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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.
______________________________/

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REPLY 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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(AB) – Answer Brief of Respondent

(A) – Appendix to Reply Brief of Petitioner

ARGUMENT

POINT-ON-APPEAL

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.

GEICO's Argument on Jurisdiction

In the Answer Brief, GEICO has reargued the issue of jurisdiction, even though this Court has already accepted jurisdiction. The argument is that because this Court relied on the evidence of opposing counsel's time without first explicitly stating that such evidence is relevant, then the decision in State Farm Fire and Casualty Company v. Palma, 555 So.2d 836 (Fla. 1990), does not contain a holding that the evidence is relevant. To the contrary, implicit in the reliance of evidence is a holding that the evidence is relevant. There is no basis for any court to rely on irrelevant evidence to support a factual finding. It is somewhat disingenuous to argue the Palma decision does not set forth a rule of law that defendant's counsel's time spent on a case is relevant to the issue of reasonable time spent by plaintiff's counsel.

Moreover, the Third District's decision in Chrysler Corp. v. Weinstein, 522 So.2d 894, 895-96 (Fla. 3d DCA 1988), makes the relevancy more explicit:

> A review of the record shows that the trial judge found the number of hours to be reasonable in comparison to those spent by Chrysler's attorneys. We approve that finding.

GEICO failed to discuss the conflict between the Fourth District's decision in this case and Weinstein, which also supports jurisdiction.

The decision below creates a presumption against relevancy, and then applies that standard to discovery. As was explained in the Petitioner's Initial Brief, the presumptive rule against relevancy, and the Fourth District's modification of the discovery rules to heightened showing of relevancy before allowing discovery also conflicts with Amente v. Newman, 653 So.2d 1030 (Fla.1995) and Allstate Ins. Co. v. Langston, 655 So.2d 91, 94 (Fla. 1995), both of which state the general rule that the concept of relevancy is broader during discovery than it is when the evidence is admitted. The Fourth District's decision in this case holds that the question of relevancy deserves stricter scrutiny when applied to discovery of attorney's fees discovery.

The decision of the Fourth District conflicts with several decisions of this Court and other districts. This Court has jurisdiction.

Reply Argument on the Merits

In the Answer Brief, GEICO attempts to limit the broad reach of the decision below by pointing out that the Fourth District did not hold that opposing counsel's records can never be discovered, and "merely" found that Paton did not prove the records were relevant in this case. GEICO goes on to point out that Paton is free to go back to the trial court and prove the records are relevant.

That is precisely the problem. The Fourth District has created a hard and fast rule requiring Paton to prove relevancy of evidence before allowing discovery of the evidence, and for Paton to prove she cannot obtain the same information elsewhere.[1] Proof of relevancy has never been required before discovery. In fact, this Court has stated repeatedly that the rules of discovery require the concept of relevancy in discovery to be broader than when the question is admissibility. In addition, there is absolutely no source for information of how much time opposition counsel spent on the litigation other than opposing counsel. No expert can provide that information, not even GEICO's own expert. If Plaintiff's counsel asked GEICO's expert what time GEICO's attorneys spent on a specific task, it would be met by an objection citing the Fourth District's decision in this case.

[1] It should be noted, again, that the trial court order here excluded privileged information, so privileges are not implicated. There is no basis to require Paton to prove the information cannot be obtained elsewhere.

Alternatively, GEICO's expert would merely state, "I don't know what is in defense counsel's billing records, I've never reviewed them. They aren't relevant." There is no way for Paton to force GEICO's expert to review the documents. As a result, there is no other source of GEICO's billing information other than GIECO or its attorneys.

GEICO criticizes Paton's discovery request by arguing, "Paton's request for GEICO's billing information was meant only to bolster her claim for fees and for a multiplier" (AB 12). Of course that is the purpose of the information. In fact, that is the purpose of all relevant evidence. "Relevant evidence" is defined as evidence tending to prove or disprove a material fact. §90.401, Fla. Stat. (2012). A litigant is <u>required</u> to present evidence that proves (or "bolsters") that party's claim. A claim that is insufficiently "bolstered" by relevant evidence fails.

GEICO's justifies the Fourth District's strict discovery rule by arguing that "many times an attorney's time is spent on pursuing potential avenues of a defense or prosecution of a claim, researching possible legal issues to be raised, or engaging in discussions and conferences debating the wisdom of raising those potential issues" (AB 13). Any of those concerns go to the weight the trial judge should give the evidence, not its admissibility and certainly not its discoverability. The idea that documents should not be discoverable because they might contain irrelevant information is absurd. By that standard, no discovery should ever be allowed. A trial judge is very capable of understanding the difference between relevant information and irrelevant information. To keep information secret because it might confuse the trial judge is an insult.

