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Recent Cases

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DISCOVERY—"SURPRISE" EXPERT TESTIMONY PRECLUDED; INSUFFICIENT REPLY TO BROAD INTERROGATORY

Nissley v. Pennsylvania R.R., 435 Pa. 503, 259 A.2d 451 (1969).

In *Nissley v. Pennsylvania R.R.*,[1] the Pennsylvania Supreme Court held that reversible error was committed by allowing an expert medical witness to testify at trial although his identity was not revealed in answer[2] to a timely interrogatory[3] seeking the names of all medical authorities *consulted* by plaintiffs. The major policy, pervasive throughout the decision, is the limitation of the springing of "surprise witnesses."[4]

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1. 435 Pa. 503, 259 A.2d 451 (1969).

2. Plaintiff asserted that no answer was required pursuant to PA. R. C. P. 4011(d) which provides:

> No discovery or inspection shall be permitted which would disclose the existence or location of reports, memoranda, statements, information or other things made or secured by any person or party in anticipation of litigation or in preparation for trial or would obtain any such thing from a party or his insurer, or the attorney or agent of either of them, other than information as to the identity or whereabouts of witnesses.

3. The interrogatory objected to read as follows: " 'State the name and address of each physician whom plaintiff or anyone acting on her behalf has *consulted* as to whether or not there is a causal connection between the accident referred to in the complaint and the decedent's death.' " Nissley v. Pennsylvania R.R., 435 Pa. 503, 506, 259 A.2d 451, 453 (1969) (emphasis added).

4. Nissley v. Pennsylvania R.R., 435 Pa. 503, 507, 259 A.2d 451, 453 (1969) (stating that the move is away from the "sporting theory of justice" to one of wide-ranging and mutual discovery); 6 WIGMORE, EVIDENCE, § 1845 (1940) (the protection against the use of surprise evidence which can be either proven false or discredited or made less damaging is the basic advantage that discovery gives the adversary).

The decedent, Kenneth Nissley, employed as a trainman with the defendant, wrenched his back while chasing a runaway boxcar. Subsequent to his death, his wife as administratrix, brought an action against the defendant on a theory that the prior back injury was the initiating cause of death.[5]

On October 1, 1965, the defendant served the interrogatories containing the controversial question. At pre-trial, plaintiff's counsel agreed to answer the interrogatory by December 6; nevertheless on December 21, he requested additional time to answer.[6] Finally, five days prior to trial plaintiff answered that pursuant to Pennsylvania Rule of Civil Procedure 4011(d),[7] no answer was required. Defendant's pre-trial motion to compel an answer was denied, and his objections to preclude the testimony were overruled.

From a verdict for the plaintiff, the defendant appealed on two points, the pertinent one being whether it was reversible error to allow a previously unidentified expert to testify at trial even though the interrogatory seeking identification of the expert was defective.[8]

Generally any party may file and serve on an adverse party written interrogatories to be answered by the party served. The served party has a duty incumbent upon him to furnish such information as is available to him.[9] The party taking the depositions may also take the testimony of any person or party for the purpose of discovering the identity or whereabouts of witnesses.[10] Thus, it follows that the defendant would be entitled to a list of all the plaintiff's witnesses.[11]

While the defendant has the right to a list of all the witnesses, in the *Nissley* case he never requested such a list.[12] The decision balanced on the weight of two contraveiling policies: use of undisclosed witnesses and limitation of the use of discovery. The majority conceded that the interrogatory in question was too broad

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5. The substantive basis for suit was maintained under the *Federal Employers Liability Act*, 45 U.S.C. §§ 51 et seq. (1964), and the *Safety Appliance Act*, 45 U.S.C. §§ 1 et seq. (1964). *See* Nissley v. Pennsylvania R.R., 435 Pa. 503, 505 n.1, 259 A.2d 451, 452 n.1 (1969).

6. *Id.* at 506, 259 A.2d at 453 (Plaintiff was apparently still searching for an expert to testify regarding the causal connection between the back injury and the subsequent death).

7. *See* note 2 *supra*.

8. Nissley v. Pennsylvania R.R., 435 Pa. 503, 508, 259 A.2d 451, 454 (1969) (the court, stating that this type of query is condemned by the Rules of Civil Procedure, see note 2 *supra*, expressly found the query, quoted in note 3 *supra*, to be too broad since it asked for all medical experts).

