified that if Keener's motion for reconsideration had been filed under SUPER. CT. CIV. R. 59, then it should have been filed within five, not six, days after the Court's decision on summary judgment. *Id.* "A motion for reargument shall be served and filed within 5 days after the filing of the Court's opinion or decision." SUPER. CT. CIV. R. 59(e).

49. *Id.*

a scheduling order. In addition, only two months had passed since the complaint was filed when Defendants moved for summary judgment, in lieu of an answer, and during the pleadings stage of this litigation. Similar to those same cases, however, Keener did miss a deadline.

The Supreme Court noted that Superior Court Rule of Civil Procedure 60(b) is underpinned by a public policy favoring trials on the merits.[50] Further, the Court noted that "excusable neglect exists if the moving party has valid reasons for the neglect – reasons showing that the neglect may have been the act of a reasonably prudent person under the circumstances."[51] Additionally, the Court explained that it may consider all surrounding circumstances in deciding whether the conduct at issue was excusable.

Ultimately, the Supreme Court concluded that Keener's noncompliance with the deadline to respond to Defendants' motion for summary judgment was excusable neglect. After noting that "a person can be reasonably prudent yet still be mistaken," the Court accepted as reasonable, albeit mistaken, Keener's belief that Defendants' supplemental filing, which occurred twenty days after Defendants originally filed their motion, extended in equal measure Keener's time to respond. Upon consideration of all surrounding circumstances, the Court remarked how, despite missing the deadline, Keener promptly attempted to file the response, which could have rendered the matter ready for a decision on the merits long before the hearing on the motion for reargument. In other words, as Justice Berger highlighted, "the case was not languishing."[52]

The Court further noted, however, that to obtain relief under Superior Court Rule of Civil Procedure 60(b), two additional findings were required: (1) that the outcome may be different if the motion were heard on the merits; and (2) that Defendants would not suffer substantial prejudice.[53] The Supreme Court remanded with instruction to the trial court to consider Keener's response (and accompanying affidavit) to Defendants' motion for summary judgment within its findings.

II. POST-*CHRISTIAN, ET AL.* DECISIONS

Since its issuance, courts have relied on *Christian* to support their refusal to dismiss cases without a hearing on the merits.[54]

A. *Bernice's Educ'l School Age Ctr., Inc. v. Cooper*

Bernice's Educ'l School Age Ctr., Inc. v. Cooper involved an appeal from the Justice of the Peace Court to the Court of Common Pleas.[55] The appellate court reversed and remanded the trial court's denial of a motion to vacate a default judgment under an abuse of discretion standard.

50. *Keener*, 58 A.3d at 409-10 (citing Tsipouras v. Tsipouras, 677 A.2d 493, 496 (Del. 1996)).

51. *Id.* (citing Dishmon v. Fucci, 32 A.3d 338, 346 (Del. 2011)).

52. *Id.* at 410.

53. *Id*. (citing Schrader-VanNewkirk v. Daube, 45 A.3d 149 (Del. 2012)).

54. This is so, even when the court acknowledged that "dismissal is within the sound discretion of the court" and Super. Ct. R. 41(e) allows the court to dismiss *sua sponte* for, among other things, a plaintiff's failure to prosecute. *See* Dickinson v. Sopa, C.A. No. K10C–10–035 , 2013 Del. Super. LEXIS 272 (Del. Super. June 20, 2013).

55. C.A. No. CPU4–12–003634, 2013 Del. C.P. LEXIS 5 (Del. Com. Pl. Feb. 18, 2013).

Cooper filed a complaint to recover an overpayment of money to Thomas for services rendered. Cooper named Thomas as an individual defendant.[56] Thomas answered the complaint. The Court noted the answer included a provision at the bottom of the page indicating that corporations and like entities needed either to be represented by counsel or file a Form 50 certificate of representation. Inexplicably, on June 7, 2012, the trial court entered a default judgment against Thomas for failure to answer or otherwise appear.[57] On June 29, 2012, the trial court vacated the judgment and ordered Cooper to investigate whether she named the proper party and, if necessary, file an alias summons naming the proper party. The trial court also scheduled trial for August 17, 2012. On June 29, 2012, Thomas filed a counterclaim against Cooper. On July 11, 2012, Cooper filed the alias summons naming Bernice's Educational School Age Center, Inc., (the "School") as a defendant, after which the Court issued summonses to Cooper, Thomas and the School.

