VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 20-CV-00931

Julia Shannon-Grillo v. James Freeman, et al

ENTRY REGARDING MOTION

Title: Motion in Limine (Motion: 3)
Filer: Thomas P. Simon
Filed Date: February 13, 2023

This is a dental malpractice case in which negligence is conceded but damages are disputed. Plaintiff has filed a motion in limine raising several issues. The court will address each in turn.

Insurance

Plaintiff wishes to present evidence about insurance in relation to Defendant's expert. The argument is that he is insured by OMSNIC,[1] "which is owned by its insureds, making him a part-owner of the company," and that he admitted he has a potential financial interest in the outcome of the case. Motion at 3. In addition, the expert testified that he has worked as a consultant for OMSNIC on about 30 cases, and for no other clients. Plaintiff argues that this is evidence of potential bias and should be admissible, citing Ede v. Atrium South OB-GYN, Inc., 642 N.E.2d 365 (Ohio 1994). Defendant argues that a trial court opinion from this court reaching the opposite

[1] This apparently stands for Oral and Maxillofacial Surgeons National Insurance Company.

conclusion should decide the issue. Reininger-Severin v. Hardy, No. S0015-03 CnC, 2005 WL 5895199 (Vt. Super. Ct. June 30, 2005) (Norton, J.).

The usual rule is to exclude mention of insurance, although the court is quite sure that most jurors are smart enough to know that insurance is often involved in tort cases. That is why the court has a standard instruction telling the jury not to consider whether either side has any insurance that might have paid, or might in the future pay, any damages in the case. The question is whether despite the potential prejudice from the mention of insurance, there are appropriate reasons to allow it. *See* V.R.E. 411. "We have . . . recognized certain exceptions to the rule against the introduction of insurance matters: [including] when . . . the fact of insurance is relevant on the issue of a witness' interest in the outcome of the litigation. . ." Hardy v. Berisha, 144 Vt. 130, 135–36 (1984); *see also* Salm v. Moses, 918 N.E.2d 897, 898 (N.Y. 2009) (noting that in an earlier case "it was proper to allow cross-examination of a physician regarding the fact that the defendant's insurance company retained him to examine the plaintiff in order to show bias or interest on the part of the witness.").

There are two issues here. One is the ownership issue, and the other is the pattern of working exclusively for the same company. As to the latter, we regularly allow questions to experts about how often they have worked with a certain lawyer or client, and the court sees no reason why that should be barred here. The fact that the expert has a motive to keep the work coming certainly goes to potential bias. This justifies allowing the questioning on this point. *See, e.g.*, Charter v. Chleborad, 551 F.2d 246, 248 (8th Cir. 1977) ("the fact that defendant's insurer employed Mr. Alder was clearly admissible to show possible bias of that witness."); Ray v. Draeger, 353 P.3d 806, 812

(Alaska 2015) (noting that courts have allowed such evidence "where an expert witness was employed by and consulted for an insurance company and 10–20% of the expert's practice consisted of reviewing records for insurance companies, and where an expert was employed by a consulting firm that derived roughly 30% of its income from insurance companies"); Golden v. Kishwaukee Cmty. Health Servs. Ctr., Inc., 645 N.E.2d 319, 325 (Ill. App. Ct. 1994) (reversing exclusion of examination about expert's ties to defendant's malpractice insurance exchange similar to OMSNIC: "Dr. Conner was shown to have more than a cursory interest in this case. Dr. Conner performed significant economic services for the Exchange. . ."); Henning v. Thomas, 366 S.E.2d 109, 113 (Va. 1988) (reversing trial court for excluding cross-examination attempting to show that the expert "was a 'doctor for hire,' who was part of a nationwide group that offered themselves as witnesses, on behalf of medical malpractice plaintiffs" and noting that "[t]his was a classic case of an effort to establish bias, prejudice, or relationship"). Any prejudice can be addressed by the court's instructions.

As to the ownership issue, the answer is "it depends." As Judge Norton suggested, some courts have formally adopted a "substantial connection" test to analyze this question. Reininger-Severin, ,2005 WL 5895199, Vermont has not adopted such a test, but the court agrees with the general principle: mere membership/ownership in OMNSIC is not sufficient without more information The record does not disclose what benefit the expert might get from OMSNIC depending upon the result of this case. How much money is at issue here? Is it enough to affect the value of the company? What ownership interest does the expert have? How might any result here affect the expert's financial interest? Without this information the court cannot determine whether there is

truly a potential bias justifying its mention. *See, e.g.*, Salm, 918 N. E. 2d at 899 (trial court reasonably found that "a $100 benefit" to the expert "was likely 'illusory' and that the possibility of bias was attenuated. . ."). Thus, the court will reserve ruling on whether this issue may be mentioned. "[A] voir dire of an expert outside the presence of the jury can better aid the court in exploring the potential for bias." Id.; *see also* Browne v. Hertz, 19 Misc. 3d 1105(A), at *3, *7, 859 N.Y.S.2d 901 (N.Y. Sup. Ct. 2008) (allowing questioning about ties to OMSNIC after voir dire outside of jury's hearing).

Wrong Tooth

Plaintiff seeks to bar evidence that her expert himself once removed the wrong tooth. She argues that because negligence is not at issue, this is not relevant. Defendant argues that it is relevant to the expert's experience with damages. An expert can certainly be cross-examined about the basis for his opinions on damages, and his own experiences with the damage caused by a similar error may well be relevant. The court will allow it.

Parents' Expenses

Plaintiff asks the court to expand the law to allow her to seek her parents' damages, citing law from other jurisdictions. Until the Legislature or the Vermont Supreme Court direct otherwise, this court is bound by the current state of the law. *See* Trapeni v. Walker, 120 Vt. 510, 516 (1958) ("When a minor child is injured by the negligent act of a third party, two causes of actions immediately spring into existence: first the right of action by the child itself for the personal injuries inflicted upon it; and second, a right of action to the parent for consequential damages, such as loss of services

and expenses, caused by the injury to the child. The right of the parent to recover is independent of the right of the child."); Savard v. Cody Chevrolet, Inc., 126 Vt. 405, 412 (1967) ("It not being established that the infant plaintiff became personally obligated to pay these medical bills . . . , it follows that the lower court was in error in allowing the medical bills to be introduced into evidence.").

Per Diem Argument

The court agrees that a plaintiff may make an argument to the jury suggesting a certain dollar amount for future damages per day. There is nothing that restricts counsel from making such proposals to a jury in Vermont. "The jury can benefit by guidance offered by counsel in closing argument as to how they can construct" damages. Debus v. Grand Union Stores of Vermont, 159 Vt. 537, 540 (1993).

Electronically signed on March 17, 2023 pursuant to V.R.E.F. 9(d).

Helen M. Toor
Superior Court Judge