Moreover, the very example GEICO gives proves why the information must be discoverable. At the hearing on Plaintiff's fees, it is conceivable that GEICO's counsel will argue that Plaintiff's time records reflect some time for research, investigation and conferences related to causes of action Plaintiff decided not to pursue, and therefore should not be compensated. If that argument is made, then it would be important for Plaintiff to have GEICO's counsel's billing records to show that consideration of alternative strategies is part of the legal process, and the time spent in such endeavors is reasonable. The Fourth District's decision would keep that evidence hidden, and allow GEICO to make the argument without fear that Paton would have evidence available to rebut the argument. Of course, Plaintiff will have an expert to testify that the thought process is a reasonable part of the time spent in litigation, but evidence that GEICO's attorneys spent as much or more time in such pursuits is much better evidence against the argument.

GEICO's reliance on Johnson v. University College of University of Alabama, 706 F.2d 1205, 1208 (11th Cir. 1983), is misplaced because the court there only held that the trial court had discretion to limit discovery an admissibility of opposing counsel's billing information. Although the court stated the same concerns as other courts about the value of the information, it concluded that the analysis must be on a case-by-case basis. The Eleventh Circuit did not create a presumptive rule against discovery or admissibility. There is no doubt Paton has the ability to present other forms of evidence, such as expert evidence as noted by the court in Johnson. But, as discussed above, evidence that an opponent performed the exact same tasks in the defense of the case that they are arguing were unnecessary dithering by the plaintiff is very powerful evidence. In fact, such evidence would be far better and far more powerful than the testimony of an expert who has been paid to testify for the plaintiff.

One argument made by GEICO warrants special note. In subsection (c) of the Answer Brief, GEICO concedes that if GEICO had taken the position that the totality of Plaintiff's hours was excessive then GEICO's billing information would be relevant, but argues it has made no such argument in the trial court. To supplement the record and explain GEICO's argument, Petitioner has included an Appendix with this Reply Brief containing GEICO's Answers to Interrogatories. In the Answers, GEICO states Plaintiff's reasonable time should be approximately 390 hours, much less than the 600 hours Plaintiff claimed (A 2). So, in point of fact, GEICO did argue the totality of the hours claimed were excessive. Of course, in the Answer Brief, GEICO has qualified the argument by claiming the discovery would be allowed only if GEICO argued the hours were "grossly excessive" or "exorbitant." But there is no explanation why discovery would be allowed if GEICO argues the claim is "grossly excessive" but not if it argues the hours claimed are "excessive." The difference is illusory.

Regardless of the evidence in this case, under no circumstances should discovery be limited by the arguments opposing counsel has revealed prior to the hearing on the motion for attorney's fees. Discovery comes before the hearing, long before Paton will know what arguments GEICO will make at the hearing. It is Plaintiff's role in the litigation to be prepared to counter every argument GEICO will make at the hearing, and there is no procedure for Paton's counsel to ask for a recess of a few months to conduct discovery after GEICO has stated its opposition. There is no procedure to require early notice of exactly what GEICO's arguments will be at the hearing. That is why discovery comes first in the litigation process, and that is why discovery rules are so broad. The parties do not know exactly what the arguments at trial or hearing will be, so they must conduct discovery to 1) determine what the evidence will be, and 2) decide the arguments that will be best supported by the evidence. It would be strange litigation indeed if the plaintiff were prevented from conducting discovery until the after the defendant has presented its defenses at trial.

In an Answer to the Complaint, a defendant must state affirmative defenses or they are waived. In opposition to a motion for attorney's fees, a defendant is required to do nothing but to attend the hearing. While some information about GEICO's arguments will be evident from its expert's deposition, Paton will have no specific information about the arguments that will be made to each and every line item in the fees claim.

In general, the Fourth District's decision makes discovery a strict process, one that may be utilized only after plaintiff proves what the discovery process will yield. That rule, in and of itself, is contrary to established discovery rules. In addition, the Fourth District has imposed on discovery a requirement that a plaintiff must prove the information is unavailable elsewhere. That rule is only applicable to discovery of work product. It is apparent the Fourth District considered the discovery of opposing counsel's billing records to be akin to privileged material, even though the trial court ordered that no privileged material should be revealed. As a result, there is no basis for the requirement.

Discovery of billing information is no different than any other discovery. It needs no special rules. The Fourth District's opinion creates a special rule where none is warranted, and in the process contradicts this Court's rules of discovery. The decision must be quashed.

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 February 16, 2015.

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CERTIFICATE OF TYPE SIZE & STYLE

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

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