PROFESSIONALISM DOs & DON'Ts: DEPOSITIONS

Issued by the Commission on Professionalism:

If there is one area of the practice of law that consistently gives rise to an inordinate number of complaints about lack of professionalism, it is the area of depositions. Depositions, of course, are an extremely important and valuable component of our adversary system, but, if abused and mishandled, they can engender unnecessary and costly strife that impedes and undercuts the entire process. To help correct this situation, the Commission on Professionalism is publishing the following guidelines, a set of deposition "dos and don'ts." The Commission believes that if lawyers follow these guidelines — which are consistent with, and to some extent provide specific amplification of, the Supreme Court's Statements on Professionalism — lawyers will be able to use depositions to advance the legitimate interests of their clients, while, at the same time, treating all participants in the process, including deponents and opposing counsel, with courtesy, civility, and respect. It is not the Commission's intention to regulate or to suggest additional bases for discipline, but rather to facilitate the promotion of professionalism among Ohio's lawyers. In short, by adhering to these guidelines, lawyers will be acting as professionals and in the manner that the courts expect.

Therefore, as a lawyer who is scheduling, conducting or attending a deposition:

DO

- Review the local rules of the jurisdiction where you are practicing before you begin.
- Cooperate on scheduling. Rather than unilaterally sending out a notice of deposition, call opposing counsel first and cooperate on the selection of the date, time, and place. Then send out a notice reflecting the agreed upon date.
- If, after a deposition has been scheduled, a postponement is requested by the other side, cooperate in the rescheduling unless the requested postponement would be one of those rare instances that would adversely affect your client's rights.
- Arrive on time.
- Be prepared, including having multiple copies of all pertinent documents available in the deposition room, so that the deposition can proceed efficiently and expeditiously.
- Turn off all electronic devices for receiving calls and messages while the deposition is in progress.

(OVER)

- Attempt to agree, either before or during the deposition, to a reasonable time limit for the deposition.
- Treat other counsel and the deponent with courtesy and civility.
- Go "off record" and confer with opposing counsel, privately and outside the deposition room, if you are having problems with respect to objections, the tone of the questions being asked or the form of the questions.
- Recess the deposition and call the court for guidance if your off-the-record conversations with opposing counsel are not successful in resolving the "problem."
- If a witness is shown a document, make sure that you have ample copies to distribute simultaneously to all counsel who are present.
- If a deponent asks to see a document upon which questions are being asked, provide a copy to the deponent.
- Inform your client in advance of the deposition (if the client plans to attend) that you will be conducting yourself at the deposition in accordance with these "dos and don'ts."

DON'T

- Attempt to "beat your opponent to the punch" by scheduling a deposition for a date earlier than the date requested by your opponent for deposition(s) that he or she wants to take.
- Coach the deponent during the deposition when he or she is being questioned by the other side.
- Make speaking objections to questions or make statements that are intended to coach the deponent. Simply say "object" or "objection."
- Make rude and degrading comments to, or ad hominen attacks on, deponent or opposing counsel, either when asking questions or objecting to questions.
- Instruct a witness to refuse to answer a question unless the testimony sought is deemed by you to be privileged, work product, or self-incriminating, or if you believe the examination is being conducted in a manner as to unreasonably annoy or embarrass the deponent.
- Take depositions for the purpose of harassing a witness or in order to burden an opponent with increased litigation expenses.
- Overtly or covertly provide answers to questions asked of the witness.
- Demand conferences or breaks while a question is pending, unless the purpose is to determine whether a privilege should be asserted.
- Engage in conduct that would be inappropriate in the presence of a judge.

RULE 30. Depositions upon oral examination

(A) When depositions may be taken. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. The attendance of a witness deponent may be compelled by the use of subpoena as provided by Civ.R. 45. The attendance of a party deponent may be compelled by the use of notice of examination as provided by division (B) of this rule. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(B) Notice of Examination; General Requirements; Nonstenographic Recording; Production of Documents and Things; Deposition of Organization; Deposition by Telephone or Other Means.

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, a designation of the materials to be produced shall be attached to or included in the notice.

(2) If any party shows that when the party was served with notice the party was unable, through the exercise of diligence, to obtain counsel to represent the party at the taking of the deposition, the deposition may not be used against the party.

(3) If a party taking a deposition wishes to have the testimony recorded by other than stenographic means, the notice shall specify the manner of recording, preserving, and filing the deposition. The court may require stenographic taking or make any other order to ensure that the recorded testimony will be accurate and trustworthy. With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise.

(4) The notice to a party deponent may be accompanied by a request made in compliance with Civ.R. 34 for the production of documents and tangible things at the taking of the deposition.

(5) A party, in the party's notice, may name as the deponent a public or private corporation, a partnership, or an association and designate with reasonable particularity the matters on which examination is requested. The organization so named shall choose one or more of its proper employees, officers, agents, or other persons duly authorized to testify on its behalf. The persons so designated shall testify as to matters known or available to the organization. Division (B)(5) does not preclude taking a deposition by any other procedure authorized in these rules.

(6) The parties may stipulate or the court may upon motion order that a deposition be taken by telephone or other remote means. For purposes of this rule, Civ.R. 28, and Civ.R. 45(C), a deposition taken by telephone is taken in the county and at the place where the deponent answers the questions.

(C) Examination and cross-examination; record of examination; oath; objections; written questions.

(1) Examination and cross-examination. Each party at the deposition may examine the deponent without regard to which party served notice or called the deposition. In all other respects the examination and cross-examination of a deponent may proceed as they would at trial under the Ohio Rules of Evidence, except Evid.R. 103 and Evid.R. 615. After putting the deponent under oath or affirmation, the officer shall record the testimony by the method designated under Civ.R. 30(B)(3). The testimony shall be recorded by the officer personally or by a person acting in the presence and under the direction of the officer.

(2) Objections. An objection made at the time of the examination whether to evidence, a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition shall be noted on the record, but the examination still proceeds, the testimony taken subject to any objection. An objection shall be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by a court, or to present a motion under Civ.R. 30(D).

(3) Participating through written questions. Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim.

(D) Motion to terminate or limit examinations. At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Civ. R. 26(C). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Civ. R. 37 apply to the award of expenses incurred in relation to the motion.

(E) Submission to witness; changes; signing. When the testimony is fully transcribed, the deposition shall be submitted to the witness for examination and shall be read to or by the witness, unless examination and reading are waived by the witness and by the parties. Any changes in form or substance that the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them.

The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill, cannot be found, or refuses to sign. The witness shall have thirty days from submission of the deposition to the witness to review and sign the deposition. If the deposition is taken within thirty days of a trial or hearing, the witness shall have seven days from submission of the deposition to the witness to review and sign the deposition. If the trial or hearing is scheduled to commence less than seven days before the deposition is submitted to the witness, the court may establish a deadline for the witness to review and sign the deposition. If the deposition is not signed by the witness during the period prescribed in this division, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(F) Certification and filing by officer; exhibits; copies; notice of filing.

(1)(a) Upon request of any party or order of the court, the officer shall transcribe the deposition. Provided the officer has retained an archival-quality copy of the officer's notes, the officer shall have no duty to retain paper notes of the deposition testimony. The officer shall certify on the transcribed deposition that the witness was fully sworn or affirmed by the officer and that the transcribed deposition is a true record of the testimony given by the witness. If any of the parties request or the court orders, the officer shall seal the transcribed deposition in an envelope endorsed with the title of the action and marked "Deposition of (here insert name of witness)" and, upon payment of the officer's fees, promptly shall file it with the court in which the action is pending or send it by United States certified or express mail or commercial carrier service to the clerk of the court for filing.

(b) Unless objection is made to their production for inspection during the examination of the witness, documents and things shall be marked for identification and annexed to and returned with the deposition. The materials may be inspected and copied by any party, except that the person producing the materials may substitute copies to be marked for identification, if the person affords to all parties fair opportunity to verify the copies by comparison with the originals. If the person producing the materials requests their return, the officer shall mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them, and the materials may then be used in the same manner as if annexed to and returned with the deposition.

(2) Upon payment, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party requesting the filing of the deposition shall forthwith give notice of its filing to all other parties.

(4) As used in division (F) of this rule, "archival-quality copy" means any format of a permanent or enduring nature, including digital, magnetic, optical, or other medium, that allows an officer to transcribe the deposition.

(G) Failure to attend or to serve subpoena; expenses.

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed with the deposition and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to the other party the amount of the reasonable expenses incurred by the other party and the other party's attorney in so attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon the witness and the witness because of the failure does not attend, and another party attends in person or by attorney because the other party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to the other party the amount of the reasonable expenses incurred by the other party and the other party's attorney in so attending, including reasonable attorney's fees.

[Effective: July 1, 1970; amended effective July 1, 1976; July 1, 1985; July 1, 1992; July 1, 1994; July 1, 1997; July 1, 2006; July 1, 2012; July 1, 2015; July 1, 2017.]

Staff Notes (July 1, 2017 Amendments)

Civ.R. 30(C). Examination and cross-examination; objections.

The 2017 amendments adopt the 2007 stylistic changes to Fed.R.Civ.P. 30(c), including a nonsubstantive substitution of "deponent" for "witness." Deponents include both parties and non-parties. See Civ.R. 30(A).

The amendments provide that the Rules of Evidence shall apply at a deposition, except Evid.R. 103 and Evid.R. 615. The Federal Rules first included this provision in 1993. With respect to the exception of Evid.R. 615, the Notes of the Federal Advisory Committee included the following comments which are approved and re-stated in this Staff Note:

"[T]he revision addresses a recurring problem as to whether other potential deponents can attend a deposition. Courts have disagreed, some holding that witnesses should be excluded through invocation of Rule 615 of the evidence rules, and others holding that witnesses may attend unless excluded by an order under [Rule 26(c)]. The revision provides that other witnesses are not automatically excluded from a deposition simply by the request of a party. Exclusion, however, can be ordered under [Rule 26(c)] when appropriate; and, if exclusion is ordered, consideration should be given as to whether the excluded witnesses likewise should be precluded from reading, or being otherwise informed about, the testimony given in the earlier depositions. The revision addresses only the matter of attendance by potential deponents, and does not attempt to resolve issues concerning attendance by others, such as members of the public or press.

In adopting the 2007 federal stylistic changes, the amendments include provisions of the federal rule addressing the manner of making objections and the circumstances under which an instruction not to answer a question may be given. These additional provisions are consistent with the guidelines entitled: *Professionalism Dos and Don'ts: Depositions*, first published by the Ohio Supreme Court's Commission on Professionalism in 2012.

