

AMY G. MERRICKS, et al : IN THE  
Plaintiffs : CIRCUIT COURT  
v. : FOR  
KIMBERLY M. DAILEY, et al : BALTIMORE CITY  
Defendants : Case No. 24-C-03-008918

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**AMENDED MEMORANDUM**

This case comes before the Court on the Defendant Kimberly M. Dailey’s second motion for sanctions against the Plaintiff Amy G. Merricks. The motion alleges that the Plaintiff has failed to comply with her discovery obligations despite a court order to do so. The Plaintiff, through counsel, filed an opposition to the motion and the Court held an oral hearing on April 11, 2005.

The action was brought to recover damages for an alleged auto tort. Following service on the Defendant, a standard track scheduling order was issued. The deadline for completion of all discovery under that Order was November 10, 2004. The Plaintiffs moved to amend that Order on March 25, 2004 for the reason that

Plaintiff Amy Merricks has a complex medical history. Since the time of the automobile accident, Ms. Merricks has been treated by over twenty-five (25) health care providers. Due to Ms. Merricks’ complex medical history, the Plaintiffs require additional time [sic] obtain a comprehensive set of Ms. Merricks’ medical records. Moreover, due to the voluminous nature of these records, potential expert witnesses for both the Plaintiffs and Defendants will likely require additional time to adequately review the records in this matter.

Plaintiffs’ Motion to Modify Pre-Trial Scheduling Order at ¶¶ 2, 3. That motion was granted. The time for completion of all discovery was moved to January 11, 2005 as

requested by the Plaintiff.

On or about May 18, 2004, the Plaintiff cited "Discovery Issue" as the reason for her request for a new pre-trial and trial date. That too was granted and trial was re-scheduled for May 8, 2005. The pre-trial conference was re-scheduled for April 5, 2005.

On May 12, 2004, Plaintiff Merricks served her interrogatories and document requests on Defendant Dailey and responded to the discovery requests of Defendant Nationwide Mutual Insurance Company. On June 9, 2004 Robert Suls entered his appearance for Defendant Dailey and on June 18, 2004 he responded to the discovery propounded by Plaintiff Merricks, among others.

On July 13, 2004, Plaintiff Merricks served Union Memorial Hospital, the Baltimore City Fire Department and Larry H. Bank, DDS with notices to take depositions and subpoenas duces tecum. Deposition notices were served again on Union Memorial and Larry Bank, D.D.S., on August 6, 2004. At this time a notice of deposition and subpoena duces tecum were also served on Howard L. Rosov, DDS.

Plaintiff Merricks moved again, without opposition, to modify the Scheduling Order on August 11, 2004. Again, she indicated that she had a complex medical history, but represented that at this time she had a complete set of medical records. She moved on the basis that she needed additional time to prepare her potential experts.

All parties have worked diligently to conduct discovery, including obtaining a complete set of the Plaintiff Amy Merricks' medical records, propounding and responding to written discovery, and contacting potential expert witnesses. Due to the voluminous and complicated nature of the [sic]

Ms. Merricks' medical records, and the ongoing nature of her treatment, the Plaintiffs require additional time to allow potential expert witnesses to adequately review and evaluate this case.

This motion too was granted and the discovery deadline was moved to February 1, 2005.

Citing "irreconcilable differences" and with Plaintiff Merricks' consent, Plaintiff Merricks' counsel requested leave to withdraw on September 14, 2004. Defendant Dailey served Plaintiff Merricks with interrogatories and document requests on or about September 16, 2004. Plaintiff Merricks, through counsel, filed her "Plaintiffs' Designation of Expert Witnesses" on September 27, 2004.

