Filing # 20932151 Electronically Filed 11/24/2014 04:20:19 PM

RECEIVED, 11/24/2014 16:23:43, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. SC14-282

Lower Case No. 4D13-2166

KELLY PATON,

Petitioner,

-vs-

GEICO GENERAL
INSURANCE CO.

Respondent.
_____/

BRIEF OF PETITIONER ON MERITS

On review from the Fourth District Court of Appeal of the State of Florida

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PREFACE

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(A Tab__ at p.__) – Appendix to Petitioner's Petition for Writ of Certiorari (4D13-2166)

(AA) – Appendix to Brief of Petitioner on Merits (SC14-282)

STATEMENT OF THE CASE AND FACTS

Kelly Paton ("Paton") filed an insurer bad faith claim arising out of an uninsured motorist coverage claim in which Paton prevailed. Paton prevailed in the bad faith claim and thereafter filed a Motion for Attorney's Fees pursuant to sections 627.428 and 624.155, Florida Statutes.

Paton served Fee Interrogatories and a Request to Produce which asked GEICO to produce time records for time spent defending GEICO, invoices for services provided to GEICO in the bad faith case, and retainer agreements between GEICO and defense counsel (A Tabs 1 and 2). In response, GEICO objected to the production pursuant to Estilien v. Dyda, 93 So.3d 1186 (Fla. 4th DCA 2012) and HCA Health Services of Florida, Inc. v. Hillman, 870 So.2d 104 (Fla. 2d DCA 2003), which GEICO argued created a rule against disclosure (A Tab 3).

In answers to interrogatories, GEICO contended that the bad faith case was not novel or complex. The questions were simple and this was a routine bad faith case where the carrier had opportunities to settle and declined each opportunity (A Tab 2 at pp. 2-3). GEICO also revealed its expert on attorney's fees, and his opinion that Plaintiff is entitled to no multiplier because it was less difficult than James v. GEICO, No. 910-CV-80769 KAM, where the court disallowed a multiplier (A Tab 4 at p. 2). GEICO's expert also opined that no multiplier was necessary because 50 different law firms in the area would have handled the case.

The trial court overruled the objections, and ordered GEICO to produce the retainer agreements, time and billing records, and invoices as requested, but may redact any privileged information (A Tab 6).

GEICO filed a Petition for Writ of Certiorari with the Fourth District. In a short opinion the court quashed the trial court's order compelling production of the records:

> Geico General Insurance Company petitions for a writ of certiorari from two trial court orders that permit discovery of its attorney's billing records. The records were sought by the respondent in support of her claim for attorney's fees in the litigation below. We grant the petition because the respondent failed to make the showing required to obtain her opponent's attorney's fee records.
>
> This case is controlled by Estilien v. Dyda, 93 So.3d 1186 (Fla. 4th DCA 2012). That case took the view that "the records of one's opponent are, at best, only marginally relevant to the general issue of determining an appropriate amount of attorney's fees to be awarded in a given case." Id. at 1188 (quoting HCA Health Srvcs. of Fla., Inc. v. Hillman, 870 So.2d 104 (Fla. 2d DCA 2003)). Estilien held that:
>
> > [W]here the billing records of opposing counsel are sought solely for the purpose of supporting a claim for attorney's fees, '[t]he party seeking production must establish that the requested material is actually relevant to a disputed issue, that the records sought are needed to prepare for the attorney's fee hearing, and that substantially equivalent material cannot be obtained from another source.'
>
> 93 So.3d at 1188–89 (quoting Hillman, 870 So.2d at 107). Respondent requested the discovery, in part, to support the award of a "multiplier." She failed to make the showing required by Estilien.

SUMMARY OF ARGUMENT

The decision below fails to properly apply the definition of "relevant" evidence, and imposes a privilege standard to production of attorney time records which is inconsistent with Florida law. The Fourth District followed a line of cases from the Fourth District and Second District which prohibit discovery of opposing counsel's time and billing records unless the party seeking to compel the time records can show unique circumstances which would make the records relevant. See HCA Health Services of Florida, Inc. v. Hillman, 870 So.2d 104, 107 (Fla. 2d DCA 2003); Estilien v. Dyda, 93 So.3d 1186 (Fla. 4th DCA 2012). These decisions hold that the time spent by opposing counsel is only marginally relevant, and must be proven to be relevant in every case by some special circumstances, such to settle a dispute over a particular billing event, not to decide whether the amount of time spent as a whole was reasonable.

