IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

ROBERT F. CRISWELL and JANET W. CRISWELL	:	No. CI-99-06340
v.	:	
J. RICHARD BOLL and MID-ATLANTIC MENNONITE MISSION	:	

OPINION

BY: STENGEL, J., APRIL 13, 2004

This is a personal injury case, arising out of a motor vehicle accident on June 21, 1997, when defendant J. Richard Boll rear-ended plaintiffs' vehicle, causing serious injuries to Robert and Janet Criswell.[1] During the course of discovery, defendants retained Perry A. Eagle, M.D., to perform an "independent" medical examination of Mr. Criswell pursuant to Rule 4010 of the Pennsylvania Rules of Civil Procedure. In his reports dated June 29, 1999, and June 19, 2001, Dr. Eagle disputed the conclusions reached by plaintiff's treating physician regarding the nature and extent of Mr. Criswell's accident-related injuries and resulting disabilities. Specifically, Dr. Eagle opined that "it is not consistent that the motor vehicle accident in question necessitated any future

[1]Plaintiff Janet Criswell sustained injuries to her back, and plaintiff Robert Criswell sustained serious injuries, necessitating seven spinal surgeries, including implantation of the intrathecal morphine pump, which he will have to live with for the rest of his life.

surgery or was the cause of any other surgical events which occurred after the accident in question." (See letter dated June 19, 2001, from Dr. Eagle to defense counsel.)

Plaintiffs propounded discovery requests on defendants seeking detailed information concerning, inter alia, Dr. Eagle's compensation from certain insurance companies and defense firms over the past five years. Defense counsel failed to respond to the expert witness interrogatories and requests for production of documents. On plaintiffs' motion to compel, I directed defendants to furnish the requested information within 30 days.[2] On January 30, 2004, Dr. Eagle presented a motion for protective order in discovery motions court. In his motion, Dr. Eagle requests the court to relieve him from the obligation of responding to plaintiffs' discovery requests. For the reasons set forth below, I will deny Dr. Eagle's motion.

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[2]This was plaintiffs' third motion to compel in this case. On September 13, 1999, plaintiffs' counsel served separate and different sets of interrogatories on each defendant. On November 30, 1999, plaintiffs were forced to file a motion to compel. On December 3, 1999, the Honorable Louis J. Farina ordered each defendant to answer the interrogatories within 30 days or risk sanctions. On January 4, 2000, plaintiffs' counsel received answers to interrogatories by Mr. Boll. No answers were provided to the set of interrogatories served on the Mid-Atlantic Mennonite Mission. Plaintiffs, therefore, filed on January 4, 2000, a motion for sanctions for failure to comply with the court's December 3, 1999, order. On January 26, 2000, defense counsel served answers and objections to the discovery requests. Accordingly, the Honorable David L. Ashworth entered an order on the same date denying plaintiffs' motion for sanctions but granting them leave to file an amended motion for sanctions should it be necessary after reviewing the discovery responses.

On April 6, 2001, plaintiffs filed their second motion to compel after having received no responses to the request for production of documents directed to Mid-Atlantic Mennonite Mission on March 31, 2000. After hearing argument from counsel, this court entered an order on April 6, 2001, directing Mid-Atlantic to respond to plaintiffs' requests within 20 days.

I. Standing

The threshold issue is whether this non-party expert witness has standing to seek a protective order. Rule 4012(a)(1) of the Pennsylvania Rules of Civil Procedure provides that "upon motion by a party *or by the person from whom discovery or deposition is sought*, and for good cause shown, the court may make any order which justice requires to protect a party or person from unreasonable annoyance, embarrassment, oppression, burden or expense." (Emphasis added.) The Rule specifically contemplates that protective orders may be sought by non-parties from whom discovery is sought. Plaintiffs contend, however, that this Rule is reserved for those upon whom discovery requests *are served*. There was no subpoena issued to Dr. Eagle in this case. Rather, the discovery requests were directed to the defendants pursuant to Pa. R.Civ.P. 4003.5. I agree with Dr. Eagle, however, in finding that notwithstanding the fact that plaintiffs addressed their expert witness discovery requests to defendants, the person from whom much of the discovery is sought is actually Dr. Eagle. Clearly the requests seek certain information that defendants cannot provide unless they obtain it from Dr. Eagle.[3]

