DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2011

SCOTT KATZMAN, M.D. and **ADVANCED ORTHOPAEDICS, P.A.,**
Petitioners,

v.

REDIRON FABRICATION, INC., GEORGE MARTIN and
ALLISON MINJARES,
Respondents.

No. 4D11-1290

[August 10, 2011]

PER CURIAM.

Scott Katzman, M.D., and his medical practice, Advanced Orthopaedics, P.A. (collectively Dr. Katzman), petition for a writ of certiorari from a trial court order denying their motion for a protective order. Dr. Katzman, a non-party to the underlying personal injury suit, contends that the defendant's discovery requests are over broad, unduly burdensome, and beyond what is authorized from an expert witness under Florida Rule of Civil Procedure 1.280(b)(4)(A). The trial court's discovery order is narrowly tailored and does not unduly intrude into the private financial affairs of the non-party. We conclude that the trial court did not abuse its broad discretion in controlling discovery and deny the petition.

Facts

Plaintiffs George Martin and Allison Minjares were involved in an auto accident with a vehicle owned by defendant Rediron Fabrication, Inc. and filed suit seeking damages for their alleged injuries. Plaintiffs' lawyer referred them to Dr. Katzman. Katzman entered into a letter of protection agreement (LOP) agreeing to be paid for treating the plaintiffs from any recovery obtained in the lawsuit.

Katzman performed an allegedly controversial outpatient surgical procedure[1] on the plaintiffs. Katzman performed the procedure on both plaintiffs within weeks of what defendant refers to as a "minor auto accident." One procedure took less than 45 minutes, and Katzman billed more than $45,000. He billed more than $36,000 for the second plaintiff. In 2008, the Center for Medicare and Medicaid Services issued a national non-coverage determination finding no evidence that this procedure improves health or reduces pain. Defendant believes that a large portion of Katzman's income is generated by recommending this procedure for patients referred to him in litigation cases and that he charges more for the procedure in litigation cases than in nonlitigation cases.

Rediron sought discovery from Katzman regarding how often he has ordered discectomies over the past four years and what he has charged in litigation and non-litigation cases. Katzman objected, moved for a protective order, and argued that the discovery is overbroad and exceeds the financial discovery that is permitted from retained experts under the discovery rules and *Elkins v. Syken*, 672 So. 2d 517 (Fla. 1996).

After two hearings, the circuit court ruled that defendant must respond to the following requests:

> 6. Dr. Katzman will provide the amounts he has collected from health insurance coverage on an annual basis in 2007, 2008, 2009 and 2010 regarding the type of surgery as what he performed on George Robert Martin and Allison Minjares, stating the number of patients for whom he performed such a procedure in each year, and the amounts received during each of those years from those health insurers.
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> 7. Dr. Katzman will provide the amounts he has collected under letters of protection received from attorneys on an annual basis in 2007, 2008, 2009, and 2010 regarding the type of surgery as what he performed on George Robert Martin and Allison Minjares, stating the number of patients for whom he performed such a procedure in each year, and the amounts received during each of those years pursuant to those letters of protection.

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[1] Katzman performed a "percutaneous discectomy" which involves removal of herniated disc material that presses on a nerve root or the spinal cord. Defendant explained that insurance companies and third party payors have questioned the need for and efficacy of this procedure.

This petition followed.

Jurisdiction

Certiorari jurisdiction does not lie to review every erroneous discovery order. *Allstate v. Langston*, 655 So. 2d 91, 94 (Fla. 1995). "[R]eview by certiorari is appropriate when a discovery order departs from the essential requirements of law, causing material injury to a petitioner throughout the remainder of the proceedings below and effectively leaving no adequate remedy on appeal." *Id.* (citing *Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097 (Fla. 1987)).

This court generally will not review orders denying a party's over-breadth or burdensomeness objections to discovery. *See Topp Telecom, Inc. v. Atkins*, 763 So. 2d 1197, 1200 (Fla. 4th DCA 2000); *Comtys. Fin. Co., LLC v. Bjork*, 987 So. 2d 231 (Fla. 4th DCA 2008).

The order at issue in this case, however, requires production of otherwise private financial information from a non-party, which has no right to appeal.

