

Court of Appeals, State of Michigan

ORDER

Kayla Rae Casciano v Home-Owners Insurance Company

Docket No. 322767

LC No. 14-030142-NI

Stephen L. Borrello
Presiding Judge

Peter D. O'Connell

Amy Ronayne Krause
Judges

This Court will review a trial court's decision on a discovery matter for an abuse of discretion. *Shinkle v Shinkle* (On Rehearing), 255 Mich App 221, 224; 663 NW2d 481 (2003). Questions of law pertaining to the interpretation and application of court rules are reviewed de novo. *Henry v Dow Chemical Co*, 484 Mich 483, 495; 772 NW2d 301 (2009). Michigan has a strong historical commitment to a far-reaching, open and effective discovery practice. Our Supreme Court has repeatedly emphasized that discovery rules are to be liberally construed to further the ends of justice. *Domako v Rowe*, 438 Mich 347, 359; 475 NW2d 30 (1991).

MCR 2.302(B)(1) provides that "[p]arties may obtain discovery of any matter, privileged, which is relevant to the subject matter involved in the pending action It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

The interest, bias or prejudice of a witness, including an expert witness, is a proper subject of cross-examination. MRE 611(c). An expert may be cross-examined about the number of times he or she has testified in court or was involved in a particular type of case. *Wilson v Stilwell*, 411 Mich 587, 599-600; 309 NW2d 898 (1981). It is also appropriate to cross-examine an expert to demonstrate a pattern of testimony for a specific attorney or a particular category of plaintiffs or defendants. *Id.* at 600-601. Evidence of an expert's credibility is generally admissible unless its probative value is substantially outweighed by the danger of unfair prejudice. *Wischmeyer v Schanz*, 449 Mich 469, 475; 536 NW2d 760 (1995).

Alternative means of discovery, such as the submission of interrogatories to nonparty expert witnesses, are not precluded by the court rules, especially when there are compelling circumstances. *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 617; 576 NW2d 709 (1998). In addition to taking an expert's deposition, MCR 2.302(B)(4)(b)(iii) provides that on motion, the court may order further discovery by other means, subject to restrictions on scope and expenses as the court deems appropriate.

Appellant cites MCL 600.2169(5) which prohibits the use of tax returns and other personal information to qualify a physician as a medical malpractice expert. This statute is limited to medical malpractice actions, and this is a no-fault action. Additionally, the fact that it is limited to medical malpractice actions could be interpreted as a Legislative determination not to extend the exclusion to experts outside that area.

While Federal case law is merely persuasive, it seems to be the type of law on which appellant is relying. A case that is far more directly on point than the ones cited by appellant is *JS v Whetzel*, 860 A2d 1112 (Pa Super, 2004), regarding a medical expert retained by an alleged tortfeasor for a personal injury action. It reads, in part:

In the instant case, the trial court ordered Dr. Eagle to produce all 1099 forms received from any insurance company or attorney from 1999 through 2002. We agree with the trial court that Dr.

Eagle must produce the 1099 forms related to his services for Mr. Whetzel's counsel, in this and other cases. See *Smith [v Celotex Corp]*, 387 Pa Super 340; 564 A2d 209 (1989); *Mohn [v Hahnemann Medical College and Hosp]*, 357 Pa Super 173; 515 A2d 920 (1986). This information addresses any potential bias Dr. Eagle might have toward Mr. Whetzel's counsel. See *Mohn, supra*. Additionally, Dr. Eagle must produce those 1099 forms related to his services for insurance companies or attorneys in personal injury cases. This information is relevant to examine any potential bias Dr. Eagle might have in favor of personal injury plaintiffs or defendants. See *Coward [v Owens-Corning Fiberglas Corp]*, 729 A2d 614 (Pa Super, 1999)]. However, the court erred to the extent it permitted unfettered production of any and all of Dr. Eagle's 1099 forms. See *Mohn, supra*. Some of these documents may contain payments from insurance companies or other sources where no litigation was involved, or payments by attorneys in cases unrelated to personal injury. See *id*.

For the foregoing reasons, we hold a party may impeach an expert witness by examining his relationship with the counsel calling him and any previous participation in certain types of litigation, so long as this inquiry is relevant to the main issue before a court. [860 A2d at 1121.]

In the case at bar, the trial court denied the protective order and limited the discovery to 1099's for the last 3 years for any insurance funded independent medical examinations, exactly the same examination the doctor had done in this case.

This is an instance of the goose/gander concept. Plaintiffs in all types of civil actions are required to allow an insurance company to have all sorts of information that may or may not be relevant. Some examples include: Listing every doctor plaintiff has seen in the last 10 years, how many times have they been involved in a lawsuit and if they recovered any damages in the other law suits. This time, the insurance company's expert is asked to disclose how much money he has received from performing IME's for insurance companies and to provide the accompanying data. It is entirely relevant, particularly in a case such as this in which the only doctor disputing the issue of whether or not plaintiff is in need of further treatment is the insurance company's doctor. All other medical experts involved have made findings contrary to the insurance company's expert in this case. How much money he receives from insurance companies should undoubtedly come in to evidence.

The application for leave to appeal is DENIED for failure to persuade the Court of the need for immediate appellate review.

The Court orders that the motion for immediate consideration is GRANTED.

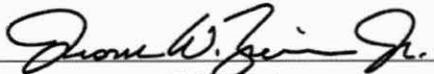
O'Connell, J. would grant leave to appeal.



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

SEP 19 2014

Date


Chief Clerk