

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR MANATEE COUNTY, FLORIDA
CIRCUIT CIVIL DIVISION

ANTHONY ALLEN JORDAN,

Plaintiff,

Case Number: 2017-CA-001913

v.

GAUDENCIA HERNANDEZ, TRINITY
SERVICES GROUP, INC. a Florida Profit
Corporation, and RYDER TRUCK RENTAL
LT, a Florida Trust d/b/a RYDER TRUCK
RENTAL, INC., a Florida Profit Corporation,

Defendants.

PLAINTIFF'S MOTION TO STRIKE DEFENDANTS' EXPERTS
MATTHEW BERLET, M.D., CARL MELZER, D.D.S, AND ALAN SEGAL, M.D.
FOR VIOLATIONS OF EXPERT DISCOVERY

Plaintiff, ANTHONY ALLEN JORDAN, moves this Honorable Court to Strike Defendants GAUDENCIA HERNANDEZ and TRINITYSERVICES GROUP, INC.'s Expert Witnesses Matthew Berlet, M.D., Carl Melzer, D.D.S, and Alan Segal, M.D. from testifying in this trial for failure to comply with basic expert discovery. In support thereof, Plaintiff states as follows:

BACKGROUND AND FACTS

1. This is a personal injury matter arising out of damages sustained by Plaintiff in a motor vehicle crash, where Defendant GAUDENCIA HERNANDEZ, while acting in the course and scope of her employment with Defendant TRINITY SERVICES GROUP, INC., rear-ended Plaintiff.

2. Plaintiff suffered severe and life changing injuries as a result.

3. Trial was previously continued to this Court's trial docket commencing in April 2019. Prior to the continuance granted on September 21, 2018, this case was scheduled to go to trial on this Court's trial docket beginning November 5, 2018.

4. On September 4, 2018, Plaintiff served expert discovery, including interrogatories and request to produce, upon Defendants

5. Expert Discovery has been an ongoing battle in this litigation and with the continued dilatory tactics and gamesmanship employed by Defendants and their counsel, Plaintiff was required to file three Motions to Compel just to obtain basic expert discovery in this case.

6. On or about October 12, 2018, Plaintiff filed a Motion to Compel Defendants to Provide Better Answers to Plaintiff's Expert Interrogatories and a Motion to Compel Defendants to Provide Better Answers to Plaintiff's Expert Request to Produce. Plaintiff also filed a Supplemental Motion to Compel Defendants to Provide Better Answers to Plaintiff's Expert Interrogatories on November 13, 2018.

7. Despite diligent effort by Plaintiff's counsel, Defendants' and their counsel have repeatedly failed to provide basic expert discovery pursuant to Rule 1.280(b)(5)(A)(i) and Boecher.

8. On or about August 30, 2018, Defendants filed their Witness and Exhibit List. Subsequent to Defendants' initial Witness and Exhibit List, Defendants filed three additional Witness and Exhibit lists wherein significant changes and additions were made.

9. Defendants filed an Amended Witness and Exhibit List on September 14, 2018, a Second Amended Witness and Exhibit List on January 14, 2019, and a Third Amended Witness and Exhibit List on January 16, 2019.

10. Despite diligent effort by Plaintiffs' counsel, Defendants' and their counsel have failed to provide basic expert discovery pursuant to Rule 1.280(b)(5)(A)(i) and Boecher for experts, Matthew Berlet, M.D., Carl Melzer, D.D.S, Alan Segal, M.D., and Paul Ladenson, M.D.

DR. MATTHEW BERLET VIOLATIONS

11. On or about October 9, 2018, Defendants served their numerous improper objections and partial responses to Plaintiff's expert discovery requests.

12. Plaintiff's Expert Interrogatory No. 9 (e) (f) and (h) and Defendants' answer pertaining to Dr. Berlet state the following:

9) During the past three (3) years, as to each and every expert identified above, please state:

e) The number of cases in which he/she has provided testimony by deposition for Defendants counsel or Defendants' counsel's law firm.

ANSWER: Matthew H. Berlet, M.D.: Approximately once.

f) The number of cases in which he/she has provided testimony by deposition for other parties or entities involved in litigation.