At trial on August 17, 2012, the court entered judgment in favor of Cooper as a result of Thomas' failure to file a Form 50 Certificate of Representation. Thomas filed a motion to vacate the judgment.[58] The trial court denied that motion. Its order indicated that

> The principal issue was the correct party and the Form 50 issue, while it never became part of the order, was discussed. Even if it were not, the Court notes that there is no requirement that the Court advise. There is no excusable neglect in this matter and the default judgment stands.[59]

On appeal, the Court of Common Pleas disagreed, finding that the trial court abused its discretion by failing to apply the excusable neglect standard. The court cited *Keener* for the proposition that "the requirements to gain relief from a final judgment are to be liberally construed in favor of deciding cases on the merits."[60] The trial court's failure to apply any standard to this case, the appellate court suggested, placed it in the category of cases favoring "the speedy resolution … that procedural rules provide."[61]

After setting forth the standard to be applied when deciding a motion to vacate a default judgment, the appellate court concluded the trial court's reasoning was arbitrary and capricious because it found no excusable neglect in Thomas' conduct, despite the fact that: (1) she made timely filings; (2) at the time she filed her answer, the corporate defendant had not yet been added as a defendant to the case and, upon its addition, the notice received by Thomas did not include the Rule 50 notice language; and (3) she appeared for trial – all of which demonstrated her diligent defense. Citing to *Keener,* the appellate court noted "[a] person can be reasonably prudent yet still be mistaken."[62] The appellate court found Thomas' conduct to be that of a reasonably prudent person under the circumstances, and reversed and remanded the trial court's decision.

---

56. Thomas operated the School but, when Cooper initially filed the complaint, she named only Thomas and not the School. *Id.* at *1-2.

57. *Id.* at *2.

58. It is not clear the basis upon which Thomas relied for her motion to vacate the default judgment (i.e., Rule 59 or Rule 60), but the Court of Common Pleas pointed out that the trial court referred to the excusable neglect standard. *Id.* at *3.

59. *Id.*

60. *Id.* at *7.

61. *Id.* at *8.

62. *Id.* at *11-12.

B. *Tsakalas v. Hicks*

In *Tsakalas v. Hicks*, the Superior Court was faced with Defendants' motion for summary judgment for Plaintiff's failure to produce a medical report.[63] The case involved a May 2010 automobile accident from which Plaintiff claimed he received permanent injuries to his neck. After suit was filed in April 2012, the Court issued a scheduling order that set a discovery deadline of November 12, 2012 for liability and expert issues and a deadline of December 11, 2012 for dispositive motions.[64] Plaintiff identified three doctors to testify regarding causation and permanency and attached the notes of one of the doctors to his Form 30 interrogatory answers.[65] At no time did Plaintiff produce any medical reports. At no time did Defendants file a motion to compel. [66]

Instead, Defendants filed a motion for summary judgment in which they argued that Plaintiff must prove negligence and that the negligence was the proximate cause of Plaintiff's injuries. This could not be done, Defendants argued, because Plaintiff failed to produce evidence of causation through medical reports and testimony. Consequently, according to Defendants, Plaintiff's claim must fail. Counsel for Plaintiff, on the other hand, contended that the scheduling order did not contain a trial date and, as such, there was no prejudice to the parties if the Court were to allow for additional time for Plaintiff to be examined by another doctor.[67]

Even though the Superior Court noted the Defendants were correct that plaintiff must (1) prove negligence, (2) show that the alleged negligence was a proximate cause or causes of his injuries, and (3) establish causation by expert medical testimony, [68] it denied their motion for summary judgment. While acknowledging the Delaware Supreme Court's recent pronouncements in *Hill*, *Keener* and *Christian*, the Court indicated that the instant case was similar to *Christian.* The Court quoted the Delaware Supreme Court at length regarding the difficult application of the *Drejka* factors and the addition of "practical guidelines that will afford great predictability to litigants and the trial courts."[69] The Court took note of Plaintiff's counsel's inability to obtain a medical report during the three years the case was pending.[70] It also commented on defense counsel's failure to file a motion to compel prior to filing the summary judgment motion.[71]

---

63. Tsakalas v. Hicks, C.A. No. 12C–04–270, 2013 Del. Super. LEXIS 35 (Del. Super. Feb. 22, 2013). The Defendants relied on the Court's decision in Hill v. DeShuttle, 58 A.3d 403 (Del. 2013) for its contention that dismissal was appropriate. However, because the Delaware Supreme Court had since reversed the lower court's decision in *Hill*, the *Tsakalas* Court concluded that "dismissal [was] not the option here." *Tsakalas*, 2013 Del. Super. LEXIS 35, at *1.

64. *Id.* at *1-2.

65. *Id.* at *2.

66. In *dicta*, the Court noted that counsel should not be concerned about "bothering" the court with motions to compel, because the Court is there "to be 'bothered' with such things." *Id.* at *10. Indeed, the Court suggested that it would rather be "bothered" with motions to compel than be faced with the situations faced by the Court in *Drejka*, *Hill*, *Keener* and *Christian.*

67. Counsel for Plaintiff contended that he attempted to obtain medical reports prior to the discovery cut-off but was unsuccessful. *Id.* at *3.

