BURNETTA FAURIA	*	**NO. 2002-CA-2320**
VERSUS	*	**COURT OF APPEAL**
CAVERLY A. DWYER AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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CONSOLIDATED WITH:	**CONSOLIDATED WITH:**
JAMES TAYLOR, ALVIN ARMOUR AND RALPH GAVIN	**NO. 2002-CA-2418**
VERSUS	
KEYANA MARIE MANCHESTER AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY	

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NOS. 2001-2778 C/W 2001-5471, DIVISION "M"
Honorable C. Hunter King, Judge
* * * * * *
Judge Patricia Rivet Murray
* * * * * *

(Court composed of Chief Judge William H. Byrnes, III, Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray, Judge David S. Gorbaty, Judge Edwin A. Lombard)

BYRNES, C. J., DISSENTS IN PART WITH REASONS

Robert G. Harvey, Sr.
Mark P. Glago
HARVEY, JACOBSON & GLAGO, APLC
2609 Canal Street – 5th floor
New Orleans, LA 70119
COUNSEL FOR PLAINTIFFS/APPELLEES

W. Patrick Klotz
KLOTZ & EARLY
2609 Canal Street – 4TH Floor
New Orleans, LA 70119
COUNSEL FOR APPELLEE
(LOUISIANA MEDICAL MANAGEMENT
COPORATION)

David V. Batt
Phillip J. Rew
LOBMAN, CARNAHAN, BATT, ANGELLE & NADER
400 Poydras Street
2300 Texaco Center
New Orleans, LA 70130-3245
COUNSEL FOR DEFENDANTS/APPELLANTS

REVERSED

This is a discovery dispute that arose out of two unrelated personal injury suits against the same insurance company, State Farm Mutual Automobile Insurance Company ("State Farm"). In both suits, State Farm noticed the depositions of the same two related non-parties--Metropolitan Health Group ("MHG"); and its management company, Louisiana Medical Management Corporation ("LMMC")—pursuant to La. C.C.P. art. 1422, and

issued accompanying subpoenas *duces tecum*. In both suits, LMMC and plaintiffs moved to quash the discovery requests and sought sanctions. The trial court granted the motions and imposed sanctions totaling $20,000 on State Farm and its attorney, David V. Batt. State Farm and Mr. Batt filed separate writ applications with this court in each case. This court reversed the sanctions award and remanded for the assessment of appropriate sanctions, if any. On remand, the trial court imposed sanctions totaling $16,000. These consolidated appeals followed. For the reasons that follow, we reverse the trial court's award of sanctions.

FACTUAL AND PROCEDURAL BACKGROUND

The pertinent facts in these consolidated cases are undisputed. State Farm, in its capacity as insurer for the respective tortfeasors, was named as a defendant in these two unrelated personal injury cases, *Taylor* v. *Manchester*, and *Fauria v. Dwyer*. Both cases arose out of motor vehicle accidents, which occurred in *Taylor* on October 20, 2000, and in *Fauria* on February 14, 2000. Both cases involved relatively minor personal injuries. In both cases, the plaintiff(s), on referral from their attorney, treated within days following the accidents with a physician employed by MHG, either Dr. Norman Ott or Dr. Sofjan Lamid. The sole plaintiff in *Fauria*, Ms. Fauria, treated with Dr. Lamid. Two of the three plaintiffs in *Taylor* treated with

MHG physicians; Mr. Taylor treated twice with Dr. Ott, and another plaintiff, Mr. Armour, treated four times with Dr. Lamid.

In preparation for trial, State Farm noticed the Article 1422 depositions of MHG and LMMC in both cases, and issued accompanying subpoenas *duces tecum*. According to State Farm, the purpose for these discovery requests was to obtain information to cross-examine the MHG physicians at trial regarding their bias. State Farm's subpoenas, which were virtually identical, sought sixteen categories (plus some sub-parts) of documentation; to wit:

1. All records regarding the referral of plaintiff to MHG and the billing, collection, and treatment records regarding plaintiff;

2. The names and addresses of all owners, investors, financiers, stock holders, members, partners, shareholders, officers, executives, directors, or other persons with a financial or proprietary interest in MHG;

3. The means of financing clinic operations such as overhead, staffing, doctor's salaries, supplies and other expenses, utilized by MHG;