ANSWER: Matthew H. Berlet, M.D.: Dr. Berlet's best estimate is 10 times per year for approximately 25 years.

h) The number of cases in which he/she has testified in court as an expert witness on behalf of other parties or entities in litigation matters.

ANSWER: Matthew H. Berlet, M.D.: Approximately 10-11.

13. Plaintiff took the deposition of Dr. Berlet on December 5, 2018 wherein Dr. Berlet was asked, ***"Do you keep a list of your trial and deposition testimony?" Dr. Berlet testified, "I do not."*** See Dr. Matthew Berlet's deposition transcript, attached hereto in pertinent part as **Exhibit A** at p. 57: 8-10.

14. Dr. Berlet was then asked, ***“Do you know how many times you’ve testified at trial in the last three years for anyone; plaintiff, defense?”*** wherein Dr. Berlet testified, ***“oh, I don’t.”*** See **Exhibit A** at pp.57:25; 58:1-3.

15. Rule 1.280(b)(5)(A)(iii)(3) informs us that Plaintiff is entitled to “The identity of other cases, within a reasonable time period, in which the expert has testified by deposition or at trial.” Fla. R. Civ. P. 1.280. The Florida Supreme Court, in Elkins v. Syken, 672 So. 2d 517 (Fla. 1996), held that three years is a reasonable timeframe for expert discovery.

16. Despite the fact that Plaintiff is entitled to this information, Defendants’ expert, Dr. Berlet does not maintain a testimony list and unsurprisingly cannot remember what cases he has been involved in within the past three years. The problem with this is that this is an easy way for an expert to circumvent well-established discovery rules that entitle a Plaintiff to bias and impeachment materials.

17. This is actually what happened in this exact instance. Plaintiff is entitled to bias and impeachment documents including when and how many times counsel for Defendants have hired their experts within a reasonable time. When asked to produce information relative to any such impeachment materials, Defendants’ counsel merely indicated that the Dr. Berlet did not maintain this information and then did not even attempt to answer this request by searching within their own files.

18. Here, Defendants failed to produce all the testimony lists or information concerning when and how many times Dr. Berlet was retained by Wicker Smith. And even when some select financial discovery was produced it was incomplete.

19. In reviewing the discovery provided and some independent research, Plaintiff obtained a trial transcript wherein Dr. Berlet testified at trial as an expert retained by Attorney

Mike Reed with Wicker Smith. This trial transcript (and information pertaining to this trial and retention) was responsive to Plaintiff's discovery requests, i.e. it was within the past three years and would show Dr. Berlet's prior work with Wicker Smith. Yet – the information about this trial was never disclosed to Plaintiff.

20. It was also discovered during the deposition of Dr. Berlet, that payment to Dr. Berlet was not listed on Wicker Smith or Zurich's accounting records produced to counsel (produced at the deposition, rather than during discovery requests) for Plaintiffs.

21. Defendants attempted to manipulate the financial disclosure requirements specified in Allstate v. Boecher, 719 So. 2d 286 (Fla. 1998) by claiming that Wicker Smith and Zurich must not have directly retained Dr. Berlet, instead, the insurance company may have retained Dr. Berlet and therefore, the insurance carrier, Travelers Insurance, would have that account information, not Wicker Smith or Zurich.

22. It is apparent, in more than one way, that Defendants are not providing all the required disclosures as it relates to their experts. The gamesmanship to manipulate the rules and laws of this state as set forth in Boecher prevents Plaintiff from the ability to properly impeach Dr. Berlet and the other identified experts.

DR. CARL MELZER VIOLATIONS

23. Plaintiff's Expert Interrogatory, No. 9 (b) and 9 (c) and Defendants' answer thereto relative to Dr. Melzer states:

9. During the past three (3) years, as to each and every expert identified above, please state:

f) The number of cases in which he/she has provided testimony by deposition for other parties or entities involved in litigation.

ANSWER: Carl J. Melzer, D.D.S.: this information has been requested and will be provided upon receipt, to the extent known.

h) The number of cases in which he/she has testified in court as an expert witness on behalf of other parties or entities in litigation matters.

