[J-51-2005]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

CAPPY, C. J., CASTILE, NIGRO, NEWMAN, SAYLOR, EAKIN, BAER, JJ.

BARBARA A. COOPER,	: No. 212 MAP 2004
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	: Appeal from the Order of the Superior
	: Court at No. 1164 MDA 2003 entered on
v.	: July 14, 2004, affirming the Order of the
	: Court of Common Pleas of Dauphin
	: County, Civil Division, at No. 5932-CV-
LORETTA SCHOFFSTALL	: 2001-CV entered on June 23, 2003.
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	: ARGUED: May 16, 2005
APPEAL OF: PERRY A. EAGLE, M.D.,	:

CONCURRING OPINION

MADAME JUSTICE NEWMAN **Decided: September 7, 2006**

I agree with the Majority that the Orders of the Superior Court and the Dauphin County Court of Common Pleas must be vacated, but write separately to emphasize my belief that pursuing the personal financial information of an expert witness is, with few exceptions, an abuse of the discovery process. The Pennsylvania Rules of Civil Procedure limit the scope of discovery to "any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ." Pa.R.C.P. No. 4003.1. Discovery of expert testimony is limited to "facts known and opinions held by an expert . . . acquired or developed in anticipation of litigation or for trial . . . ." Pa.R.C.P. No. 4003.5(a). As

indicated by the Majority, additional discovery may be sought from an expert witness "upon cause shown." However, cause shown is limited to "such restrictions as to scope and such provisions concerning fees and expenses as the court may deem appropriate." Pa.R.C.P. No. 4003.5(a)(2). Thus, the trial court has the discretionary authority to expand the discovery of expert opinions "acquired or developed in anticipation of litigation or for trial" upon cause shown or may permit reasonable inquiry about fees and expenses "upon cause shown." That discretion is limited, as noted by the Majority to a showing of cause. While it may generally be appropriate for a party to inquire whether a witness offered as an expert in a particular field earns a significant portion or amount of income from applying that expertise in a forensic setting, I believe that the trial court abused its discretion and that Dr. Eagle is being subjected to an inappropriate expedition into his personal and financial records.

The general belief is that expert testimony adds an aura of reliability to the theories and claims proffered by the parties. Further, the proliferation of forensic programs in the media has conditioned jurors to expect testimony from experts in the majority of cases. The general trial strategy descends to an attack on the credibility of the expert witness to diminish his or her effectiveness in the eyes of the fact finder and to enable the opposing party to "lift [the expert's] visor, so that the jury [can] see who he was, what he represented, and what interest, if any, he had in the results of the trial." Goodis v. Gimbel Bros., 218 A.2d 574, 577 (Pa. 1966). In the instant matter, this attack took the form of a subpoena that required Dr. Eagle to produce "all federal 1099 forms received by [him] from any insurance company or law firm in connection with medical/legal independent medical examinations, the preparation of reports, examinations, and depositions for the years 1997 through 2001." (Superior Court Memorandum Opinion, page 2.) While the trial court limited the production of 1099s to the period from 1999 through 2001, the request for proof

of income received from any insurance company or attorney involving independent medical examinations and depositions during this period is overbroad because unfettered production of any and all of Dr. Eagle's 1099 forms could involve payments from insurance companies or other sources where no litigation was involved, or payments by attorneys in cases unrelated to personal injury. It could also reflect payments from attorneys or insurance companies for which Dr. Eagle did not end up testifying.

The Maryland Court of Appeals in Wrobleski v. Nora de Lara, 727 A.2d 930, 938 (Md. 1999), cited with approval by the Majority, found that a party may inquire both into the amount of income earned in the recent past from services as an expert witness and into the approximate portion of the witness' total income derived from such service. The Court hastened to add, however, two important caveats:

> First, we do not intend by our decision today to authorize the harassment of expert witnesses through a wholesale rummaging of their personal and financial records under the guise of seeking impeachment evidence. The allowance of the permitted inquiry, both at the discovery and trial stages, should be tightly controlled by the trial court and limited to its purpose, and not permitted to expand into an unnecessary exposure of matters and data that are personal to the witness and have no real relevance to the credibility of his or her testimony. Second, the fact that an expert witness devotes a significant amount of time to forensic activities or earns a significant portion of income from those activities does not mean that the testimony given by the witness is not honest, accurate, and credible.

Id. at 938. I would also observe that the amount of an expert's income may be irrelevant altogether because the more skilled the professional, the more specialized or more complex the field, or the greater the expert's professional acclaim or reputation, the more he or she can charge for their services. Thus, an expert may earn a substantial income from forensic or analytical services because he or she is a leader in the field and not because he or she will serve any master for a price.

This Court has recognized that the level of a witness's compensation is a proper subject of cross-examination, tending to flush out any bias of the witness. See Zamsky v. Public Parking Auth., 105 A.2d 335 (Pa. 1954); Commonwealth v. Simmons, 65 A.2d 353 (Pa. 1949); Grutski v. Kline, 43 A.2d 142 (Pa. 1945). Cross-examination of an expert on financial bias, whether in a deposition or at trial, however, should generally reflect his or her compensation in the particular case and his or her relationship with the party or lawyer employing the expert. The fact that an expert witness has received generous compensation, coupled with such red flags as dubious methodology, the inability to test the expert's hypothesis, or a lack of general acceptance in the related field, may reasonably suggest that the expert has allowed his or her bank account to overcome his or her professional judgment. It is unduly burdensome to require an expert witness to compile financial information regarding his or her expert activities over an extended period of years. It is an inappropriate and, indeed, unnecessary inquiry in the case sub judice considering the amount of information Ms. Cooper has already amassed. Therefore, I agree with the Majority that before an expert is required to bare his or her financial soul, sufficient cause must be shown in the nature of falsity, deception, or misrepresentation for purposes of denying bias. I am pleased that Pennsylvania is joining those select few of our sister states that have held that requiring an expert witness to produce personal financial information is generally an abuse of the discovery process.[1]

[1] See, e.g., Araiza v. Roskowinski-Droneburg, 670 A.2d 466 (Md. 1966); Donelson v. Fritz, 70 P.3d 539 (Colo. Ct. App. 2002); Syken v. Elkins, 644 So.2d 539 (Fla. Dist. Ct. App. 1994).