The amendments also add an introductory sentence to Civ.R. 30(C), which specifies that each party at the deposition may examine the deponent without regard to which party served notice or called the deposition. Although this introductory sentence is not found in the current federal rule, the provision is consistent with

2319.09 Uniform Interstate Depositions and Discovery Act.

(A) This section may be cited as the "Uniform Interstate Depositions and Discovery Act."

(B) As used in this section:

(1) "Foreign jurisdiction" means a state other than Ohio.

(2) "Foreign subpoena" means a subpoena issued under authority of a court of record of a foreign jurisdiction.

(3) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(4) "State" means a state of the United States, the District of Columbia. Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.

(5) "Subpoena" means a document, however denominated, issued under authority of a court of record requiring a person to do any of the following:

(a) Attend and give testimony at a deposition;

(b) Produce and permit inspection and copying of designated books, documents, records, electronically stored information, or tangible things in the possession, custody, or control of the person;

(c) Permit inspection of premises under the control of the person.

(C)

(1) To request issuance of a subpoena under this section, a party shall submit a foreign subpoena to a clerk of court in the county in which discovery is sought to be conducted in this state. A request for the issuance of a subpoena under this section does not constitute an appearance in the courts of this state.

(2) When a party submits a foreign subpoena to a clerk of court in this state, the clerk, in accordance with that court's procedure, shall promptly issue a subpoena for service upon the person to which the foreign subpoena is directed.

(3) A subpoena issued under division (C)(2) of this section shall do both of the following:

(a) Incorporate the terms used in the foreign subpoena;

(b) Contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

(D) A subpoena issued by a clerk of court under division (C) of this section shall be served in compliance with any rule of court or statute relating to the service of a subpoena issued in this state.

(E) The Ohio Rules of Civil Procedure and any statutes relating to service of subpoenas and compliance with subpoenas to attend and give testimony, produce designated books, documents, records, electronically stored information, or other tangible things, or to allow inspection of premises shall apply to subpoenas issued under division (C) of this section.

(F) An application to the court for a protective order or to enforce, quash, or modify a subpoena issued by a clerk of court under division (C) of this section shall comply with the Ohio Rules of Civil Procedure and be submitted to the court in the county in which discovery is to be conducted.

(G) In applying and construing this section, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact a substantially similar statute or rule.

(H) This section applies to requests for discovery in cases pending on the effective date of this act.

Added by 131st General Assembly File No. TBD, SB 171, §1, eff. 9/14/2016.

TITLE V. DISCOVERY

RULE 26. General Provisions Governing Discovery

(A) Policy; discovery methods. It is the policy of these rules (1) to preserve the right of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of such cases and (2) to prevent an attorney from taking undue advantage of an adversary's industry or efforts.

Parties may obtain discovery by one or more of the following methods: deposition upon oral examination or written questions; written interrogatories; production of documents, electronically stored information, or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise, the frequency of use of these methods is not limited.

(B) Scope of discovery. Unless otherwise ordered by the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties 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, custody, condition and location of any books, documents, electronically stored information, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Insurance agreements. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure subject to comment or admissible in evidence at trial.

(3) Trial preparation: materials. Subject to the provisions of subdivision (B)(5) of this rule, a party may obtain discovery of documents, electronically stored information and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing of good cause therefor. A statement concerning the action or its subject matter previously given by the party seeking the statement may be obtained without showing good cause. A statement of a party is (a) a written statement signed or otherwise adopted or approved by the party, or (b) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement which was made by the party and contemporaneously recorded.

(4) Electronically stored information. A party need not provide discovery of electronically stored information when the production imposes undue burden or expense. On motion to compel discovery or for a protective order, the party from whom electronically stored information is sought must show that the information is not reasonably accessible because of undue burden or expense. If a showing of undue burden or expense is made, the court may nonetheless order production of electronically stored information if the requesting party shows good cause. The court shall consider the following factors when determining if good cause exists:

(a) whether the discovery sought is unreasonably cumulative or duplicative;

(b) whether the information sought can be obtained from some other source that is less burdensome, or less expensive;

(c) whether the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; and

(d) whether the burden or expense of the proposed discovery outweighs the likely benefit, taking into account the relative importance in the case of the issues on which electronic discovery is sought, the amount in controversy, the parties' resources, and the importance of the proposed discovery in resolving the issues.

In ordering production of electronically stored information, the court may specify the format, extent, timing, allocation of expenses and other conditions for the discovery of the electronically stored information.

(5) Trial preparation: experts.

(a) Subject to the provisions of division (B)(5)(b) of this rule and Civ.R. 35(B), a party may discover facts known or opinions held by an expert retained or specially employed by another party in anticipation of litigation or preparation for trial only upon a showing that the party seeking discovery is unable without undue hardship to obtain facts and opinions on the same subject by other means or upon a showing of other exceptional circumstances indicating that denial of discovery would cause manifest injustice.

(b) As an alternative or in addition to obtaining discovery under division (B)(5)(a) of this rule, a party by means of interrogatories may require any other party (i) to identify each person whom the other party expects to call as an expert witness at trial, and (ii) to state the subject matter on which the expert is expected to testify. Thereafter, any party may discover from the expert or the other party facts known or opinions held by the expert which are relevant to the stated subject matter. Discovery of the expert's opinions and the grounds therefor is restricted to those previously given to the other party or those to be given on direct examination at trial.

(c) Drafts of any report provided by any expert, regardless of the form in which the draft is recorded, are protected by division (B)(3) of this rule.

(d) Communications between a party's attorney and any witness identified as an expert witness under division (B)(5)(b) of this rule regardless of the form of the communications, are protected by division (B)(3) of this rule except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(e) The court may require that the party seeking discovery under division (B)(5)(b) of this rule pay the expert a reasonable fee for time spent in responding to discovery, and, with respect to discovery permitted under division (B)(5)(a) of this rule, may require a party to pay another party a fair portion of the fees and expenses incurred by the latter party in obtaining facts and opinions from the expert.

(6) Claims of Privilege or Protection of Trial-Preparation Materials.

(a) Information Withheld. When information subject to discovery is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(b) Information Produced. If information is produced in discovery that is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a receiving party must promptly return, sequester, or destroy the specified information and any copies within the party's possession, custody or control. A party may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim of privilege or of protection as trial preparation material. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

(C) Protective orders. Upon motion by any party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method

of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court, on terms and conditions as are just, may order that any party or person provide or permit discovery. The provisions of Civ. R. 37(A)(5) apply to the award of expenses incurred in relation to the motion.

Before any person moves for a protective order under this rule, that person shall make a reasonable effort to resolve the matter through discussion with the attorney or unrepresented party seeking discovery. A motion for a protective order shall be accompanied by a statement reciting the effort made to resolve the matter in accordance with this paragraph.

(D) Sequence and timing of discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(E) Supplementation of responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (a) the identity and location of person having knowledge of discoverable matters, and (b) the identity of each person expected to be called as an expert witness as trial and the subject matter on which he is expected to testify.

(2) A party who knows or later learns that his response is incorrect is under a duty seasonably to correct the response.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through requests for supplementation of prior responses.

[Effective: July 1, 1970; amended effective July 1, 1994; amended effective July 1, 2008; July 1, 2012.]

Staff Note (July 1, 2012 Amendment)

Civ.R. 26(B)(5) is amended to clarify the scope of expert discovery and align Ohio practice with the 2010 amendments to the Federal Rules of Civil Procedure relating to a party's ability to obtain discovery from expert witnesses who are expected to be called at trial. The amendment provides work product protection for draft reports and communications between attorneys and testifying experts, except for three categories of communications: communications that relate to compensation for the expert's study

143 Ohio App.3d 196 (Ohio App. 7 Dist. 2001)

757 N.E.2d 849, 2001-Ohio-3178

DENNIS et al., Appellants,

v.

STATE FARM INSURANCE COMPANY, Appellee. [*]

No. 99 CA 78.

Court of Appeals of Ohio, Seventh District, Mahoning.

May 15, 2001.

[757 N.E.2d 850] [Copyrighted Material Omitted]

[757 N.E.2d 851]

[143 Ohio App.3d 198] Anzellotti, Sperling, Pazol & Small Co., L.P.A., andAngela J. Mikulka, Youngstown, for appellants.

Williams, Sennett & Scully and Louis R. Militerno, Twinsburg, for appellee.

WAITE, Judge.

This timely appeal arises from a judgment entry of the Mahoning County Court of Common Pleas granting State Farm Insurance Company ("appellee") a protective order preventing Gus and Delores Dennis ("appellants") from deposing David Nuzzi, an insurance adjuster employed by appellee. Appellants filed a complaint against appellee seeking to collect underinsured motorist benefits on a policy issued to them by appellee. The deposition was requested during the discovery phase of the litigation. Appellee argues that Nuzzi is protected by the attorney-client privilege and work-product doctrine. For the following reasons, the judgment of the trial court is reversed.

On October 14, 1996, appellant Delores Dennis was injured when a car backing out of her driveway struck her. At the time of the accident she was covered by an automobile insurance policy issued by appellee that included underinsured motorist coverage. With appellee's permission, appellants exhausted the tortfeasor's insurance coverage. Appellants then attempted to recover underinsured motorist benefits from appellee but their claim was denied. On July 17, 1998, appellants filed a complaint against appellee in a further attempt to collect on the underinsured motorist provisions of their policy.

On January 21, 1999, appellants filed a notice of deposition of David Nuzzi, a claims specialist employed by appellee. On February 8, 1999, appellee filed a motion for a protective order to prevent appellants from taking Nuzzi's deposition. After a hearing, the trial court granted appellee's motion for a protective order on March 18, 1999, and this timely appeal followed.

Appellants' sole assignment of error states:

[143 Ohio App.3d 199] "The trial court abused its discretion in granting defendant-appellee's motion for protective order *in toto*, thereby preventing State Farm and its employee, David Nuzzi, from submitting to any deposition discovery."

Appellants argue that Civ.R. 26(B) allows discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action." They contend that the Civil Rules make no exception for deposing employees of insurance carriers and that there was nothing unusual about their January 21, 1999 notice of deposition regarding adjuster Nuzzi. Appellants argue that Civ.R. 30(A) enables a party to compel another party to submit to a deposition upon oral examination by giving that party proper notice as prescribed in Civ.R. 30(B). They assert **[757 N.E.2d 852]** that appellee identified Nuzzi as one of its employees who had knowledge of the facts of the case. Appellants conclude that they gave appellee proper notice of their intent to depose appellee's designated representative and that they were entitled to that deposition.