ANSWER: Carl J. Melzer, D.D.S.: this information has been requested and will be provided upon receipt, to the extent known.

24. Although numerous discovery efforts were done by Plaintiff, Dr. Melzer's testimony list was not provided to Plaintiff until his Deposition on November 6, 2018, over two months after the information was requested. Additionally, Dr. Melzer's testimony list was deficient and incomplete. He failed to include the cases where he testified in trial during 2017 or 2018.

25. It is apparent that Plaintiff is not receiving all necessary expert discovery when Dr. Melzer admitted that he has been testifying on behalf of Wicker Smith for decades. Yet – we have minimal information regarding his prior testimony or the payments made for his deposition.

26. Clearly there is a significant amount of impeachment discovery that Plaintiff has not been able to obtain despite the numerous motions to compel and attempts.

DR. ALAN SEGAL VIOLATIONS

27. Plaintiff's Expert Interrogatory, No. 9 (f) and (h) and Defendants' answers to Dr. Segal's violations state:

9. During the past three (3) years, as to each and every expert identified above, please state:

f) The number of cases in which he/she has provided testimony by deposition for other parties or entities involved in litigation.

ANSWER: Alan Z. Segal, M.D.: Approximately 30.

h) The number of cases in which he/she has testified in court as an expert witness on behalf of other parties or entities in litigation matters.

ANSWER: Alan Z. Segal, M.D.: Approximately 20.

28. Like Dr. Berlet, Dr. Segal claims to not maintain a testimony list, essentially precluding any impeachment of Dr. Segal although it is a complete violation of Rule 1.280(b)(5).

29. If an expert claims to not maintain a testimony list, they are effectively safeguarded from bias and impeachment materials at trial. If such behavior allowed, then it seems like all experts would suddenly stop maintain such documents. This type of “exception” to the rule does not exist and should not be allowed.

30. If Dr. Segal would like to testify at trial, he should be required to produce a testimony list pursuant to the rules of this state.

MEMORANDUM OF LAW

Florida Law holds that obtaining information regarding a witness' financial relationship with a party or representative is a proper goal of discovery. Morgan, Coiling and Gilbert, P.A., v. Pope, 798 So.2d 1, 3 (Fla. 2d DCA 2001). Because financial interests affect a witness' credibility and because credibility is always relevant, requests for such information are certainly calculated to lead to the discovery of admissible evidence. *Id.*

Similarly, Allstate Insurance Co. v. Boecher, 733 So.2d 993 (Fla. 1999), held that “where the discovery sought is directed to a party about the extent of that party's relationship with a particular expert, the balance of the interests shifts in favor of allowing the pretrial discovery.” *Id.* at 997 (weighing the need for the discovery against possible annoyance and embarrassment to the expert).

Defendants refuse to provide the required financial documents after numerous Motions to Compel. Defendants' objection to providing this information is inappropriate. Based on the definitions contained in Plaintiff's Expert Interrogatories, it is clear that Plaintiff is seeking information relative to how much Defendants' insurers have paid Defendants' testimonial experts. As previously explained, Plaintiff is entitled to discovery the financial relationship and potential bias between Defendants and their experts.

Boecher points out that "the more extensive the financial relationship between a party and a witness, the more it is likely that the witness has a vested interest in that financially beneficial relationship continuing... To limit this discovery would potentially leave the jury with a false impression concerning the extent of the relationship between the witness and the party..." Id. at 997-998. In addition, the principle in Boecher applies to a defendant's liability carrier. "Where an insurer provides a defense for its insured and is acting as the insured's agent, the insurer's relationship to an expert is discoverable from the insured. To hold otherwise would render Boecher meaningless in all but a small class of cases." Springer v. West, 769 So.2d 1068, 1069 (Fla. 5th DCA 2000). Springer goes on to say that "the information sought is relevant to the witness' bias and will enhance the truth-seeking function and fairness of the trial, as intended by Boecher." Id. Thus, information regarding the relationship between an expert witness testifying on behalf of a defendant and her liability carrier can be obtained through a discovery request directed to the defendant (insured). Id.