The decision in this case, as well as in Hillman and Estilien, are a departure from the long-standing rules regarding relevancy in a determination of attorney's fees. What is relevant for purposes of discovery is much broader than what is relevant for purposes of evidence admitted at the hearing. In addition, the comparison of one party's fees to the fees paid by opposing parties has always been considered relevant, and rightly so. A good measure of what amount of work was "reasonable" on a given case is the amount of work that was performed by

opposing parties. The time spent and work performed by opposing counsel will always be relevant, not just sometimes relevant under extraordinary circumstances. The amount of work which must be performed by plaintiff's counsel is always influenced by the activities of defense counsel. There is a direct cause and effect relationship between the activities of the attorneys in a case.

The decision below also applied a work product privilege analysis to the issue, even though most entries in time and billing records are not privileged. There is no basis to expand the work product privilege to time and billing records in their entirety. If some time entries are, in fact, work product, then GEICO should file a privilege log and redact the entries. The Fourth District's decision assumed that every entry in the time records was privileged, without any showing by GEICO that a privilege exists, and then used that assumption as a basis to balance relevancy with the privilege. Because the court misapprehended the relevancy of the evidence, and assumed the documents were privileged in their entirety, the court came to the wrong conclusion.

The decision under review should be quashed.

POINT-ON-APPEAL

ARGUMENT

THE FOURTH DISTRICT'S DECISION THAT OPPOSING COUNSEL'S TIME AND BILLING RECORDS ARE NOT RELEVANT TO THE ISSUE OF THE REASONABLE FEE AND A FEE MULTIPLIER, AND THAT THE MATERIAL IS PRIVILEGED, MISAPPLIES THE DEFINITION OF RELEVANCY AND FAILS TO REQUIRE GEICO TO PROVE THE DOCUMENTS ARE PRIVILEGED.

The decision below, Geico Gen. Ins. Co. v. Paton, 133 So.3d 1071 (Fla. 4th DCA 2014), arises out of an insurance dispute. As a result of the lawsuit, Paton was entitled to payment of his attorney's fees. Plaintiff requested production of defense counsel's billing records. The trial court compelled the production and, on petition for certiorari, the Fourth District quashed the order.

The Fourth District held that opposing counsel's billing records were not discoverable, applying the controlling precedent of Estilien v. Dyda, 93 So.3d 1186, 1188-89 (Fla. 4th DCA 2012) (quoting HCA Health Srvcs. of Fla., Inc. v. Hillman, 870 So.2d 104, 107 (Fla. 2d DCA 2003)):

> [W]here the billing records of opposing counsel are sought solely for the purpose of supporting a claim for attorney's fees, '[t]he party seeking production must establish that the requested material is actually relevant to a disputed issue, that the records sought are needed to prepare for the attorney's fee hearing, and that substantially equivalent material cannot be obtained from another source.'

The court held that Paton had not made the required showing.

The Fourth District's decision in Estilien relied heavily on the decision of the Second District in Hillman, which apparently applied a type of work product analysis to the relevancy question, holding "[t]he party seeking production must establish that the requested material is actually relevant to a disputed issue, that the records sought are needed to prepare for the attorney's fee hearing, and that substantially equivalent material cannot be obtained from another source." Id. at 107. It is the latter requirement which is the same requirement for production of work product material. Hillman, in fact, balanced the relevancy of the information with the presumed work product nature of the time records. Ibid. The court reasoned that the only issues which are relevant to calculation of fees due are listed in Rule 4-1.5(b) of the Rules Regulating The Florida Bar, which sets forth the relevant factors to be considered in determining a reasonable fee, and the amount of time spent by opposing counsel is not listed among the factors. It therefore concluded the information was not relevant.

The basic assumption that opposing counsel's time records are irrelevant is flawed. "Relevant evidence is evidence tending to prove or disprove a material fact." §90.401, Fla. Stat. (2012). For purposes of discovery, the concept of relevancy is broader than in the context of admissibility. Amente v. Newman, 653 So.2d 1030 (Fla.1995) (concept of relevancy is broader in discovery context than

in trial context, and party may be permitted to discover relevant evidence that would be inadmissible at trial if it may lead to discovery of relevant evidence); Allstate Ins. Co. v. Langston, 655 So.2d 91, 94 (Fla. 1995). As a starting point to the analysis, then, the district court's focus on relevancy resulted in a more restrictive conclusion.

