

In The Superior Court of Pennsylvania

NO. 1856 MDA 2009

CARL J. BARRICK

Appellant

Received in Superior Court

vs.

DEC 30 2010

SODEXHO MANAGEMENT INC.

MIDDLE

Appellee

AMICUS CURIAE SUBSTITUTED BRIEF SUBMITTED BY THE
PENNSYLVANIA DEFENSE INSTITUTE IN SUPPORT OF POSITION OF
APPELLEE SODEXHO MANAGEMENT, INC. ON RE-ARGUMENT EN BANC

APPEAL BY PLAINTIFFS, CARL J. BARRICK AND BRENDA L. BARRICK
FROM THE ORDER OF OCTOBER 16, 2009
OF THE COURT OF COMMON PLEAS OF COLUMBIA COUNTY
No. 07-3604 CIVIL TERM

DANIEL E. CUMMINS, ESQUIRE
Pa. I.D. #71239

507 Linden Street, Suite 700
Scranton, PA 18503
570-346-0745

Counsel for Amicus Curiae,
PENNSYLVANIA DEFENSE INSTITUTE
IN SUPPORT OF DEFENDANT/APPELLANT
SODEXHO MANAGEMENT, INC.

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STATEMENT OF INTEREST

The Pennsylvania Defense Institute (PDI) is a statewide association of defense counsel and insurance company professionals. Organized forty (40) years ago in December of 1969, it now boasts a combined membership of approximately 1,000 lawyers, insurance company professionals, members of self-insurers, and independent adjusters from all across the Commonwealth of Pennsylvania. The members of the PDI come from all across the insurance spectrum, from automobile, land, other property, to casualty insurers. Also a part of the PDI are the attorneys who customarily represent those carriers and their insureds in Pennsylvania civil litigation matters.

The Pennsylvania Defense Institute has a significant interest in this case because its members, as well as the policyholders of the insurance company members, i.e. the Pennsylvania public, may be materially affected by the outcome of this matter which implicates the truth-seeking purpose of discovery proceedings in all personal injury civil litigation matters. The PDI therefore files this Amicus Curiae (Latin for “a friend of the court”) Brief because it believes that there will be broader ramifications if discovery of bias on the part of Plaintiffs’ medical expert and/or discovery pertaining to any influence by Plaintiffs’ attorney upon Plaintiffs’ medical expert’s formulation of his opinion is unfairly circumscribed as requested by the Plaintiffs in this matter.

For these broader policy reasons, and for the more specific substantive reasons stated below, it is respectfully requested that this Court affirm the trial court’s October 16, 2009 discovery Order as properly compelling the Plaintiffs’ production of the complete file of their medical expert for trial, including repeated correspondence and e-mails from Plaintiffs’ counsel to that expert purposefully designed to impact how the expert should frame his expert opinion for trial presentation.

INCORPORATION

The Pennsylvania Defense Institute incorporates by reference the entire Brief(s) submitted on behalf of the Defendant/Appellee, Sodexo Management, Inc., specifically including but not limited to, its Statement of Jurisdiction and Order in Question. Pa. R.A.P. 2137.

STATEMENT OF SCOPE AND STANDARD OF REVIEW

Under Pennsylvania law, the trial court was granted broad discretion to address the discovery Motion to Enforce Subpoena Directed to Appalachian Orthopedic Center, Ltd. filed by the Defendant, Sodexho Management, Inc., in the underlying matter. *See McNeil v. Jordan*, 586 Pa. 413, 426-427, 894 A.2d 1260, 1268 (2006).

As discovery matters are decided within the broad discretion of the trial court, in reviewing the trial court discovery Orders, the Superior Court generally applies an abuse of discretion standard on appeal. *McNeil*, 586 Pa. at 426-427, 894 A.2d at 1268. “To the extent that the question involves a pure issue of law, [the Superior Court’s] scope and standard of review are plenary.” *Crum v. Bridgestone/Firestone North American Tire, LLC*, 907 A.2d 578, 585 (Pa.Super. 2006).

“Judicial discretion requires action in conformity with law on facts and circumstances before the trial court after hearing and consideration.” *Continental Casualty Co. v. Pro Machine*, 916 A.2d 1111, 1115 (Pa.Super. 2007) quoting *Chenot v. A.P. Green Services, Inc.*, 895 A.2d 55, 61 (Pa.Super. 2006)[citation omitted]. “Consequently, the court abuses its discretion if, in resolving the issues for decision, it misapplies the law, exercises its discretion in a manner lacking reason, or does not follow legal procedure.” *Continental Casualty*, 916 A.2d at 1115-1116; *Chenot*, 895 A.2d at 61.

COUNTER-STATEMENT OF THE CASE

This matter arises out of a March 29, 2006 incident during which a chair allegedly collapsed from under the Plaintiff, Carl J. Barrick, while he was sitting at a table in the cafeteria of the Holy Spirit Hospital. On September 28, 2007, the Plaintiffs filed suit against the various Defendants essentially alleging a claim in negligence for failing to ensure that the chair was safe to sit on and for failing to otherwise protect the Plaintiff from a dangerous condition.

During the course of discovery and pursuant to Pa.R.C.P. 4009.21, the Defendant, Sodexho Management, Inc., (“Sodexho”), served subpoenas upon the Appalachian Orthopedic Center, Ltd. seeking the contents of that facility’s medical file on the Plaintiff. The subpoena essentially called for the production of the entire file on the Plaintiff, including any “correspondence” in the file. The Plaintiff’s treating orthopedic surgeon, Dr. Thomas J. Green, M.D. was affiliated with the Appalachian Orthopedic Center, Ltd. Dr. Green was eventually identified by the Plaintiff as the Plaintiffs’ expert witness in this matter.