Dr. Berlet was not listed on Wicker Smith or Zurich's accounting records produced to Plaintiff. Defendants attempted to manipulate the financial disclosure requirements specified in Boecher and Springer by claiming that Wicker Smith and Zurich must not have directly retained Dr. Berlet, instead, the insurance company may have retained Dr. Berlet and therefore, Travelers

would have that account information, not Wicker Smith or Zurich. Financial information of how much Defendants' counsel has paid the specific expert, regardless of how it came about, is discoverable.

Florida Rules of Civil Procedure 1.280(b)(5)(A)(iii) which was promulgated in response to Elkins v. Syken, 672 So.2d 517 (Fla. 1996) affirmed that a party may obtain the following discovery regarding any person disclosed by interrogatories or otherwise as a person expected to be called as an expert witness at trial:

- 1. The scope of employment in the pending case and the compensation for such service.**
- 2. The expert's general litigation experience, including the percentage of work performed for Plaintiffs and defendants.**
- 3. The identity of other cases, within a reasonable time period, in which the expert has testified by deposition or at trial.**

The Florida Supreme Court in Boecher further held that Rule 1.280(b)(5)(A)(iii) was not intended to shield a party from revealing the extent of its relationship with an expert witness. The jury is entitled to know the extent of any financial connection between a party and a witness and the cumulative amount a party has paid an expert during their relationship. Similarly, in the case at issue, not only has counsel for Defendants refused to provide the basic discovery including testimony lists of some of their experts, but they have misrepresented the required financial information and have yet to produce this information for impeachment purposes. They continue to make frivolous objections unsupported by Florida Rules and caselaw.

In Orkin Exterminating Co., Inc. v. Knollwood Prop., Ltd., 710 So.2d 697 (Fla. 5th DCA 1998), the trial court issued an order compelling the *defendant*, (not the expert) to produce a list of cases in which the defendant's expert had testified in a deposition or at trial, or alternatively, the documents from which such list could be compiled, including billing records, 1099 forms, or other documents, for the previous three years. "When it is disclosed or made apparent to the trial court

that such a witness has falsified, misrepresented, or obfuscated the required data, the aggrieved party may move to exclude the witness from testifying or move to strike that witness's testimony and or further, move for the imposition of costs and attorney's fees in gathering the information necessary to expose the miscreant expert.” Syken v. Elkins, 644 So. 2d 539, 546-47.

Defendants are attempting to use Boecher as a shield to avoid revealing the extent of its relationship with their expert witnesses which is a clear violation of the Florida Supreme Court ruling. Even if the defendant’s insurance carrier retained the expert witnesses in this case, they are equally required to produce that information so that Plaintiff can use the information for impeachment purposes in trial.

Plaintiff should be permitted to move to strike experts Matthew Berlet, M.D., Carl Melzer, D.D.S, and Alan Segal, M.D., and further move for the imposition of costs and attorney's fees in gathering the information necessary to expose the miscreant experts and dilatory tactics by Defendants’ counsel.

WHEREFORE, Plaintiff, ANTHONY ALLEN JORDAN, respectfully requests that this Court enter an Order striking Defendants, GAUDENCIA HERNANDEZ and TRINITY SERVICES GROUP, INC’s Expert Witnesses Matthew Berlet, M.D., Carl Melzer, D.D.S, and Alan Segal, M.D. and preventing them from testifying in this trial for failure to comply with basic expert discovery, and such other relief this Court deems appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic mail via the Florida E-filing Portal to: **Michael E. Reed, Esq., Christopher A. Cazin, Esq.**, tpacrtpleadings@wickersmith.com; Wicker Smith O’Hara McCoy & Ford, P.A. (Counsel for the Defendants); **Jeffrey S. Glassman, Esq. and William G.K. Smoak, Esq.**,

courtdocuments@flatrialcounsel.com; Smoak, Chistolini & Barnett, PLLC (Co-Counsels for Trinity Service Group, Inc.); **Lisa Ann Kalo, Esq.**, lkalo@kvpalaw.com, (Co-Counsel for Plaintiff), on this 15th day of **March, 2019**.