Petitioner alleges that the order is overbroad, unduly burdensome, and that it departs from the essential requirements of *Elkins* and rule 1.280. To this extent, petitioner makes a threshold jurisdictional showing that the trial court's order compels production of cat-out-of-the-bag discovery. *Martin-Johnson*, 509 So. 2d at 1100. *See also Price v. Hannahs*, 954 So. 2d 97, 100 (Fla. 2d DCA 2007).

Analysis

In *Syken v. Elkins*, 644 So. 2d 539 (Fla. 3d DCA 1994), *approved,* 672 So. 2d 517 (Fla. 1996), experts retained to provide compulsory medical examinations were ordered to produce expansive discovery of their private financial information, including tax returns. The information was sought to show what should have been fairly obvious to most, that the expert may be biased in favor of the retaining party because he or she has a financial incentive. Trial courts, however, permitted broad, wholesale discovery into the private financial affairs of the experts far beyond what was reasonably necessary to fairly litigate the potential for bias. The problem with such invasive and harassing discovery was expanding and threatened to chill the willingness of experts to become involved in litigation.

The Third District Court of Appeal fashioned a methodology that balanced a party's need to obtain financial bias discovery from an expert with the need to protect the privacy rights of experts. The Florida Supreme Court approved of the Third District's criteria and, subsequently, the methodology was codified in Florida Rule of Civil Procedure 1.280(b)(4)(A).[2]

Several years following *Elkins*, the Court decided *Allstate Insurance Co. v. Boecher*, 733 So. 2d 993 (Fla. 1999), which arose from insurance litigation. The insured sought to discover from the insurance company the extent of its financial relationship with the expert witness that the insurance company intended to call at trial to dispute causation. The Court held that the *Elkins* limitations could not be used to shield the

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[2] In relevant part, the rule provides;

> (iii) A party may obtain the following discovery regarding any person disclosed by interrogatories or otherwise as a person expected to be called as an expert witness at trial:
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> 1. The scope of employment in the pending case and the compensation for such service.
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> 2. The expert's general litigation experience, including the percentage of work performed for plaintiffs and defendants.
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> 3. The identity of other cases, within a reasonable time period, in which the expert has testified by deposition or at trial.
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> 4. An approximation of the portion of the expert's involvement as an expert witness, which may be based on the number of hours, percentage of hours, or percentage of earned income derived from serving as an expert witness; however, the expert shall not be required to disclose his or her earnings as an expert witness or income derived from other services.
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> An expert may be required to produce financial and business records only under the most unusual or compelling circumstances and may not be compelled to compile or produce nonexistent documents. Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and other provisions pursuant to subdivision (b)(4)(C) of this rule concerning fees and expenses as the court may deem appropriate.

Fla. R. Civ. P. 1.280(b)(4)(A)(iii).

discovery sought *from the party* regarding its financial relationship with the expert. The Court strongly condemned the insurance company's attempt to hide discovery of its financial relationship with the expert: "Only when *all* relevant facts are before the judge and jury can the 'search for truth and justice' be accomplished." *Id.* (emphasis in original) (citation omitted). Because the discovery in *Boecher* sought information *from the party* regarding its relationship with a particular expert, the Court found that the analysis changed and the balance of interests shifted in favor of allowing the discovery. *Id.* at 997.

The situation presented in this case, which we have seen recurring, involves a physician who treats a patient who was involved in an auto accident and referred by a lawyer. The physician enters into a letter of protection agreement and agrees to obtain payment from any recovery that is obtained in the law suit. In one respect, the physician is a "fact" witness, a treating physician.

In another respect, the same physician often provides expert opinions at trial regarding the permanency of injuries, prognosis, the need for future treatment, etc. In these circumstances, the witness is a "hybrid," treating physician and expert witness. The physician is not merely a witness retained to give an expert opinion about an issue at trial. Likewise this is not a typical treating physician that a patient independently sought out. A lawyer referred the patient to the physician in anticipation of litigation, and the physician has injected himself into the litigation by entering into the letter of protection agreement. This "hybrid" witness potentially has a stake in the outcome of the litigation.

As in *Boecher*, the circumstances in the present situation are different from that in *Elkins*, and the balance of interests is different.

Katzman argues that he is an "expert" within the meaning of the rule and that financial bias discovery is therefore limited. *See* Fla. R. Civ. P. 1.390(a) (defining "expert" as the term is used in the discovery rules as "one possessed of special knowledge or skill about the subject upon which called to testify"). Katzman alleges that he is being compelled to compile and produce non-existent documents which exceeds what *Elkins* and rule 1.280(b)(4)(A) allow.