Sodexho eventually received updated medical records from Dr. Green’s office. However, on the Certificate of Compliance provided by Appalachian Orthopedic Center, Ltd., the following was written: “Enclosed are the medical records and related correspondence for Mr. Barrick. Certain records of this office that pertain to Mr. Barrick but were not created for treatment purposes are not being produced.” It was later determined that, among the records not produced, were correspondence and e-mails written by Plaintiffs’ counsel to the medical facility.

Thereafter, on June 29, 2009, Sodexho filed a Motion to Enforce Subpoena directed to Appalachian Orthopedic Center, Ltd. The Plaintiffs opposed this Motion. Argument

was held on the issue before the Honorable Kevin A. Hess of the Columbia County Court of Common Pleas on August 6, 2009. After an *in camera* review of the correspondence at issue, the Honorable Kevin A. Hess noted that the information in the Plaintiff's attorney's letters and emails may have "materially impacted" the expert's formulation of his opinion and the trial court judge therefore ordered the Appalachian Orthopedic Center, Ltd. to produce all of the documents pertaining to the Plaintiff, Carl J. Barrick, including those letters and e-mails in question issued by Plaintiffs' attorney to Dr. Thomas J. Green. *See* Trial Court's Opinion Pursuant to Rule 1925 at p. 6.

On October 28, 2009, the Plaintiffs filed a Notice of Appeal from the trial Order of Court as a collateral Order under Pa. R.A.P. 313. On November 4, 2009, Judge Hess issued an Order for a Statement of Matters Complained of on Appeal. On November 18, 2009, the Plaintiffs filed a Statement of Matters Complained of on Appeal. Thereafter, on December 15, 2009, Judge Hess issued his Opinion Pursuant to Rule 1925 outlining the reasons supporting his discovery Order of court.

Oral argument was originally held before this Court on June 9, 2010 in front of Superior Court Judges John L. Musmanno, Anne E. Lazarus, and Judith F. Olson. On September 16, 2010, the Superior Court panel issued its Opinion, as written by the Honorable Judith F. Olson, AFFIRMING the trial court's Order of October 16, 2009.

Thereafter, on September 27, 2010, the Plaintiff filed a Petition for Re-Argument *en banc* which was granted by this Honorable Court under an Order dated November 19, 2010.

COUNTER-STATEMENT OF QUESTION INVOLVED

WHETHER THE TRIAL COURT PROPERLY RULED, WITHIN ITS BROAD DISCRETION, THAT REPEATED COMMUNICATIONS FROM PLAINTIFFS' ATTORNEY TO THE PLAINTIFFS' EXPERT MEDICAL WITNESS FOR TRIAL WERE DISCOVERABLE BY THE DEFENSE WHERE THE LETTERS AND E-MAILS TO THE EXPERT PURPOSEFULLY ADDRESSED HOW THE EXPERT SHOULD FRAME HIS OPINION TESTIMONY AND WHERE THE TRIAL COURT FOUND, AFTER AN *IN CAMERA* INSPECTION OF THE PLAINTIFFS' ATTORNEY'S LETTERS AND EMAILS, THAT SUCH WRITTEN COMMUNICATIONS BY THE PLAINTIFFS' ATTORNEY MAY HAVE "MATERIALLY IMPACTED" THE EXPERT'S FORMULATION OF HIS MEDICAL OPINION FOR TRIAL.

(ANSWERED IN THE AFFIRMATIVE BY THE COURT BELOW)

SUMMARY OF ARGUMENT

The discovery issue involved in this personal injury case revolves around letters and e-mails sent by the Plaintiffs' attorney to the Plaintiffs' expert that purposefully addressed the strategy of how the expert should frame his opinion. When the Defendant Sodexo sought the discovery of these written communications in order to fully prepare for its cross-examination of the expert at trial, the Plaintiffs incorrectly asserted that this information was protected from disclosure by the attorney work product doctrine.

The lower court conducted an *in camera* review of the information and held that "where an expert is being called to advance a plaintiff's case in chief and the nature of the expert's testimony may have been materially impacted by correspondence with counsel, such correspondence is discoverable." *See* Trial Court's Opinion Pursuant to Rule 1925 at p. 5-6. In so ruling, the trial court did not abuse its broad discretionary power in handling discovery disputes.

The courts of Pennsylvania have repeatedly held that "the work-product privilege is not absolute and items may be deemed discoverable if the 'product' sought becomes a relevant issue in the action." *T.M. v. Elwyn, Inc.*, 950 A.2d 1050, 1062 (Pa. Super. 2008) [other citations omitted]. Here, the communications by the Plaintiffs' attorney to the Plaintiffs' medical expert are discoverable as they are obviously relevant to the issue of how the Plaintiffs' expert formulated his opinion and whether his opinion was influenced by the repeated contact from Plaintiffs' attorney. By ordering the production of the documents at issue, the trial court furthered the truth-searching purposes of discovery proceedings and upheld the overall design of civil trials in Pennsylvania, which is to allow for a search for the truth on the claims presented. For these reasons and the other reasons noted below, it is respectfully requested that the Superior Court AFFIRM the trial court's discovery order.

ARGUMENT

I. THE TRUTH-SEEKING PURPOSE OF CIVIL TRIALS SUPPORTS THE FINDING THAT THE DOCUMENTS AT ISSUE ARE DISCOVERABLE.

It is initially and respectfully asserted that, in reviewing the discovery issue at hand, it is important to keep in mind that the question presented involves the much broader query of the *discoverability* of evidence and not the more narrow, and currently inapplicable, question of the *admissibility* of the evidence at issue. Keeping this thought in mind compels the conclusion that the lower court correctly ruled within its broad discretionary powers that Defendant Sodexho was entitled to discover the information at issue as part of the truth-seeking process of discovery proceedings.