The material facts at issue here are: 1) whether the time spent by Plaintiff's counsel litigating the case is reasonable; and 2) whether Plaintiff's counsel is entitled to a multiplier. GEICO has contested both issues. While Plaintiff can and will produce an expert who will give an opinion of what amount of time spent would have been reasonable and the difficulty of the case, Defendant will do so as well. Neither of the experts will have actually worked on the case, however, so their testimony will suffer from the same handicap. The time and billing records of defense counsel, by contrast, can provide a useful measure of the amount of time an attorney should reasonably spend litigating the case because defense counsel actually worked on the case. If and when an expert retained by GEICO opines that Plaintiff's counsel spent more time and effort litigating the case than was reasonable, evidence that defense counsel spent as much time as Plaintiff's counsel would tend to disprove the expert's testimony. If defense counsel's time actually spent confirmed Defendant's expert's opinion, then it would be relevant in that instance as well.

The Hillman court's statement that Rule 4-1.5(b) of the Rules Regulating The Florida Bar does not list opposing counsel's time as a factor overlooks the specific factors that are listed in the rule. Subsection (b)(1)(A) of Rule 4-1.5(b) lists "the time and labor required, the novelty, complexity, and difficulty of the questions involved, and the skill requisite to perform the legal service properly" as factors to consider. Opposing counsel's time is relevant to the factors listed in that subsection. If little time is required, then opposing counsel will spend very little time. If the case is not complex or difficult then, again, opposing counsel will spend very little time on the case. While opposing counsel's time spent is not listed in the rule, evidence of opposing counsel's time tends to prove or disprove the factors which are listed.

Prohibiting the discovery puts the party opposing the fee claim in a superior position. In this case, if defense counsel's time records confirm GEICO's position that the case was not novel or complex, then GEICO would be free to use that fact as evidence to support its position because it has the ability to waive any objection to discovery. If defense counsel's time records contradict GEICO's position, then the Fourth District's ruling allows GEICO to keep that fact secret. The reality is that in both circumstances the evidence of opposing party's time in the case is equally relevant, yet the evidence will only be available when it benefits the party who must pay the fee.

In two cases, the third and fifth districts relied on opposing counsel's time when deciding whether the claimant's fee claim was reasonable. Chrysler Corp. v. Weinstein, 522 So.2d 894 (Fla. 3d DCA 1988); LaFerney v. Scott Smith Oldsmobile, Inc., 410 So.2d 534 (Fla. 5th DCA 1982). The information was clearly relevant in those cases. In a later decision, the fifth district held that the information is not always relevant, but should be left to the trial court's discretion. Mangel v. Bob Dance Dodge, Inc., 739 So.2d 720, 724 (Fla. 5th DCA 1999). In Real v. Continental Group, 116 F.R.D 211 (N.D. Cal. 1986), the defendant opposed plaintiff's fees request by saying defendant's own handling of the case was more "economical." The judge responded to that claim by writing, "What constitutes an "economical" number of hours with respect to this case is relevant, in my opinion, to the plaintiff's petition." Clearly, the comparison of fees between the parties, as well as the hourly rates, was relevant evidence. The same conclusion was reached in Stastny v. Southern Bell Tel. & Tel. Co., 77 F.R.D. 662 (W.D. N.C. 1978), where the court held that the number of hours worked by an attorney is not a privileged communication, and that "it is obvious that the time the opposition found necessary to prepare its case would be probative." Id. at 663.

This Court also found evidence of opposing counsel's time relevant in deciding a reasonable fee for plaintiff's counsel in State Farm Fire & Cas. Co. v. Palma, 555 So.2d 836, 837 (Fla. 1990). In Palma, the work performed by

defendant, along with other evidence, indicated that defendant had decided to "go to the mat" on the issue, which made it reasonable for plaintiff's counsel to spend hundreds of hours litigating a claim that had a very small monetary value. This Court wrote (emphasis added):

> In computing this fee, the trial court found that 650 was a reasonable amount of hours and that a reasonable hourly rate was $150. Further, the trial court applied a multiplier of 2.6. We note that State Farm's counsel expended 731 hours on this case. On appeal, the district court affirmed and found the fee to be reasonable in light of the extraordinary circumstances presented, stating:
>
> > It appears that State Farm decided to "go to the mat" over the bill for thermographic studies because, apparently, it is a diagnostic tool which is becoming more widely used contrary to State Farm's view of what is "necessary medical treatment" as provided in the statute. Having chosen to stand and fight over this charge, State Farm, of course, made a business judgment for which it should have known a day of reckoning would come should it lose in the end.