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[3]Plaintiffs seek: all 1099 forms sent to Dr. Eagle for the past five years from two insurance companies and two law firms; Dr. Eagle's expert fee schedules for the past five years; and detailed information concerning Dr. Eagle's services in all medical-legal cases and his activities as a guest speaker or lecturer over the past five years. Plaintiffs also seek the annual income Dr. Eagle has derived from each of the insurance companies and law firms, together with the percentage of Dr. Eagle's total income this represents, and documents confirming these statistics.

Neither counsel nor the court was able to find any appellate authority directly addressing this issue. Dr. Eagle cites the court to two cases in which the courts have ruled on motions made by non-parties objecting to discovery, without commenting on the movant's standing to do so. In **Ben v. Schwartz**, 556 Pa. 475, 729 A.2d 547 (1999), the Pennsylvania Supreme Court allowed the Bureau of Professional and Occupational Affairs, a non-party witness, to appeal the trial court's order compelling the Bureau to produce its investigative files. **Ben** is procedurally distinguishable, however, because in **Ben** a subpoena was issued to the non-party witness, who filed a motion to quash pursuant to Pa. R.Civ.P. 234.4.[4]

Dr. Eagle also cites to **Commonwealth v. Miller**, 406 Pa. Super. 206, 593 A.2d 1308 (1991). In **Miller** the Pennsylvania Superior Court heard the appeal of a rape crisis center, which was not a party to the action, challenging an order requiring production of its files. The criminal defendant in **Miller** moved the court to direct the center to provide the victim's records, instead of subpoenaing the documents from the

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[4]Rule 234.4 of the Pennsylvania Rules of Civil procedure provides a well-delineated mechanism for objecting to discovery requests:

> A motion to quash a subpoena, notice to attend or notice to produce may be filed by a party, by the person served or by any other person with sufficient interest. After hearing, the court may make an order to protect a party, witness or other person from unreasonable annoyance, embarrassment, oppression, burden or expense.

Pa. R.Civ.P. 234.4(b). If plaintiffs had subpoenaed Dr. Eagle, he would have had a mechanism for objecting to the discovery requests in Rule 234.4. Because no subpoena was issued here, Dr. Eagle proceeded by filing a motion for protective order under Rule 4012 rather than a motion to quash.

center. Id. at 208, 593 A.2d at 1309. In response to that motion, the trial court entered an order directing the center to provide to the trial court, for an in-camera proceeding, all records and information in their possession pertaining to the alleged victim of a sexual assault. Although no subpoena was issued as in **Ben**, the Superior Court found that the order stating the purpose of the scheduled hearing and at whose request it was entered was "strikingly similar to that of a court ordered subpoena" as authorized by § 5905 of the Judicial Code, 42 Pa. C.S. § 5905.[5] Id. at 211-12, 593 A.2d at 1310-11.

Dr. Eagle likens this court's order of December 16, 2003, to a subpoena, because it directed Dr. Eagle to answer the interrogatories and produce the requested documents. Under the circumstances of this case, I decline to equate this court's discovery order with a court-ordered subpoena. However, because Dr. Eagle is the person from whom discovery is sought, and because he is directly affected by this court's December 16, 2003, order requiring him to respond through defendants to

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[5]Section 5905 of the Judicial Code provides:

> Every court of record shall have power in any civil or criminal matter to issue subpoenas to testify, with or without a clause of duces tecum, into any county of this Commonwealth to witnesses to appear before the court or any appointive judicial officer. Subpoenas shall be in the form prescribed by general rules.