This matter involves the very specific discovery question pertaining to whether the defense is entitled to the production of repeated letters and e-mails from Plaintiffs' counsel to the Plaintiffs' expert which were admittedly and purposefully designed to address the strategy of how the expert should formulate and frame his opinion for trial. Significantly, as noted below, the trial court found, after an *in camera* review of the documents in question, that the content of these letters and e-mails were such that the Plaintiffs' expert witness may have been "materially impacted" by repeated written communications from the Plaintiffs' attorney. *See* Trial Court Opinion Pursuant to Rule 1925 at p. 6.

Taking a step back from the very specific discovery issue presented and looking at the big picture, it is well established under Pennsylvania jurisprudence that "the purpose of...civil trials is to discover the *truth*...." *Bailey v. Tucker*, 533 Pa. 237, 248, 621 A.2d 108, 113 (1993)[emphasis in original]. As a sometimes crucial part of the truth-finding process of trial, parties are permitted to present expert witnesses to provide opinion

testimony on matters that may be beyond the common knowledge of lay persons on the jury panel. *See Carrozza v. Greenbaum*, 866 A.2d 369, 379 (Pa.Super. 2004); *see also* Pa.R.E. 702-706.

Pre-trial discovery of information given to witnesses is important as it is well-settled that, in the search for the truth at trial, it is for the jury to determine the credibility of the witnesses, including expert witnesses, along with the weight to be given to the testimony of the witnesses. *See Ludmer v. Nernberg*, 433 Pa. Super 316, 323, 640 A.2d 939, 942 (1994). Stated otherwise, in a case where the credibility of the witnesses is at issue, for example as where there is a “battle of the experts,” the weight to be assigned to its testimony of various witnesses is within the exclusive province of the jury. *See Smith v. Shaffer*, 511 Pa. 421, 425, 515 A.2d 527, 528-529 (1986).

In this regard, a jury is permitted to believe all, a part of, or none of the testimony of any witness. *Neison v. Hines*, 539 Pa. 516, 520-521, 653 A.2d 634, 636-637 (1995). Ultimately, a jury is under no obligation to accept as true the testimony presented by either side of the case, but must compare the conflicting evidence to determine the truth. *Metz v. Travelers Fire Ins. Co.*, 355 Pa. 342, 346, 49 A.2d 711, 713 (1946). In fact, a jury may even disbelieve the testimony of expert witnesses, even when that testimony is uncontradicted. *Douglass v. Licciardi Construction Co.*, 386 Pa. Super. 292, 298, 562 A.2d 913, 916 (1989); *Janson v. Hughes*, 309 Pa. Super. 399, 402, 455 A.2d 670, 671 (1982). Thus, pre-trial discovery of information fed or provided to a witness, and particularly an expert witness, may prove important in the process of exploring the credibility of that witness through the process of cross-examination.

Pennsylvania Rule of Evidence 607(b) provides that “[t]he credibility of a witness may be impeached by any evidence relevant to that issue, except as otherwise provided by

statute or these Rules.” Pa.R.E. 607(b). Surely, the fact that a plaintiff’s attorney repeatedly communicated with an expert for the plaintiff with the express purpose of addressing the strategy pertaining to the expert’s formulation of his opinion for trial, as was admittedly done in this matter, could raise serious questions for a jury as to the credibility of that expert’s opinion and the weight to be given to it.

The most important tool provided to a litigant to test the credibility of the opinion of an adversary’s expert witness and thereby challenge the truth of the adversary’s claims at trial, is the right to cross-examine witnesses. The primary purpose of cross-examination is to elicit testimony tending to refute all inferences and deductions raised by direct examination. *Collins v. Cooper*, 746 A.2d 615, 617-618 (Pa. Super. 2000)[other citations omitted]. The right of cross-examination includes the right to examine the witness on any facts tending to refute those inferences or deductions. *Id.* An additional purpose of cross-examination is to provide an opportunity to elicit answers that will impeach the impartiality and, most importantly, the veracity or credibility of the witness. *Catina v. Marie*, 272 Pa. Super. 247, 260, 415 A.2d 413, 420 (1980), *rev’d on other grounds*, 498 Pa. 443, 447 A.2d 228 (1982).

The Courts of Pennsylvania have recognized that the cross-examining attorney is unlikely to have the requisite expertise on the topic testified to by the expert, or any knowledge as to how the expert formulated his or her opinion for that matter, without some procedural assistance from the Rules of court. It is for this reason that the Pennsylvania Rules of Civil Procedure require the pre-trial identification by experts along with the substance and all of the grounds for the expert’s opinion to be presented at trial. This affords the opposing counsel an opportunity to prepare by retaining his or her own expert as well as an opportunity to prepare an appropriate cross-examination during the search for the

truth on the claims presented at trial. *See Freeman v. Maple Point, Inc.*, 393 Pa.Super. 427, 435-436, 574 A.2d 684, 689 (1990). The below more specific review of the discovery Rules of Court confirms that the trial court properly ruled, within its broad discretion, that the documents at issue were indeed discoverable under the circumstances presented in this matter.

II. THE PURPOSE OF DISCOVERY PROCEEDINGS--ALLOWING A FAIR TRIAL ON THE MERITS OF THE CASE--SUPPORTS THE FINDING THAT THE DOCUMENTS AT ISSUE ARE DISCOVERABLE.

