

DAWN MCMILLION

NO. 15-CA-578

VERSUS

FIFTH CIRCUIT

EAST JEFFERSON GENERAL HOSPITAL

COURT OF APPEAL

STATE OF LOUISIANA


ON APPEAL FROM THE OFFICE OF WORKERS' COMPENSATION,
DISTRICT 7
STATE OF LOUISIANA
NO. 14-6631
HONORABLE SHANNON BRUNO BISHOP, JUDGE PRESIDING

May 26, 2016

COURT OF APPEAL
FIFTH CIRCUIT

FILED MAY 26 2016

MARC E. JOHNSON
JUDGE


Cheryl Quirk Landrum

Panel composed of Judges Marc E. Johnson,
Robert A. Chaisson, and Hans J. Liljeberg

CHAISSON, J., DISSENTS WITH REASONS

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AFFIRMED



Defendant/Appellant, East Jefferson General Hospital (hereinafter referred to as “EJGH”), appeals a judgment awarding supplemental earnings benefits in favor of Plaintiff/Appellee, Dawn McMillion, from the Office of Worker’s Compensation, District “7” (hereinafter referred to as “the OWC”). For the following reasons, we affirm the judgment.

FACTS AND PROCEDURAL HISTORY

On October 22, 2012, Ms. McMillion, a registered nurse employed by EJGH, injured her elbow against a doorframe while exiting one of the hospital’s medication rooms. The accident was reported to EJGH that same day. The parties do not dispute that the injury occurred, and that it was sustained while Ms. McMillion was working in the course and scope of her employment. EJGH began paying Ms. McMillion temporary total disability payments on November 5, 2012.

In the course of her treatment, Ms. McMillion received medical services from multiple providers, include Dr. Eric George, who performed two surgeries to her arm to repair ulnar nerve damage. On March 12, 2014, Dr. George declared that Ms. McMillion had reached maximum medical improvement. Following receipt of Dr. George's letter of maximum medical improvement, EJGH terminated Ms. McMillion's temporary total disability payments and began paying her only supplemental earnings benefits.

Subsequently, EJGH assigned a vocational rehabilitation counselor, Danielle Rhodes of Bailey-McCaffrey, LLC (hereinafter referred to as "Bailey-McCaffrey"), to Ms. McMillion's case. Ms. Rhodes met with Ms. McMillion several times between April and September of 2014. In the course of those meetings, Ms. Rhodes collected information regarding Ms. McMillion's educational background and work experience. Ms. Rhodes also worked with Dr. George to identify jobs suitable for Ms. McMillion. On September 4, 2014, EJGH terminated all of Ms. McMillion's remaining benefits, even though Ms. McMillion had not secured employment, based upon the presumption it had offered Ms. McMillion meaningful vocational rehabilitation.

On October 1, 2014, Ms. McMillion filed a Disputed Claim for Compensation against EJGH, alleging wrongful termination of supplemental earnings benefits. The basis of Ms. McMillion's claim was that EJGH failed in its duty to provide vocational rehabilitation to her, as required by La. R.S. 23:1221, because the jobs identified by Ms. Rhodes were not available at the time Ms. McMillion received notification of the jobs, the jobs failed to meet the minimum 90% pre-injury wage requirements, or both.

As part of the discovery process, Ms. McMillion propounded interrogatories and requests for production of documents seeking, among other things, the

documents EJGH intended to use as exhibits at trial. On February 25, 2015, EJGH answered the discovery interrogatories and requests. In those answers, EJGH identified Ms. Rhodes as an expert witness in the area of vocational rehabilitation and stated its intent to introduce “all medical reports of the claimant...the claimant’s medical file, and reports of Bailey McCaffery.” In response to the request for the production of all of the documents which EJGH intended to introduce as evidence, EJGH provided a redacted claims and personnel file and noted that it was not in possession of all of the exhibits at that time. EJGH reserved the right to supplement its exhibit list and forward all of the information upon receipt.

In a letter dated March 24, 2015, Ms. McMillion’s attorney notified EJGH of the receipt of unidentified documents and further requested the production of all the previously requested documents and a claims file without redactions. On April 9, 2015, EJGH supplemented its initial discovery responses with additional documentation.¹ By the end of April 2015, both parties submitted pre-trial statements, which detailed proposed stipulations, issues to be litigated, contentions, witnesses, and exhibits. Both parties identified representatives from Bailey-McCaffrey, specifically Ms. Rhodes, as witnesses. In her statement, Ms. McMillion did not list any outstanding discovery or depositions to be taken prior to trial.

