DORESE WADE, ADMINISTRATIRX OF THE ESTATE OF ANTHONY DAWKINS Plaintiff	IN THE COURT OF COMMON PLEAS FOR THE 26TH JUDICIAL DISTRICT, MONTOUR COUNTY BRANCH, PENNSYLVANIA CIVIL ACTION - LAW
vs	
MERCY HOSPITAL and SHISHIR PRASAD, M.D. Defendant	CASE NO: 419 OF 1995 MONTOUR

ALEX H. PIERRE, ESQUIRE, Attorney for Plaintiff
JOSEPH A. MURPHY, ESQUIRE, Attorney for Defendant Mercy Hospital
THOMAS B. HELBIG, ESQUIRE, Attorney for Defendant Shishir Prasad, M.D.

June 29, 2005. JAMES, J.

OPINION

This matter involves is a medical negligence suit and is before this court to consider defendants' Motion for Nonsuit, defendants' Motion for Summary Judgment, and payment of costs.

Motion for Nonsuit

The trial was originally scheduled to begin October 13, 2004, for jury selection. On October 12, 2004, (the day before jury selection), plaintiff's counsel filed an Emergency Motion for Continuance because of the

unavailability of plaintiff's expert. Contrary to this court's order, plaintiff's counsel had not filed his trial brief or points for charge five days before the October 13, 2004, jury selection date. However, this court granted the continuance.

The continued trial was scheduled for jury selection in the Montour County Courthouse in Danville on February 8, 2005. Testimony was scheduled to begin February 16 and projected to be completed on February 18, 2005. Prior to trial, the parties had taken the trial deposition of plaintiff's expert, Dr. Barry Wenig. In his testimony, Dr. Wenig failed to address the issue of causation of decedent's injuries and death. Just prior to trial (late January 2005), defendants filed summary judgment motions advocating that without expert testimony regarding causation, plaintiff could not carry her burden of proof. The court had intended to hear arguments on the same after jury selection because the motions were filed right before said jury selection, and it was practically easier to hear the motions after jury selection and before the beginning of testimony.

However, at 9:00 a.m. on February 8, 2005, plaintiff's counsel was not present to select the jury. All parties and counsel were present, as were approximately seventy

jurors. This was the only case to be tried in this two month trial term in Montour County. Just prior to 9:00 a.m. plaintiff's counsel called this court's secretary who relayed to the court that plaintiff's counsel was still in Philadelphia (three hours away from Danville) and that his car had broken down near Philadelphia and that he was attempting to get a rental car. He spoke to one of defense counsel. About 9:50 a.m., this court attempted to contact plaintiff's counsel on his cell phone, and he did not answer. At 10:00 a.m. this court continued the matter. Plaintiff's counsel could not possibly have traveled to Danville before 1:00 p.m., and there was no reason to expect that even that would happen. This court saw no reason to inconvenience the jury pool for an entire day when it was probably to no avail.

On February 16, 2005, all counsel appeared before this court to argue defendants' summary judgment motions and for plaintiff to offer an explanation as to his non-appearance at jury selection. As to the non-appearance, plaintiff's counsel said, "Judge, may I say it again. The car broke down and that is what happened. I am on my way to the Courthouse, my car breaks down. This morning I made sure – even, well, yesterday I made sure that the car was at the shop and was in condition to get up here." (N.T February

16, 2005, pp. 5-6). Defense counsel politely asked for documentation of the fact that the car broke down, including items such as repair records and/or car rental receipts.

Plaintiff's counsel never provided this court with any documentation of a mechanical breakdown or car rental receipt. If fact, plaintiff's counsel admitted in his affidavit dated March 14, 2005, that his vehicle did not have any type of mechanical breakdown outside of Philadelphia prior to 9:30 a.m. on February 8, 2005. He actually did not own a car on February 8, 2005. He did not attempt to rent a vehicle until after he left his house at 6:30 a.m. on February 8, 2005, and he did not rent a vehicle from until 10:05 a.m. In other words, he was still in Philadelphia an hour after he was required to be in Danville, where a jury, the court, court personnel, defense counsel, and all parties had been waiting patiently for well over an hour.[1]

The Pennsylvania Supreme Court has set rules for addressing cases where a party is not ready when a case is called for trial. Pa.R.C.P. 218 says:

> (a) Where a case is called for trial, if without satisfactory excuse a plaintiff is not ready, the court may enter a nonsuit on motion of

[1] This court will set a hearing on whether plaintiff's counsel should be held in contempt of court under a separate order.

