

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

CITY OF WESTLAND,

Plaintiff/Appellee,

18th District Court Case No: 15WE21150A OD
Wayne County Circuit Court No: 15-003652-01-AR

vs.

HUSSEIN ALI CHOUMAN,

HON. CATHERINE L. HEISE

Defendant/Appellant

At a session of said Court, held in the City of Detroit, County of Wayne,

on JUL 21 2015

HONORABLE CATHERINE L. HEISE, Circuit Court Judge

OPINION AND ORDER ON DEFENDANT-APPELLEE'S APPEAL OF MUTUAL

DISCOVERY ORDER OF APRIL 9, 2015

INTRODUCTION

This appeal arises out of the charge of Operating While Impaired, made against the defendant/appellant, Hussein Ali Chouman, by the Plaintiff/Appellee, City of Westland (also referred to hereinafter as the "People"). The Defendant/Appellant volunteered that he would be raising the defense of Gastroesophageal Reflux Disease (hereinafter "GERDS"), and that he intended to call Mr. Ron Henson to offer expert testimony that a reflux episode affected the DataMaster test results. The People then filed a motion to exclude Mr. Henson's testimony or, in

the alternative, requested a *Daubert*¹ hearing under MRE 702. The Plaintiff/Appellee asserts that Mr. Henson's proposed testimony is "junk science" and therefore should be excluded. The lower court set a hearing date in which to determine whether Mr. Henson was qualified as an expert and whether his proposed testimony would be admissible. When Mr. Henson did not appear in the lower court at the date and time set for the hearing, the Defendant/Appellant requested the court to "turn over the facts, data, methodology and opinions upon which Mr. Henson would be testifying" under the "discretion granted to the court pursuant to MRE 705.

Over the objection of the Defendant/Appellant, the trial court entered the Order which forms the basis of this appeal. The Order, dated April 9, 2015, states that

This matter having come before the court upon motion of the Plaintiff, the Defendant having filed his opposition, the Court orders that a Daubert hearing shall occur at the jury trial outside the presence of the jury. It is further ordered that, despite AO-1999-3 and the inapplicability of MCR 6.201, reciprocal discovery is ordered in this case, over Defendant's objection. Request for stay is denied.

The Defendant/Appellant filed an Application for Leave to Appeal on April 30, 2015, and this court issued an Order Granting Stay of Proceedings in the lower court. The Plaintiff/Appellee filed its brief on June 17, 2015, and this court heard oral arguments from both parties on July 14, 2015.

For all the reasons set forth herein, the district court's order granting discovery in this case is REVERSED, and the case is REMANDED for further proceedings consistent with this Opinion.

¹ *Daubert v Merrill Dow Pharmaceuticals*, 509 US 579 (1993)

STANDARD OF REVIEW

If the inquiry requires interpretation of the Michigan Rules of Evidence, an issue of law is presented, which the court reviews *de novo*. *People v Dobek*, 274 Mich App 58, 93; 732 NW2d 546, 570 (2007). Similarly, an interpretation of a court rule is reviewed *de novo*. *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003).

I.

The first issue is whether the order of “reciprocal discovery” entered on April 9, 2015, violates longstanding Michigan law governing discovery in the district courts. The law is well-settled that MCR 6.201 only applies to felony cases.² Subsequent appellate court decisions have recognized this limitation³, and the Michigan Supreme Court has reiterated its refusal to add a new court rule that would provide for discovery in district court.⁴ The prohibition against discovery in discovery extends even to the filing of witness lists⁵ and, by extension, to the disclosure of experts and the basis for the expert’s testimony. This court finds, therefore, that the lower court made an error of law in ordering what the *Hammond* court described as a “nonexistent duty of disclosure”.⁶

II.

Alternatively, the Plaintiff-Appellee asserts that the issue is not about “discovery” “in a general sense”⁷. Rather, the People’s argument turns on the interpretation and application of MRE 705, which states that

² Administrative Order 1999-3.