The trial on the matter was held on May 4, 2014. At the trial, Ms. McMillion’s attorney made an oral Motion to Strike Evidence and Witnesses, seeking the exclusion of Ms. Rhodes’s testimony and any documentation provided by Bailey-McCaffrey. The oral motion was granted. The OWC excluded any written documentation from Bailey-McCaffrey, and Ms. Rhodes was only allowed

¹ According to Ms. McMillion, EJGH did not include any reports or documentation from Ms. Rhodes or Bailey-McCaffery with the supplementation.

to testify as a fact witness. At the conclusion of the trial, the matter was taken under advisement, and post-trial memoranda were allowed.

On July 30, 2015, the OWC rendered its judgment. Utilizing the test set forth by the Louisiana Supreme Court in *Banks v. Indus. Roofing & Sheet Metal Works*, 96-2840 (La. 7/1/97); 696 So.2d 551, 557, the OWC determined that Ms. McMillion met her burden of showing she was unable to earn 90% or more of her average pre-injury wages. It also determined that EJGH met its burden of showing the existence of jobs within Ms. McMillion's physical capabilities and geographical region. However, the OWC found that EJGH failed to show the amount of wages Ms. McMillion could be expected to earn at any of the jobs, or that an actual position was available for a particular job at the time Ms. McMillion received the notification. Because EJGH failed to meet its evidentiary burden, the OWC awarded Ms. McMillion supplemental earnings benefits for a period of 26 weeks at \$605 per week.² On August 10, 2015, Ms. McMillion filed a Motion for New Trial, seeking the award of penalties and attorney's fees. The motion was denied on the same date. The instant appeal of EJGH followed.

ASSIGNMENT OF ERROR

On appeal, EJGH alleges the trial court erred in excluding the expert testimony of Ms. Rhodes and her vocational rehabilitation reports at trial.

LAW AND ANALYSIS

EJGH alleges the trial court erred when it did not allow Danielle Rhodes, a vocational rehabilitation counselor, to testify as an expert in the field of vocational rehabilitation. EJGH argues that Ms. Rhodes should have been allowed to qualify as an expert in the field of vocational rehabilitation, and her report should have been allowed into evidence. EJGH contends that Ms. McMillion failed to follow

² Because Ms. McMillion secured new employment on March 1, 2015, with wages 90% or greater than her pre-injury wages, her claim was limited to 26 weeks of benefits at \$605.

the proper procedure in seeking relief regarding discovery, in that she never filed a motion to compel any missing discovery. Additionally, EJGH contends that Ms. Rhodes's testimony was not a surprise to Ms. McMillion because Ms. Rhodes was listed as a witness on the pre-trial order. EJGH further argues that Ms. Rhodes testified that she provided Ms. McMillion with numerous job leads that were approved by Dr. Eric George, and that Ms. McMillion applied for some of these positions, which means that Ms. McMillion did receive the documentation.

Ms. McMillion asserts that the OWC properly excluded Ms. Rhodes as an expert and any documentation related to that testimony. She contends that EJGH never produced any report or other documentation prior to trial that would have indicated its intent to offer the expert testimony of a vocational rehabilitation counselor. As a result, Ms. McMillion contends that the OWC was correct in ruling in her favor on the basis that EJGH failed to prove the availability of positions that would pay her, at least, 90% of her pre-injury average weekly wage through competent evidence.

At trial, Ms. McMillion made an oral Motion to Strike Evidence and Witnesses in an effort to exclude the testimony and documentation EJGH intended to present to the court from Ms. Rhodes. The OWC initially heard the motion off of the record. However, Ms. McMillion and EJGH subsequently reargued the motion on the record. Ms. McMillion argued that any documentation produced by Bailey-McCaffrey, Ms. Rhodes's employer, should have been excluded from the record because EJGH did not produce any documentation, reports or curriculum vitae of any witness from Bailey-McCaffrey during discovery. Ms. McMillion, likewise, argued that Ms. Rhodes's live testimony should have been excluded. Conversely, EJGH argued that Ms. McMillion declared in her pre-trial statement there was no outstanding discovery or depositions to be taken, and she could not

contend she wanted that information on the morning of trial. EJGH then urged the OWC to allow Ms. Rhodes testify as a fact witness.