Appellee correctly observes that a trial court ruling relating to discovery issues is reviewed on appeal for abuse of discretion. *Arnold v. Am. Natl. Red Cross* (1994), 93 Ohio App.3d 564, 575, 639 N.E.2d 484, 491. An abuse of discretion connotes more than an error of law or judgment; it implies an attitude that is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 482-483, 450 N.E.2d 1140, 1142.

Appellee contends that a trial court is given authority to grant discovery protective orders under Civ.R. 26(C) to protect a party from "annoyance, embarrassment, oppression, or undue burden or expense." Appellee argues that it is within the province of the trial court to issue a protective order to prevent discovery of privileged information. Appellee asserts that the existence of a privilege is a discretionary determination to be made by the trial court. *State ex rel. Greater Cleveland Regional Transit Auth. v. Guzzo* (1983), 6 Ohio St.3d 270, 271, 6 OBR 335,

336-337, 452 N.E.2d 1314, 1315. Appellee maintains that the trial court was justified in granting the protective order because appellants were indirectly attempting to obtain documents protected by the work-product privilege and because Nuzzi had no relevant information to add to the case outside of the information contained in the claims file.

Turning to the arguments presented, it is true that a trial court has broad discretion in regulating the discovery process. *Breech v. Turner* (1998), 127 Ohio App.3d 243, 248, 712 N.E.2d 776, 779-780. That discretion is not unlimited, however, but is reviewed on appeal for an abuse. *Id.* The trial court is also subject to the procedures and limitation set forth in the Ohio Rules of Civil Procedure pertaining to discovery. Civ.R. 26(B) allows for broad discovery of any unprivileged matter relevant to the subject matter of the underlying litiga

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tion and that, at least, "appears reasonably calculated to lead to the discovery of admissible evidence." Depositions are an accepted discovery device and Civ.R. 30(A) provides a means whereby a party can compel the attendance of another party at a deposition. During the course of a deposition a party may request the court by way of a motion to limit or terminate the deposition upon a showing that it is being conducted in bad faith or to annoy, embarrass, or oppress the deponent or party. Civ.R. 30(D).

A party from whom discovery is sought may also request the court to issue a protective order limiting discovery in order to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Civ.R. 26(C). A party seeking such a protective order must also satisfy the following requirement:

"Before any person moves for a protective order under this rule, that person shall make a reasonable effort to resolve the matter through discussion with the attorney or unrepresented party seeking discovery. A motion for a protective order shall be accompanied by a statement reciting the effort made to resolve the matter in accordance with this paragraph." *Id.*

The record reflects that appellee did not include any such statement with its February 8, 1999 motion for a protective order. Appellee's failure to satisfy the requirements of Civ.R. 26(C) is a sufficient reason to vacate the March 18, 1999 protective **[757 N.E.2d 853]** order. Nevertheless, even if appellee had satisfied the requirements of the Civil Rules, we would still be compelled to reverse the decision of the trial court. This is due to the fact that the work-product doctrine does not bar appellants from taking Nuzzi's deposition and because Nuzzi's testimony is relevant to the subject matter of this case even if he has no knowledge of any facts outside of those contained in the claims file.

The work-product doctrine emanates from the United States Supreme Court decision *Hickman v. Taylor* (1947), 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451. *Hickman* was concerned that the attorney-client privilege was not broad enough to protect the memoranda, briefs, notes, and other writings prepared by counsel for his or her own use during the course of pursuing a case. *Id.* at 508, 67 S.Ct. at 392, 91 L.Ed. at 460-461. The court reasoned that if such materials did not receive some protection during the discovery phase of litigation, much of what is normally put down in writing, such as interviews, statements, legal theories, opinions, and mental impressions, would never be written down, ultimately causing the interests of the client to suffer. *Id.* at 511, 67 S.Ct. at 393-394, 91 L.Ed. at 460-461. The *Hickman* work-product doctrine now protects all materials prepared in anticipation of litigation, and gives almost absolute protection to the opinions, conclusions, judgments, and legal theories of a client's attorney. *Id.* at 511, 67 S.Ct. at 393-394, 91 L.Ed. at 462-463; *State v. Hoop* (1999), 134 Ohio

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App.3d 627, 642, 731 N.E.2d 1177, 1187-1188; *Frank W. Schaefer, Inc. v. C. Garfield Mitchell Agency, Inc.* (1992), 82 Ohio App.3d 322, 329, 612 N.E.2d 442, 446-447.

Civ.R. 26(B)(3) codifies Ohio's version of the work-product doctrine as it pertains to civil cases:

"Trial preparation: materials. Subject to the provisions of subdivision (B)(4) of this rule, *a party may obtain discovery of documents and tangible things prepared in anticipation of litigation* or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing of good cause therefor. A statement concerning the action or its subject matter previously given by the party seeking the statement may be obtained without showing good cause. A statement of a party is (a) a written statement signed or otherwise adopted or approved by the party, or (b) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement which was made by the party and contemporaneously recorded." (Emphasis added.)

Appellee's reliance on Civ.R. 26(B)(3) as a basis for the trial court's decision to grant a discovery protection order is misplaced. First, Civ.R. 26(B)(3) by its very terms applies only to discovery of "documents and tangible things," whereas appellants attempted to take an oral deposition of one of appellee's employees. There is nothing in Civ.R. 26(B)(3) that can be read as a limitation on a party's right to initiate the oral deposition of an opposing party. If

appellants had desired to examine the documents in the claims file, they would have needed to make a request for production of documents pursuant to Civ.R. 30(B)(4) and Civ.R. 34, which was not done. If, after the deposition had commenced, appellee concluded that other privileged information or material was about to be divulged, appellee's counsel could have made timely objections or filed a motion with the court to limit or terminate examinations as provided by Civ.R. 30(C) and (D).

[757 N.E.2d 854] Appellee relies on *Breech v. Turner* (1998), 127 Ohio App.3d 243, 712 N.E.2d 776, for the proposition that Civ.R. 26(B) protects the information in an insurance claim file from discovery rather than merely protecting the documents themselves. We do not interpret *Breech* so broadly. The issue in *Breech* was whether a third party could obtain discovery of statements made by an insured to his insurance adjuster regarding an automobile accident. *Id.* at 247, 712 N.E.2d at 779. The third party had sued the insured for negligence in allowing his cows to wander on a nearby road, which led to the accident. The documents in question allegedly contained evidence that the insured told the adjuster that he had seen his cows on the road.

[143 Ohio App.3d 202] The *Breech* court held that the trial court was within its discretion to deny the plaintiff's motion to compel discovery of statements made by an insured which were recorded by the insured's liability insurer and that were then passed on to the lawyer representing the insured pursuant to the insurance contract. *Id.* at 250, 712 N.E.2d at 781 see, also, *In re Klemann* (1936), 132 Ohio St. 187, 7 O.O. 273, 5 N.E.2d 492, paragraph one of syllabus. The rationale for prohibiting discovery of such statements is that the insurance company is required to take such statements from its insureds to prepare a defense and is normally required to provide defense counsel to the insured as part of its coverage. Any statements made by the insured in this context are in essence communications intended for defense counsel and therefore fall under the protective umbrella of the attorney-client privilege. *Breech*, 127 Ohio App.3d at 250, 712 N.E.2d at 781; *Klemann* at 194, 7 O.O. at 276-277, 5 N.E.2d at 495.

The situation in the case at bar is quite different. This matter does not involve a third party attempting to obtain discovery of an insured's statements made to its own insurance adjuster or defense counsel. The insureds are attempting to depose a representative of their own liability carrier in a contract dispute over coverage issues. Although no Ohio cases appear to be directly on point, other jurisdictions have clearly distinguished third-party cases such as *Breech* and *Klemann* from first-party contract dispute cases such as the instant one, and have allowed the insured to depose the adjuster and to have access to the claims file. *Tayler v. Travelers Ins. Co.* (N.D.N.Y.1998), 183 F.R.D. 67, 70-71; *Reavis v. Metro. Property & Liability Ins. Co.* (S.D.Ca.1987), 117 F.R.D. 160, 164.

Tayler, although dealing with Fed.R.Civ.P. 26(b)(3) rather than Ohio's equivalent rule, is particularly instructive because it dealt with an insured attempting to depose its uninsured motorists liability carrier. The *Tayler* court distinguished the typical two-vehicle personal injury case from an uninsured motorist case. *Id.* at 71. The court noted that in a two-vehicle accident (1) there is no insurance contract between the injured person and the other driver or his carrier, (2) a personal injury loss exists, (3) the carrier denies that its insured is liable for damages, (4) an adversarial relationship exists between the injured party and the insured, and (5) the trial issue is the amount of the injured party's legal damages against the insured. *Id.* In contrast, in an uninsured motorist case (1) there is an insurance contract between the injured person and the carrier, (2) a personal injury loss exists, (3) the carrier denies that legal damages exist or are as extensive as claimed by the insured injured person, (4) an adversarial relationship arises between the insured and the carrier, and (5) the trial issue is the amount of the injured person's legal damages **[757 N.E.2d 855]** against the insurance carrier pursuant to the insurance contract. *Id.*

[143 Ohio App.3d 203] The *Tayler* court reasoned that when an insurance company investigates a third-party claim it is doing so in defense of its insured with an eye towards litigation if the claim is denied. *Id.* On the other hand, an insurer's research into a typical uninsured motorists claim is done as part of its normal routine business pursuant to the contract that exists between the insured and the carrier. *Id.* "When a first party claim between an insured and his/her insurer is at issue, the insured 'is asking for payment under the terms of the insurance contract between him and the insurance company, and the insurance company owes [the insured] a duty to adjust his claim in good faith. There is no initial contemplation of litigation.' " *Id.*, quoting *Weitzman v. Blazing Pedals, Inc.* (D.Colo.1993), 151 F.R.D. 125, 126.