/s/**Marc Matthews**

MARC MATTHEWS, ESQ.

Florida Bar No. 0711098

Email: Marc@mcintyrefirm.com

McIntyre Thanasides Bringgold

Elliott Grimaldi Guito & Matthews, P.A.

500 E. Kennedy Blvd., Suite 200

Tampa, Florida 33602

Telephone: (813) 899-6059

Facsimile: (813) 225-1221

Service of Court Documents:

Marc@mcintyrefirm.com

Eservice-Marc@Mcintyrefirm.com

and

LISHA BOWEN, ESQ.

Florida Bar No. 0169374

Lisha@bowentrials.com

LISHA BOWEN, P.A.

P.O. Box 173442

Tampa Florida 33672

(T :) (813) 995-5580

(F :) (813) 489-4344

Service of Court Documents:

Lisha@bowentrials.com

Attorneys for Plaintiff

IN THE CIRCUIT COURT OF THE 12TH JUDICIAL CIRCUIT
IN AND FOR, MANATEE COUNTY, FLORIDA
CIRCUIT CIVIL DIVISION

ANTHONY ALLEN JORDAN,

Plaintiff,

vs.

CASE NO.:
2017-CA-001913

GAUDENCIA HERNANDEZ, TRINITY
SERVICES GROUP, INC., a Florida
Profit Corporation, and RYDER
TRUCK RENTAL LT, a Florida Trust
d/b/a RYDER TRUCK RENTAL, INC.,
a Florida Profit Corporation,

Defendants.

DEPOSITION OF: MATTHEW H. BERLET, M.D.

TAKEN AT: St. Joseph's Hospital
SDI Office
3001 West Dr. Martin Luther
King, Jr. Boulevard
Tampa, Florida 33607

DATE AND TIME: Wednesday, December 5, 2018
11:14 a.m. to 1:55 p.m.

REPORTED BY:

Pamela Cook, RPR, CRR, CLR
Registered Professional Reporter
Certified Realtime Reporter
Certified LiveNote Reporter
Notary Public, State of Florida

CLARK REPORTING SERVICE
Joseph Garcia International Center
1101 Channelside Drive, Suite 303
Tampa, Florida 33602
(813)229-3332

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EXHIBIT A

1 Q Okay. And you have testified for the
2 defense firm in this case before, correct?

3 A Correct.

4 Q How many times?

5 A I really am not certain. It's probably
6 four or five times, though. I'm not certain of
7 that number.

8 Q Do you keep a list of your deposition
9 and trial testimony?

10 A I do not.

11 Q The interrogatory responses indicate
12 that you devote approximately five percent of your
13 professional time in serving as an expert witness;
14 is that correct?

15 A It's a little bit higher now. It's
16 about eight percent now.

17 Q How is it that you determine the
18 percentage of time that you devote to expert stuff
19 as compared to --

20 A I usually just put --

21 Q -- clinical?

22 A I just put, you know, salary. You know,
23 I make generally about the same per hour as I make
24 as a radiologist doing this.

25 Q Okay. Do you know how many times that

1 you've testified at trial in the last three years
2 for anyone; plaintiff, defense?

3 A Oh, I don't.

4 Q How about so far this year?

5 A So far this year, was it once this year?
6 Geez, I try to erase this stuff from my memory.
7 It's so traumatic. Was it this year? Twice --
8 once -- it's either once or twice this year. It
9 may have been the end of last year and then once
10 this year.

11 Q Okay. The case in which you testified
12 for the defendant's firm and specifically for Mike
13 Reed, do you remember the name of that case?

14 A I don't remember the case, not the
15 patient. You remember the disease. You don't
16 remember the patient.

17 I don't remember the name of the case.
18 I don't remember the name of the patient or the
19 defendant. I don't want to be politically
20 incorrect, but it was a Spanish name.

21 Q Did it involve an epidural injection?

22 A Correct.

23 Q Dr. Jose Medina Sanchez?

24 A That was it.

25 Q Okay. Have you also been retained by