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no-fault newsline

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Striking the Testimony of a Defense Medical Expert Due to the Doctor's Failure to Comply with a Subpoena Duces Tecum Was Considered an Abuse of Discretion in a No Fault Case

By Kellie Joyce

The Michigan Court of Appeals, in *Estate of Ronnie Hubbert, by Charles Pitts, Personal Representative v Auto Club Insurance Association,* in an unpublished opinion on December 4, 2014, reversed and remanded for a new trial a first party no-fault case, where the defendant's medical expert's testimony was stricken.

The defendant appealed a judgment for the plaintiff following a jury trial. The defendant argued that the trial court abused its discretion in striking the testimony of the defense medical expert, Dr. Phillip Friedman, as a sanction for Dr. Friedman's failure to comply with a subpoena duces tecum, requiring him to produce financial documents. The Court of Appeals agreed with the defendant.

The Court of Appeals found that it was not appropriate for the trial court to sanction a party for a nonparty witness's failure to comply with a subpoena duces tecum. The discovery sanctions authorized in MCR 2.313(B)(2) may be imposed when a party fails to obey an order to provide or permit discovery. In this case, the Court of Appeals found that there was no evidence the defendant failed to obey an order to provide or permit discovery. Rather, it was Dr. Friedman, a non-party witness, who failed to produce the documents requested in the subpoena. The Court of Appeals found no basis in the court rules to sanction a party for a nonparty witness's failure to obey a subpoena.

SECREST WARDLE NOTES:

Although the Court of Appeals reversed the trial court's decision to strike Dr. Friedman's testimony in this case, it does not mean that a trial court will never strike a defendant's expert witness's testimony again.

In order to best ensure an expert witness is able to testify at trial, it is important to properly name the expert witness on a timely filed witness list, respond to all written discovery regarding the expert witness and produce any IME reports written by the expert. If the expert is subpoenaed, efforts should be made to respond to the subpoena timely. Although timely responding to discovery may not prevent an opposing party from filing a motion to strike, such compliance will be more persuasive to a trial judge than taking no action at all.

In making its decision, the Court of Appeals reasoned that even if a sanction could be imposed on the defendant for Dr. Friedman's failure to obey the subpoena, the exclusion of Dr. Friedman's testimony would fall outside the range of principled outcomes. The Court of Appeals went through the factors found in *Dean v Tucker,* 182 Mich App 27 (1990) to determine whether the sanction was appropriate. The factors reviewed were:

(1) Whether the violation was willful or accidental;
(2) The party's history of refusing to comply with discovery requests (or refusal to disclose witnesses);

(3) The prejudice to the defendant;
(4) Actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice;
(5) Whether there exists a history of plaintiff's engaging in deliberate delay;
(6) The degree of compliance by the plaintiff with other provisions of the court's order;
(7) An attempt by the plaintiff to timely cure the defect; and
(8) Whether a lesser sanction would better serve the interests of justice.

Id. at 32-33.

In reviewing the *Dean* factors, the Court, amongst other evidence reviewed, noted that at his deposition, Dr. Friedman testified that he was out of town when the subpoena was served and he only learned of the subpoena from his office staff one business day before his deposition. Dr. Friedman further testified that he had not seen the subpoena and said that his staff took care of such matters. He did not believe his office retained any of the requested documents nor had his accountant retained the 1099 tax forms requested. During his deposition, Dr. Friedman acknowledged that 40 percent of his practice was comprised of performing independent medical examinations and record reviews and that he performed thousands of examinations for defense attorneys and insurance companies over a 20-year period. He testified he charges $450 an hour and will charge $450, even if the exam only lasts 20 minutes.

In reviewing such testimony, the Court of Appeals found that the plaintiff's counsel had a thorough cross-examination of Dr. Friedman. It also found that although Dr. Friedman did not produce the financial documents requested in the subpoena, the plaintiff's counsel elicited testimony establishing Dr. Friedman's potential bias, which was the reason for the documents requested anyway. Accordingly, the application of these factors led to the conclusion that striking Dr. Friedman's testimony was not an appropriate sanction, even if it were an available option under the court rules.

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