42 Pa. C.S. § 5905.

plaintiffs' discovery requests, I find that Dr. Eagle has standing to petition this court for a protective order.[6]

Plaintiffs maintain that even if Dr. Eagle has standing to file a motion for protective order, the motion should be denied as untimely. A motion seeking this type of relief must be filed, at the latest, before the party seeking discovery has filed either a motion to compel compliance with the discovery request or a motion for sanctions. **National Railroad Passenger Corp. v. Fowler**, 788 A.2d 1053, 1059 (Pa. Cmwlth. 2001) (citing **Mountain View Condominium Owners' Association v. Mountain View Associates**, 9 D.&C.4th 81 (1991)). Dr. Eagle filed his motion not only after plaintiffs filed their motion to compel and argued it in front of this court, but also well after I issued an order and well after the deadline for compliance with the order had expired. Yet, because the discovery requests were directed to a party and not to Dr. Eagle, and because there is not prejudice to plaintiffs, I will not deny the motion as untimely.

II. Protective Order

Petitioner is seeking a protective order under Pennsylvania Rule of Civil Procedure 4012(a)(1). A party generally is entitled to the discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . ."

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[6]My order of December 16, 2003, stated: "Defendants *and their experts, including Dr. John Rychak and Perry A. Eagle, M.D., shall respond* to plaintiffs' interrogatories and requests for production of documents within 30 days of the date of this order." (Emphasis added.)

Pa. R.Civ.P.4003.1(a). It is no objection that the information sought may be inadmissible at trial. Pa. R.C.P. 4003.1(b). As long as the requested information "appears reasonably calculated to lead to the discovery of admissible evidence," discovery is permissible. Id.

However, upon motion and for good cause shown, a court may make "any order which justice requires to protect a party or person from unreasonable annoyance, embarrassment, oppression, burden or expense. . . ." Pa. R.Civ.P. 4012(a). The burden of proving grounds for protection lies with the moving party. **Chrysler v. Zigray**, 7 D. & C.4th 408, 410 (1990). Furthermore, as stated in Rule 4012(a), "good cause" must be shown before a court will grant a protective order, which requires "the moving party to show that the information sought to be protected is confidential and that public disclosure of the information will result in a clearly defined and very serious injury." Id. at 412.

Decisions regarding the propriety and scope of a protective order rest within the discretion of the trial court and should not be disturbed unless that discretion has been abused. **Hutchinson v. Luddy**, 414 Pa. Super. 138, 144, 606 A.2d 905, 908 (1992); **Allegheny W. Civic Council, Inc. v. City Council of Pittsburgh**, 86 Pa. Cmwlth. 308, 314, 484 A.2d 863, 866 (1984). "The judicial sanction of a protective order should rarely be employed." **Chrysler**, 7 D. & C.4th at 410.

Dr. Eagle objects to the proposed discovery on the grounds that it (1) is beyond the scope of expert witness discovery, (2) is overly broad and unduly burdensome, (3) is not reasonably calculated to lead to the discovery of admissible evidence, and (4) would cause him unreasonable annoyance and embarrassment.

A. Scope of Expert Witness Discovery

Initially, Dr. Eagle claims the requested discovery is beyond the scope of permissible discovery under Pa. R.Civ.P. 4003.5(a), which limits discovery of expert witnesses except "upon cause shown." Under Rule 4003.5(a), absent cause shown, plaintiffs may obtain only the identity of expert witnesses, together with "the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion."

A review of the numerous orders and opinions cited to by plaintiffs' counsel indicates that the same requests have been upheld as relevant and within the scope of expert witness discovery by various Pennsylvania courts and, in some cases, against this very same medical expert witness. See, for example, **Kogod v. Spangler**, 1:CV-97-0608 (M.D. Pa., Dec. 17, 1997) (motions for protective order and to quash subpoenas denied where evidence of other examinations or work performed by Dr. Eagle on behalf of insurance company or defendant's counsel is relevant to the issue of Dr. Eagle's bias or prejudice), and **Cooper v. Schoffstall**, No. 5932 CV 2001 (C.P.