This Court specifically utilized the information requested (opposing counsel's time records) to prove the need for a fee multiplier. The decision in Palma did not limit the relevance to that one special instance, nor did it set forth any new or unique need for additional relevance, nor did it impose an additional burden of having to show that the substantial equivalent being otherwise unavailable. This Court's decision makes it clear that the amount of time and the work performed by opposing counsel is relevant to the question of whether the work performed by Plaintiff's counsel was reasonable.

It is evident that historically, the time spent by opposing counsel is probative and relevant. That is not to say that the trial court did not have discretion to deny discovery in the appropriate circumstances. In Mangel and in Pollard v. E.I. DuPont de Nemours & Co., 2004 WL 784489, at *3 (W.D. Tenn. Feb. 24, 2004) (not reported), the courts noted there was a split of authority on the issue of discoverability, with some courts holding that the evidence was not relevant because of differences between the motivations and work done by plaintiff's counsel and defense counsel, and other courts deciding that any differences would go to the weight, not the admissibility of the evidence. The Mangel court decided that given the split of authority the trial court did not abuse its discretion when it denied discovery, while in Pollard the federal judge based his decision to order discovery on that same split in authority. The court below, by contrast, held that the trial court abused its discretion by ordering the production. The Fourth District's decision reflects a categorical rule that opposing counsel's time and billing records simply are not relevant; it failed to give the trial court the benefit of the discretion to order production of discovery.

The newer Florida appellate decisions (Estilien, Hillman and Paton) have departed from the established precedent, creating a presumptive rule that evidence of the work performed by opposing counsel is not relevant, and placing the burden of proving the time and billing records are "actually relevant" and not privileged

on the party seeking discovery. The presumptive rule against relevancy and discoverability is contrary to this Court's decisions in Palma and Amente. The district court's requirement that Paton prove the records are "actually relevant," ignores the rule that relevancy for purposes of discovery is broader than for admissibility. It also ignores historical precedent that recognizes the relevancy of the information.

There is no support for a requirement that information be "actually relevant" before it can be discovered. Discovery in civil cases "must be relevant to the subject matter of the case and must be admissible or reasonably calculated to lead to admissible evidence." Allstate Ins. Co. v. Langston, 655 So.2d 91, 94 (Fla. 1995). To quash a discovery order under Langston, the petitioner must "affirmatively establish[] that such discovery is neither relevant nor will lead to the discovery of relevant information." Id. at 95. This Court in Langston clearly placed the burden on the petitioner challenging the order. By contrast, the court below placed the burden on Paton to prove "actual" relevance, with no recognition that the petition must be denied if the documents requested are reasonably calculated to lead to admissible evidence." Under Langston, even "marginally relevant" evidence would be discoverable, even if it is not eventually admissible.

The decisions in Palma, Weinstein, LaFerney and Pollard make it clear that the Langston requirement is met in this case; opposing counsel's time and billing

records are related to the subject matter. The courts in Hillman, Estilien and Paton apparently imposed a greater burden on discovery because of a perceived intrusion into sensitive matters. But there is no authority for the creation of a blended discovery category which imposes stricter rules for production even though there is no legally significant distinction between the production of time and billing records of an attorney and production of invoices for a manufacturing business.

To be sure, there are circumstances which may make the time spent by defense counsel a less than perfect gauge for the reasonable time to be spent by plaintiff's counsel. The fact that the issue is more important to one side than the other might be one factor. In addition, excessive effort by plaintiff's counsel in a simple case might necessitate excessive work by defense counsel. But the fact that evidence is open to interpretation is the reason for broad discovery rules, not a reason to restrict discovery. The trier-of-fact is trusted with the responsibility to view the evidence in light of the extenuating circumstances, and then give the evidence the proper weight. The rule applied by the Fourth District in this case assumes the trier-of-fact is incapable of discerning the weight the evidence should be given, and avoids the issue by keeping the evidence hidden. The court's conclusion is contrary to the law.