9. PA. R. C. P. 4005(a).

10. PA. R. C. P. 4007(a).

11. Nissley v. Pennsylvania R.R., 435 Pa. 503, 508, 259 A.2d 451, 454 (1969).

12. *Id.* at 512, 259 A.2d at 456.

and that the limits of discovery had been breached.[13] Nevertheless, they held that the objection to the broad interrogatory must be asserted more than five days prior to trial.[14] They further suggested, in dictum, that such an objection to a broad interrogatory must like an objection to the form of an interrogatory be asserted within ten days of the filing of the interrogatory.[15] It is difficult to conclude whether the majority was extending Pennsylvania Rule of Civil Procedure 4005(b)[16] or 4004(b).[17] When read together, these rules indicate that the party may file objections to interrogatories within ten days from the filing thereof, and objections to form of interrogatories are waived unless filed within the allotted time, a maximum of ten days. The two rules do not apparently provide authority for limiting the length of time in which the objections to interrogatories, other than objections as to the form of the interrogatories, must be made,[18] or the rights asserted by plaintiff to be protected from discovery.[19]

Although not soundly supported by logic, the decision is vindicated by the basic policy underlying its establishment. The court, showing its disdain for the deployment of surprise witnesses, stated:

> However, we would be returning to the dark ages of the rules of discovery if we were to hold that the plaintiff could wait until the eleventh hour and use this defect as a means to conceal the identity of a surprise witness.[20]

The strength of this policy alone may be sufficient to prohibit the introduction into evidence of the testimony designated in the unanswered interrogatory.[21]

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13. *Id.* at 508, 259 A.2d at 454.
14. *Id.*
15. *Id.* at 510, 259 A.2d at 455; *cf.* PA. R. C. P. 4005(b): "within ten (10) days after service of interrogatories a party *may* file and serve written objections thereto. . . ." (emphasis added); PA. R. C. P. 4004(b): "Objections to the form of interrogatories are waived unless filed and served upon the party propounding them within the time allowed for serving the succeeding cross or other interrogatories or within 5 days. . . ."; cross interrogatories have a maximum ten day limit, PA. R. C. P. 4004(a).
16. For basic provision of rule, see note 15, *supra.*
17. For basic provision of rule, see note 15, *supra.*
18. See PA. R. C. P. 4004(b), 4005(b), quoted note 15, *supra.*
19. Nissley v. Pennsylvania R.R., 435 Pa. 503, 512, 259 A.2d 451, 456 (1969) (dissenting); *see* PA. R. C. P. 4011 for limits on discovery.
20. *Id.* at 508, 259 A.2d at 454.
21. PA. R. C. P. 4019 provides:

> (a) The court may, on motion, make an appropriate order if (1) a party wilfully fails to file answers or sufficient answers to written interrogatories served under Rule 4005;
> . . . .
> (c) The court, when acting under subdivision (a) of this rule

In evaluating the contraveiling policy, pre-trial disclosure of expert witnesses is justified to allow an opposing party time to prepare for cross-examination; however, not all experts *consulted* are witnesses.[22] To require disclosure of all experts consulted could be prejudicial to the plaintiff's case.[23]

If the defendant had requested a list of all witnesses, a request often used in interrogatories, the issue would have been settled. A party has the right to a list of all witnesses.[24] The request made by plaintiff was, however, quite different. As stated the question was prejudicial and would have been grounds for timely objection. While the fact that the objection to the interrogatory was made a mere five days prior to trial may vindicate the decision, the suggestion that assertions to limit the scope of discovery must be made within ten days of the filing of the interrogatory seems to be without merit.

Without reference to authority, the dissent suggested that discovery of witnesses could be had until three days prior to trial.[25] The three day restriction must have been a local rule, however, since a party may file written interrogatories under Pennsylvania Rule of Civil Procedure 4005 until the time of trial subject to restriction or extension by the court under Rule 248.[26]

Limited to its facts, *Nissley* could be acceptable. Extended by the suggested dictum, it could create a retraction in the use of material which is normally within the safe harbor limits of discovery. The logic of the decision fails upon an assessment of the following sequence: (1) a question requiring no answer, and (2) a tardy answer to the effect that no answer is required. Under the dictum of *Nissley*, for failing to answer the question requiring no answer, the witness's testimony which had been privileged from discovery would be precluded pursuant to Pennsylvania Rule of Civil Procedure 4019[27] from being heard at trial. When the party filing the defective interrogatory has other proper questions at his disposal, it would seem to be more justified to require him to use the proper questioning rather than to deprive the tardy party

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may make . . . (2) an order refusing the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated . . . testimony. . . .

22. Nissley v. Pennsylvania R.R., 435 Pa. 503, 511, 259 A.2d 451, 455 (1969).

23. *Id.* at 512, 259 A.2d at 456. (For example, where plaintiff contacts a number of experts but only utilizes certain ones at trial, obviously, if the defendant knows the witnesses to be employed, and those experts consulted, it follows those not employed might not be advantageous to the plaintiff).

24. PA. R. C. P. 4011(d), last clause; see notes 9-11 and accompanying text *supra*.

25. Nissley v. Pennsylvania R.R., 435 Pa. 503, 512, 259 A.2d 451, 455 (1969) (dissenting).

26. R. ANDERSON, ANDERSON PENNSLVANIA CIVIL PRACTICE § 4005.11 (1966).

27. See authority cited in note 21 *supra*.

of his privileged testimony. In the *Nissley* case such reasoning would have required the defendant to have requested a list of witnesses, which was the proper request open to him. While the policy of precluding "surprise witnesses" is strong, its application to a situation where the defendant had avenues of discovery open, though not utilized, does not seem justified in policy or reason.

RONALD J. MISHKIN