Dauphin March 4, 2003) (defendant's objection to subpoena intended to secure all 1099 forms sent to Dr. Eagle in connection with medical/legal independent medical examinations, the preparation of reports, examinations and depositions denied). See also **Schwab v. Milks**, 8 D.&C.4th 557 (1990); **Gass v. Stellmach**, CV-01-158 (C.P. Northumberland Feb. 6, 2003), pet. for review denied, No. 20 MDM 2003 (Pa. Super. June 19, 2003); **Wright-Haines v. Armbruster**, No. 11426-2001 (C.P. Erie, May 9, 2002); **Lang v. Serafino**, No. 01-02144 (C.P. Montgomery Sept. 27, 2002); **Clifford v. Leonardi**, No. 99 CV 4236 (C.P. Lackawanna, Oct. 3, 2002); **Newsome v. Lerch**, No. 3072 S 2001 (C.P. Dauphin Nov. 22, 2002).

The court in **Kogod v. Spangler** noted:

> Impeachment of an expert witness by demonstrating partiality to the party for whom the expert is testifying is permissible. **Smith v. Celotex Corp.**, 564 A.2d 209, 213 (Pa. Superior Ct. 1989) (citing **Grutski v. Kline**, 43 A.2d 142 (1945)). It is proper to elicit from an expert the fee that the expert is being paid to testify and whether a personal relationship exists between the expert and either the party calling him or that party's counsel. Id. at 214. '[E]vidence of an ongoing relationship between the witnesses and defense attorneys is information which the jury would want to know about, and . . . is entitled to know about.' **Tiburzio-Kelly v. Montgomery**, 681 A.2d 757, 767 (Pa. Superior Ct. 1996) (holding that plaintiff's counsel should have been allowed to cross-examine the defendants' experts to attempt to show a professional relationship, beyond the confines of the case at bar, of the experts and the defense attorneys).

Slip op. at 8-9.

I find that the discovery sought by plaintiffs regarding Dr. Eagle's work for Erie Insurance, The Brotherly Aid Liability Plan, and defense counsel may be relevant to Dr. Eagle's bias or prejudice.

B. Overly Broad and Unduly Burdensome Discovery

Next, Dr. Eagle claims the requested discovery is overly broad and unduly burdensome in that it requires him to search his records and compile information and statistics with respect to his professional activities and financial matters over the past five years. Moreover, Dr. Eagle maintains that such information is "completely collateral" to the instant action.

As a practical matter, Dr. Eagle claims he "cannot produce 1099 forms which are limited to medical-legal activities." (See Motion for Protective Order at ¶ 20.) This is an interesting argument given the fact that plaintiffs' counsel has identified for the court at least two cases where Dr. Eagle was ordered to do precisely that. In **Cooper v. Schoffstall**, supra, the Honorable Richard A. Lewis of Dauphin County ordered Dr. Eagle to produce requested 1099 forms for specific years for "defense related reports, examinations and depositions," as did Magistrate Judge J. Andrew Smyser in **Kogod v. Spangler**, supra. As these courts have found that the production of 1099 forms is not unduly burdensome or "completely collateral" to the pending litigation, I will not rule otherwise.

Moreover, I would note that if information sought through discovery is relevant, as I have found this discovery to be, the burden is on the party opposing discovery to show that the request is *unduly* burdensome. Dr. Eagle has failed to meet this burden.

C. The Discovery Requests Are Reasonably Calculated to Lead to the Discovery of Admissible Evidence

Dr. Eagle first contends that any reference at trial to a payment history from Brotherly Aid or Erie would inject the issue of insurance into the proceedings of this case, an issue which must be excluded from jury consideration. First, I would point out to Dr. Eagle and defendants that we are not yet at trial. Plaintiffs are engaging in *pre-trial* discovery. "Any objecting party may not object on the ground that the information sought would be inadmissible at trial." **Davis v. Starosta**, 62 D.&C.4th 76, 79 (2002) (citing Pa. R.C.P. 4003.1(b)).