On the record, the OWC judge did not explicitly make a ruling on the admissibility of the documentation; however, it is presumed that the documentation associated with Ms. Rhodes's expert testimony was stricken during the off-the-record hearing. However, the OWC judge did state on the record that Ms. Rhodes would not be allowed to testify as an expert on the basis that Ms. McMillion did not receive the expert report. The record does not reflect that EJGH attempted to proffer the excluded expert testimony of Ms. Rhodes or the documentation that would have been associated with it.

In order for this Court to review evidence deemed inadmissible by the trial court, the party must comply with La. C.C.P. art. 1636 to preserve the evidence. *Tatum v. United Parcel Service, Inc.*, 10-1053 (La. App. 5 Cir. 11/15/11); 79 So.3d 1094, 1104. It is well-settled that error may not be predicated upon a ruling that excludes evidence, unless a substantial right of a party is affected and the substance of the evidence was made known to the court by counsel. *Id.* at 1105. In those instances, it is incumbent upon the party who contends the evidence was improperly excluded to make a proffer; and if the party fails to do so, then that party cannot contend such exclusion was erroneous. *Id.* Without a proffer, an appellate court cannot ascertain the nature of the excluded evidence. *Abadie v. Metro. Life Ins. Co.*, 00-344 (La. App. 5 Cir. 3/28/01); 784 So.2d 46, 86, writ denied, 01-1735 (La. 12/14/01); 804 So.2d 644, citing *McLean v. Hunter*, 495 So.2d 1298, 1305 (La. 1986).

In *Abadie, supra*, this Court addressed a similar situation where the trial court excluded evidence because the defendant, ACL, failed to respond to the plaintiffs' discovery requests. At the trial on the merits, ACL failed to proffer the

excluded evidence into the record. On appeal, ACL argued that the trial court erred by imposing a discovery sanction through the exclusion of its evidence. Although this Court found that the sanction was excessive, we also found that ACL had an adequate remedy on appeal to have the exclusion of the evidence reviewed. Because ACL chose not to introduce the excluded evidence at the trial in the form of a proffer for appellate review, this Court declined to reverse the outcome of the trial because of the excluded evidence.

Other circuits have held similar rulings when considering the exclusion of evidence in the absence of a proffer. In *Lavespere v. Lavespere*, 07-2171 (La. App. 1 Cir. 5/2/08); 991 So.2d 81, the defendant argued that the trial court erred in refusing to allow him to present evidence because he was late in returning to court following a lunch recess. On appeal, the Louisiana First Circuit noted the defendant made no effort to proffer the excluded evidence. The court found that when a trial judge rules that the testimony of a witness is inadmissible, an offer of proof or proffer should be made, and held that in the absence of a proffer, a party cannot complain that an exclusion was an error. *Id.* at 86.

In *Briscoe v. Briscoe*, 25,955 (La. App. 2 Cir. 8/17/94); 641 So.2d 999, the plaintiff argued that the trial court erroneously excluded witnesses whose identities were not disclosed to opposing counsel prior to trial. On appeal, the Louisiana Second Circuit held it could not address whether any alleged exclusion prejudiced the plaintiff and found that failure to proffer improperly excluded evidence results in a waiver of the right to complain of the exclusion on appeal. *Id.* at 1004.

In this matter, neither Ms. Rhodes's expert testimony nor her vocational rehabilitation reports were proffered by EJGH at the trial. Consequently, we have no way of ascertaining exactly what evidence EJGH intended to introduce to the OWC through the expert testimony or documentation. Furthermore, we cannot

determine whether the excluded evidence would have satisfied EJGH's burden to show the amount of wages Ms. McMillion could have been expected to earn at any of the jobs or that an actual position was available for a particular job at the time Ms. McMillion receive the notification from Ms. Rhodes. Because EJGH failed to proffer either Ms. Rhodes's expert testimony or the vocational rehabilitation reports, we decline to address the merits of EJGH's assignment of error.

DECREE

For the foregoing reasons, we affirm the judgment of the OWC in favor of Dawn McMillion and against East Jefferson General Hospital. East Jefferson General Hospital is assessed the costs of this appeal.