As stated, the overriding purpose of civil trials is to determine the truth of the claims and defenses presented. *Bailey*, 533 Pa. at 248, 621 A.2d at 113. The courts of Pennsylvania have repeatedly held that it therefore follows that “the purpose and spirit of discovery proceedings is to avoid surprises at trial and to permit trials to be a truth-seeking devic[e].” *Feld v. Merriam*, 1980 WL 194225, 4 Phila.Co.Rptr. 511 (Phila. Co. 1980), *aff’d as modified*, 314 Pa.Super. 414, 461 A.2d 225 (1983), *rev’d on other grounds*, 506 Pa. 383, 485 A.2d 742 (1984). Stated otherwise, “[t]he purpose of the discovery rules is to prevent surprise and unfairness and to allow a fair trial on the merits.” *Dominick v. Hanson*, 753 A.2d 824, 826 (Pa.Super. 2000) *quoting Smith v. Grab*, 705 A.2d 894, 902 (Pa.Super. 1997) *quoting Linker v. Churnetski Transp., Inc.*, 360 Pa.Super. 366, 368-369, 520 A.2d 502, 503 (1987), *appeal denied*, 516 Pa. 641, 533 A.2d 713 (Pa. 1987).

Under the liberal Pennsylvania Rules of Civil Procedure pertaining to discovery, i.e., Pa. R.C.P. 4003.1(a), a party is generally permitted to “obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action” even if that discovery was prepared in preparation for litigation or trial. 42 Pa.R.C.P. 4003.1(a); Pa.R.C.P. 4003.3. With regards to expert discovery, the discovery

rules avoid surprises and allow for a fair trial on the merits by providing that a party may require an adversary to identify the trial expert, state the subject matter on which the expert is expected to testify, state the facts and opinions to which the expert is expected to testify, and state a summary of the grounds for each opinion. Pa.R.C.P. 4003.5(a)(1)(b).

Rule 4003.5 specifically allows for the discovery of “facts known” and opinions held by the testifying expert witness including the grounds for each opinion, even if those facts were acquired in anticipation of litigation. *See Pavlak v. Dyer*, 59 D.&C.4th 353, 355 (Pike Co. 2003 Thomson, J.). In providing for such discovery pertaining to the expert and the formulation of his or her opinion, Rule 4003.5 has been construed as intended to serve several functions, including allowing for the effective cross-examination and rebuttal of an expert witness by opposing parties. 9 Goodrich-Amram §4003.5:2 (2008; 2009-2010 Suppl.).

It does not appear that the Plaintiffs are asserting that the documents at issue are protected from discovery under the above-noted general rules of discovery. Rather, as found by the trial court, the Plaintiffs are erroneously attempting to rely upon an exception to the general rule favoring the discovery of such information. That is, the Plaintiffs are erroneously relying upon the attorney work product doctrine in order to prevent the production of these otherwise discoverable documents relevant to the impeachment of the Plaintiffs’ medical expert. It is requested that the Superior Court uphold the truth-seeking purposes of discovery proceedings and allow for a trial on the merits by affirming the trial court’s discretionary and correct decision to require the disclosure of the documents at issue.

III. THE TRIAL COURT PROPERLY FOUND THE DOCUMENTS AT ISSUE TO BE DISCOVERABLE PARTICULARLY WHERE THE PLAINTIFFS' ATTORNEY'S LETTERS AND E-MAILS TO THE EXPERT WERE RELEVANT IN THAT THEY WERE FOUND TO HAVE POSSIBLY MATERIALLY IMPACTED THE EXPERT'S FORMULATION OF HIS OPINION.

- A. The attorney work product doctrine is not absolute and items may be deemed discoverable if, as in this matter, the "product" sought becomes a relevant issue in the action.

The trial court in this matter correctly ruled that the attorney work product doctrine should not be allowed to prevent the disclosure of documents at issue particularly where it was determined, after an *in camera* review, that the letters and e-mails provided to the Plaintiffs' expert by the Plaintiffs' attorney may have "materially impacted" how the expert wrote his report and opinion. See Trial Court's Opinion Pursuant to Rule 1925 at p. 6.

The attorney work-product doctrine is set out in the Rules of Civil Procedure and "appears as an exception to the general discovery rules." *In Re Estate of Wood*, 818 A.2d 568, 572 (Pa.Super. 2003). The doctrine provides, in pertinent part, as follows:

Subject to the provisions of Rules 4003.4 and 4003.5, a party may obtain discovery of any matter discoverable under Rule 4003.1 even though prepared in anticipation of litigation or trial by or for another party or by or for that other party's representative, including his or her attorney, consultant, surety, indemnitor, insurer, or agent. The discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes, or summaries, legal research or legal theories. ****

Pa. R.C.P. 4003.3.

"The work product protection is not a privilege; it is a creature of the rules of discovery. Consequently, the limits of the work product protection are determined by

reviewing the language of the applicable rule of discovery, the purposes for the rule, and the explanatory note to the rule.” *Mueller v. Nationwide Mut. Ins. Co.*, 31 Pa. D. & C. 4th 23, 26 (Allegh. Co. 1996, Wettick, J.) citing with “see” signal *Maleski v. Corporate Life Insurance Co.*, 163 Pa. Cmwlth. 36, 45, 641 A.2d 1, 5 (1994). The purpose of the rule is obviously to protect an attorney’s own legal analysis where appropriate.