> the defendant or a non pros on the court's own motion.
>
> (b) If without satisfactory excuse a defendant is not ready, the plaintiff may
>
> (1) proceed to trial, or,
>
> (2) if the case called for trial is an appeal from compulsory arbitration, either proceed to trial or request the court to dismiss the appeal and reinstate the arbitration award.
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> Note: See Rule 1007.1(c)(2) for withdrawal of demand for trial by jury when a party who has filed a demand therefore fails to appear or is not ready.
>
> (c) A party who fails to appear for trial shall be deemed to be not ready without satisfactory excuse.
>
> Note: The mere failure to appear for trial is a ground for the entry of a nonsuit or a judgment of non pros or the reinstatement of a compulsory arbitration award.
>
> A nonsuit is subject to the filing of a motion under Rule 227.1(a)(3) for post-trial relief to remove the nonsuit and a judgment of non pros is subject to the filing of a petition under Rule 3051 for relief from a judgment of non pros.
>
> A decision of the court following a trial at which the defendant failed to appear is subject to the filing of a motion for post-trial relief which may include a request for a new trial on the ground of a satisfactory excuse for the defendant's failure to appear.

”Some of the circumstances a court should consider in determining whether counsel's failure to appear should be excused are: 1) whether the failure to appear was

inadvertent; 2) whether counsel's failure to appear was part of a pattern of improper behavior, misconduct or abuse; 3) whether the court attempted to contact counsel prior to dismissing the appeal; 4) whether the opposing party would be prejudiced by the delay; and 5) whether the court gave any consideration to lesser sanctions." Thompson v. Houston, 839 A.2d 389, 391 (Pa.Super. 2003), citing Shin v. Brenan, 764 A.2d 609, 611 (Pa.Super. 2000). *See also*, Faison v. Turner, 858 A.2d 1244, 1246 (Pa.Super. 2004).

This court has considered all the circumstances. Pa.R.C.P. 218(c) says that a "party who fails to appear for trial shall be deemed to be not ready without satisfactory excuse." (Emphasis provided). The plaintiffs were present for jury selection. Their attorney was not present. This court questions whether counsel's failure to appear was inadvertent in light of the issue concerning his expert's failure to testify regarding causation during his trial deposition. This was also a pattern of conduct since the last scheduled trial was continued at the last minute by plaintiff's counsel. This court tried to contact plaintiff at the time of jury selection to further explore his excuse that his car malfunctioned, but he did not answer his cell phone. (As it turns out, plaintiff's counsel

misrepresented facts to this court when he said his car broke down. His did not have a car and simply neglected to arrange for transportation prior to the day of trial. (Query: In light of the expert/causation issue, did he hope to get another continuance to cure that problem during a new delay?).

According to the criteria set forth in Thompson v. Houston, *supra*, this court must consider whether defendants are prejudiced by the delay and whether there are other sanctions. There is no prejudice to defendants provided they are compensated through the procedures set forth in Pa.R.C.P. 217 (see below) and further provided that plaintiff is not put in a better position (particularly regarding the expert/causation issue) as a result of the delay.

The plaintiff herself was present for jury selection. There are lesser sanctions than a nonsuit available to remedy this breach of duty and responsibility by plaintiff's counsel other than a nonsuit, i.e., imposition of costs and maintaining the procedural status quo as it existed prior to the February 8, 2005, continuance.

"[W]e reiterate our expression in Stock v. Arnott, 415 Pa.Super. 113, 608 A.2d 552, 556 (1992): While we share the trial court's interest in expeditious administration of

justice, we are mindful of our supreme court's admonition that[:]

It must always be borne in mind that lawsuits are more than numbers or punches in computer cards. Individuals cases are, of course, of great importance to the litigants involved, and courts must not overreach in their zeal to move cases to such an extent as to allow for no deviations from strict and literal adherence to policies justifiably laid down to improve the conditions of the courts. Budget Laundry Co. v. Munter et al., 450 Pa. 13, 21-22, 298 A.2d 55, 58 (1972)."

Since there is no evidence that the plaintiff litigant was at fault in causing the continuance, and since there are lesser sanctions available, this court will deny the motion for a nonsuit.

Defendants' Motions for Summary Judgment

In regard to defendant's summary judgment motions, plaintiff's counsel suggests that he could have cured and intended to cure the lack of causation testimony by bringing the expert to testify live or by telephonic testimony. Dr. Barry Wenig's trial deposition was taken on December 7, 2004, and he clearly does not address the issue of causation. It is important to note, however, that Dr.