On October 6, 2004, Plaintiff Merricks' counsel was granted leave to withdraw and on October 12, 2004 the Clerk notified Plaintiff Merrick of her need to employ new counsel. In response to that notice Plaintiff Merrick personally sent typed correspondence dated October 18, 2004, to the judge in charge of the civil docket in this Circuit, Judge Carol E. Smith. She wrote as follows:

I am responding to your letter dated October 12, 2004, in which you advised that I have fifteen days to obtain new attorney in this case, from the date I received your letter. I received it on October 15, 2004, so that would mean my deadline is October 30.

I am about to enter the hospital for reasons related to my injuries which resulted in my lawsuit, and may be confined for weeks. Also, I have been in communication with an attorney who is considering taking my case, but he is still attempting to obtain the files from my prior counsel, to review before making the decision concerning representation. For these two reasons, I request that you grant me until November 30, 2004 to obtain counsel.

Letter docketed at #43,000.

On November 2, 2004, after requesting discovery responses from the Plaintiff in a letter dated October 21, 2004, Defendant Dailey moved for sanctions against Plaintiff Merricks for failing to respond to discovery requests. Plaintiff Merricks, pro se, opposed that motion on or about November 13, 2004 “for the reasons set forth in the attached letter to the Honorable Carol Smith. . .” Docket Entry #44001. The letter, in pertinent part, states as follows:

I am about to enter the hospital for reasons related to my injuries which resulted in my lawsuit, and may be confined for weeks. I suffer from Cushings syndrome, which leads to adrenal failure. Also, I have been in communication with an attorney who is considering taking my case, but he is still attempting to obtain the files from my prior counsel, to review before making the decision concerning representation. I understand the files will be arriving this month.

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I also see that Mr. Suls, the lawyer for Defendant Kimberly Dailey, has filed a motion for sanctions and a default against me because my prior lawyers did not answer his interrogatories or his requests for production of documents. I did not even know of these interrogatories or requests (which my prior lawyers received in September) until late October.

I ask that I not be sanctioned, and that my new lawyers, when I hire them, be given until December 31 to respond to these. I will file something more formal now in response to the motion for sanctions, attaching a copy of this letter. I am happy to cooperate with Mr. Suls, but I need counsel, which I am working to obtain.

Defendant Dailey replied requesting a default judgment. Plaintiff Merricks, now represented by counsel, filed a surreply on or about December 20, 2004 requesting

until January 31, 2005 to respond to the outstanding discovery requests. That request was granted. By Order dated December 21, 2004 this Court granted the Plaintiff until January 31, 2005 to respond to the Defendant's discovery requests, as she had requested through counsel. Defendant Dailey's request for default judgment was denied.

On January 25, 2005, the Plaintiff filed discovery responses. On February 8, 2005, Defendant Dailey again served Plaintiff Merricks, through counsel, with a motion for sanctions. The Plaintiff supplemented those responses on February 11, 2005. The supplemental responses, however, as late as April 11, 2005 had not been executed. Plaintiff Merricks opposed the motion for sanctions and this Court scheduled a hearing on the motion for March 29, 2005. To accommodate the Court, that hearing was re-scheduled to April 11, 2005.

### **ANALYSIS**

The Plaintiff was on notice as early as February 8 of Defendant Dailey's contentions as to the deficiencies in her responses. Specifically, Defendant Dailey moved for default judgment based on 1) a deficiency in the expert witness disclosures; 2) a deficiency in her identification of medical treatment and health care providers, her identification of present complaints, and her contention as to permanency of her injuries; and 3) her failure to provide any information in response to the request for itemization of charges, expenses, and losses (paid and outstanding).

With respect to the disclosure of expert witnesses, Plaintiff Merricks provided no information in her answers to interrogatories except to state that she expected to call her treating physicians to testify as to the findings in their reports, the necessity for

treatment, the reasonableness of the bills and causality. At oral hearing and in the unexecuted supplemental answers to interrogatories, the Plaintiff also relied on the expert designation provided by her prior counsel in September, 2004.