However, as stated in the Explanatory Note to Rule 4003.3, “[t]here are... situations under the Rule where the legal opinion of an attorney becomes a relevant issue in an action.” Accordingly, numerous Pennsylvania appellate courts have held that “the work-product privilege is not absolute and items may be deemed discoverable if the “product” sought becomes a relevant issue in the action.” *T.M. v. Elwyn, Inc.*, 950 A.2d 1050, 1062 (Pa. Super. 2008) citing *Gocial v. Independent Blue Cross*, 827 A.2d 1216, 1222 (Pa. Super. 2003); see also *Birth Center v. St. Paul Companies*, 727 A.2d 1144, 1165 (Pa. Super. 1999). Therefore, as in this matter, an attorney’s work product may be discoverable in “situations under [Rule 4003.3] where the legal opinion of an attorney becomes a relevant issue in an action....” *Birth Center*, 727 A.2d at 1165 citing Pa. R.C.P. 4003.3, Explanatory Note.¹

It therefore follows that, under the much broader standards of discoverability recognized under Pennsylvania law, the trial court correctly ordered the production of the written communications at issue.

¹ While an Explanatory Note is not part of a rule, these notes accompany the publication of a rule and are relied upon by the courts of Pennsylvania in construing the rules. See *Onorato v. Wissahickon Park, Inc.*, 430 Pa. 416, 421-422 n. 1, 244 A.2d 22, 25 n. 1 (1968); See also, for example, *Com. v. O’Byrne*, 243 Pa. Super. 289, 294, 365 A.2d 856, 858 (1976).

B. The trial court properly ruled that the attorney work product doctrine does not protect from disclosure correspondence from a plaintiff's attorney to a medical expert that was designed to, and possibly did, materially impact how the expert framed his opinion.

The more specific issue before this Court, involving the question of whether the attorney work product doctrine protects from disclosure letters and e-mails from a party's attorney to that party's medical expert where the correspondence specifically addresses the role of the physician as an expert witness and the strategy on how the expert should frame his opinion, appears to be an issue of first impression in the Pennsylvania appellate courts. As noted by the trial court, the Plaintiffs' reliance upon the case of *Shambach v. Fike, et al.*, 82 Pa.D.&C.4th 535 (Lacka. Co. 2006 Minora, J.) is misplaced as that case is "inapposite to the matter sub judice." See Trial Court's Opinion Pursuant to Rule 1925 at p. 2. *Shambach* involved the entirely separate issue of the scope of a deposition of a doctor who is both the treating physician and an expert. See *Id.* The matter presently before the case does not involve the scope of a deposition of an expert at all, but rather, deals with the disclosure of an attorney's written statements to an expert regarding how the expert should write his opinion. *Id.*

The lower court in this matter felt that the facts of this case were more in tune with similar situation found in the Pike County Court of Common Pleas case of *Pavlak v. Dyer*, 59 D.&C.4th 353, 355 (Pike Co. 2003 Thomson, J.). *Id.* In *Pavlak*, the plaintiff's attorney likewise objected to the discovery of portions of the attorney's correspondence sent to the plaintiff's treating doctor, who also happened to be identified as the plaintiff's medical expert for trial.

At the time of its decision, the *Pavlak* court found no controlling Pennsylvania law on this issue. A review of the federal court precedent available at the time led Judge

Thomson to conclude that the trend of the federal court decisions was “to the effect that expert disclosure requirements ‘trump’ any assertion of work product privilege.” See Trial Court’s Opinion Pursuant to Rule 1925 at p. 3 quoting *Pavlak*, 59 Pa.D.&C.4th at p. 363. Judge Thomson also confirmed that a number of other jurisdictions follow the federal court trend towards the bright-line rule in favor of full disclosure which is the rule that was adopted by the lower court in this matter. See *Pavlak*, 59 Pa.D.&C.4th at 366-367 citing with “see e.g.” signal *Rowlands v. Choon Lai*, 1999 Del.Super. Lexis 176, at *3 (“Delaware courts do not distinguish documents sent to experts based on what they contain. Any correspondence to an expert who will be testifying waives the privilege no matter what is contained in the documents.”); *Emergency Care Dynamics v. Superior Ct. of the State of Arizona*, 188 Ariz. 32, 33, 932 P.2d 297, 298 (1997)(“A lawyer forgoes work-product protection for communications with an expert witness concerning the subject of the expert’s testimony even if the expert also plays a consulting role.”).

Nevertheless, after reviewing the federal court precedent, the Pike County trial court in *Pavlak* held that it would choose to allow the redaction of the alleged attorney work product portions of the letters at issue in its case. It is important to note that, in so ruling, the *Pavlak* court did not consider the rule of law that the attorney work product privilege against non-disclosure could be rendered inapplicable where, as here, the attorney’s opinion becomes a relevant issue in the case. See *T.M. v. Elwyn, Inc.*, 950 A.2d at 1062; citing *Gocial*, 827 A.2d at 1222; see also *Birth Center*, 727 A.2d at 1165. Perhaps the *Pavlak* court’s decision would have been different if it included this analysis in its opinion. Instead, the court in *Pavlak* court issued a compromise decision calling for a cumbersome and impracticable three-step approach to this discovery issue.

First, the plaintiff's attorney in *Pavlak* was allowed to redact his legal opinion work product from the letters he sent to his medical expert and then produce the redacted letters to defense counsel. *Pavlak*, 59 Pa.D.&C.4th at 368. Under the second step mandated by the *Pavlak* decision, the plaintiff's attorney was to provide the trial court, within seven days, copies of both the redacted letters and copies of the complete, unedited letters to the expert. Third, the trial court would then have to complete an *in camera* inspection of the redacted and unredacted letters to determine whether or not plaintiff's attorney had inappropriately redacted information that did not fall within the attorney work product doctrine. If plaintiff's attorney was found to have inappropriately withheld information, he or she would be required to produce the unedited letters to the opposing party as a discovery sanction.