Second, I must note that this position being advanced by Dr. Eagle was considered and rejected by the Honorable Robert B. Sacavage in the Northumberland County case of **Gass v. Stellmach**, supra. In his opinion, Judge Sacavage wrote:

> *Lastly, the Court will address the issue raised by Defendant that the information regarding the number of examinations that Dr. Moncman performed on behalf of the Defendant's insurance company should not be permitted because evidence of insurance is not admissible to prove negligence.* Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. Pa. R.E. 411. However, this rule does not require the exclusion of evidence of

> insurance against liability when offered for another purpose, such as **proof of bias** or prejudice of a witness. Pa. R.E. 411. Thus, again considering that the scope of discovery is broad and liberally permitted the Plaintiff may inquire into any financial relationship, which may exist between Dr. Moncman and the Defendant's insurance company.

Slip op. at 3 (emphasis in original). In Footnote 4, Judge Sacavage added:

> As with all evidence, evidence not excluded by Pa. R.E. 411 may be excluded under Pa. R.E. 403. The Court cannot weigh the probative value against its prejudicial effect until the evidence in question is revealed. Because substantial referrals and percentage of income to an expert witness could be viewed as a financial bias, the information sought is likely to lead to admissible relevant evidence.

Slip op. at 3 n.4. See also **Kogod v. Spangler**, Slip op. at 10-11 (rejecting defendant's contention that the plaintiff was attempting to introduce the fact of liability insurance at trial).

Next, Dr. Eagle contends that inquiry at trial into payments received from sources other than defendant's law firm exceeds the scope of permissible cross-examination as prescribed by the leading case of **Mohn v. Hahnemann Medical College & Hospital of Philadelphia**, 357 Pa. Super. 173, 515 A.2d 920 (1986), appeal discontinued, 515 Pa. 582, 527 A.2d 542 (1987). In **Mohn**, the Superior Court awarded a new trial as a result of cross-examination of the defendant's medical expert where the trial court permitted inquiry into the amount of fees received by the expert for services provided not only to patients, but to private and governmental agencies, and law firms. Id. at

179, 515 A.2d at 923. Finding that cross-examination about "the expert's total income, unrelated . . . to the 'results of the trial'" was improper, the **Mohn** court "conclude[d] that, under the facts of this case, the nexus between [the expert's] compensation for *all* services rendered (which included work for private and governmental agencies, patients and other law firms) from 1979 to 1983, exclusive of those received for work performed for defense counsel's law firm, and his credibility on the witness stand is tenuous at best." Id. at 181, 515 A.2d at 925 (emphasis in original).

A short time later, the Superior Court took up the issue again in **Smith v. Celotex Corp.**, 387 Pa. Super. 340, 564 A.2d 209 (1989). In **Smith**, an asbestos manufacturer sought a new trial based upon "the trial court's [alleged] error in allowing broad cross-examination of one of appellant's medical expert witnesses regarding his prior testimony on behalf of other asbestos companies and the fees he earned therefrom" and "contend[ed] that the [trial] court violated the rule of **Mohn** . . . ." Id. at 348, 564 A.2d at 213. The Superior Court rejected the defense argument and affirmed the lower court ruling by noting that while an expert's "entire financial picture" was not relevant, information involving an asbestos expert's involvement and fees received in other asbestos related cases "may be perceived as at least somewhat relevant to whether this expert was biased or prejudiced in favor of asbestos defendants," and, therefore, was permitted. Id. at 351-52, 464 A.2d at 214-15. Accord, **Fitt v. General Motors Corp.**, 13 D.&C. 4th 336, 338-39 (Lackawana Co. 1992) (ordering defense

experts in automobile design defect litigation to produce "information as to other product liability cases in which the defense experts testified on behalf of other defendant-automobile manufacturers" since such information could "possibly expose any potential partiality or bias on the part of these experts").

