

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2020 MTWCC 19

WCC No. 2020-4954

CANDIDA KREZELAK

Petitioner

vs.

INDEMNITY INS. CO. OF NORTH AMERICA

Respondent/Insurer.

ORDER GRANTING PETITIONER'S MOTION TO COMPEL

Summary: Petitioner moves to compel Respondent to produce the journal articles on which its IME physician relied; the raw data from the IME; and the advertisements for the company for which the physician performed the examination.

Held: This Court granted Petitioner's motion because the evidence sought is discoverable.

¶ 1 Respondent Indemnity Ins. Co. of North America (Indemnity) had Petitioner Candida Krezelak undergo an examination under § 39-71-605, MCA, with Emily Heid, MD, of Ortho IME, PLLC. At the time of the examination, Dr. Heid was working for WellCare IME LLC (WellCare), which is now known as Clarus IME LLC (Clarus), and she issued her report on WellCare's letterhead. Krezelak now moves to compel Indemnity to produce: (1) the journal articles on which Dr. Heid relied in reaching her opinions; (2) the raw data from Dr. Heid's examination, including her notes, the questionnaires that she had Krezelak fill out, and test results; and (3) any advertising published by WellCare or Clarus.

¶ 2 Indemnity opposes Krezelak's motion, asserting that her discovery requests would require Dr. Heid to violate copyright law, are overly burdensome, and could not lead to the discovery of admissible evidence.

Journal Articles

¶ 3 M.R.Evid. 705 provides:

The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

The Commission Comments to this rule state, “The cross-examiner should be aware of the underlying facts or data of the opinion through discovery”

¶ 4 The Montana Supreme Court has “repeatedly stated that Rule 705 affords a party an essential right to cross-examine [an] expert witness regarding the basis of that expert’s opinion.”¹ The court has also explained, “the right to cross-examine an opposing expert regarding the basis of that expert’s opinion is ‘the shield to guard against unwarranted opinions,’ and is ‘essential’ to the ‘discovery of truth.’ ”²

¶ 5 At her deposition, Dr. Heid testified that she relied upon 11 journal articles to reach her opinions. However, she claimed that she could not produce the journal articles to Krezelak because she had been told that it was unlawful for her to do so under copyright law. Indemnity asserts that Dr. Heid’s understanding of copyright law is correct under 17 U.S.C. § 106 which, *inter alia*, prohibits a person from distributing the copyrighted work of another to the public. Indemnity asserts that Dr. Heid would be “forced” to violate copyright law if she must produce the articles to Krezelak in discovery.

¶ 6 Here, Krezelak is correct that Indemnity has not cited any copyright law supporting its position. Krezelak is not asking Dr. Heid to distribute the articles to the public. Rather, Krezelak is asking Dr. Heid to produce the articles on which Dr. Heid relied to Indemnity’s attorneys, so Indemnity’s attorneys can answer discovery which will allow Krezelak’s attorneys to evaluate whether the journal articles actually support Dr. Heid’s opinions. Thus, 17 U.S.C. § 106 does not support Indemnity’s claim that copyright law prohibits Dr. Heid from producing the articles in discovery.

¶ 7 Indemnity also argues that requiring Dr. Heid to produce the articles would “inflict an unjustified cost on her.” However, Dr. Heid already has the articles and Indemnity does not explain what cost she will incur other than possibly the cost of copying the articles and mailing them to Indemnity’s attorneys so they can answer Krezelak’s discovery requests, an amount that is negligible. In the alternative, Dr. Heid can scan the articles and email them to Indemnity’s attorneys, which will cost her nothing.

¹ *Clark v. Bell*, 2009 MT 390, ¶ 22, 353 Mont 331, 220 P.3d 650 (citations omitted).

² *Reese v. Stanton*, 2015 MT 293, ¶ 21, 381 Mont. 241, 358 P.3d 208 (citation omitted).

¶ 8 Finally, Indemnity argues that this Court should require Krezelak to purchase the articles herself. However, there is no good reason to increase Krezelak's cost of litigation.

¶ 9 For the foregoing reasons, the journal articles on which Dr. Heid relied are discoverable.

Dr. Heid's "raw data"

¶ 10 Krezelak asserts that Dr. Heid's raw data — which she defines as Dr. Heid's notes taken during the examination, the questionnaires that Krezelak filled out for Dr. Heid, and the results of the tests that Dr. Heid had Krezelak perform — are discoverable under M.R.Evid. 705.