AFFIRMED

DAWN MCMILLION

NO. 15-CA-578

VERSUS

FIFTH CIRCUIT

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COURT OF APPEAL

STATE OF LOUISIANA

RAC

CHAISSON, J., DISSENTS WITH REASONS

In my opinion, it was an abuse of discretion for the trial court to exclude the expert testimony of the vocational rehabilitation expert, and her reports, from the trial of this matter. I respectfully disagree with the majority's decision to decline to address the merits of EJGH's assignment of error regarding the exclusion of this evidence due to defendant's failure to proffer this evidence at trial.¹

The rationale for the rule of proffer is that an appellate court is unable to review the appropriateness of a trial court's ruling excluding evidence unless the substance of that evidence is made known to the appellate court. In my opinion, when the trial court's ruling is based upon an objection to the content, or some characteristic, of the excluded evidence, then the rationale for the rule of proffer is implicated and strict adherence to the rule is necessary. However, when the trial court's ruling is based upon an alleged discovery violation, as is the case here, the rationale for the rule is not implicated and this court is not prevented from reviewing the appropriateness of the trial court's ruling without knowing the substance of the excluded evidence. In my opinion, in such cases, application of the rule of proffer is discretionary with the appellate court, not a mandatory rule that, rather than recognizing the appellate court's limitations in reviewing

¹ As will be discussed later in this dissent, I am also not convinced that there was a violation of the rule of proffer by EJGH in this case.

evidentiary rulings based upon the content of the evidence, becomes a sanction against a party for failure to strictly adhere to the rule of proffer.²

Under the facts of this case, even if EJGH failed to strictly comply with the rule of proffer, I would exercise this court's discretion and review the merits of EJGH's assignment of error. I find that when the merits of the assignment of error are reviewed, I am drawn to the conclusion that the trial court abused its discretion in excluding the expert testimony and reports of EJGH's vocational rehabilitation expert.

On the morning of trial, before the commencement of trial, claimant's counsel made an off-the-record oral motion to strike the testimony and reports of EJGH's vocational rehabilitation expert. Because this motion was made orally and off-the-record, we are not privy to the exact arguments that claimant's counsel made to the court in support of his motion. Upon commencement of trial, the transcript contains what is apparently a limited summary of the arguments made to the trial court regarding this motion. In this limited summary, claimant's counsel appears to argue that the vocational rehabilitation expert's testimony and "*any* documentation produced by Bailey-McCaffery" be struck because "they failed to produce *any* documentation [from Bailey-McCaffery]" in discovery. (emphasis added). To the extent that claimant's counsel intended to inform the trial court that claimant or her attorney received *no* documentation from the

² I fully recognize that there may be cases, such as the factually and procedurally distinguishable *Abadie* case cited by the majority, where it is appropriate for the appellate court to choose to apply the rule of proffer even when the trial court's ruling is based upon a discovery violation. *Abadie* was a complex asbestos exposure lawsuit in which the consolidated claims of 129 plaintiffs culminated in a seven month jury trial. Plaintiffs filed a motion to compel due to a defendant's refusal to respond to discovery, which resulted in the trial court excluding that evidence. The defendant took an emergency writ to this Court. In denying the defendant's writ, this Court specifically instructed the defendant that it should proffer the disputed evidence in the trial court, yet defendant chose not to follow the Court's instructions. This Court appropriately declined to upset the result of the seven month jury trial where defendant had failed to proffer the excluded evidence. See *Abadie v. Metro. Life Ins. Co.*, 00-344 (La. App. 5 Cir. 3/28/01), 784 So.2d 46, 86-87, writ denied 01-1735 (La. 12/14/01), 804 So.2d 644.

vocational rehabilitation expert, several portions of the record belie this assertion.

Defense counsel argued to the trial court that Ms. Rhodes sent claimant's treating physician, Dr. George, a list of job leads for his approval, and that these lists show that claimant's counsel was sent copies of the lists.³ Furthermore, claimant's testimony at trial that she met with the vocational rehabilitation counselor and applied for the jobs that she was advised of, is conclusive proof that claimant, in one format or another, received the information contained in these lists.⁴ Additionally, in claimant's pre-trial statement filed on April 22, 2015, three weeks prior to trial, claimant lists as an exhibit "[d]ocumentation provided to Plaintiff by vocational rehab counselors." Furthermore, claimant's pre-trial memorandum clearly reveals that claimant's counsel was aware of defendant's burden of proof at trial, and that defendant would need to meet this burden through the testimony of the vocational rehabilitation expert; yet, claimant indicated in her pre-trial statement that there were no outstanding discovery issues. EJGH's pre-trial statement revealed Ms. Rhodes as a witness, and claimant's pre-trial statement listed a representative of Bailey-McCaffery (Ms. Rhodes's employer) as a witness. Despite claimant having met with Ms. Rhodes and receiving job leads from her, knowing that Ms. Rhodes was the vocational rehabilitation counselor and that her testimony was crucial to EJGH's burden of proof at trial, and allegedly having never received any documentation from Ms. Rhodes, claimant's counsel chose not to depose