The trial court in this matter found this provision for further and repeated court intervention in resolving a single discovery issue to be "troublesome." See Trial Court's Opinion Pursuant to Rule 1925 at p. 4. The lower court also noted a concern with already overburdened trial courts having to make decisions pertaining to *in camera* inspections of documents without the benefit of participation in the decision-making process by both attorneys and their arguments in favor of and against the production of the documents. See Trial Court's Opinion Pursuant to Rule 1925 at p. 5 citing *Allegheny County Discovery Opinions* Vol. 2, Pittsburgh Allegheny County Law Library (1991 Wettick, J.). Another danger of this approach is that trial courts would become overwhelmed if this approach, mandating *in camera* inspections of letters in every case, was also applied to those letters that defense counsel routinely forward to defense medical experts in the independent medical examination process allowed by Pa.R.C.P. 4010.²

² It is parenthetically noted that defense counsel routinely turn over in discovery their letters sent to the independent medical expert when requested and otherwise generally do not object when, at the trial deposition of the defense expert, the plaintiff's attorney requests to review the expert's file, including correspondence received from the defense attorney. It is generally understood that the plaintiff's attorney is entitled, in

Another shortcoming of the Pike County Court's approach in *Pavlak* is that it does not provide the members of the civil litigation bar with any certainty or precedent as to which documents, or which portions of documents, may prove discoverable in the future. *See Krisa v. Equitable Life Assurance Society*, 196 F.R.D. 254, 259 (M.D.Pa. 2000 Vanaskie, J.) *quoting Karn v. Ingersoll-Rand Co.*, 168 F.R.D. 633, 639-640 (N.D.Ind. 1996)("Those courts that have favored the disclosure of attorney work product argue that their "bright line" interpretation 'makes good sense on several policy grounds: effective cross examination of expert witnesses will be enhanced, the policies underlying the work product doctrine will not be violated; and, finally, litigation certainty will be achieved— counsel will know exactly what documents will be subject to disclosure and can react accordingly.'").

It is noted that the affirmance of the bright line rule adopted by the trial court in this matter may educate members of the bar not to include attorney work product information in correspondence to experts and will thereby prevent this issue from repeatedly coming before the trial courts on discovery motions in a tedious, annoying, and burdensome manner. Conversely, accepting the Pike County approach in *Pavlak* may encourage unscrupulous attorneys to issue letters to their experts blatantly telling them what to put in their reports with the attorney then turning around to argue that the letters to the expert, or portions of the letters, are protected from disclosure under the attorney work product doctrine because the information was phrased as an attorney legal opinion or conclusion.

preparation of his or her cross-examination of the expert, to review documents that may have impacted the expert's formulation of his opinion. It is for this reason that the wise defense attorney strives to write his or her letter in an entirely neutral fashion in order to avoid any argument that the expert's opinion was purposefully influenced by the contact from defense counsel. There is no reason why members of the plaintiff's bar, including the Plaintiff's attorney in this matter, could not similarly frame written communications to their experts in a neutral fashion and thereby avoid any issues.

For example, the approach advocated by the Pike County Court of Common Pleas in *Pavlak*, would protect from disclosure a letter from an attorney to an expert stating,

“In my legal opinion, the records from the Plaintiff’s other doctors all support the argument that the Plaintiff’s C5-6 disc herniation with a resultant radiculopathy is a permanent condition that was proximately caused by the accident, and this information should be included in your final expert report.

Also note that, according to my legal research, it is my opinion that you should avoid stating that any of my client’s injuries ‘may be related’ or that they are ‘possibly related’ to the accident as such statements may be found to be legally insufficient to establish legal causation. In my legal opinion, you should couch your conclusions with statements like, ‘to a reasonable degree of medical certainty, the Plaintiff’s C5-6 herniation and other injuries *are* related to the accident.’

Please also make sure you include conclusions in your report, to a reasonable degree of medical certainty, that the Plaintiff’s time off from work (wage loss) is related and that her medical expenses were all reasonable, necessary, and related, all of which, in my humble legal opinion, I conclude appears to be confirmed by the records of the other medical providers of my client.”

Under the analysis of the *Pavlak* court, the plaintiff’s attorney would be allowed to redact this information from the letter to the expert before producing it in discovery and the defense would be unjustly deprived of the opportunity to impeach the credibility of the plaintiff’s expert with this information during cross-examination during trial. This absurd potential scenario, allowed by the *Pavlak* approach, violates the truth-seeking goals of discovery proceedings and prevents a trial on the merits of truth of the claims presented.

Judge Hess in his Opinion below in this matter made the additional well-reasoned point that the legal theory of the attorney and the medical opinion of the expert may be so intertwined in the correspondence and e-mails at issue such that it “is seldom possible to discern” where one ends and the other begins. Accordingly, “[a]ny attempt to redact out this information becomes impracticable.” See Trial Court’s Opinion Pursuant to Rule 1925 at p. 5. This difficulty was also apparently experienced by the lower court in this matter as

well during its own *in camera* review of the documents. For this additional reason, the *Pavlak* procedure proves unworkable.

- C. The trial court correctly held, after an *in camera* review, that the documents at issue should be produced in discovery as information relevant to a trial on the merits given that the expert's testimony may have been materially impacted by correspondence from Plaintiffs' counsel.

