

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

EDWARD BENEVILLE, JR. and :  
WINCHESTER INSURANCE COMPANY, :  
 :  
Plaintiffs, :  
 :  
v. : Civil Action No. 03-474 JJF  
 :  
FRANCIS G.X. PILEGGI, :  
ESQUIRE, FOX ROTHSCHILD, LLP, :  
and ROBERT M. UNTERBERGER, :  
 :  
Defendants. :

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Rothschild, LLP.

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Attorney for Defendant Robert M. Unterberger, Esquire.

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**OPINION**

July 19, 2004

Wilmington, Delaware

**Farnan, District Judge.**

Presently before me is the Motion For Summary Judgment Filed By Defendants Pileggi And Fox, Rothschild (collectively the "Fox Rothschild Defendants") Based Upon Plaintiffs' Lack Of Expert Evidence. (D.I. 33.) For the reasons discussed, I will deny the Motion.

**BACKGROUND**

On August 16, 2003, I entered a Rule 16 Scheduling Order (the "Scheduling Order") setting January 30, 2004, as the deadline for Plaintiffs' disclosure of their expert's report. On January 29, 2004, Plaintiffs submitted a letter request for an amendment to the Scheduling Order, asking for an extension of time by which they could provide the Fox Rothschild Defendants with their expert's report. On February 3, 2004, Plaintiffs subsequently sent the Fox Rothschild Defendants, by electronic mail, a copy of their expert's report.

**DISCUSSION**

**I. Parties' Contentions**

The Fox Rothschild Defendants contend that they are entitled to summary judgment because Plaintiffs failed to timely provide an expert report regarding the Fox Rothschild Defendants' alleged legal malpractice. The Fox Rothschild Defendants maintain that such expert opinion is necessary to establish the standard of care for an attorney in Delaware and, accordingly, without such

testimony, Plaintiffs are precluded, as a matter of law, from succeeding on their claim.<sup>1</sup> Further, the Fox Rothschild Defendants contend that Plaintiffs' letter application for an amendment to the Scheduling Order entered in this case is procedurally improper and should not be granted.

Plaintiffs respond that their tardy disclosure of an expert report was a consequence of the difficulty they experienced in finding a Delaware attorney willing to provide a negative report on another member of the bar. Further, Plaintiffs contend that the winter weather made it hard for them to timely comply with the Scheduling Order. Plaintiffs also contend that their late disclosure of the expert report was "harmless" under Rule 37(c)(1), and therefore, should be excused.

## **II. Decision**

Because the Fox Rothschild Defendants request me to sanction Plaintiffs for failure to comply with the Scheduling Order by granting summary judgment, I must evaluate the actions of Plaintiffs pursuant to the balancing test described by the Third Circuit in Poullis v. State Farm Fire & Casualty Co., 747 F.2d 863 (3d Cir. 1984). See Emerson v. Thiel College, 296 F.3d 184, 190 (3d Cir. 2002). Although neither party briefed whether the Poullis factors justify granting the Fox Rothschild Defendants

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<sup>1</sup> In Delaware, claims of professional malpractice generally must be established through expert testimony. See Seiler v. Levitz Furniture Co., 367 A.2d 999, 1008 (Del. 1976).

summary judgment, after balancing the evidence, I will deny the Motion for Summary Judgment.

A district court has the discretion to grant dismissal for a party's failure to comply with its orders. However, dismissal is a "drastic sanction" only appropriate in "extreme" circumstances. Poulis, 747 F.2d at 868. To assist in determining whether dismissal is appropriate, the Poulis court enumerated six factors to be balanced by a district court:

(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 the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense.

Id. (emphasis in original).

Balancing these factors, I conclude that the "drastic sanction" of granting the Fox Rothschild Defendants summary judgment would be inappropriate in the circumstances of this case. First, I have been provided with no evidence exhibiting that the tardy compliance with the Scheduling Order's deadline for exchanging expert reports is attributable directly to Plaintiffs and not their counsel. Second, I view the prejudice claimed by the Fox Rothschild Defendants to be minimal, and moreover, can be remedied by the alternative sanctions I discuss below. The prejudice claimed by the Fox Rothschild Defendants is that they were unable to depose Plaintiff Edward Beneville

effectively because they were without information of the specific evidence Plaintiffs' expert relied upon in reaching his conclusions. The Fox Rothschild Defendants assert that no such information is disclosed in Plaintiffs' expert's report.

Although I agree that the disclosures of Plaintiffs' expert were minimal, after a review of the report, I find that Plaintiffs' expert did identify the materials he relied on in reaching his opinions. (D.I. 37, Ex. A at 9.) Thus, I am not persuaded that the prejudice suffered by the Fox Rothschild Defendants is sufficient to justify granting them summary judgment.

Next, the Fox Rothschild Defendants have provided no evidence of a history of dilatoriness by Plaintiffs. With respect to the effectiveness of alternative sanctions, I conclude that assessing the costs and fees expended by the Fox Rothschild Defendants in preparing the instant motion against Plaintiffs' attorney is appropriate in this case. I will not award the Fox Rothschild Defendants the fees and costs they would expend in re-depositing Plaintiff Beneville because I find that Plaintiffs' expert's report provided them with the bases for his opinions.<sup>2</sup>

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<sup>2</sup> In addition, Plaintiffs have the obligation to correct the deficiencies in their expert's report and ensure that said report complies with the requirements of Federal Rule of Civil Procedure 26(a)(2). If Plaintiffs do not comply with Rule 26's requirements, I will revisit the Fox Rothschild Defendants' Motion for Summary Judgment against the backdrop discussed here.

With regard to the final Poulis factor, the meritoriousness of Plaintiffs' claims, I conclude that this factor also weighs against granting the sanction requested by the Fox Rothschild Defendants. A claim is meritoriousness if the allegations of the complaint, proved at trial, would enable the plaintiff to succeed on his or her claim. Poulis, 747 F.2d at 869-70. In this case, I previously denied a motion to dismiss filed by the Fox Rothschild Defendants (D.I. 58, 56), thus answering this question in favor of Plaintiffs.

In sum, having considered the parties' arguments and balancing the Poulis factors, I conclude that granting the Fox Rothschild Defendants summary judgment would be inappropriate at this time.

#### **CONCLUSION**

For the reasons discussed, I will deny the Motion for Summary Judgment filed by the Fox Rothschild Defendants.

An appropriate Order will be entered.

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**O R D E R**

At Wilmington, this 19th day of July, 2004, for the reasons discussed in the Opinion issued this date;

IT IS HEREBY ORDERED that:

1) The Motion For Summary Judgment Filed By Defendants Pileggi And Fox, Rothschild (collectively the "Fox Rothschild Defendants") Based Upon Plaintiffs' Lack Of Expert Evidence.

(D.I. 33) is **DENIED**;

2) Plaintiffs' counsel shall reimburse the Fox Rothschild Defendants for the attorney's fees and costs incurred in preparing the instant motion.

JOSEPH J. FARNAN, JR.  
UNITED STATES DISTRICT JUDGE