Wenig's expert report is appended to plaintiff's pre-trial memorandum. In his report, he clearly expresses an opinion regarding causation.

The trial was supposed to begin with testimony on February 16 and conclude February 18, 2005. After the trial continuance, plaintiff's counsel contacted defense counsel Attorney Helbig by faxed letter on February 9, 2005, requesting a telephone supplemental deposition of Dr. Wenig on Monday February 14, 2005, or February 17, 2005, during the trial. Attorney Helbig faxed a response immediately objecting to the telephonic supplemental trial deposition. Defense counsel Attorney Murphy did not get a copy of the faxed letter until February 10, 2005, and he also objected. There were no other attempts to schedule a supplemental trial deposition of Dr. Wenig.

At the time of the continuance, this court said that the summary judgment motion would not be allowed to be cured by the continuance under the circumstances of non-appearance by plaintiff's counsel. This court said that "[t]he issue is whether or not Dr. Wenig's testimony was going to be presented, could have been presented before trial to supplement it. And that's the issue." (N.T February 16, 2005, p. 36). Thus, this court suggested that Dr. Wenig's deposition be taken to clarify his availability

for the February 2005 trial. The deposition was taken on February 25, 2005. Dr. Wenig testified that he was available by telephone on February 14 and 17, 2005. He was not available live on February 16, 17, or 18, 2005.

Defendants objected to Dr. Wenig's supplemental testimony by telephone indicating that there was no authority for this procedure. However, in Mansour v. Lingana, 787 A.2d 443, 446 (Pa.Super. 2001), the Pennsylvania Superior Court permitted plaintiff's expert doctor to be recalled during the trial via telephonic deposition. The court permitted the testimony provided the expert's testimony was within the "fair scope of his report." Id. In our case, plaintiff's expert should be permitted to supplement his testimony for trial provided it is within the fair scope of his report. Furthermore, the testimony must be by telephone (unless waived by defense counsel), and must be prior to trial to avoid surprise to the defendants.

Costs

Pa.R.C.P. 217. provides for the imposition of costs when a continuance is granted:

> When a continuance is granted upon application made subsequent to the preliminary call of the trial list, the court may impose on the party making the application the reasonable costs actually incurred by the opposing party which would not have been incurred if the application had been made at or prior to such preliminary call.
>
> Where a continuance has been so granted and costs imposed, the party upon whom such costs have been imposed may not, so long as such costs remain unpaid, take any further step in such suit without prior leave of court.
>
> A party upon whom such costs are so imposed and who was at fault in delaying the application for continuance may not recover such costs, if ultimately successful in the action; otherwise such costs shall follow the judgment in the action.

Defendant Mercy has moved for reimbursement of costs, and this court sua sponte believes costs are very appropriate under these facts. The costs requested by the defendants are:

1.	Defendant Mercy’s Expert Dr. Moses:	$2800.00.
2.	Defendant Mercy’s Atty.:	$1390.69
3.	Defendant Dr. Prasad’s Atty:	$1402.50
	Total	$5593.19

All of these costs would not have been incurred if there were no continuance of this matter, which was occasioned by plaintiff. All of these costs must be paid forthwith. As long as the costs remain unpaid, this court

will take no further action in this matter. This case will be relisted for trial upon payment of said costs in full. If said costs are not paid in full by September 1, 2005, this court will entertain a motion for non pros.[2] This matter cannot be allowed to linger much longer.

[2] It is strongly suggested that plaintiff reevaluate this case based on the facts.

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ORDER

AND NOW, this 29th day of June 2005, the court ORDERS and DECREES the following:

1. Defendants' Motion for Nonsuit is DENIED.
2. Defendants' Motion for Summary Judgment is DENIED. Plaintiff's expert should be permitted to supplement his testimony for trial provided it is within the fair scope of his report. Furthermore, the testimony must be by telephone (unless waived by defense counsel), and must be prior to trial to avoid surprise to the defendants.
3. Plaintiff shall pay costs in the amount of $5593.19 to the defendants (As set for in the opinion) by September 1, 2005. As long as the costs remain unpaid, this court will take no further action in this

matter. This case will be relisted for trial upon payment of said costs in full. If said costs are not paid in full by September 1, 2005, this court will entertain a motion for non pros.

BY THE COURT

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HONORABLE THOMAS A. JAMES, JR., J.