This same reasoning was used by the Ohio Supreme Court in the recent case of *Boone v. Vanliner Ins. Co.* (2001), 91 Ohio St.3d 209, 744 N.E.2d 154. The question in *Boone* was whether in a bad-faith denial-of-coverage claim an insured was able to discover documents in the claims file containing attorney-client communications. *Id.* at 210, 744 N.E.2d at 155-156. The court held that "in an action alleging bad faith denial of insurance coverage, the insured is entitled to discover claims file materials containing attorney-client communications related to the issue of coverage that were created prior to the denial of coverage. At that stage of the claims handling, the claims file materials will not contain work product, *i.e.*, things prepared in anticipation of litigation, because at that point it has not yet been determined whether coverage exists." *Id.* at

213-214, 744 N.E.2d at 158. The court's reasoning would apply just as well to deposing the claims adjuster about materials in the claims file that existed prior to the filing of a complaint. If the claims file itself is not protected prior to the time the claim is denied, then there is no reason to prohibit the insured from deposing the claims adjuster even if the purpose of the deposition is to obtain that unprotected information.

Ohio's Civ.R. 26(B)(3), like the federal rule at issue in *Tayler, supra,* only protects work-product, "in anticipation of litigation." The rule does not protect the ordinary work-product of an underinsured motorist carrier during the initial investigation of a claim made by one of its insureds. Thus, Civ.R. 26(B)(3) would not prevent the taking of a deposition of the insurance adjuster responsible for the claims file, at least in relation to aspects of the file created prior to litigation with the insured. Therefore, at minimum, appellants should have been permitted to depose Nuzzi about matters arising prior to the initiation of this present litigation, unless the trial court granted the protective order for some other reason.

The trial court's March 18, 1999 order does not give any reason it was granted. The only other reason for granting the protective order argued by

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appellee was that Nuzzi could not have any relevant information to contribute to the discovery process. This argument is not well taken. Civ.R. 26(B)(1) provides for a very broad scope of discovery:

"Unless otherwise ordered by the court in accordance with these rules, the scope of discovery is as follows:

"(1) In general. *Parties 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, custody,

[757 N.E.2d 856]

condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial *if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.*" (Emphasis added.)

The concept of relevancy as it applies to discovery is not to limit it to the issues in the case, but to the subject matter of the action, which is a broader concept. *Nilavar v. Osborn* (2000), 137 Ohio App.3d 469, 499, 738 N.E.2d 1271, 1292-1293; *Tschantz v. Ferguson* (1994), 97 Ohio App.3d 693, 715, 647 N.E.2d 507, 521-522. The rule permits discovery of information so long as it is "reasonably calculated to lead to the discovery of admissible evidence." Civ.R. 26(B)(1).

An insurer has a duty to act in good faith in the processing of the claims of its insured. *LeForge v. Nationwide Mut. Ins. Co.* (1992), 82 Ohio App.3d 692, 697, 612 N.E.2d 1318, 1321-1322. "[W]hen an [insurer] insists that it was justified in refusing to pay a claim of its insured because it believed there was no coverage of the claim, ' * * * such a belief may not be an arbitrary or capricious one. The conduct of the insurer must be based on circumstances that furnish reasonable justification therefor.' " *Hoskins v. Aetna Life Ins. Co.* (1983), 6 Ohio St.3d 272, 277, 6 OBR 337, 341, 452 N.E.2d 1315, 1320, quoting *Hart v. Republic Mut. Ins. Co.* (1949), 152 Ohio St. 185, 188, 39 O.O. 465, 466, 87 N.E.2d 347, 349. Although appellants' cause of action only raises a contract dispute and does not allege the separate tort of bad faith handling of the insurance claim, the issue of appellee's good faith or bad faith in denying coverage is certainly related to the subject matter of this action. Nuzzi's lack of direct knowledge of the underlying automobile accident does not mean that he does not have relevant information as to the reasons why appellants' claim was denied. In fact, Nuzzi's *lack* of knowledge of the claims file or underlying accident may be very relevant to appellants' attempt to thoroughly investigate the full subject matter of this

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action. Therefore, appellee's argument that Nuzzi could not possibly have relevant discoverable information is not well taken.

Although the trial court's discretion in matters of discovery is very broad, we must conclude that the trial court abused its discretion in arbitrarily granting appellee's motion for a discovery protection order where (1) there was no actual basis for the protection order centered on either the work-product doctrine or on a theory of lack of relevance as argued in appellee's original motion for a protective order, and (2) appellee failed to provide the trial court with a written statement reciting the effort made to resolve the discovery dispute as required by Civ.R. 26(C).

Appellants' assignment of error is well taken, and the judgment of the trial court is reversed and this cause remanded for further proceedings according to law and consistent with this court's opinion.

Judgment reversed and cause remanded.

VUKOVICH, P.J., and DONOFRIO, J., concur.

Notes:

[*] Reporter's Note: A discretionary appeal to the Supreme Court of Ohio was dismissed upon application of appellant in (2001), 93 Ohio St.3d 1401, 752 N.E.2d 983.

RULE 32. Use of Depositions in Court Proceedings

(A) Use of depositions. Every deposition intended to be presented as evidence must be filed at least one day before the day of trial or hearing unless for good cause shown the court permits a later filing.

At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(B)(5) or Rule 31(A) to testify on behalf of a public or private corporation, partnership or association which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (a) that the witness is dead; or (b) that the witness is beyond the subpoena power of the court in which the action is pending or resides outside of the county in which the action is pending unless it appears that the absence of the witness was procured by the party offering the deposition; or (c) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or (d) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (e) that the witness is an attending physician or medical expert, although residing within the county in which the action is heard; or (f) that the oral examination of a witness is not required; or (g) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts.

Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken. When another action involving the same subject matter is or has been brought between the same parties or their representatives or successors in interest, all depositions lawfully taken in the one action may be used in the other as if originally taken therefor.

(B) Objections to admissibility. Subject to the provisions of subdivision (D)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying. Upon the motion of a party, or upon its own initiative, the court shall decide such objections before the deposition is read in evidence.

(C) Effect of taking or using depositions. A party does not make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition as described in subdivision (A)(2) of this rule. The use of subdivision (A)(3)(e) of this rule does not preclude any party from calling such a witness to appear personally at the trial nor does it preclude the taking and use of any deposition otherwise provided by law. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

(D) Effect of errors and irregularities in depositions:

(1) As to notice. All errors and irregularities in the notice for taking a deposition are waived unless written objection stating the grounds therefor, is promptly served upon the party giving the notice.

(2) As to disqualification of officer. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) As to taking of deposition.

(a) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(b) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless reasonable objection thereto is made at the taking of the deposition.

(c) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within seven days after service of the last questions authorized.

(4) As to completion and return of deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rule 30 and Rule 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

[Effective: July 1, 1970; amended effective July 1, 1972.]

RULE 704. Opinion on Ultimate Issue

Testimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact.

[Effective: July 1, 1980.]

Staff Note (July 1, 1980 Amendment)

Rule 704 differs from Federal Evidence Rule 704 in only one regard. The word "solely" has been added after the word "objectionable" to clarify the thrust of the rule.

The rule does not serve to make opinion evidence on an ultimate issue admissible; it merely provides that opinion evidence on an ultimate issue is not excludable per se. The rule must be read in conjunction with Rule 701 and Rule 702, each of which requires that opinion testimony be helpful to, or assist, the trier of the fact in the determination of a factual issue. Opinion testimony on an ultimate issue is admissible if it assists the trier of the fact, otherwise it is not admissible. The competency of the trier of the fact to resolve the factual issue determines whether or not the opinion testimony is of assistance.

The rule is in accordance with Ohio law as it has developed prior to the adoption of the Rules of Evidence.

The general rule in Ohio as to the admissibility of opinion evidence on an ultimate issue was stated in the first two paragraphs of the syllabus in the case of Shepherd v. Midland Mutual Life Ins. Co. (1949), 152 OS 6, 39 OO 352, 87 NE2d 156, as follows:

Although a witness may be qualified to give an opinion concerning a matter upon which opinion evidence may be admissible in and pertinent to the determination of an issue, as a general rule such an opinion, whether expert or otherwise, may not be admitted when it, in effect, answers the very question as to the existence or nonexistence of an ultimate fact to be determined by the jury.

Where an ultimate fact to be determined by the jury is one depending upon the interpretation of certain scientific facts which are beyond the experience, knowledge or comprehension of the jury, a witness qualified to speak as to the subject matter involved may express an opinion as to the probability or actuality of a fact pertinent to an issue in the case, and the admission of such opinion in evidence does not constitute an invasion or usurpation of the province or function of the jury, even though such opinion is on the ultimate fact which the jury must determine.

The exception extends to lay opinion testimony as well as to expert opinion testimony. A lay witness may not render an opinion as to the capacity of a testator to make a will, Runyan v. Price (1864), 15 OS 1, but a lay witness may testify as to the capacity to form an intent to dispose of property by a will. Dunlap, Exr., v. Dunlap (1913), 89 OS 28, 104 NE 1006; Weis v. Weis (1947), 147 OS 416, 34 OO 350, 72 NE2d 245. The same example as to capacity is utilized in the Advisory Committee Note to Federal Evidence Rule 704 to illustrate that the effect of the rule is not to admit all opinion on the ultimate issue, but to assure that helpful opinion on the ultimate issue is not automatically excluded.

RULE 804. Hearsay Exceptions; Declarant Unavailable

RULE 804 Hearsay Exceptions; Declarant Unavailable

(A) Definition of unavailability. "Unavailability as a witness" includes any of the following situations in which the declarant:

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;

(3) testifies to a lack of memory of the subject matter of the declarant's statement;

(4) is unable to be present or to testify at the hearing because of death or then-existing physical or mental illness or infirmity;

(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under division (B)(2), (3), or (4) of this rule, the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.

(B) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. Testimony given at a preliminary hearing must satisfy the right to confrontation and exhibit indicia of reliability.

(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant, while believing that his or her death was imminent, concerning the cause or circumstances of what the declarant believed to be his or her impending death.

(3) Statement against interest. A statement that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against

another, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. A statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, is not admissible unless corroborating circumstances clearly indicate the truthworthiness of the statement.

(4) Statement of personal or family history. (a) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though the declarant had no means of acquiring personal knowledge of the matter stated; or (b) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Statement by a deceased or incompetent person. The statement was made by a decedent or a mentally incompetent person, where all of the following apply:

(a) the estate or personal representative of the decedent's estate or the guardian or trustee of the incompetent person is a party;

(b) the statement was made before the death or the development of the incompetency;

(c) the statement is offered to rebut testimony by an adverse party on a matter within the knowledge of the decedent or incompetent person.