It would be several years before the Superior Court would again revisit the issue of expert witness interrogation in the case of **Spino v. John S. Tilley Ladder Co.**, 448 Pa. Super. 327, 671 A.2d 726 (1996), aff'd, 548 Pa. 286, 696 A.2d 1169 (1997). There the court was asked to consider whether "the trial court committed reversible error, requiring the award of a new trial, when it permitted [defendant] to cross-examine Dr. Smith, the expert retained by appellants, as to income earned as an expert witness in assignments unrelated to the instant case." Id. at 351, 671 A.2d at 738. In refusing to grant a new trial, the **Spino** Court concluded that counsel's inquiry concerning the amount of income earned by the expert from his forensic consulting business "was marginally relevant to the issue of bias." Id. at 353, 671 A.2d at 739.

Mohn was subsequently discussed in **Tiburzio-Kelly v. Montgomery**, 452 Pa. Super. 158, 681 A.2d 757 (1996), where the Court stated: "Significantly, **Mohn v. Hahnemann Medical College & Hospital**, supra, did not announce a per se rule regarding the extent of permissible cross-examination into a witness' potential bias," and reiterated the rule that "bias or interest of a witness in a dispute which may effect his or her credibility is a proper subject for impeachment." Id. at 183, 681 A.2d at 769.

In 1999, the Superior Court in **Coward v. Owens-Corning Fiberglass Corporation**, 729 A.2d 614 (Pa. Super. 1999), noted that

> [o]ur Supreme Court has held that the level of a witness' compensation is a proper subject of cross-examination, tending to flush out the witness's bias. . . . Subsequently, we have limited the field of inquiry on cross-examination to those aspects of the witness's financial interest that are demonstrably probative of any bias he may harbor in favor of the law firm retaining him, or in favor of parties litigating claims in industry-wide litigation.

Id. at 624. The **Coward** court recounted that in **Smith v. Celotex Corp.**, supra, cross-examination concerning the defense witness's prior testimony for asbestos manufacturers other than the defendant was permitted due to its relevance concerning possible bias of the expert in favor of all asbestos manufacturers. Id. at 626.

In this case, plaintiffs do not seek information as to Dr. Eagle's entire income, just as to that income derived from defense oriented work. The cross-examination of a defense expert to show bias in favor of not just a particular law firm but an industry-wide bias could be pursued during cross-examination. Thus, plaintiffs' requests are within the parameters of permissible discovery and do not violate the rule of **Mohn** and its progeny.

Dr. Eagle further contends that the information and documentation sought extends into "such collateral territory that Plaintiffs can have no reasonable basis for the discovery they seek." (Motion for Protective Order at ¶ 26.) This argument was soundly rejected in **Clifford v. Leonardi**:

> It is well settled that a party may challenge the credibility of an expert witness by demonstrating that [s]he has a bias, partiality, interest or relationship which might affect the expert's testimony. **Brady v. Ballay, Thornton, Maloney Medical Assoc., Inc.**, 704 A.2d 1076, 1083 (Pa. Super. 1997), app. denied, 555 738, 725 1217 (1998); **Douglass v. Licciardi Construction Co., Inc.**, 386 Pa. Super. 292, 300, 562 A.2d 913, 917 (1989). As Justice Musmanno aptly remarked, an expert witness should be required to 'lift his visor so that the jury could see who he was, what he represented, and what interest, if any, he had in the results of the trial, so that the jury could appraise his credibility.' **Goodis v. Gimbel Brothers**, 420 Pa. 439, 445, 218 A.2d 574, 577 (1966). Accord, **Matylewicz v. Werner Ladder Co.**, 103 Lacka. Jur. 313, 318-19 (2000) (a party may attempt to expose the bias or partiality of a product design expert by interrogating the expert concerning other cases in which [s]he has expressed opinions regarding the defective design of a product). 'Clearly, one who has significant economic interests connected to one side of litigation has reason for shading opinion testimony, and may even have an ideological frame of reference.' Hon. Mark I. Bernstein, **Expert Testimony in Pennsylvania**, 68 Temp.L.Rev. 699, 704 (Summer 1995). As a consequence, many attorneys seek 'the discovery of an expert witness' financial records in order to establish interest, bias, or prejudice . . . [and] to show how much of an expert's income is generated from testifying, how many times an expert has testified, and an expert's previous associations with opposing attorneys in the current lawsuit.' M.M. Kethcum, **Experts: Witnesses for the Persecution? Establishing an Expert Witness's Bias Through the Discovery and Admission of Financial Records**, 63 U.Mo.K.C.L.Rev. 133 (Fall 1994).