4. The nature of the fee agreements between MHG and its patients or their attorneys, including the contingency fee agreement between MHG and/or LMMC and the plaintiff in this matter or his (or her) attorney;

5. The percentage of patients treated by MHG which are referred to the clinic by attorneys; the percentage of patients treated by MHG which are referred by the plaintiffs bar, the percentages of patients treated by MHG which are referred by plaintiff(s) counsel in this matter, and/or the percentage of patients treated by MHG who are engaged in litigation or have made some type of personal injury claim with an insurance company in connection with their

treatment;

6. With regard to referrals of patients to MHG, identification of persons or organizations who make or have made such referrals; identification and production of reports that are made reflecting such referrals or the economic value of such referrals to MHG; and the identification of all persons who have referred plaintiff in this matter to MHG;

7. Identification and production of any type of agreement or documentation regarding any letter of guarantee, contingency fee agreement, or other fee agreement between MHG and/or LMMC and plaintiff's counsel in this matter;

8. Identification and production of any written manuals dealing with medical protocols to be employed by MHG or its physicians;

9. Identification and production of protocols employed by MHG for the generation, transcription, and preparation of medical reports or bills;

10. Number of patients seen per day at MHG, the types of treatment given, the average time of treatment, and/or the average time of evaluation by a physician for patients treated at MHG;

11. Production of all documentation relating to the following: (a) the conception, creation and operation of MHG including but not limited to articles of incorporation, partnership agreement, operating agreement, stock certificates or other documentation reflecting the nature of MHG and/or the ownership or proprietary interest thereof; (b) the ownership or transfer of any proprietary interest in MHG; (c) the number of patients seen per day, types of treatment given, average time of treatment and/or evaluation by any MHG physician; (d) lien forms, letters of guarantee, or contingency fee agreements used by MHG; (e) lien forms, letters of guarantee, or contingency fee agreements between counsel for plaintiff in this matter and MHG or any of its employees, doctors, or chiropractors, and (f) all standard forms used in the preparation of patient medical reports and/or bills;

12. Identification and production of all procedures and protocols

regarding: (a) the process by which the doctors' and therapists' notes, sign-in sheets, and other medical records of MHG patients are used by MHG to generate the patients' medical bills and transcribe narrative medical reports; (b) the method by which MHG selects the appropriate CPT codes in order to describe the therapy or other services provided by MHG; (c) the name and address of all MHG employees responsible for the generation of patients' medical bills, transcription of narrative medical reports, and selection of the appropriate CPT codes; (d) whether additional language was added to narrative medical reports transcribed by employees of MHG and, if so, the name and address of the persons responsible for the additional language, and the protocols used for the addition of language; and (e) whether additional billing entries were added to medical bills generated by MHG and, if so, the names and address of persons responsible for the additional entries, and the protocols used for the additional entries;

13. Identification and production of all procedures utilized to assure the accuracy of the transcription of medical reports and medical bills generated by MHG;

14. With regard to the physical therapy provided to MHG clients: (a) number and identity of all licensed physical therapists (PTs) or entity employing PTs, employed by MHG, having offices within the offices of MHG, renting space from MHG, or receiving referrals from MHG; (b) the supervision of all PTs and physical therapy support personnel, including, but not limited to, aides, technicians, assistants, students and permitees, including the identity and licensure of all supervising individuals; (c) produce all rental and/or revenue agreements between MHG and/or LMMC and any and all PTs, or entity employing PTs, providing physical therapy to clients of MHG; (d) the qualifications and licensure required by MHG or LMMC of any PTs or support personnel, or entity employing PTs and support personnel, which provide physical therapy to clients of MHG; and (e) the training provided by MHG and/or LMMC, or on the premises of MHG, to physical therapy aides, assistants, permitees, technicians, and students;

15. With regards to physical therapy provided to each respective plaintiff, produce all prescriptions, referrals, initial physical therapy evaluations, progress notes, reassessments, treatment records, and

discharge summaries generated in conformity with Title 46:323 of the Louisiana Administrative Code;

16. Produce all documentation relating to the following: (a) the conception, creation, and operation of LMMC including articles of incorporation, partnership agreement, operating agreement, stock certificates or other documentation reflecting the nature of LMMC and/or the ownership or proprietary interest thereof; (b) the ownership or transfer of any proprietary interest in LMMC; (c) the number of patients seen per day, types of treatment given, average time of treatment, and/or evaluation by any LMMC physician; (d) all lien forms, letters of guarantee, or contingency fee agreements used by LMMC; (e) all lien forms, letter of guarantee, or contingency fee agreements between plaintiff's counsel and LMMC or any of its employees, doctors, or chiropractors; and (f) all standard forms used in the preparation of patient medical reports and/or bills.

