

no-fault newswire

A ROAD MAP FOR MOTOR VEHICLE INSURERS AND OWNERS

12-09-13

Medical Expert's Financial Documents Cannot Be Obtained to Show Bias

By Sidney A. Klingler

In an unpublished opinion, the Court of Appeals has held that financial documents of retained medical experts could not be discovered merely to show bias. In *Kincaid v Croskey*, unpublished per curiam opinion of the Michigan Court of Appeals, issued November 21, 2013 (Docket Nos. 310148, 311857), the trial court permitted the disclosure of financial documentation pertaining to two physicians who performed IME examinations of the Plaintiff. The information was sought from non-party ExamWorks, a business that coordinates independent medical examinations by physician consultants. The documentation that the trial court permitted to be disclosed included the gross income the physicians received from "defense medical examinations" with ExamWorks. ExamWorks appealed, and the Court of Appeals vacated the discovery order.

Plaintiff had sought the financial documentation in question by means of subpoenas issued to ExamWorks, without seeking to take the deposition of either IME physician. The Court of Appeals held that the proper means of discovery had not been used. The panel instructed that discovery of documents from a nonparty is either by deposition or by written requests for production. Furthermore, while the Court Rules provide for further discovery by other means, the panel held that "a litigant must first take the deposition of the expert and then, if unsatisfactory, may proceed to seek alternative means of discovery from the court." The panel noted that another decision of the Court implied that "compelling circumstances" are required to justify further discovery by other means. The panel looked to dictionary definitions of the term "compelling" as well as the Court Rule definition of "exceptional circumstances" referenced in another portion of the relevant Court Rule. The panel found nothing in the case before it to suggest the existence of "compelling" or "exceptional" circumstances to justify the scope or method of discovery permitted by the trial court.

The Court noted that bias is a proper subject for cross examination, and further that an expert may be cross examined about the number of times he or she has appeared in court or been involved in a particular type of case, or about a pattern of testimony for a particular attorney or a particular class of plaintiffs or defendants. However, the Court cautioned, such evidence "is only minimally probative of bias and must be carefully scrutinized by the trial court." At deposition, the Court noted, "the

SECRET WARDLE NOTES:

The key holding in this case is that financial documents of a medical expert are not discoverable merely to show bias, although a Plaintiff can inquire at deposition concerning the extent of the physician's practice in performing defense work and the amount of compensation received for such work. The Court has imposed an extremely high standard for the discovery of financial documentation, requiring that a Plaintiff demonstrate that she could not obtain "the substantial equivalent of the materials" by deposition or that the use of deposition would constitute "undue hardship" to her.

This opinion, although unpublished and therefore not binding on trial courts, provides much needed guidance on the frequently recurring issue of discoverability of financial documentation of expert witnesses.

CONTINUED...

physicians could be asked questions regarding their relationship with ExamWorks, the extent of their practices in performing this type of defense work and the amount of compensation received to demonstrate bias.” However, in its key holding, the Court advised that “[i]t is unnecessary to obtain their detailed financial records for this purpose.”

As for the admission of financial documents to show bias, the Court applied the stringent standards of MCR 2.302(B)(3)(a), which governs the discovery of documents prepared in anticipation of litigation or for trial. Under this standard, Plaintiff was required to show that alternative means, such as deposing the physicians, would not permit her “to obtain the substantial equivalent of the materials” or that the use of depositions would constitute “undue hardship” to her. The Court held that Plaintiff had failed to make such a showing.

CONTACT US

Troy

2600 Troy Center Drive, P.O. Box 5025
Troy, MI 48007-5025
Tel: 248-851-9500 Fax: 248-538-1223

Lansing

6639 Centurion Drive, Ste. 100, Lansing, MI 48917
Tel: 517-886-1224 Fax: 517-886-9284

Grand Rapids

2025 East Beltline SE, Ste. 600, Grand Rapids, MI 49546
Tel: 616-285-0143 Fax: 616-285-0145

www.secretwardle.com

SECRET
SW
WARDLE

Copyright 2012 Secrest, Wardle, Lynch, Hampton,
Truex and Morley, P.C.

This newsletter is published for the purpose of providing information and does not constitute legal advice and should not be considered as such. This newsletter or any portion of this newsletter is not to be distributed or copied without the express written consent of Secrest Wardle.

CONTRIBUTORS

Motor Vehicle Litigation Practice Group Chairs

Thomas N. Economy
Jane Kent Mills
Michael W. Slater

Editor

Linda Willemsen

We welcome your questions and comments.

OTHER MATERIALS

If you would like to be on the distribution list for No-Fault Newslines, or for newsletters pertaining to any of our other practice groups, please contact Secrest Wardle Marketing at swwsubscriptions@secretwardle.com or 248-539-2850.

Other newsletters include:

Benchmarks – Navigating the hazards of legal malpractice
Blueprints – Mapping legal solutions for the construction industry
Boundaries – A guide for property owners and insurers in a litigious society
Community Watch – Breaking developments in governmental litigation
Contingencies – A guide for dealing with catastrophic property loss
Fair Use – Protecting ideas in a competitive world
In the Margin – Charting legal trends affecting businesses
Industry Line – Managing the hazards of environmental toxic tort litigation
Landowner's Alert – Defense strategies for property owners and managers
On the Beat – Responding to litigation affecting law enforcement
On the Job – Tracking developments in employment law
Safeguards – Helping insurers protect their clients
Standards – A guide to avoiding risks for professionals
State of the Art – Exploring the changing face of product liability
Structures – A framework for defending architects and engineers
Vital Signs – Diagnosing the changing state of medical malpractice and nursing home liability