Summary Judgment Motion Not Preceded by Motion to Compel Akin to Trial by Ambush

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On January 2, the Delaware Supreme Court issued a trilogy of cases dealing generally with the issue of whether a case should be dismissed for the attorneys' failure to obey scheduling orders. In the lead case, *Christian v. Counseling Resource Associates*, No. 460, 2011 (Del. Jan. 2, 2013), the court announced that, henceforth, parties who ignore or extend scheduling deadlines without promptly consulting the trial court would do so at their own risk. The court noted that when a party misses a discovery deadline, opposing counsel will have two choices — resolve the matter informally or promptly notify the court. If counsel contacts the court, that contact can take the form of a motion to compel, a proposal to amend the scheduling order, or a request for a conference. If the party chooses not to involve the court, the party will be deemed to have waived the right to contest any late filings by opposing counsel from that time forward. The court made clear that in those cases, there would be no motions to compel, motions for sanctions, motions to preclude evidence or motions to continue the trial.

The implications of the *Christian* trilogy are still being worked out by the trial courts and counsel. A recent decision by the Superior Court illustrates how the Supreme Court's "practice guidelines" are being implemented by the trial courts. In *Tsakalas v. Hicks*, C.A. No. 12C-04-270-JOH (Del. Super. Feb. 22, 2013), the court had before it a motion for summary judgment by the defendants arguing that they were entitled to summary judgment because the plaintiff had failed to meet the court's deadline for producing a medical expert report that their negligence had caused his injury. Because causation requires expert testimony, the failure to provide such an opinion when due would ordinarily result in the dismissal of the plaintiff's case. In *Tsakalas*, the court's scheduling order set a discovery deadline and a deadline for dispositive motions. The plaintiff failed to provide any expert medical reports during the discovery period, and the defendants moved for summary judgment on the last date for filing dispositive motions.

The court found the conduct of both sides problematic. The court noted that the suit was filed 23 months after the accident and three years since the accident, no expert medical report had been produced. The court did not know whether plaintiff's counsel discussed the difficulties of obtaining a report with the defendants' counsel, or whether the plaintiff's injuries were such that a medical opinion could not be obtained earlier. On the other hand, counsel for the defendants did not first file a motion to compel, and there was nothing in the record before the court to suggest that there had been any effort on their part to communicate with plaintiff's counsel to get discovery compliance prior to their filing the summary judgment motion. While pretrial discovery is meant to eliminate or discourage trial-by-ambush, in the court's view, filing a summary judgment motion without the requisite motion to compel was exactly that.

The court denied the defendants' summary judgment motion. It recognized that dismissal is now clearly a "very disfavored remedy" for discovery problems, and the January 2 trilogy provided "a clear, unmistakable signal" about what counsel and the court must do or not do and set clear steps to be undertaken before dispositive motions are filed. From the court's perspective, the *Christian* trilogy requires the parties to involve the court in discovery issues before they can resort to dispositive motion practice based on the failure of a party to provide the required discovery.

The judge in the *Tsakalas* case acknowledged that he follows the minority approach among Superior Court judges in preferring to set a trial date after ordering most discovery to be completed and a date for dispositive motions. In this way, he finds that the trial date, once set, remains more certain. He also wrote that he would not hesitate to reopen the discovery window in the pretrial scheduling order when appropriate. The majority of the other Superior Court judges now prefer to set the trial date in the initial scheduling order, which affords the parties and the court less flexibility to change the trial date and puts more onus on the parties to involve the court in discovery disputes much sooner, lest the trial date be lost.

The *Christian* trilogy has generated much discussion among the bench and bar. Some practitioners wonder whether the inevitable result will be to lessen the tradition of collegiality among the bar or the practice among Delaware lawyers to work out scheduling issues among themselves without getting the court involved except as a last resort. A lot will depend on the receptivity of the bench to work with practitioners. At least as evidenced by this decision of the Superior Court, there is no reason to fear the "refinements" to practice promulgated in the *Christian* trilogy.

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