As noted, plaintiffs and LMMC responded by filing motions to quash the discovery requests and seeking sanctions. In its motions, LMMC conceded that the first item sought was discoverable and represented that State Farm had been provided with that information; to wit, all medical records regarding each of the respective plaintiffs. As to the other fifteen items, however, LMMC asserted that it was entitled to a protective order pursuant to La. C.C.P. art. 1426 because the information sought was either privileged commercial information under La. C.C.P. art. 1426 A(7), or irrelevant, and because the overall request was overly burdensome, oppressive, and harassing.

Given that both suits were pending before the same trial court and

given that both sets of motions were scheduled for hearing on the same date, the trial court considered the motions together. Following a lengthy hearing, the trial court granted the motions and awarded a total of $20,000 in sanctions ($5,000 per attorney, per case in attorney's fees) on State Farm and its attorney, David V. Batt. From that ruling, State Farm and Mr. Batt filed separate writ applications in each case.

On August 2, 2002, we exercised our emergency supervisory jurisdiction in the *Taylor* case due to the impending August 5, 2002 trial date. Insofar as the writ application requested reversal of the trial court's order quashing the discovery request, we denied the writ. However, we granted the writ insofar as it requested reversal of the trial court's $20,000 sanction award. Reversing that award, we found it was an abuse of discretion, reasoning:

> It is apparent that the trial court assessed the $20,000.00 sanction, *inter alia*, as a form of punishment for the relator's actions in the case at bar as well as other cases in other trial courts where the relator or counsel sought the same or substantially similar information for LMMC and MHG. Article 1420 envisions the award of sanctions for things within the trial judge's actual knowledge and based upon evidence received in his or her own courtroom. A trial judge may not award sanctions for similar behavior by an attorney or party in other cases without *bona fide* evidence as to all of the facts and circumstances that were at issue therein. In the case at bar, although argument was made that the relator had done the same thing in other cases, no formal evidence was presented as to what the precise issues were in those cases. It is possible that the information sought in those other cases, based upon the

> pleadings and other factors, may have been relevant and necessary.

We remanded in *Taylor* to the trial court with instructions that it "assess an appropriate sanction to be imposed, if any, based upon the evidence in the record as it presently exists." Moreover, we limited the scope of the potential sanction award to " the actual time incurred by attorneys for and actual necessary expenses of LMMC's and MHG's during the period of 12 June 2002 (the date the notice of deposition and subpoena were issued) through 12 July 2002 (the date the motion to quash was heard and disposed of by the trial court) that resulted in the successful quashing of the depositions and subpoenas."

On August 22, 2002, we denied in part and granted in part the writ application in the *Fauria* case. In so doing, we adopted our reasoning in the *Taylor* case. As in *Taylor*, we remanded for an assessment of the appropriate sanction. Following the instructions we enunciated in *Taylor*, and adopted in *Fauria*, the trial court on remand conducted a hearing and awarded $16,000 in sanctions ($4,000 per attorney, per case in attorney's fees).

DISCUSSION

The manifest error or clearly wrong standard applies to our review of the trial court's sanctions award. *See Murphy v. Boeing Petroleum Services*,

Inc., 600 So. 2d 823, 827 (La. App. 3 Cir. 1992); *see also Hester v. Hester*, 97-1326, p. 8 (La. App. 4 Cir. 2/11/98), 708 So. 2d 462, 466. The narrow issue presented is whether sanctions, if any, were appropriately granted pursuant to Article 1420.