Slip op. at 6-7.

Based upon the supporting documentation provided by plaintiffs in this case[7] and the above cited case law, I find that plaintiffs' discovery requests in this case are reasonably calculated to lead to the discovery of admissible evidence.

D. The Discovery Requests Will Not Cause Unreasonable Annoyance and Embarrassment to Dr. Eagle

Dr. Eagle makes the boilerplate allegation that the requested discovery, which seeks personal financial information, would cause Dr. Eagle unreasonable annoyance, embarrassment, and oppression. If objections are made to discovery, the burden is on the objecting party to establish why the interrogatories are objectionable in order to enable the court to ascertain the basis of the objection and whether they are proper. **McAndrews v. Donegal Mutual Ins. Co.**, 56 D.&C.4th 1, 7 (2002); **Schwab**, 8 D.&C.4th at 558. Dr. Eagle has failed to provide any reasonable support for his position. **Painewebber, Inc. v. Devin**, 442 Pa. Super. 40, 53-54, 658 A.2d 409, 415-16 (1995) (a defendant may not respond to discovery requests with bald assertions lacking facts justifying specifically why the interrogatories were objectionable); **Reusswig v. Erie Insurance**, 49 D.&C.4th 338, 351 (2000) (defendant may not assert boilerplate

[7]Plaintiffs have produced the deposition testimony of Dr. Eagle from 13 different cases, as well as the "independent" medical examination reports prepared by Dr. Eagle in 19 different cases, dating back to 1984, to establish their argument that Dr. Eagle has been performing a high volume of defense oriented work for three decades and has derived tens of millions of dollars from such work.

objections to valid interrogatories and document requests seeking information relevant to the underlying action).

Dr. Eagle claims that the proposed discovery requests seek financial information which is not relevant to this litigation or litigation in general and would only serve to embarrass and harass the doctor. "Almost any discovery request causes some annoyance, embarrassment, oppression, burden or expense to the deponent. Consequently, the issue is whether the discovery request causes *unreasonable* annoyance, embarrassment, oppression, burden or expense. This requires a court to consider both the interests of the party seeking discovery and the burdens that the discovery request imposes on the party opposing discovery." **D.S. v. DePaul Institute**, 32 D.&C.4th 328, 334 (1996) (emphasis in original).

Dr. Eagle admittedly has an interest in preventing disclosure of his financial affairs. This interest must be balanced with the right of plaintiffs to a fair trial, and the right of each party to a litigation to expose possible bias and partiality of the opposing party's experts. Clearly, the cross-examination of a party's expert witness with respect to the fees he is being paid to testify, the number of times he has been retained by the defense counsel, firm or party calling him, and his relationship with the other parties in the litigation is proper to challenge the credibility of the expert by showing bias, partiality or prejudice. As Judge Nealon notes in **Clifford v. Leonardi**,

> By offering his services as a defense expert, [the doctor] has exposed himself to cross examination concerning his possible bias, partiality or relationship with the defense side of litigation which could conceivably taint or affect his testimony. Information which may demonstrate the extent of that bias or relationship and the frequency with which he provides such fee based services for the defense is clearly relevant to the jury's assessment of his credibility and its determination of the weight, if any, to be accorded to his expert opinions.