The Fourth District Shifted the Burden of Proving a Privilege

Whether any of the documents contained privileged information was not a proper basis to quash the trial court's order because the trial court ruled that GEICO could redact any privileged information before producing the records. Although the appellate court did not base its decision on the privileged nature of the documents, the Fourth District's decision in this case relied on Hillman, and that court based its decision on the privileged nature of the records requested. Hillman, 870 So.2d at 107 ("Balanced against this limited relevance, one must consider the fact that billing records contain privileged, attorney-client information"). The vast difference between the circumstances in this case and in Hillman is that there is no balancing against the privileged nature of the request here. The trial court's order took the possibility of privileged information being compelled out of the equation because the trial court told GEICO to redact any privileged materials. That makes the Fourth District's privilege concerns unnecessary.

The Fourth District's treatment of the records as presumptively privileged is also contrary to the established law regarding privileged material. The burden of establishing the attorney-client privilege rests on the party claiming it. S. Bell Tel. & Tel. Co. v. Deason, 632 So.2d 1377, 1383 (Fla. 1994). In the decision below, however, the court imposed a requirement that Paton prove the same information

cannot be obtained elsewhere before obtaining discovery. That requirement is essentially the same as Florida Rule of Civil Procedure 1.280(b)(3), which permits the disclosure of work product if the party seeking discovery "has need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." See also Deason, 632 So.2d at 1385. The court below imposed the requirement, however, without any showing that privileged documents were compelled.

Generally, an in camera inspection of the material is required before concluding it is privileged. Cf. Lloyd's Underwriters at London v. El-Ad Villagio Condo. Ass'n, Inc., 976 So.2d 28, 29 (Fla. 4th DCA 2008) (error for the trial court to order production of allegedly privileged documents before an in camera inspection to determine if they are privileged); Snyder v. Value Rent-A-Car, 736 So.2d 780, 782 (Fla. 4th DCA 1999) (remanding with instructions that the trial court conduct an in camera inspection and then, if it concludes the documents are privileged, allowing the opposing party to establish the need and inability to obtain the information elsewhere). In addition, no privilege log was ever filed by GEICO in this case. At the very least, GEICO should submit a privilege log, and Paton should have the opportunity to challenge GEICO's claim of privilege. If the billing statements contain detailed entries which may reveal privileged information, then the trial court can review them in camera to decide the issue.

Old Holdings, Ltd. V. Taplin, Howard, Shaw & Miller, P.A., 584 So.2d 1128 (Fla. 4th DCA 1991). The trial court could also specifically excluded privileged material from the order, so privilege should not be an issue.

By contrast to the general rule, the decision below assumes all parts of the time records are a privileged communication, and therefore imposes a new burden on the party seeking discovery. One of those requirements is to prove the equivalent information is unavailable elsewhere. Given the unique nature of the information, that requirement seems to be a misplaced burden. There can be no source of the opposing attorneys' time and billing information other than the opposing attorney or the party. Invoices to clients are generally not placed in the public domain or given to third parties. If the information were available from third parties, then there would be no privilege to overcome.

The Fourth District apparently decided that Paton's attorney's time records are a source of information equivalent to defense counsel's time records. But this is not the same as other work product gathered by opposing counsel, such as witness statements. In the case of witness statements, the information is available to all parties because any party may interview a witness. The same is true for other information gathered by counsel. All parties have the same access and can investigate the same information. But there is no other source for opposing counsel's time records. The only source is the opposing party.

The Fourth District should not have imposed the additional barrier to discovery.

CONCLUSION

The decision below should be quashed, and the decisions in Estilien v. Dyda, 93 So.3d 1186 (Fla. 4th DCA 2012) and HCA Health Srvcs. of Fla., Inc. v. Hillman, 870 So.2d 104 (Fla. 2d DCA 2003), should be disapproved.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished to all counsel on the attached service list, by email, on November 24, 2014.

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CERTIFICATE OF TYPE SIZE & STYLE

Petitioner hereby certifies that the type size and style of the Brief of Petitioner on Merits is Times New Roman 14pt.

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