Faced with the above potential difficulties posed by the *Pavlak* approach, the lower court in this matter correctly held, within its broad discretion and after its own *in camera* review of the documents in question, that “where an expert is being called to advance a plaintiff's case in chief and the nature of the expert's testimony may have been materially impacted by correspondence with counsel, such correspondence is discoverable.” *See* Trial Court's Opinion Pursuant to Rule 1925 at p. 5-6. In other words, the trial court essentially and properly followed and upheld the rule of law that “the work-product privilege is not absolute and items may be deemed discoverable if the “product” sought becomes a relevant issue in the action.” *T.M. v. Elwyn, Inc.*, 950 A.2d at 1062 *citing* *Gocial*, 827 A.2d at 1222; *see also* *Birth Center*, 727 A.2d at 1165.

The letters and e-mails from the Plaintiffs' attorney to the Plaintiffs' medical expert were admittedly addressed specifically to the role of the physician as an expert witness and apparently spoke directly to the strategy as to how the expert should frame his opinion. It is most significant to reiterate that the trial court reviewed the Plaintiffs' attorney's letters and e-mails and found that they may have “materially impacted” the formulation of the expert's opinion. *See* Trial Court Opinion Pursuant to Rule 1925 at p. 6. In other words, it may be that the attorney's letters may have caused the expert to color or slant his opinion in favor of the claims being presented by the Plaintiffs. Therefore, there can be no question that these letters were obviously relevant to the credibility and weight to be given to the expert

witness' testimony at trial. With this discovery being properly permitted, the defense will be able to utilize information that is material to the preparation of its cross-examination of the Plaintiffs' expert on all aspects of his report and his credibility as a witness. This, in turn, if later ruled admissible, will assist the jury in determining the truth of the claims presented by the Plaintiff at trial.

Consequently, through the required production of the documents in question, the defense will not be deprived of the right to thoroughly explore, in front of a jury, the full extent to which the Plaintiffs' attorney may have influenced the expert's opinion regarding the nature, causation, and extent of the Plaintiff's injuries and damages. By ordering the production of the documents at issue, the trial court not only upheld the purposes of discovery of preventing unfairness and allowing a trial on the merits, but also furthered the overall purpose of civil trials in Pennsylvania of searching for the truth on the claims presented.

Stated otherwise, it would have been unjust and inequitable under the circumstances presented in this case for the trial court to have allowed the Plaintiffs in this matter to prevent the production of the correspondence and e-mails issued by their attorney to their medical expert, particularly where the trial court found, after its own *in camera* inspection of the documents, that such written communications may have "materially impacted" the expert's opinion. See Trial Court Opinion Pursuant to Rule 1925 at p. 6. Allowing the Plaintiffs' attorney to withhold such discovery from the defense would have subverted the truth-seeking goals of discovery and civil litigation as a whole. If such discovery was never allowed in this matter, the case could potentially proceed to a jury without the defense being able to provide the jury with complete information, through a proper cross-examination of the Plaintiffs' medical expert on all of the relevant issues, including the influence of

Plaintiffs' attorney upon the formulation of the Plaintiffs' expert's opinion offered on behalf of the Plaintiffs. The jury's verdict in this case would thereby be rendered upon less than all of the information and in violation of the purpose of civil trials as a truth-seeking device.

This Court should therefore reject any suggestion that a "bright line" rule mandating the production of the documents at issue only provides minimal or marginal value in terms of the cross-examination of experts at trial. In addition to attempting to discredit an opponent's expert by presenting one's own credible expert in the proverbial "battle of the experts," litigants should be permitted to show the jury, through a proper cross-examination based upon information obtained in pre-trial discovery, that the opposing party's expert's opinion may have been influenced by repeated correspondence from the opposing party's attorney. In cases where the experts are of similar credibility, or otherwise cancel each other out, the fact that one party's expert's opinion was influenced or shaped by correspondence from that party's attorney could be the difference that tips the scales of justice ever so slightly in favor of the other party.

D. Recent changes to Federal Rule of Civil Procedure 26 are of no moment and do not compel a different result.

The Plaintiff's argument that this Court's ruling on the issue presented should fall into line with the recent changes to Federal Rule of Civil Procedure 26 should be rejected as devoid of merit.

By way of background, as of December 1, 2010, F.R.C.P. 26 no longer required full discovery of draft expert reports or broad disclosure of any communications between trial counsel and the expert, all of which was previously required since the last revision of Federal Rule 26 back in 1993. Under the new F.R.C.P. 26, these types of communications now come more fully under the protection of the work-product doctrine in federal civil

litigation matters. The new F.R.C.P. 26 prohibits discovery of draft expert reports and limits discovery of attorney-expert communications. Still permitted, however, is the full discovery of the expert's final opinion and of the facts or data used to support the opinions.

It is initially noted that the Courts of the Commonwealth of Pennsylvania, from the Supreme Court all the way down to the various trial courts, have repeatedly confirmed that they are not bound by the Federal Rules of Civil Procedure. *See London v. City of Philadelphia*, 412 Pa. 496, 500, 194 A.2d 901, 902 (Pa. 1963); *Barrick v. Holy Spirit Hospital*, 5 A.3d 404, 409 n. 3 (Pa.Super. 2010)(*Decision later withdrawn on granting of Petition for Re-Argument en banc*); *Chianese v. Heintz*, 34 Pa.D.&C.2d 253, 258 (Allegh. Co. 1969); *Lambert v. Correct Mfg. Co.*, 59 Pa.D.&C. 694, 697 (Beaver Co. 1947).