As argued by Defendant Dailey, the information provided in that September disclosure of experts does not adequately respond to the Defendant's inquiry by interrogatory. That disclosure names Richard Schlesinger, M.D., Jerome Staller, Ph.D.; Phillip Bussey, Ph.D., CRC.; Dr. Amy Karlen; and Jennifer Schlesinger. Plaintiff Merricks failed in September, 2004 or any time thereafter to provide the information requested by the Defendant. She has not provided a summary of the grounds for the opinion of any of these purported experts. She has not provided the substance of the opinion or the opinion itself of Karlen and Jennifer Schlesinger.

The Plaintiff's disclosures are so deficient as to prevent the Defendant from adequately preparing for trial. Moreover, the Defendant was required to designate her experts without the benefit of the information she requested from the Plaintiff regarding her experts. This is of obvious prejudice to the Defendant and the Plaintiff had not, as of the date of oral hearing, made any effort to rectify the situation. Accordingly, having prevented the Defendant from preparing for expert testimony, the Plaintiff shall be foreclosed from presenting any expert testimony as a sanction for her dilatory conduct and to "level the playing field." The deficiency of the responses and prejudice to the Defendant are particularly egregious in light of the Plaintiff's express recognition, a year ago, that she had a complex medical history involving voluminous records.

Being cognizant of the Court of Appeals decision in Dorsey v. Nold, 362 Md. 24 (2001), the Court anticipates that the Plaintiff will call the Plaintiff's treating physicians

and other health care providers as experts. Dorsey permits the plaintiff to do so to the extent the witnesses' testimony and opinions were not developed in anticipation of litigation or for trial. Therefore, Plaintiff Merricks may not elicit from her treating health care providers testimony that was developed in anticipation of litigation and for trial. See id. at note 5. That means, at a minimum, the Plaintiff may not illicit from her treating physicians and other health care providers their opinions as to the cause of her injuries or the fairness and reasonableness of the bills. Having failed to ever properly identify her experts, the Plaintiff may not escape her conduct by calling her treating health care professionals to opine as to opinions formed for purposes other than treatment itself.

In Interrogatory No. 18, Defendant Dailey asked the Plaintiff for the name and location of her injuries, the medical treatment she received for her injuries with the date of treatment and the names of the health care providers giving that treatment, the nature of any present complaints and her contention as to whether her injuries were permanent. In response Defendant Dailey received on January 25, 2005 a package containing 1,617 pages of documents together with the statement that "Plaintiff suffered multiple injuries to her arms, neck, head, back and legs. Plaintiff continues to suffer from debilitating pain and receive [sic] treatment for her injuries." Defense counsel stated during oral hearing, and it was not contradicted, that the over 1600 pages of documents were not in any particular order, had not been organized by the Plaintiff, and were not in chronological order or segregated by provider. "Billing statements and explanation of benefits are mixed in with other medical records frequently unrelated to the treatment provided. Multi-page reports are produced without inclusion of all pages."

Memorandum of Points and Authorities in support of Defendant's motion for sanctions at 3. (Plaintiff's counsel did explain the blank pages, but not the upside down or duplicate pages.) Defense counsel's representation that over 1600 pages of documents were dumped on the Defendant is, unquestionably, an apt description which is not seriously disputed by Plaintiff. In the unexecuted supplemental answers to interrogatories of February 9, 2005, the Plaintiff does not do much better. She names four diagnoses and six health care providers without identifying which providers treated which injury or otherwise giving the Defendant a clue as to where the answers to her interrogatories might be found in the voluminous medical records in this case involving a "complex medical history". She indicates that she continues to suffer pain with no further explanation and she contends that all of her injuries are permanent.

The Plaintiff's failure to answer the interrogatories in a comprehensible manner is inexcusable. These documents were in the hands of Plaintiff's prior counsel at least as early as August 11, 2004 when she represented to this court that she had acquired a complete set of the medical records. Despite having them since August, as of the date of April 11, she had made no attempt to produce them in a comprehensible fashion nor had she otherwise answered the interrogatories. A party, of course, has the option of answering interrogatories by producing and specifying the documents from which the answers can be gleaned, but only if "the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served" and if "[a] specification [is] in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained." A "dump," (defense counsel's description) of over 1600

documents, without organization, does not fit either of those criteria.