Adopted in 1988, Article 1420 is intended to provide an additional remedy for a party subjected to frivolous discovery. Article 1420 sanctions may be awarded if the court determines that "the discovery is interposed for an improper purpose, such as harassment, or is 'unduly burdensome.'" 1 Frank L. Maraist and Harry T. Lemmon, *Louisiana Civil Law Treatise: Civil Procedure* § 9.13 (1999). Stated otherwise, such sanction "may be imposed upon an attorney or a party if the court determines that the discovery was improper or that the proponent's motive or judgment in seeking the discovery was bad." *Id.*

Before Article 1420 was adopted, the only remedy available for frivolous discovery was a protective order pursuant to La. C.C.P. art. 1426. Article 1426 provides that "for good cause shown" a trial court "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," and expressly enumerates as one of the orders a trial court may make "[t]hat the discovery not be had . . .[or] . . . [t]hat certain matters not be inquired into, or that the

scope of discovery be limited to certain matters." La. C.C.P. art. 1426(1), (4); see also La. C.C.P. art. 1354 (providing that a trial court may in its discretion "vacate or modify the subpoena if it is unreasonable or oppressive"). Article 1426 has been construed as granting the trial court broad discretion to regulate specific discovery requests. *Maraist & Lemmon, supra.* at §9.1. Notably, this is the precise relief LMMC sought in its motions to quash that it filed in this case; to wit, it sought a protective order as to items two through sixteen.

Article 1420 B(2) and (3), which are similar to Article 1426, provide that a party is subject to sanctions if the discovery is interposed for an improper purpose, such as to harass or to cause needless increase in the cost of litigation; or [is] "unreasonable, unduly burdensome, or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation." La. C.C.P. art. 1420B. In finding State Farm and Mr. Batt violated Article 1420 B(2) and (3), this court in *Taylor* reasoned:

> In the absence of any allegation in a pleading in which the liability of LMMC or MHG for damages might be assessed, made directly, or upon information and belief, we find that the late filings of the discovery requests [we noted that on June 12, 2002, with a discovery cutoff date of June 13, 2002, State Farm served the Article 1422 notice of deposition and accompanying subpoena *duces tecum*], although technically timely, in a suit in which the amounts of money sought by the plaintiffs from the relator and their insured are not substantial, are violations of the

plain language of La. C.C.P. art. 1420B (2) and (3).

Insofar as our reasoning was premised on the belated nature of State Farm's discovery requests, it was misplaced for two reasons. First, as State Farm submits, that reasoning was totally inapposite to the *Fauria* case in which no discovery cutoff date had been set. Second, our reference in *Taylor* to June 12th (the day before the discovery cutoff date) as the date on which the subpoenas were served (and the sanction period commenced) was factually mistaken. The subpoenas actually were issued on May 28th, about two weeks earlier. Although the plaintiffs and LLMC argue that this court's prior decision in *Taylor* should simply be read to mean that the sanction period commenced on that earlier date, there is a flip side to that argument; namely, we expressly relied on the belated nature of the discovery request, being filed on the day before the discovery cutoff, as a basis for finding the request constituted a violation of La. C.C.P. art. 1420 B.

Regardless, given the circumstances of these two cases, arising out of minor personal injury claims, we cannot say that the trial court was clearly wrong in finding that State Farm's discovery requests were unduly burdensome under La. C.C.P. art. 1420 B(3). This finding, however, does not end our inquiry. A discovery request can be both unduly burdensome and yet not warrant sanctions. Indeed, this flexibility in regulating frivolous

discovery is implicit in La. C.C.P. art. 1420 D and E. Although Article 1420 D authorizes sanctions when the court finds a certification has been made in violation of the provisions of Article 1420 B, Article 1420 E provides that "[a] sanction authorized in Paragraph D shall be imposed only after a hearing at which any party or his counsel may present any evidence or argument relevant to the issue of imposition of the sanction." La. C.C.P. art. 1420 E. To conduct such an Article 1420 E hearing was the reason for our remand in both of these cases.

At the Article 1420 E hearing held on remand on October 4, 2002, State Farm's attorney, Mr. Batt, argued that although the trial court found the discovery requests inappropriate and unduly burdensome, the discovery requests were pursued for a legitimate purpose—to establish bias on the part of the MHG physicians--and in good faith given the prior jurisprudence. Over State Farm's objection, the trial court allowed the plaintiffs and LLMC to offer invoices to establish the attorney's fees and costs they incurred in pursuing these motions to quash. On that basis, the trial court again awarded sanctions, yet indicated there was some merit to Mr. Batt's argument and thus lowered the sanctions award to $16,000.