(6) Forfeiture by wrongdoing. A statement offered against a party if the unavailability of the witness is due to the wrongdoing of the party for the purpose of preventing the witness from attending or testifying. However, a statement is not admissible under this rule unless the proponent has given to each adverse party advance written notice of an intention to introduce the statement sufficient to provide the adverse party a fair opportunity to contest the admissibility of the statement.

[Effective July 1, 1980; amended effective July 1, 1981, July 1, 1993; July 1, 2001.]

Staff Note (July 1, 2001 Amendment)

Evidence Rule 804 Hearsay exceptions; declarant unavailable
Evidence Rule 804(A) Definition of unavailability

The amendment to division (A) of the rule involved clarifying changes in language. In addition, the amendment placed in a separate paragraph what had been in the last sentence of division (A)(5) in order to clarify that the final sentence of the division applies to all of the rule's definitions of "unavailability." No substantive change is intended by these amendments.

Charles D. Shimola Plaintiff-appellee

v.

Nationwide Insurance Co., et al. Defendant-appellants

Nos. 48772, 49372.

85-LW-2454 (8th)

Court of Appeals of Ohio, Eighth District, Cuyahoga

May 2, 1985

Civil appeal from Common Pleas Court Case No. 030512.

For plaintiff-appellee: William T. Wuliger, William D. Beyer, Richard H. Verheij, 840 Western Reserve Bldg., Cleveland, Ohio 44113.

For defendant-appellants: Hugh M. Stanley, Jr., Irene C. Keyse-Walker, 1100 Huntington Bldg., Cleveland, Ohio 44115.

JOURNAL ENTRY AND OPINION

BROWN, J.

On July 23, 1981, Charles Shimola, plaintiff-appellee(cross-appellant) filed a complaint against Nationwide Insurance Company, defendant-appellant (cross-appellee), and Herb Veith, defendant, for breach of contract in refusing to honor claims arising out of fire damage to real property, (which was demolished by the City of Cleveland) allegedly insured by Nationwide. The insured sought 1.5 million dollars in compensatory damages and 3 million dollars in punitive damages.

In its answer, defendants raised as an affirmative defense the fact that Shimola (the insured) intentionally and negligently misrepresented or omitted material facts in the course of obtaining insurance, which voids coverage under the policy. Following extensive discovery, Shimola filed a motion for summary judgment claiming that no genuine issue of material fact exists, since Nationwide had bound coverage on the real property prior to its destruction and was liable for the loss. Defendants filed a motion for summary judgment and maintained that the house was not insured at the time it was destroyed because it had not been placed on its foundation, and that Shimola was told that this was a prerequisite to obtaining insurance. On June 1, 1984, the trial court overruled both parties' motions for summary judgment and dismissed the action with prejudice as to defendant Veith only.

At trial, the following evidence was adduced: Charles Shimola testified that in 1975 he became involved in the business of purchasing and relocating homes for profit. Shimola said that he purchased six homes between 1975 and 1983 and that on each occasion he procured insurance from Herb Veith, a Nationwide agent who represented his family since 1970. Shimola initially contacted Veith in 1974 or 1975 after buying two partially constructed and vacant homes from a Sheriff's sale. Shimola told Veith that he intended to reside in one of the homes and renovate the second home and sell it as an investment, and that he needed to insure the properties. Veith told Shimola that these properties would be insured immediately.

Later in 1975, Shimola purchased a vacant ranch-style house that was located in Seven Hills with the intention of moving the house 26 miles to Westlake. Shimola phoned Vieth prior to moving the structure, and told him that he needed insurance once the house was relocated. Veith told Shimola that he had never handled this type of situation and would have to ask the "Home Office" what the procedure was. The next time Shimola spoke with Veith, Shimola was told that the house would be covered by insurance the moment it was placed on the relocated lot. Shimola reiterated that it was his understanding that when a house was in transit (*i.* e, being moved from one lot to another) the risk of loss was on the mover, but once the house "hit a lot" it became his responsibility to procure insurance.

In 1979, Shimola purchased four additional houses from the State of Ohio, which included two colonial-style structures. In April, 1980, Shimola phoned Veith and told him that the two colonial houses were going to be moved shortly and that he needed to obtain insurance. The smaller colonial house was relocated on April 24, 1980, and Shimola received an invoice from Veith which bound coverage on that date. However, Shimola testified that work on the foundation of the smaller house did not begin until April 25, 1980, (the date the concrete was delivered), and the house was not placed on the foundation until approximately May 8 to May 15. Hence, insurance was effective the date before supplies were delivered to start building the foundation.

The larger colonial house, which forms the basis of this action, was first moved to Schaaf Road from state property in April, 1980. Shimola testified that this house had been vandalized at its original location, and that vandalism was not uncommon since the property had been vacant. In fact, the smaller colonial had sustained greater damage.

Once the house was moved to Schaaf Road on April 24, 1980, a fire occurred, which resulted in damage to the roof joints, the ceiling joints, the studding, siding, window units,

plaster, trim molding, and electrical units. Following an investigation of the fire Shimola received a notice from a City of Cleveland Building Inspector which indicated that certain violations needed to be corrected. Bill Mural, who worked with Shimola in moving the houses, obtained a permit to repair the fire damage, and, according to Shimola, the roof was disassembled and lowered before the property was moved to its next destination-South Ridge Road. The Building Inspector further testified that while the building was on Schaaf Road, the City of Cleveland posted a condemnation notice on the property.

On August 19, 1980, Shimola testified that he called Veith's office but was unable to reach Veith. He told the agent he spoke with that he was intending to move the house from Schaaf Road to South Ridge Road, that he was going out of town, and that he wanted to be certain that the property would be insured. The agent told Shimola that he was "covered." On August 21, 1980, Shimola's brother (an attorney) spoke with Veith personally and told him that the house was being moved to South Ridge Road later that day and that the house would not be on its foundation for a few days. Veith insured the property for $40,000 effective August 21, 1980, (at the time it reached the lot). Veith initially testified that he knew that the house was not on its foundation at the time he insured it but then said that when he first spoke with Shimola in 1975 he told him that in order for a house to be insured, it needed to be on a foundation. Both Shimola and his brother denied that Veith made this representation.

Veith also said that he knew he was going "out on a hook" by binding coverage on the house prior to the foundation being laid, and "as far as the company (Nationwide) understood, it would be covered when it hit the foundation." Veith also stated that had he inspected the house and been aware of its condition and of the arson threats that had been made prior to the last fire, he would not have bound coverage. Veith further stated that he billed Shimola on August 25, 1980, that Shimola paid Nationwide a $256 premium, but that he never received a commission.

On the evening of August 21, 1980, or August 22, a small rubbish fire was started by vandals, which resulted in approximately $250 damage. Shimola's brother contacted Veith and Veith told him that he believed that he was covered by his fire risk insurance. Another fire erupted the next night which, according to the City of Cleveland Assistant Commissioner, Division of Building and Housing, "destroyed the house." The Assistant Commissioner further stated that "the building was so damaged and so weakened that it had to be demolished * * * to protect life and property." The Assistant Commissioner admitted that he had received a phone call from the councilwoman before contacting the Bureau of Demolition but insisted tht the building was destroyed for safety reasons and not because of a political pique.

On September 24, 1980, Shimola received a letter from Nationwide indicating that his claim would not be honored due to material misrepresentations and omissions made to Veith prior to issuance of a binder. Shimola did not notify Veith of the fire on Schaaf Road or of the fact that the building had been condemned or that following the rubbish fire on South Ridge Road neighborhood children had threatened to start another fire. However, Veith never asked Shimola about the condition of the property and Shimola did not take the threats of 5 or 10 year old children seriously enough to warrant calling Veith. Moreover, Veith testified that he believed his action caused the claim in the instant case. The manager of Nationwide's Claims Department testified that the claims officer conducted an invesitgation concerning the August 22, fire and that neither Shimola's brother nor Bill Mural, who helped moved the house, were interviewed. Furthermore, the records indicated that there was a recorded interview of Shimola, but neither a transcript nor a tape were included in the record. In response to an interrogatory that requested the names and addresses of every person who reviewed or was involved with the claim, Nationwide objected on the ground that the question was vague and ambiguous. However, the manager testified that he was, in fact, familiar with the records.

At the close of Nationwide's case, Shimola's counsel moved for a directed verdict on the issue of liability and requested permission to present evidence relative to damages as to the tort of bad faith. The trial court overruled the motion for a directed verdict, but allowed evidence to be presented regarding the "bad faith" claim. Counsel for Nationwide objected on the ground that plaintiff's complaint did not address the issue of "bad faith" nor did the evidence present a claim of "bad faith."

Nevertheless, Shimola then testified that he was experienced in valuating profits and losses (since he was also employed as a corporate systems analyst). According to Shimola's analysis, he incurred lost profits in the amount of $434,000 as a result of Nationwide's refusal to honor his claim. He further stated that he has been unable to establish credit and was forced to sell two tractors. Essentially, he claimed that he was "put out of business." Nationwide objected to Shimola's testimony on the ground that it was based on speculation.

The trial judge instructed the jury that it was their function to determine whether the insurance was actually binding at the time the house was on the lot, and whether the fire damage was the proximate cause of the house being razed. The trial judge further instructed the jury on the issues of compensatory and punitive damages. Nationwide objected to the charges concerning damages and objected on the ground that there was no charge on the effect of material

misrepresentations and omission.

After the jury deliberated, they asked for clarification with regard to the issue of punitive damages. The jury then returned a verdict in favor of Shimola for $40,000 compensatory, plus interest, and $160,000 punitive damages.

On July 19, 1984, Shimola filed a motion for interest on the court's award of punitive damages, which was denied on September 26, 1984.

Nationwide filed a timely appeal and raises four assignments of error. Shimola filed a cross-appeal and assigns a single error.

ASSIGNMENT OF ERROR NO.I:

THE TRIAL COURT ERRED IN FAILING TO GRANT DEFENDANT'S MOTION FOR A DIRECTED VERDICT ON THE ISSUE OF BAD FAITH PUNITIVE DAMAGES, ALLOWING EVIDENCE TO BE PRESENTED ON SUCH DAMAGES, AND SUBMITTING THE QUESTION OF BAD FAITH PUNITIVE DAMAGES TO THE JURY.