In light of the fact that the Plaintiff was represented by counsel at the time of this response, it can only be presumed that the deficient answer was tactical. Accordingly, for the reason that Plaintiff's response to interrogatory #18 is so deficient as to be the equivalent of no response at all, the Plaintiff will be prohibited at trial from using any evidence that should have been provided in response to this interrogatory. For clarity, the Plaintiff is foreclosed from offering any evidence of any treatment received for any alleged injuries she may have suffered as a result of the accident, any evidence of present complaints allegedly resulting from the accident, and any contention that these alleged injuries are permanent.

It is also noteworthy that at no time did the plaintiff provide any medical records or information concerning the hospitalization she referred to in her letters to Judge Carol Smith. She twice stated to the Court, once in October and once in November, 2004 that she was "about to enter the hospital" for treatment related to the injuries which allegedly were suffered as a result of this accident. She supplied this information to request extensions of time to obtain substitute counsel and to oppose Defendant Dailey's first motion for sanctions. This Court relied on that opposition in fashioning its order of December 21, 2004.

The reason for the Plaintiff's failure to provide these medical records is simple. She was not hospitalized in the Fall of 2004. At the oral hearing on April 11, the Defendant used the lack of production of these documents as further evidence that the Plaintiff had been dilatory in her discovery responses. Plaintiff's counsel opined, apparently for the first time, that perhaps she had not been hospitalized. The Court

insisted that Plaintiff's counsel investigate. The Court received a letter from Plaintiff's counsel dated April 12, 2005 in which counsel indicates that his client "did not enter any hospital facility; that she was able to 'work through her difficulties at that time.'" Until required to do so by the Court, the Plaintiff never advised the Court that the information she had given was inaccurate information.

The Plaintiff received favorable treatment on the Defendant's first motion for sanctions based on the Court's reliance on her statement regarding hospitalization. She did nothing to correct that reliance. Her counsel did nothing to correct that reliance until directed by the Court to get full information from his client. While this Court does not fashion any specific sanction for this conduct by the Plaintiff, the Court is mindful that the lenient treatment afforded the Plaintiff previously and the extensions of time she received from late October, 2004 through January 31, 2005 were obtained, in part, by statements that were perhaps not correct when made and which were certainly never corrected until the Court demanded candor.

Finally, the Plaintiff was asked in interrogatory #21 to "[g]ive an itemized statement of all charges, expenses and losses allegedly paid or incurred by you as a result of the occurrence, and indicate which charges, expenses or losses have been paid, and by whom." On January 25, 2005 when she responded to other interrogatories, she did not respond to this interrogatory. The space for the answer is simply blank. In her unexecuted responses of February 9, 2005, she lists property damage of \$7011.43 of which she paid a deductible of \$200; medical bills of \$29,489.89 for which there is a lien; loss of a stipend valued at \$234,000; and "various other bills" paid by her parents. She also offers that she is receiving SSI benefits and

refers the Defendant to the “numerous reports and bills, already forwarded.” Curiously, in her Pre-Trial Statement served on April 4, 2005 she references \$64,775.52 in medical bills in addition to the \$29,489.89 that is the subject of the lien.