³ The record shows that these lists of job leads, dated July 14, 2014, August 5, 2014, August 29, 2014 and September 1, 2014, were also attached to EJGH's pre-trial memorandum filed with the trial court and copied to claimant's counsel on May 1, 2015, three days prior to the May 4, 2015 trial.

⁴ Claimant acknowledges that she obtained a new job through her own efforts on March 1, 2015, so presumably she had received the job lead information from the vocational rehabilitation expert and applied for those other jobs prior to that date.

Ms. Rhodes and further chose not to file a motion to compel the production of the allegedly missing documentation. Instead, claimant's counsel waited until the morning of trial and urged a motion to strike, implying that claimant was somehow prejudiced by the alleged failure to receive documentation from Ms. Rhodes.

Since claimant never filed for or received a court order compelling the production of these allegedly missing documents, EJGH was not in violation of any such court order. At best, to the extent that EJGH failed to provide certain documents, it failed to comply with its ongoing obligation to update discovery, not a court order compelling discovery. And as stated above, the record of this matter contradicts any claim by claimant's counsel to have been surprised or prejudiced by any alleged failure of EJGH to produce these documents. Under these circumstances, I am of the opinion that the trial court abused its discretion by imposing the excessive sanction of excluding the expert testimony and reports of EJGH's vocational rehabilitation expert, especially where that testimony was crucial to EJGH's ability to carry its burden of proof.⁵

Lastly, even if the rule of proffer is a mandatory rule to be strictly applied by this Court, I do not believe that EJGH violated the rule of proffer in this case. The rule of proffer requires that *the substance of* the excluded evidence be made known to the court by counsel. *Archangel v. Mayeaux*, 12-696 (La. App. 5 Cir. 5/30/13), 119 So.3d 786, 793 (emphasis added). Therefore, counsel is not required to necessarily provide detailed and specific evidence to the court in order to comply with the rule, as long as the substance of that evidence is made known to the court.

⁵ The basis of the trial court's judgment in favor of claimant was that the "employer did not show the amount of wages that Claimant could be expected to earn in that job and that an actual position was available for that particular job at the time that the claimant received notification of the job."

In this case, the record is clear that Ms. Rhodes was EJGH's vocational rehabilitation expert, and that the parties and the trial court were well aware that the function of such expert is to assist the claimant in obtaining available employment in her locale for which she is qualified at pay equal to at least 90% of her pre-injury wages. In my opinion, this is sufficient knowledge of the substance of Ms. Rhodes's testimony, without knowing the particulars of her testimony, for compliance with the rule of proffer. Likewise, I find that this knowledge is sufficient for this Court to address the merits of EJGH's assignment of error.

The majority points out that "we cannot determine whether the excluded evidence would have satisfied EJGH's burden to show the amount of wages Ms. McMillion could have been expected to earn at any of the jobs or that an actual position was available for a particular job at the time Ms. McMillion received the notification from Ms. Rhodes." I agree. However, in my opinion, EJGH should have been given the opportunity to present that evidence at trial, and it was an abuse of the trial court's discretion to exclude it. I would therefore vacate the judgment of the trial court and remand this matter for a re-trial in which both parties are allowed to submit their evidence. I therefore respectfully dissent from the majority opinion.

SUSAN M. CHEHARDY
CHIEF JUDGE

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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **Uniform Rules - Court of Appeal, Rule 2-20** THIS DAY **MAY 26, 2016** TO THE TRIAL JUDGE, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

A handwritten signature in cursive script, appearing to read "Cheryl Q. Landrieu", written over a horizontal line.

CHERYL Q. LANDRIEU
CLERK OF COURT

15-CA-578

E-NOTIFIED

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