³ *People v Greenfield*, 271 Mich App 442, 450 (2006); *People v Nickerson*, 478 Mich 901, 732 NW2d 114 (2007).

⁴ *Nickerson* AT 901, 732 NW2d 114.

⁵ *People v Hammond*, 2010 WL 3984665.

⁶ *Id.*

⁷ Brief of Plaintiff/Appellant, page 2.

The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

(Emphasis added.)

The People contend that the phrase “unless the court orders otherwise” extends beyond a court’s foundational concerns about an expert’s opinion during direct examination, to encompass the providing of facts and data underpinning the expert’s testimony to opposing counsel when the witness is not on the stand. Under this interpretation of MRE 705, the district court has discretion to order “discovery” of the facts and data supporting an expert’s opinion: since AO 1999-03 only prohibits discovery of the kind described in MCR 6.201, it does not, therefore, by its own terms, apply to quasi-“discovery” under MRE 705.

The court finds this interpretation of MRE 705 to be inconsistent with the rationale underpinning the adoption of the rules concerning expert testimony.⁸ MRE 705 focuses on expediency: it removes the need for the expert to make an elaborate disclosure of the bases of his opinion on direct examination, and places the onus for eliciting the bases on the cross-examiner. *Bryan v. John Bean Division of FMC Corp v Midland-Ross Corp*, 566 F2d 541, 545 (5th Cir. 1978). MRE 705 dispenses with the requirement that a question directed to the expert by his proponent be accompanied by a recital of a hypothesis, unless required by the judge.⁹ While this approach does not lessen the partisanship of either the question or the answer on direct examination, it simplifies the examination and removes the occasion for reversing the trial judgment by appellate disputes over deficiencies in the form of hypothetical questions.¹⁰ MRE 705, however, does give the judge discretion to require prior disclosure of basic facts *on direct*

⁸ The court notes that neither side – nor this court - could find case law that supports the People’s interpretation and proposed application of MRE 705.

⁹ BARON, KENNETH S. ET AL, *MCCORMICK ON EVIDENCE* §14 (Seventh Edition 2013).

¹⁰ *Id.* at §17.

examination.¹¹ There is nothing, however, in either the development or application of FRE 705 (and, by extension, the identically worded MRE 705) that extends the discretion of the trial court to order disclosure the expert's underlying facts or data *outside the context of direct examination*.

The court believes that this interpretation is consistent with both the stated purpose for the adoption of MRE 705, and consistent with the language of the rule itself. If "prior disclosure of the underlying facts or data" can be ordered, at the court's discretion, to opposing counsel outside of direct examination, then the second sentence of MRE 705 – which gives the cross-examiner the choice whether to expose the underlying data¹² while the witness is on the stand -- becomes meaningless.

The court understands the People's concern that, absent "discovery" ordered by the court under MRE 705, they may not have the kind of particular knowledge of the facts concerning the "substance of the proposed testimony of the expert" and the "underlying basis of that opinion" that they would have had under MCR 2.601(A)(3). AO 1999-03, however, settled the question concerning discovery in the district court, and the Michigan Supreme Court has declined to add a new court rule that would provide for such discovery. *People v Nickerson*, 478 Mich 901, 732 NW2d 114 (2007). To avoid the seemingly harsh application of the rule of non-discovery, the Plaintiff/Appellee suggests an expansive interpretation of MRE 705 which this court declines to do in the absence of precedent, or without a basis in the development and implementation of the Rule itself.


This court finds that the lower court made an error of law in ruling that MRE 705 imposes a duty of "discovery" outside the examination of the expert witness on the stand.

¹¹ *Id.* The author goes on to note that "Judges tend to do so [require disclosure of basic facts on direct] when there has not been adequate pretrial opportunity to discover them, especially in criminal cases."


¹² *Id.* at §14.

CONCLUSION

For all the reasons set forth herein, the district court's order granting discovery in this case is REVERSED, and the case is REMANDED for further proceedings consistent with this Opinion.


CATHERINE L. HEISE (P41614)
WAYNE COUNTY CIRCUIT COURT

Date: July 21, 2015

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