The Plaintiff has an obligation to disclose facts to the Defendant in response to the Defendant’s inquiries. The Defendant’s questions were straightforward and the Plaintiff’s responses should be equally as straightforward. She, however, initially elected not to answer this interrogatory even though the Court had ordered her to do so. Then she provided additional information, on which the Defendant could not rely because she did not execute her answers. Even if she had, however, the Plaintiff provided different information in her pre-trial statement. The Court of Appeals admonition that the purpose of discovery is to “eliminate, as far as possible, the necessity of any party to litigation going to trial in a confused or muddled state of mind . . . .” is certainly invoked here. Baltimore Transit Co. v. Mezzanotti, 227 Md. 8, 13 (1961). The Plaintiff’s response to this interrogatory is so confusing, and unnecessarily so, as to suggest that the muddled state of mind she creates is intentional. For this reason, the Plaintiff is going to be confined to her original (and only executed) answer to this interrogatory, that is, a blank. The Plaintiff will be foreclosed at trial from offering any information that should have been produced prior to January 31, 2005 in response to this interrogatory.

At the hearing on the Defendant’s motion for sanctions, the Plaintiff opposed the imposition of sanctions. Her arguments were that 1) the trial was still one month away and the parties had sufficient time to prepare and 2) she would obtain a postponement of the trial. The Defendant should not have to work frantically to complete discovery of

fact and expert witnesses after the discovery deadline because the Plaintiff did not fulfill her discovery obligations. This is not a burden the Defendant should be forced to carry. The Defendant planned and promulgated discovery requests in sufficient time to obtain the answers and complete depositions and other discovery within the Court's schedule. The Defendant should not be forced to work "under the gun" because the Plaintiff has not seen fit to provide reasonable answers to interrogatories after having been directed to do so by the Court.

The Plaintiff's suggestion that she could or would get yet another extension for the purpose of mitigating her dilatory action is disingenuous. First, the parties had already been to a pre-trial conference at the time of the April 11 hearing and no postponement of the trial date had been sought before that pre-trial conference. This Court's scheduling orders set the pre-trial conference approximately one month before the trial date for the reason that the parties are expected to be ready for trial by the date of the pre-trial conference. If the Plaintiff were serious about pursuing a postponement of the trial date, the time to do so was prior to the pre-trial conference. Second, if the Plaintiff were sincere about her desire for a postponement, and if she realistically thought her request would be granted in light of her prior requests and questionable candor with the Court, it would have been reasonable for her to obtain that postponement prior to the sanctions hearing on April 11. Perhaps she did not because she knew it is not the policy of this Court to grant trial postponements without good cause. The Defendant's lack of preparedness being of the Plaintiff's making would not, most likely, have been accepted as good cause to postpone a trial.

The Plaintiff's conduct has resulted in forcing the Defendant to trial unprepared.

Her conduct has violated the discovery rules, an Order of this Court, and the Scheduling Order in this case. Sanctions that level the playing field for both parties, although severe, are the only sanctions that are just. Accordingly, the Plaintiff shall be 1) foreclosed from presenting any expert testimony; 2) foreclosed from offering any evidence of any treatment she received for any alleged injuries she may have suffered as a result of the accident, any evidence of present complaints and any evidence of her contention that her injuries are permanent.

The Plaintiff has alleged a serious case. She seeks from Defendant Dailey “in excess of Five Hundred Thousand Dollars (\$500,000.00), plus interest, costs, and [ ] other relief. . . .” When Defendant Dailey responded to her serious allegations with reasonable requests for basic information within the time frames set by this Court, the Plaintiff responded with less than serious and less than reasonable efforts. The sanctions imposed prevent the Defendant from going to trial without the basic information to which she is entitled upon timely request.

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Date

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Kaye A. Allison  
Judge

Merricks	*	IN THE
	*	CIRCUIT COURT
Plaintiff	*	
	*	FOR
v.	*	
	*	BALTIMORE CITY
Dailey, et al	*	
	*	24-C-03-8918
Defendants	*	
	*	

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**ORDER**

Having considered the Plaintiff's motion for reconsideration, it is this 11<sup>th</sup> day of May, 2005, **ORDERED** that the motion is **DENIED** for the reason that post-hearing efforts by the plaintiff to obtain a postponement of the trial does not cure her prior intentional and significant failures to comply with her discovery obligations and her lack of candor with the Court in that regard.

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KAYE A. ALLISON  
JUDGE