Katzman clearly qualifies as an expert and is expected to provide expert opinion testimony as a witness in this case, but Katzman is also a treating physician who has agreed to treat the patient under a letter of protection agreement. The discovery that can be obtained from such a

"hybrid witness" is not limited strictly by the rule that governs discovery from typical experts retained to provide opinions at trial.

Generally, financial bias discovery from such a hybrid expert should not exceed that permitted under *Elkins* and rule 1.280(b)(4)(A). Discovery that exceeds these limits should be presumed burdensome and harassing for the cogent reasons discussed in *Elkins*.[3] For similar reasons, the privacy interests of hybrid experts are weighty and should be protected within reasonable limits.

Petitioner notes that permitting intrusive financial discovery from these physicians could negatively impact the availability of healthcare for uninsured patients injured in accidents where litigation is anticipated. This policy concern should also be afforded some weight.

On the other hand, the search for truth and justice weighs against allowing *Elkins* to shield from discovery evidence that may prove highly relevant to the potential bias of the witness. As the court observed in *Boecher*, courts should condemn "any practice that 'undermines the integrity of the jury system which exists to fairly resolve actual disputes between our citizens' . . . . Only when *all* relevant facts are before the judge and jury can the 'search for truth and justice' be accomplished." *Boecher*, 733 So. 2d at 995 (emphasis in original).

We do not endeavor in this opinion to set in stone what can and cannot be discovered from hybrid physician witnesses of this type. We are confident, however, that the narrow discovery permitted by the trial court in this case does not depart from the essential requirements of law such that a writ of certiorari should issue.

In this case, the discovery that is sought is not relevant merely to show that the witness is biased based on an ongoing financial relationship with a party or lawyer. We agree that *Elkins* discovery should generally provide sufficient discovery into such financial bias. The discovery here is relevant to a discrete issue, whether the expert has recommended an allegedly unnecessary and costly procedure with

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3 The Third District Court of Appeal observed in *Elkins* that "decisions in this field have gone too far in permitting burdensome inquiry into the financial affairs of physicians, providing information which 'serves only to emphasize in unnecessary detail that which would be apparent to the jury on the simplest cross-examination: that certain doctors are consistently chosen by a particular side in personal injury cases to testify on its respective behalf.'" *Elkins*, 644 So. 2d at 545 (citations omitted).

greater frequency in litigation cases, and whether the expert, as a treating physician, allegedly overcharged for the medical services at issue in the lawsuit. The limited intrusion into the private financial affairs of the doctor in this case is justified by the need to discover case-specific information relevant to substantive issues in the litigation, i.e., the reasonableness of the cost and necessity of the procedure.

Elkins was not intended to shield discovery of such relevant information.

In addition, the last paragraph of rule 1.280(b)(4)(A) provides: "Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and other provisions pursuant to subdivision (b)(4)(c) of this rule concerning fees and expenses as the court may deem appropriate." This language indicates that a trial court retains some flexibility and discretion to permit further discovery by other means when the situation requires.

Trial courts have broad discretion in controlling discovery and in issuing protective orders. *Rojas v. Ryder Truck Rental, Inc.*, 641 So. 2d 855, 857 (Fla. 1994). We expect that trial judges will exercise their discretion carefully when circumstances require discovery in excess of *Elkins* and not allow the exception to swallow the rule. Trial courts should not allow discovery from hybrid experts to become a tactical litigation weapon to harass the witness, the party, or the law firm(s). *See* Fla. R. Civ. P. 1.280(b)(4)(C) (allowing trial courts to require the party seeking discovery from an expert to pay a fair part of the fees and expenses reasonably incurred by the expert).

In this case, the trial court did not abuse its broad discretion when it permitted the limited discovery at issue, and the discovery order does not depart from the essential requirements of law.

Petition denied.

POLEN, TAYLOR and LEVINE, JJ. concur.

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Petition for writ of certiorari to the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County; Dwight L. Geiger, Judge; L.T. Case No. 562009CA007932.

Kimberly P. Simoes and Mario B. Simoes of The Simoes Law Group, P.A., Deland, for petitioners.

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Not final until disposition of timely filed motion for rehearing.