On appeal, State Farm argues that the trial court abused its discretion in sanctioning it for pursuing routine discovery under Article 1422. Indeed,

State Farm argues that its discovery request was justified by this court's recent decision in *Francois v. Norfolk Southern Corp.*, 2001-1954 (La. App. 4 Cir. 3/6/02), 812 So. 2d 804, which upheld a broad discovery request on a nonparty physician to establish bias or collusion with the plaintiffs' attorneys. Plaintiffs and LLMC counter that this court's prior decision in *Taylor* and *Fauria* are dispositive on their right to recover sanctions and that the purpose for remand was solely to set the quantum of sanctions.

Like the trial court, we find merit to Mr. Batt's argument that even assuming the discovery was unduly burdensome, it was pursued for a legitimate purpose and in good faith in light of the jurisprudence allowing similar discovery requests. We further find that the trial court was clearly wrong in imposing sanctions under Article 1420 in these cases under these circumstances. While we find that the trial court did not abuse its discretion in quashing the discovery sought as unduly burdensome, that finding does not automatically mandate an award of sanctions.

A failure to prevail is not a basis for awarding sanctions. *See* C*urole v. Avondale Industries, Inc.*, 2001-1808, p. 5 (La. App. 4 Cir. 10/17/01), 798 So. 2d 319, 322. "Only when the evidence is clear that there is no justification for the assertion of a legal right, should sanctions be considered." *Id.* Article 1420 is a statutory provision authorizing sanctions

and thus must be strictly construed. *See Maxie v. McCormick*, 95-1105, p. 6 (La. App. 1 Cir. 2/23/96), 669 So. 2d 562, 566.

Given that sanctions are reserved for extreme cases, we construe Article 1420 as contemplating a sliding scale on which there are three points. First, there is a point at which the discovery request is appropriate and sanctions not warranted. Second, there is a point at which the discovery request is entirely inappropriate—frivolous--and sanctions are warranted. Finally, there is a middle position at which the discovery request is inappropriate, yet sanctions are not warranted. Applying that sliding scale standard to the instant cases, we conclude that these cases fall in the middle position.

Although we cannot say the trial court was clearly wrong in finding State Farm's discovery requests overly burdensome, State Farm articulated a legitimate purpose for pursuing the discovery. As we noted in *Taylor*, State Farm's purpose for seeking the discovery was to establish bias "to impeach the testimony of the plaintiffs' treating [MHG] physicians who are connected with respondents." Indeed, this purpose is apparent from many of the sixteen discovery requests. It is well settled that if one of the MHG physicians testified at trial State Farm would be permitted to attack his credibility by showing bias. *See Brown v. Bush*, 98-0581 at p. 3 (La. App. 4

Cir. 4/22/98), 715 So. 2d 464, 465 (citing La. C.E. art. 607). To prepare for such impeachment, State Farm should be permitted "to discover an expert's bias by discovery or subpoena." *Id.* (citing *Rowe v. State Farm Mutual Automobile Ins. Co.*, 95-669 (La. App. 3 Cir. 3/6/96), 670 So. 2d 718, 725). And, as State Farm stresses, in *Francois*, *supra*, we likewise recognized the need for allowing discovery to obtain the information necessary to develop a witness' bias on cross-examination at trial.

Arguing to the contrary, LLMC submits that State Farm has already taken two depositions of LLMC and should not be permitted to take a third. State Farm counters that one of those prior depositions was taken a decade ago in October 1992. The deponent of that 1992 deposition was LLMC's founder, Robert Harvey, Jr., and that deposition was taken before LLMC was even formed. The other LLMC deposition was taken more recently in July 2001 by another attorney in Mr. Batt's office, but was taken on behalf of another insurance company, Allstate Insurance Company. Plaintiffs and LLMC offered no evidence to the contrary.

Summarizing, the record in these cases does not support a finding that State Farm's discovery requests were frivolous or lacking even the slightest justification. Although State Farm's attempt to conduct formal discovery to obtain impeachment evidence regarding bias of MHG's physicians was

inappropriate under the particular facts of these two cases, its failure to prevail is not a grounds for sanctions. Nor did the plaintiffs and LLMC offer any evidence establishing that State Farm lacked good faith in seeking such impeachment evidence. Accordingly, we find the trial court was clearly wrong in imposing sanctions on State Farm and Mr. Batt under the unique facts of these consolidated cases.

DECREE

For the foregoing reasons, the judgments of the trial court awarding sanctions are reversed.

REVERSED