CROSS ASSIGNMENT OF ERROR:

WHETHER THE TRIAL COURT ERRED AS A MATTER OF LAW IN DENYING AN AWARD OF PREJUDGMENT INTEREST WHERE BOTH A JURY AND THE COURT DETERMIND THAT AN INSURER ACTED IN BAD FAITH IN DENYING THE INSURED THE BENEFITS OF HIS INSURANCE POLICY SO AS TO SUPPORT AN AWARD OF PUNITIVE DAMAGES.

I.

A.

Appellant (Nationwide) contends that the trial court's award of punitive damages must be vacated on the ground that (1) appellee's complaint does not contain enough operative facts to support a claim of "bad faith" nor did appellee amend the complaint to conform with the evidence; (2) appellant reasonably believed that it was justified in denying appellee's claim; and (3) the amount of punitive damages awarded was based on speculation rather than actual proof.

The Ohio Supreme Court, in the seminal case of *Hoskins v. Aetna Life Ins. Co.* (1983), 6 Ohio St. 3d 272, determined that "based on the relationship between an insurer and its insured, an insurer has the duty to act in good faith in the handling and payment of the claims of its insured. A breach of this duty will give rise to a cause of action [in tort] against the insurer." *Id.* at 276. The court noted that mere refusal to pay a claim will not give rise to tort liability. Instead, the insured has the burden to prove that the insurer acted in bad faith. The court defined bad faith as more than bad judgment or negligence. "It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another." *Id.*, citing, *Slater v. Motorists Mut. Ins. Co.* (1962), 174 Ohio St. 148.

Where the insurer breaches its duty of good faith, the insured is entitled to an award of punitive damages upon adequate proof. *Hoskins, supra*, at 277. In order for there to be a claim of punitive damages based on bad faith, the insurer's denial of the insured's claim must be motivated by actual malice. Hence, the complaint itself must contain operative facts which allege more than mere inaction on the part of the insurer or the facts apparent from the record must be sufficient to sustain a punitive damages claim. *Id.*, at 278-79.

In the instance case, appellee's complaint states that "defendant Veith assured him (Shimola's brother) that the house was insured. * * * The defendants have failed and refused to honor the claims of the plaintiff and the terms of the insurance contract, thus breaching their contract with the plaintiff. * * * As a direct and proximate result of the defendants' acts and omissions, the plaintiff has suffered damage to his reputation and standing in the community, injury to his business, and has suffered mental anguish, pain and suffering * * * (and) has had to seek legal recourse and obtain counsel to protect his legal right and interests." We find that the complaint is inadequate in that it merely states a cause of action in contract and fails to show that appellant acted with actual malice.

Nevertheless, Civil Rule 15(B) allows for a liberal amendment of the pleadings. It provides, in relevant part:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. * * * If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. * * *

At the outset of the trial, the judge told counsel that he would allow testimony concerning bad faith if the evidence so presented itself. Apparently, after hearing extensive testimony, the judge determined that evidence concerning bad faith should be admitted. In *Hall v. Bunn* (1984), 11

Ohio St. 3d 118, the Ohio Supreme Court recently determined that under Rule 15(B), the objecting party who seeks to have evidence excluded must prove that the introduction of such evidence will "put him to serious disadvantage in presenting his case." *Id*., at 122. Appellant failed to show that he would be prejudiced in any way. He merely objected on the ground that the evidence did not indicate any basis of bad faith, nor did the complaint address the issue of bad faith. Under these circumstances, it cannot be said that the trial court erred in allowing testimony pertinent to appellee's claim of bad faith to be presented.

Appellant further maintains that the award of punitive damages was erroneous. According to *Hoskins, supra*:

Mere refusal to pay insurance is not, in itself, conclusive of bad faith. But when an insured insists that it was justified in refusing to pay a claim of its insured because there was no coverage of the claim, "* * * such a belief may not be an arbitrary or capricious one. The conduct of the insurer must be based on circumstances that furnish reasonable justification therefor."

Id., at 277.

Appellant contends that it was reasonably justified in denying appellee's claim since (1) it believed that the claim was excluded under the policy terms as a demolition; (2) the house was not insured until it was placed on its foundation; and (3) the binder was procured as a result of material misrepresentations and omissions made by the insured which would void the policy.

The fire risk insurance policy issued to appellee provides that: "We (Nationwide) do not cover loss resulting directly or indirectly from: Ordinance or Law, meaning enforcement of any enforcement or law regulating the use, construction, repair or *demolition of property* unless specifically provided under this policy." (Emphasis added). Prior to trial, the deposition of a structural engineer who inspected the property was taken and clearly established that the building was razed because the fire had made it unsafe. Hence, appellant was not warranted in claiming that this policy exclusion applied.

Similarily, the fact that the house was not yet on the foundation does not justify appellant's refusal to honor the insured's claim. Nor does the fact that Veith exceeded his authority by binding coverage prematurely negate Nationwide's liability to its insured. It is well-established that an agent who exceeds the authority delegated to him is personally liable to those who deal with him. *Brawner v. Welfare Finance Corp*. (1950), 61 Ohio Law Abs. 329, 334. During the trial, Veith was dismissed as a party defendant on the express stipulation that Nationwide is responsible for whatever Veith did. Therefore, even if Veith initially had no authority to bind Nationwide, Nationwide ratified i s agent's acts and therefore assumed liability. Under agency principles Nationwide would be liable for Veith's acts.

Although Veith allegedly told the insured's brother that "The Company (Nationwide) will not cover a home that is not on its foundation," Nationwide had notice that Veith did, in fact, bind coverage. Nationwide's records indicated that (1) the house is "sitting on blocks (or was) waiting for foundation to be build [sic]; (2) "Insured completely renovated it, new foundation, wiring, plumbing, siding, roofing, heating, etc.;" and that (3) Veith thought his action "may have caused claim." Finally, there was evidence that Veith had insured a previous home before the foundation was laid down. Under these circumstances, we find that since Nationwide's agent represented to the insured that the coverage was effective at the time the house "hit the lot" and since Nationwide accepted Veith's conduct as its own, Nationwide is estopped from denying liability on this ground.

Appellant further contends that the policy is voidable since appellee failed to tell Veith that the house had previously been condemned due to an earlier fire; that there were arson threats made by neighborhood children following the first rubbish fire; and that there were political problems associated with the relocation of the house. We disagree.

In general, parties to an insurance contract must act in good faith and a failure by an applicant to disclose conditions affecting the risk makes the contract voidable at the insurer's request. *Stipioch v. Metropolitan Life Ins. Co*. (1928), 277 U.S. 311; see also, *Mutual Life Ins. Co. v. Hilton-Green* (1915), 241 U.S. 613. Hence, where an applicant knowingly answers a question falsely, the insurer has the option to void the contract. *Prudential Ins. Co. v. Carr* (1964), 94 Ohio Law. Abs. 385, 388. However, the materiality of information is dictated by the insurer. *Id*., at 389. Therefore, where the insurer (or its agent) fails to ask specific questions of the insured, and the insured does not offer such information, the insurer cannot claim that the insured willfully failed to disclose the information.

In the instant case, appellee's brother was only asked general questions, (such as the size of the house) when applying for protection. Since the agent (Veith) failed to ask more specific questions, regarding the actual condition of the house (*e*. g. previous fire damage, vandalism, etc.), and since the agent was required, but failed to, inspect the house before issuing a binder, Nationwide cannot claim that insured willfully failed to disclose information which would warrant the policy being voided. Moreover, the agent had inspected a previous home he insured and testified that the home had one or two walls open and was undergoing construction. There was also evidence that supplies used to

build the foundation on the previous house were not delivered until the day *after* the insurance policy was issued, which would rebut Veith's claim that when he inspected the house, he thought the foundation was started. Veith also stated that he knew the house in the instant case had been vacant for a period of time. These facts only indicate that the agent had knowledge that the house at issue was not in stable condition, and was consequently more susceptible to risk of loss than more "permanent" structures.

Finally, appellee's failure to mention the arson threats made by neighborhood children or the political climate surrounding the relocation of the house do not give rise to the fraudulent or willful conduct needed to void an insurance contract. Appellee's brother said he did not take the threats seriously, and that he contacted the police department promptly. As to the political climate, this is merely extraneous to the contract, and has no *direct* bearing to the risks related to a fire insurance policy. Consequently, appellant's contention that the policy was procured by material misrepresentations or omissions is without merit. Hence, Nationwide's refusal to pay appellee's claim constituted "bad faith", since it was not reasonably justified, as required by the Ohio Supreme Court in *Hoskins*.

The record is replete with evidence to establish lack of good faith on the part of the insurer. It was firmly established that the insurer had knowledge that its agent bound coverage, without inspecting the property, as required, and in fact admitted that his action may have caused the claim. Moreover, the alleged "investigation" was hardly sufficient. The fire occurred on Friday, August 21, 1980. The investigation ceased on Monday, August 24, 1980. Neither the insured's brother nor the mover were contacted and interviewed. The company's internal records indicate that there was a recorded interview with the insured, yet neither a transcript nor a tape were shown to exist. Un er these circumstances, we conclude that the insurer breached its duty of good faith.

Nevertheless, we must vacate the court's award of punitive damages on the ground that the insured failed to prove that he sustained actual damages that stemmed from Nationwide's failure to honor his claim.

In *Ali v. Jefferson Ins. Co.* (1982), 5 Ohio App. 3d 105, 108, the court struck down a punitive damages award and in so doing noted:

It is well-established that punitive damages may not be recovered in the absence of proof of actual injury or damage. In order to recover punitive damages in a case such as this, where the action arises out of contract, but is also based upon tortious conduct, *actual damages attributable to the wrongful acts of the alleged tortfeasor must be shown in addition to those damages attributable solely to the breach of the contract*.

(Emphasis added).

In applying this standard it is clear that insured was required to prove that he suffered a harm distinct from the breach of contract action and attributable solely to the tortious conduct of the insurer.

Essentially, the insured maintained that Nationwide's failure to honor his claim deprived him of the capital necessary to continue his business. Yet, the insured's contention that he incurred lost profits in the amount of $434,000, sustained $4,000 in legal fees (for depositions)®1¯ was forced to sell two tractors, and incurred a debt of $12,000 to his mover were not substantiated and were merely based on his own self-serving statements. For instance, with regard to the lost profits claim, the insured states that the houses he purchased for $25 and $111 had a market value of $60,000 (for the smaller colonial) and $90,000 (for the larger house). He then used these figures as well as estimated investments costs to determine the net profit and return of investment for the 46-month period Nationwide failed to honor his claim. According to his analysis, the insured was capable of moving two houses per year, which yielded a 90% annual return on investment, totalling $434,000 in lost profits. Not only did the insured fail to substantiate how he arrived at the figures he relied on but he also based his analysis on mere speculation (*i.* e. whether he could reasonably expect to move two houses annually, etc.).