Slip op. at 13.

Dr. Eagle requests that, to the extent discovery of his finances if permitted, the information be treated on a confidential basis, and not exposed to the public record *until* the court rules it is admissible evidence at trial, and is admitted in a public record. In **Clifford v. Leonardi**, the court considered a request by defendant to have the discovered documents and trial deposition of the defense medical expert filed under seal and to prohibit the plaintiff and his counsel from disseminating information regarding forensic services that the defense expert had provided exclusively for defendants, employers and insurers. In finding that the defendant had not satisfied her burden of establishing that a protective order was warranted, Judge Nealon wrote:

> To justify closure or sealing of the record, the defendant must overcome the common law presumption of openness by demonstrating that a party's personal interest in secrecy outweighs the traditional presumption of openness and that the requisite good cause exists in that closure or sealing is necessary to prevent a clearly defined and serious injury.

Slip op. at 11. The court further noted that "[s]ince the defendant's sealing request is not confined to discovery responses and, to the contrary, also encompasses [the

doctor's] trial deposition, the defendant must defeat the public's presumptive right of access to trial transcripts." Id. Judge Nealon concluded:

> Defendant has not articulated any *bona fide* secrecy interest possessed by [the doctor] which outweighs the common law presumption of openness and access to trial transcripts and judicial records. . . . The forensic data which will be discussed by [the doctor] during his trial deposition has already been disclosed in other federal and state litigation . . . and is widely known by or available to the trial bar. Moreover, sworn testimony with respect to forensic services and fees is not particularly sensitive or embarrassing so as to justify sealing of a trial deposition. . . . Additionally the defendant does not maintain that the deposition testimony at issue will somehow divulge proprietary trade secrets that are not known by others and which will be used by [the doctor's] competitors to his detriment.

Slip op. at 12. I agree with the well-reasoned analysis by Judge Nealon but distinguish it from the instant case. Dr. Eagle has requested an order prohibiting the parties and their counsel from disclosing or disseminating information produced in response to plaintiffs' discovery requests *except* to the extent it is admitted for use at trial. By such a request, Dr. Eagle concedes that this information, if admitted at trial, must be part of the public record. Until that time, I will limit disclosure of the discovery requested to the parties to this matter.

III. Conclusion

The reasons for not permitting plaintiffs access to the requested discovery material do not constitute "good cause" pursuant to Rule 4012(a) of the Pennsylvania Rules of Civil Procedure. Dr. Eagle has not met his burden of showing that the

information sought to be protected is confidential and that public disclosure of the information will result in a clearly defined and very serious injury. The reasons given will not subject Dr. Eagle to unreasonable annoyance, embarrassment, oppression, burden or expense. As such, Dr. Eagle's motion for protective order must be denied.

Accordingly, I enter the following:

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

ROBERT F. CRISWELL and JANET W. CRISWELL : No. CI-99-06340

v. :

J. RICHARD BOLL and MID-ATLANTIC MENNONITE MISSION :

ORDER

AND NOW, this 13th day of April, 2004, it is hereby ORDERED that Dr. Eagle's motion for protective order is denied. It is further ORDERED that defendants shall have 30 days from the date of this order to respond to plaintiffs' expert witness discovery requests. Failure of defendants to comply with this Order will result in the imposition of further sanctions, including but not limited to, being precluded from presenting evidence or entering a defense in this matter, upon application to this court.

It is further ORDERED that the information sought through discovery shall not be disclosed to any person or entity not a party to this action unless and until it is admitted for use at trial.

BY THE COURT:

LAWRENCE F. STENGEL
JUDGE

ATTEST:

Copies to: Nina Milovanovich, Esquire
George C. Werner, Esquire
Susan V. Metcalfe, Esquire