68. *Id.* at *4.

69. *Id.* at *7.

70. *Id.* at *12.

71. The Court indicated that it would have been helpful had the Court had at its disposal the information required by Super. Ct. R. 37(e)(1) either in a motion to compel or in Defendants' motion for summary judgment, however, it suggests that the answers would not have changed the Court's holding.

The Court concluded that

> [d]ismissal is now clearly, the very disfavored remedy. *Drejka* and the January 2, 2013 trilogy [of the decisions in *Hill*, *Keener* and *Christian*] provided a clear, unmistakable signal about what counsel and this Court must do or not do. They may represent a sea change, especially for counsel, and set now, clearer steps to be undertaken *before* dispositive motions are filed.[72]

C. *Dickenson v. Sopa*

The most recent decision dealing with the implications of *Christian* is *Dickenson v. Sopa*,[73] which involved a medical malpractice claim filed on October 22, 2010. The Court issued a scheduling order on April 24, 2012. In it, the Court established a deadline of October 15, 2012 by which Plaintiff was to identify experts. Three days prior to the deadline, Plaintiff requested, and Defendants granted, an extension of the deadline. The extended deadline came and went, but Plaintiff failed to identify experts and failed to contact defense counsel to request an additional extension. On November 16, 2012, Defendant filed a motion to dismiss pursuant to Superior Court Rule of Civil Procedure 41(b).[74] The Court noted that Plaintiff claimed in his response to the motion that he submitted a supplemental expert report. Defense counsel responded that Plaintiff's efforts to comply with the expert disclosure requirements and deadlines were insufficient and requested dismissal for failure to comply with the Court's scheduling order.

The Court acknowledged that Superior Court Rule of Civil Procedure 41(b) allows a movant to seek dismissal for failure to prosecute or comply with the Court's rules and/or orders, and Superior Court Rule of Civil Procedure 41(e) allows the Court to dismiss *sua sponte*. Though the Court noted that "dismissal is within the sound discretion of the Court," it held that Plaintiff's failure to identify experts by the deadlines contained in the scheduling order did not warrant dismissal.[75] The Court based its analysis on the *Drejka* factors. Specifically, the record did not contain any facts to suggest that the Plaintiff himself was responsible for the failure to identify experts timely, the continuance of the trial date cured any prejudice to the Defendant, and, while Plaintiff's counsel had demonstrated a history of dilatoriness *vis a vis* discovery deadlines and extensions thereof, the Court noted that the delay was due to Plaintiff's expert and not Plaintiff's counsel.[76] The Court also cited *Christian,* noting that "[p]arties who ignore or extend scheduling deadlines without promptly consulting the trial court do so at their own peril. That is, 'any party that grants an informal extension to opposing parties counsel will be precluded from seeking relief from the court with respect to any deadlines in the scheduling order.'"[77] The Court denied Defendant's motion to dismiss, holding:

---

72. *Id.* at *14.

73. 2013 Del. Super. LEXIS 272 (Del. Super. June 20, 2013).

74. Defendant moved not only to dismiss, but also moved in the alternative for summary judgment. On the same day but after the filing of Defendant's motion, Plaintiff's counsel faxed an expert report to defense counsel but explained that it needed certain clarifications. *Id.* at *2-3.

75. *Id.* at *4, 7.

76. *Id.* at *8.

77. *Id.* at *5. The Court included a lengthy footnote citing not only to *Christian* but also to *Hill*, *Keener* and *Adams. See id.* at n. 7.

> The dictates of *Christian* are clear. By granting [an extension to produce an expert report], Defendant has waived his right to contest any late filings from that point forward. This includes a waiver of the right to move to dismiss the case pursuant to Rule 41(e). Accordingly, I find that dismissal of Plaintiff's complaint for failure to timely file an expert report is too harsh a sanction.[78]

---

78. *Id.* at *8-9. The Court then turned to Defendant's alternative motion for summary judgment, which the Court granted. As the Court pointed out, a plaintiff must present expert medical testimony regarding standard of care and causation, without which a plaintiff cannot survive a summary judgment motion. *Id.* at *10. The Court noted that the expert in this case did not offer an expert opinion "with any degree of certainty" that Defendant proximately caused Plaintiff's injuries and, as such, found Plaintiff could not establish causation. The Court rejected Plaintiff's argument that the jury could draw an inference of causation from the expert's opinion, noting that 18 Del. C. § 6853 requires a plaintiff to establish causation by expert medical testimony, not by "a jury … connect[ing] the dots between a bare allegation of medical negligence and an injury." *Id.* at *12. As a result, the Court granted Defendant's motion for summary judgment. *Id.* at *11-12.