Footnote 1 On cross-examination the insured admitted that only one 58 page deposition was taken in this case and that the $4,000 figure reflected the cost of that deposition plus costs incurred in pending cases.

It is well-established that lost profits may only be recovered if they are reasonably certain and thus will not be awarded if based upon mere speculation. *Charles R. Combs Trucking, Inc. v. International Harvester Company* (1984), 12 Ohio St. 3d 241; see, also, *Battista v. Lebanon Trotting Ass'n.* (6th Cir. 1976), 538 F. 2d 111, 119; 1 *Kinetico v. Independent Nail Company* (Aug. 23, 1984), Cuyahoga App. No. 47464, 47476, unreported. There must be more substantial proof than a conclusory statement:

More is required of the plaintiff than merely his assertion (either directly or through an expert witness) that he would have made a particular amount in profits. Unless the figure is substantiated by calculations based on facts available or in evidence, the courts will properly reject it as speculative or uncertain. [citations omitted]

R. Dunn *Recovery of Damages for Lost Profits 2d* (1981),

Section 5.5, p. 223.

Since the insured did not substantiate his calculations, we conclude that the award of punitive damages must be vacated.®2¯ Consequently, we sustain appellant's first assignment of error.

Footnote 2 We also note that the jury's verdict revealed that no compensatory damages were awarded for the tort of bad faith. The $40,000 in compensatory damages represented only the face value of the polioy, *i.* e., for the breach of contract. Since punitive damages cannot be recovered in a contract action, alone, the award in the instant case would have to be set aside notwithstanding the fact that no actual damages attributable to the tortious act were proven.

B.

In his cross-appeal, Shimola (appellee, cross-appellant) raises the issue of whether the trial court erred in overruling his motion for prejudgment interest on the $160,000 punitive damages award.

At the conclusion of the prejudgment interest hearing, the trial judge indicated that the $160,000 punitive damages award is "somewhat akin" to a prejudgment interest award, and that prejudgment interest cannot be assessed against punitive damages.

The insured (appellee cross-appellant) nevertheless maintains that the trial court is empowered to assess an additional penalty on the $160,000 punitive damages award, pursuant to R.C. 1343.03(C). This section provides that:

Interest on a judgment, * * * rendered in a civil action based on tortious conduct and not settled by agreement of the parties, shall be computed from the date the cause of action accrued to the date on which the money is paid, if, upon motion of any party to the action, the court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case.

However, in light of the fact that the punitive damages award has been vacated, the issue of whether prejudgment interest can be assessed against punitive damages is moot. Consequently, the assignment of error presented on cross-appeal is not well taken.

ASSIGNMENTS OF ERROR NOS. II AND III:

II. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY PROPERLY ON DAMAGES ALLOWED FOR BREACH OF CONTRACT.

III. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON DEFENDANT'S DEFENSE OF MATERIAL MISREPRESENTATIONS AND OMISSIONS.

II.

Appellant objects to the trial court's instruction concerning compensatory damages. The challenged instruction states in relevant part:

The total loss in a fire means either that a fire destroyed the structure such that it could not be rebuilt, or that the fire damage caused the City of Cleveland to demolish the structure.

The municipality does have the right to demolish a structure if it constitutes a danger to the life and property of other people.

The issue with respect to this phase of the case is whether or not the fire damage was actually the cause of the demolition of the structure by the City of Cleveland.

A total loss due to fire occurs when the damage to property is such that its character as a building is destroyed and it remains simply a mass of ruins, part of which may remain standing but has no value in repairing or rebuilding the structure.

If you find that plaintiff's house at 320 South Ridge Road suffered fire damage * * * and that as a proximate result of that fire the City of Cleveland condemned and razed plaintiff's house, then you must find that plaintiff suffered a total loss of his house at 320 South Ridge Drive as I have defined that term to you.

Appellant contends that the court erred in failing to instruct the jury that pursuant to R.C. 3929.25®3¯ and under the terms of the policy itself®4¯ if a loss is partial, the insurer has the option of repairing or replacing the building without deduction for depreciation, up to the amount of the policy ($40,000) as opposed to paying the full policy value where the loss is total.

Footnote 3 This section provides:

A person, company, or association insuring any building or structure against loss or damage by fire or lightning, by renewal of a policy, shall have such building or structure examined by his or its agent, and a full description thereof made, and its insurable value fixed, by said agent. In the absence of any change increasing the risk without the consent of the insurers, and in the absence of intentional fraud on the part of the insured, in the case of total loss the whole amount mentioned in the policy or renewal, upon

which the insurer received a premium, shall be paid.

Footnote 4 The policy reads:

If at the time of loss the amount of insurance in this policy on the damaged building is 80% or more of the full replacement cost of the building immediately prior to the loss, we will pay the cost of repair or replacement, without deduction for depreciation, but not exceeding the smallest of the following amounts:

(a) the limit of liability under this policy applying to the building:

(b) the replacement cost of that part of the building damaged for equivalent construction and use on the same premises; or

(c) the amount actually and necessarily spent to repair or replace the damaged building.

Both the mover (who admittedly did not view the house following the fire and prior to the demolition) and appellee testified on cross-examination that the building was structurally sound when it was demolished by the City. However, the City of Cleveland Assistant Commissioner, Division of Building and Housing, unequivocally established that the house was dangerous and that the fire was the cause of the demolition. He stated that "the building was so damaged and so weakened that it had to be demolished * * * to protect life and property." Therefore, the fact that the house may have had value following the fire does not mean that the loss was partial and could consequently be replaced. If that were the case, then the court's failure to instruct the jury on the effect of a partial loss would be erroneous. However, the structure was found to be dangerous and the fire necessitated the razing of the structure. Consequently, we find that the court was warranted in instructing the jury as to the amount of compensatory damages awarded where there is a total loss.

III.

Appellant maintains that the jury was prejudiced by the trial court's failure to include an instruction on the defense of material misrepresentations and omissions, which, if present, void the policy.

Based upon the evidence presented and particularly in light of the fact that appellant's agent bound coverage prematurely and did not inspect the property prior to binding coverage, as required, and failed to ask the insured specific questions regarding the risks associated with the property, the trial court properly declined to instruct the jury on the defense of material misrepresentations and omissions. Moreover, as stated previously, the materiality of information is dictated by the insurer. Thus, the fact that the insured did not offer such information on his own initiative does not negate the insurer's duty to ask appropriate questions.

ASSIGNMENT OF ERROR NO. IV:

THE JURY VERDICT WAS INFECTED BY PASSION AND PREJUDICE AND MUST BE VACATED.

IV.

It is well-settled that the "parties [to a lawsuit] are entitled to have the issues of fact submitted to and determined by the jury uninfluenced in its deliberation by passion or prejudice." *Cleveland R. Co. v. Crooks* (1935), 130 Ohio St. 255, 257. The terms "passion" and "prejudice" indicate that a jury was swayed by its emotions and have been defined as follows:

* * * "Passion" means moved by feelings or emotions, or may include sympathy as a moving influence without conscious violation of duty. "Prejudice" includes the forming of an opinion without due knowledge or examination. *Alabama Gas Co. v. Jones*, 244 Ala., 413, at p. 418, 13 So. (2d), 873; *Valdez vs. Glenn*, 79 Wyo., 53, at p. 63, 330 P. (2d). 309.

Yerrick v. East Ohio Gas Co. (1964), 119 Ohio App. 220, 226.

Appellant contends the introduction of evidence pertaining to its agent's (Veith) liability insurance as well as the improper conduct of appellee's counsel require the verdict to be vacated.

During the direct examination of appellant, appellant made reference to the fact that the insurer's agent carried liability insurance, when he stated, over objection, that:

* * * I asked him [agent] if he had insurance to cover this problem - * * *

He said he did and he was covered by Nationwide. And I said, well, we probably would see you in Court.

In general, Evidence Rule 411 excludes evidence that a person was or was not insured unless it is being offered for another purpose, such as proof of agency, ownership, control or bias or prejudice of a witness. Therefore, "[t]estimony that the defendant in an action for negligence is insured * * * or that the defense is conducted by an insurance company, is incompetent, and so dangerous as to require a reversal, even when the court strikes it from the record and directs the jury to disregard it, *unless it clearly appears that it could not have influenced the verdict*." *Wilson v. Wesler* (1927), 27 Ohio App. 386, 389-90.

(Emphasis added).

In the instant case, the insurer's agent was dismissed as a party defendant while the trial was in process. The jury was told that Nationwide stipulated that it was responsible for whatever its agent did in connection with these proceedings. Therefore, although the interjection of evidence pertaining to liability insurance was improper, its admission could not have influenced the verdict since the agent was no longer a defendant and since Nationwide stipulated that it was liable for its agent's acts. Under these circumstances, we find that the jury was not prejudiced.

Appellant next contends that the jury was inflamed by the alleged misconduct of appellee's counsel. At the deposition of Veith (Nationwide's agent) appellant's counsel repeatedly objected to questions posed and in doing so interjected a synopsis of what the witness allegedly testified to®5¯ and on one occasion told Veith not to answer a particular question if he did not understand it.®6¯ At trial, these portions of the depositions were read into evidence, which appellant maintains is prejudicial error. However, we find that there was no error in admitting this evidence. The deposition itself reveals that *appellant's counsel* acted improperly by repeatedly interrupting the questioning and in providing "clarifications" to the agent's testimony. See, *Smith v. Klein* (Mar. 21, 1985), Cuyahoga App. No. 48749, unreported. Although this issue was elaborated on at trial, the jury was entitled to be aware of the conduct of counsel to determine whether the witnesses' statements merely reflected what counsel "suggested." As stated in *Smith, supra*,

Footnote 5 For instance, appellant's counsel objected and stated that the witness "testified there was no insurance until it was moved to the new location on a foundation. * * * [a]nd the purpose of my objection was that he has testified that he never looked at any of the houses until after he bound coverage. And that coverage wouldn't be bound until that period of time when the new house was on the new foundation." (Emphasis added). Although the witness did say that the house would not be insured until "it was on the lot itself, on the foundation," he later admitted that he did bind insurance prematurely.