The Courts of Pennsylvania, including the original Superior Court panel in this matter, have also repeatedly recognized that Pa.R.C.P. 4003.3, which is at the center of the discussion in this case, "differs materially" from F.R.C.P. 26. *See Barrick*, 5 A.3d at 409 n. 3 (Pa.Super. 2010)("Additionally, as the explanatory comment to Pa.R.C.P. 4003.3 makes clear, Rule 4003.3 "differs materially from Fed.R.C.P. 26 (b)(3). Thus, we disavow any reliance upon F.R.C.P. 26.") (*Decision later withdrawn on granting of Petition for Re-Argument en banc*).

The Courts of Pennsylvania have more specifically recognized that "[t]he Pennsylvania Rules of Civil Procedure, with respect to attorney work product, differ from the federal rules." *Morganti v. Ace Tire & Parts, Inc.*, 70 Pa.D.&C.4th 1, 7 (Allegh. Co. 2004 Wettick, J.). In *Morganti*, Judge Wettick went on to emphasize the difference, as follows:

Except in limited circumstances., Pennsylvania does not protect trial preparation material. To the contrary, Pa.R.C.P. 4003.3 specifically provides that a party may obtain discovery of any matter discoverable under Rule 4003.1 even though prepared in anticipation of litigation for trial....

Id. at p. 7.

The Pennsylvania Superior Court itself has previously described F.R.C.P. 26 as being “more stringent” when compared to “the more relaxed standard in Pennsylvania” under Pa.R.C.P. 4003.3. *Dominick v. Hanson*, 753 A.2d 824, 827 (Pa.Super. 2000). The Superior Court in *Dominick* noted:

Moreover, Pennsylvania’s work product rule, Pa.R.C.P. 4003.3, is broader than its federal counterpart, Fed.R.Civ.P. 26(b)(3); the federal rule permits discovery of work product “only when the party seeking discovery shows *substantial need* of the materials in the preparation of his case and is unable, *without undue hardship*, to obtain substantial equivalent of the materials by other means.” Pa.R.C.P. 4003.3, Explanatory Note (emphasis added).

Thus, given the material differences between Pa.R.C.P. 4003.3 and F.R.C.P. 26, the recent changes to F.R.C.P. 26, which serve to make that rule even more stringent, are of no moment and do not compel a different result in this matter.

Rather, unlike in the federal court system, “for Pennsylvania courts, the issue is not whether [a party] has shown a substantial need for the [discovery] material but, rather, whether it is a matter discoverable under Pa.R.C.P. 4003.1.” *Morganti*, 70 Pa.D.&C.4th at p. 8 (Allegh. Co. Wettick, J.). As noted above, under Pa.R.C.P. 4003.1, a party may obtain discovery “regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, content, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.” Pa.R.C.P. 4003.1.

Here, discovery regarding repeated written communications from Plaintiff’s attorney to the Plaintiff’s identified medical expert witness for trial, which written communications

were admittedly and purposefully designed to address the strategy of how the expert should frame his opinion and which the trial court judge found, after an *in camera* review, “may have...materially impacted” the expert’s opinion for trial, comes within the scope of Pa.R.C.P. 4003.1 because it relates to the claims of the Plaintiff. *See* Trial Court’s Opinion Pursuant to Rule 1925 at p. 6.

Furthermore, as stated in the Explanatory Note to Rule 4003.3, pertaining to the work product doctrine as recognized under Pennsylvania law, “[t]here are...situations under the Rule where the legal opinion of an attorney becomes a relevant issue in an action.” As noted, numerous Pennsylvania appellate courts have held that “the work-product privilege is not absolute and items may be deemed discoverable if the “product” sought becomes a relevant issue in the action” as it has in this matter. *T.M. v. Elwyn, Inc.*, 950 A.2d 1050, 1062 (Pa. Super. 2008) citing *Gocial v. Independent Blue Cross*, 827 A.2d 1216, 1222 (Pa. Super. 2003); *see also Birth Center v. St. Paul Companies*, 727 A.2d 1144, 1165 (Pa. Super. 1999).

It therefore follows that, under the much broader standards of discoverability recognized under Pennsylvania law, the trial court correctly ordered the production of the written communications at issue. Allowing a party to at least review the written communications from the opposing party’s attorney to the opposing party’s expert in discovery furthers the recognized goal of the search for the truth in civil litigation matters. Simply put, by allowing this discovery, parties will be afforded an opportunity to determine whether or not an opposing party’s expert opinion is the expert’s own opinion or is, instead, in whole or in part, a mere recitation by the expert of the opinion desired by opposing counsel.

CONCLUSION

In conclusion, it is again emphasized that the trial court's Order allowing the Defendant access to the Plaintiffs' attorney's letters and emails to the Plaintiffs' expert did not mean that such records were admissible at trial. While it appears, even at this early stage of this case, that evidence showing that the Plaintiffs' attorney may have influenced the Plaintiffs' expert's formulation of his opinion is likely to be admissible at trial for the purpose of impeaching the expert, this separate, distinct, and narrower question of admissibility remains open for decision on another day.

Rather, under the much broader and more liberal Pennsylvania Rules of Civil Procedure applicable to the discovery issue currently before the court, it is again respectfully requested that the Superior Court find that the trial court did not abuse its broad discretion in requiring the disclosure of the documents that may have "materially impacted" the expert's formulation of his opinion for trial. It is therefore respectfully requested that this Court again AFFIRM the trial court's October 16, 2009 Order.

Respectfully Submitted
FOLEY, COGNETTI, COMERFORD,
CIMINI & CUMMINS

A handwritten signature in black ink, appearing to read 'D. Cummins', written over a horizontal line.

DANIEL E. CUMMINS, ESQUIRE
I.D. #71239
Attorney for Amicus
PENNSYLVANIA DEFENSE INSTITUTE