¶ 11 Indemnity asserts that it should not have to produce Dr. Heid's raw data because she testified that she gave the documents containing the raw data to WellCare for storage and she does not know if Clarus has them. Relying upon *Vulk v. Employers Compensation Ins. Co.*,³ Indemnity asserts that Dr. Heid cannot be required to produce documents that she does not possess. In *Vulk*, this Court ruled that the insurer did not have to produce a list of all insurance companies for which an IME physician had provided services or a list of all IMEs he had performed because he had never prepared such lists and they therefore did not exist.⁴

¶ 12 However, this case is distinguishable from *Vulk* because Dr. Heid did not testify that the raw data has never existed; rather, she testified that the information once existed and that she does not know whether it currently exists because she gave it to WellCare. For obvious reasons, an expert cannot circumvent her duty under M.R.Evid. 705 of producing the data and facts upon which she based her opinions by giving her records to another for storage. Krezelak is correct that Dr. Heid is in the business of providing forensic examinations and that she should have expected a discovery request asking for this evidence. She now has a duty to obtain the evidence and provide it to Indemnity, so it can produce it in discovery.

Advertising

¶ 13 Krezelak argues that WellCare's and Clarus's advertisements could contain evidence that the examinations it arranges are done by physicians with a bias. Indemnity asserts that the advertisements are not discoverable because WellCare and Clarus are completely "independent" from Dr. Heid and, therefore, whatever the advertisements state cannot be attributed to her. In the alternative, Indemnity asserts that the advertisements could not possibly be relevant.

³ 2014 MTWCC 13.

⁴ *Vulk*, ¶¶ 24, 27.

¶ 14 Here, WellCare’s and Clarus’s advertisements are discoverable because they could contain evidence of bias. This Court has recognized that “discovery is very broad.”⁵ The advertisements could be evidence that the medical examinations WellCare and Clarus arranges are not truly independent.⁶ Thus, Krezelak has the opportunity to discover whether the advertising includes something more than mere puffing or other evidence of potential bias. There is no merit to Indemnity’s claim that Dr. Heid is completely independent from WellCare and Clarus. Dr. Heid issued her report on WellCare letterhead and Indemnity paid WellCare for Dr. Heid’s services. And, as noted above, Dr. Heid gave her file to WellCare for storage. Dr. Heid is not completely independent from WellCare and an insurer cannot hide discoverable evidence behind the veils of business entities.

Sanctions

¶ 15 For the first time in her reply brief, Krezelak argues for sanctions, including her attorney fees for bringing her motion to compel and, if Indemnity does not fully respond to her discovery requests or if evidence has been destroyed, an order excluding all evidence from Dr. Heid. However, this Court does not consider arguments made for the first time in a reply brief;⁷ thus, this Court does not consider Krezelak’s request for sanctions. Moreover, Krezelak’s request to exclude evidence from Dr. Heid is premature. Krezelak can move for sanctions and/or move in limine to exclude the evidence if Indemnity does not answer the discovery or if evidence has been destroyed.

¶ 16 Based on the foregoing, this Court now enters the following:

ORDER

¶ 17 Krezelak’s Motion to Compel is **granted**. Indemnity shall produce the evidence via supplemental answers on or before **Wednesday, October 14, 2020**.

⁵ *Overholt v. Liberty Nw. Ins.*, 2013 MTWCC 5, ¶¶ 5-6.

⁶ See *Hegwood v. Mont. Fourth Jud. Dist. Ct.*, 2003 MT 200, ¶ 9, 317 Mont. 30, 75 P.3d 308 (explaining that an IME may not be truly independent if the physician is biased and quoting a case stating, “Certainly, in an era in which classified advertisements offering expert testimony appear commonly in publications addressed to lawyers, the adversarial context in which these examinations occur is a reality that must be taken into account in determining what procedures best accommodate the conflicting interests of the parties in a particular case.” (citations omitted)).

⁷ *Dargin v. XL Ins. of Am.*, 2020 MTWCC 9, ¶ 20 (citation omitted).

DATED this 6th day of October, 2020.

(SEAL)

/s DAVID M. SANDLER
JUDGE

c: Matthew J. Murphy and Thomas M. Murphy
Joe C. Maynard and Marina Horsting

Submitted: September 24, 2020