IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 2009

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v. Case No. 5D08-3577

LINDA GERMAN, INDIVIDUALLY AND AS, ETC., ET AL,

Respondent.

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Opinion filed July 24, 2009

Petition for Certiorari Review of Order from the Circuit Court for Brevard County, John D. Moxley, Jr., Judge.

W. Andrew Rariden of Mimi L. Smith & Associates, Orlando, for Petitioner.

Douglas R. Beam of Douglas R. Beam, P.A., Melbourne, for Respondents.

PER CURIAM.

Petitioner seeks certiorari review of an order denying discovery of information from Respondent's treating physicians. Curiously, although the trial court ordered Respondent to provide answers to so-called *Boecher*[1] interrogatories, seeking information concerning the physicians' involvement with Respondent's counsel in prior cases, it denied Petitioner's request to examine the physicians to uncover evidence of bias, as permitted by *Elkins v. Syken,* 672 So. 2d 517 (Fla. 1996) and Florida Rule of

[1] *Allstate Ins. Co. v. Boecher,* 733 So. 2d 993 (Fla. 1999).

Civil Procedure 1.280(b)(4)(A)(iii). The trial court concluded that, because the physicians were "treating physicians," rather than retained experts, bias discovery of this type was not permitted.

Without reaching the merits, we conclude that we do not have jurisdiction to consider the writ because Petitioner has an adequate remedy on appeal from the adverse discovery ruling. *Chavarria v. Bautista,* 922 So. 2d 245, 246 (Fla. 3d DCA 2006).

PETITION DISMISSED.

GRIFFIN and COHEN, JJ., concur.

TORPY, J., concurs and concurs specially with opinion.

TORPY, J., concurring and concurring specially.

The trial court's ruling here answered the rather limited question framed by the lawyers. They centered their arguments on whether a so-called "treating physician" is an "expert witness," as that phrase is contemplated under Florida Rule of Civil Procedure 1.280(b)(4)(A)(iii). Calling treating physicians "hybrid witnesses," the trial court ruled that they are not subject to discovery under **this** rule. It relied upon *Frantz v. Golebiewski,* 407 So. 2d 283, 284 (Fla. 3d DCA 1981), which held that *ex parte* contact with a treating physician was not prohibited by rule 1.280's limitation that discovery of experts be done "only" in accordance with the procedure in the rule, because a treating physician does not acquire facts and develop opinions “in anticipation of litigation or for trial." *Id.* at 285 (quoting rule 1.280(b)(1)). Whether *Frantz* was correctly decided or applies in this situation is, in my view, largely irrelevant, because the real question is not the procedural method under which the discovery is sought but rather whether the discovery may be obtained at all. I think the answer to this question is clearly yes.

A treating physician, just as any other witness, may be questioned at trial concerning any bias he or she might have for or against a party. § 90.608(2), Fla. Stat. (2009). For example, a treating physician who devotes a substantial portion of his or her practice to expert testimony on behalf of plaintiffs might have a bias towards plaintiffs just as a retained expert, and inquiry at trial to expose that potential bias is permitted. It logically follows that pretrial discovery is permissible to uncover evidence of bias for all the same reasons that discovery on any trial issue is permitted. The extent to which discovery is permitted on this issue is a function of balancing its importance

against the burden of providing the discovery. Thus, in *Winn-Dixie Stores, Inc. v. Miles,* 616 So. 2d 1108 (Fla. 5th DCA 1993), a case not cited by either party to these proceedings, although we acknowledged the theoretical right to bias discovery of the nature sought here, we sustained a trial court's protective order of overly burdensome bias discovery directed to a treating physician.

Elkins v. Syken, 672 So. 2d 517 (Fla. 1996), did not establish the right to this pretrial discovery. It constricted the right to ameliorate the burden on expert witnesses while still permitting reasonable discovery on the issue of bias. Rule 1.280(b)(4)(A)(iii) implemented the holding in *Elkins.* If the rule does not apply to treating physicians, then the limitation does not apply either. Discovery of bias information is still permissible, however, with reasonable limitations to be determined by the trial judge on a case-by-case basis. Under most circumstances, it would seem that the correct balance is the same balance contained in the rule for all other experts because there is no logical distinction between treating physicians and retained experts for purposes of uncovering this type of information. The information is similarly relevant, and the burdens of producing the information are the same for all of these professionals.