Footnote 6 After the question was posed, and before the witness had a chance to answer, appellant's counsel stated:

He will explain it. Don't answer. He doesn't want you to answer any question that you don't understand.

The witness then responded: "I don't understand what you're saying."

it is not the function of counsel to act as a puppetmaster, offering his client's proffered answer in lieu of the deponent's answers. The purpose of a deposition is to probe the mind of the deponent, not to elicit selfserving answers from counsel.

Appellant also contends that appellee's counsel made unwarranted charges and personal attacks against appellant's counsel, which, in the absence of a proper instruction to the jury, constitutes prejudicial error. In his closing argument appellee's counsel alludes that the comments made by appellant's counsel at Veith's deposition were "designed to hide the truth" and had the "effect of coaching a witness on what's appropriate to say." Appellee also stated during rebuttal argument that

* * * what it really comes down to is they want you to disregard the law and let them walk out of here, because he is attractive and makes a nice impression.

Finally, appellee suggested that Nationwide had "buried" photographs depicting the condition of the house in question.

Counsel may comment on the parties or opposing counsel's conduct and "may persuade and advocate to the limit of his ability and enthusiasm so long as he does not misrepresent evidence or go beyond the limits of propriety set upon his arguments by the trial judge in his sound discretion." *Hall v. Burkert* (1962), 117 Ohio App. 527, 529-30. Where the unwarranted charges are of a *scurrilous* character, failure to admonish the attorney and promptly instruct the jury constitutes prejudicial error. *Plas v. Holmes Const. Co.* (1952), 157 Ohio State 95.

Although the conduct of appellee's counsel is not to be condoned, it was not of such a scurrilous character as to warrant a reversal. Moreover, on cross-examination Veith admitted that photographs he had taken of the homes he insured (other than the smaller colonial) were sent to Nationwide, but were no longer in existence. He further stated that Nationwide does not have a policy of destroying photographs. Although the use of the word "buried" is strong, it can nevertheless be inferred that Nationwide "misplaced" the photographs. Under these circumstances, we find that appellant's fourth assignment of error has no merit.

Judgment reversed in part and affirmed in part.

This cause is reversed in part and affirmed in part.

It is, therefore, considered that said appellant(s) recover of said appellee(S) their costs herein.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate

pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

ANN McMANAMON, P.J., CONCURS.

KRUPANSKY, J., CONCURS IN JUDGMENT ONLY.

WILLAM B. BROWN, retired Justice of The Supreme Court of Ohio, sitting by assignment.

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

35 Ohio St.3d 4 (Ohio 1988)

517 N.E.2d 892

OFFICE OF DISCIPLINARY COUNSEL

v.

LEVIN.

D.D. Nos. 86-22 and 87-3.

Supreme Court of Ohio.

January 6, 1988

[517 N.E.2d 893] Hearings were held before a panel of the Board of Commissioners on Grievances and Discipline on January 18, June 28, and October 24, 1985. Relator dismissed Counts I, X, and XI during the proceedings of June 28. Count IX was also dismissed on October 24. Counts IV, V, VI, VII and VIII were dismissed by the board. The allegations in the remaining counts involve respondent's actions during the course of and in response to a malpractice suit filed against him by attorney Richard Neller on behalf of Salvador Pena, Melquiades Pena, and Adrian Pena.

Counts II and III of the complaint as amended specified that respondent was the defendant in a matter styled Salvador Pena et al. v. Jack M. Levin, Sandusky C.P. No. 80-CV-942. The suit resulted from the representation respondent had provided Salvador and Melquiades Pena as defendants in a murder prosecution. On April 15, 1982, a deposition was held in the Sandusky County Courthouse wherein respondent, the party-deponent, represented himself with the assistance of his son and associate, Dennis Levin. As this proceeding progressed, respondent's language and demeanor became increasingly abusive. Respondent repeatedly threatened, among other things, to take his questioner's

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mustache off his face, to give Neller the beating of his life, to slap him across his face, and to break his head. Respondent also accused Neller of behaving in an undignified and obscene fashion. Respondent addressed Neller in a variety of expletives **[517 N.E.2d 894]** and otherwise unprofessional terms, including, but not limited to: "lying son-of-bitch," "asshole," "child and a punk," "fat slob," "fucker" and "cocksucker." The proceeding eventually deteriorated to the point that a local common pleas court judge threatened to eject the parties from the courthouse.

Disciplinary Counsel charged that the foregoing conduct violated DR 1-102(A)(5) (engaging in conduct prejudicial to the administration of justice), DR 1-102(A)(6) (engaging in conduct that adversely reflects on one's fitness to practice law), DR 7-106(C)(1) (stating a matter before a tribunal that one has no reasonable basis to believe is relevant or that will not be supported by admissible evidence), DR 7-106(C)(2) (asking any question before a tribunal that one has no reasonable basis to believe is relevant and that is intended to degrade a witness or other person), DR 7-106(C)(4) (asserting a personal opinion before a tribunal as to the justness of a cause), DR 7-106(C)(5) (failing to comply with known local customs of courtesy or practice while appearing before a tribunal), and DR 7-106(C)(6) (engaging in undignified or discourteous conduct while appearing before a tribunal).

The board's reaction to the evidence pertaining to Counts II and III was unanimous indignation. The board found respondent's behavior during the Neller deposition to be unprofessional. While the board acknowledged that respondent's adversary may have contributed to this already volatile situation, the board nevertheless determined respondent to have violated DR 1-102(A)(5), 1-102(A)(6), 7-106(C)(2), 7-106(C)(5), 7-106(C)(6) and 7-106(C)(7). Having so found, the board recommended that respondent be given a public reprimand and that the cost of the proceeding be taxed to him.

D.D. No. 87-3

Relator filed a second complaint against respondent on August 13, 1985, specifying another three counts of misconduct. This matter was heard by a panel of three board commissioners on June 20 and November 14, 1986. All the specifications involve respondent's representation of Lawrence Bennice.

Count I of this complaint accuses respondent of having fraudulently induced Bennice to execute a quit-claim deed to Bennice's residence in Port Clinton, Ohio. Bennice had engaged respondent during the latter part of 1980 to represent him in a divorce action. Incident to the divorce action, Bennice agreed to pay respondent $5,000 by signing a note which identified neither the due date nor the payee. Bennice later agreed to pay respondent $10,000 for representing him in connection with a felony charge arising from an alleged assault upon Bennice's wife.

Bennice apparently paid respondent $4,000 toward the cost of his legal fees. After a July 10, 1981 hearing in the

divorce action, respondent and Dennis Levin took Bennice with them to obtain a legal description of the property Bennice owned. They then drove Bennice to his home which was locked and vacant. (Bennice's wife had moved out, but had secured an order restraining Bennice from entering the residence.) Upon their arrival, respondent gave Bennice a clipboard with some papers on it and told Bennice to sign them so that he would be able to

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get back in his house. Bennice did so after he was encouraged to "trust" respondent. On August 4, 1981, respondent met again with Bennice and directed him to draft a document which reads:

"I here by [sic] give Jack Levin a security interest for my fees and expenses in my divorce cases and felony case."

The felony trial commenced on November 15, 1981. At the disciplinary hearing, respondent explained that after the first day of the felony trial, Bennice had announced that respondent would never see him again if he were found guilty. The criminal action was dismissed. Nevertheless, on November 17, 1981, respondent caused a quit-claim deed transferring title of Bennice's residence to himself to be filed as an exempt transaction. The deed was purportedly notarized on August 4, 1981 by Dennis Levin with Bennice's signature being witnessed by Dennis and respondent's **[517 N.E.2d 895]** secretary, who was also his daughter. (Respondent admitted that his daughter was not present when this deed was executed, but contends Bennice's signature was acknowledged during a subsequent telephone conversation. Respondent's daughter did not testify before the panel.)

Pursuant to Count I of the second complaint, Disciplinary Counsel charged that respondent had violated DR 1-102(A)(3) (illegal conduct involving moral turpitude), DR 1-102(A)(4), 1-102(A)(5), and 1-102(A)(6).

In addition to incorporating the averments of Count I, Count II alleged that the market value of Bennice's interest in his residence substantially exceeded that owed respondent as of the date the deed was filed. (The most conservative evaluation of Bennice's home was $85,000. A mortgage of $34,000 to $38,000 was outstanding in 1981 and Bennice's equity was subject to his wife's half interest.) It was further submitted that the deed did not contain any conditions under which the property could be returned to Bennice, although the exemption statement, supplied contemporaneously, reflected the transaction was to provide security. Count II also specified that respondent had not explained the terms of this transaction to Bennice and that, consequently, the transfer was without Bennice's consent or knowledge. Disciplinary Counsel charged that these actions violated DR 7-101(A)(3), 5-104(A) (entering into business transaction with client without full disclosure), and DR 2-106(A) (charging a clearly excessive fee).

Finally, Count III charged that after gaining title to Bennice's home through false pretenses, respondent refused to reconvey the property and Bennice was forced to sue respondent over the transaction. A jury verdict rendered in Bennice's favor was later, on appeal, reversed and remanded for a new trial. The $11,000 award to respondent on his counterclaim for fees, however, remained intact. Disciplinary Counsel charged that this conduct violated DR 7-101(A)(3).

Upon review of the second complaint, it was the opinion of the board that respondent's actions were tantamount to deceit and fraud and thereby adversely reflected on his fitness to practice law. Thus, of the infractions specified, the board determined that respondent had violated DR 1-102(A)(4) and 1-102(A)(6), as well as DR 7-101(A)(3). Due to the severity of respondent's offense, the board recommended that respondent be indefinitely suspended from the practice of law.

This court granted relator's motion to consolidate the matters raised in these two complaints on February 27, 1987, such that all are now before us.

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J. Warren Bettis, Disciplinary Counsel, and Mark H. Aultman, Columbus, for relator.

Jack M. Levin, pro se.

Dennis P. Levin, Beachwood, for respondent.

PER CURIAM

This court finds that respondent committed the disciplinary violations identified by the board. Accordingly, this court adopts the board's recommendations. Respondent is hereby publicly reprimanded for the misconduct found by the board in D.D. No. 86-22. It is further ordered that respondent be indefinitely suspended from the practice of law in the state of Ohio for the misconduct found by the board in D.D. No. 87-3. Costs taxed to respondent.

Judgment accordingly.

MOYER, C.J., and SWEENEY, LOCHER, HOLMES, DOUGLAS and HERBERT R. BROWN, JJ., concur.

WRIGHT, J., concurs in judgment only.