

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CREATIVE DIMENSIONS IN : CIVIL ACTION
MANAGEMENT, INC. :
 :
v. :
 :
THOMAS GROUP, INC. : NO. 96-6318

M E M O R A N D U M

WALDMAN, J.

March 11, 1999

This is a diversity action in which plaintiff has asserted various state law claims including claims for fraud, negligent misrepresentation, breach of contract and conversion. Presently before the court is defendant Thomas Group Inc.'s ("TGI") Motion to Preclude Robert A. Lessack from Testifying for Plaintiff. TGI argues that Mr. Lessack should not be permitted to testify because of an "illegal" agreement by plaintiff's principal to pay Mr. Lessack a percentage of any damage award in this case.

Mr. Lessack is the ex-husband of Irene Martin, the sole shareholder of the plaintiff corporation, and is a fact witness for plaintiff.¹ He helped plaintiff to negotiate the contract from which its claims against TGI arise in return for a flat fee and a ten percent royalty on any revenues received by plaintiff from the contract. Shortly after the instant suit was filed, Ms.

¹ Mr. Lessack and Ms. Martin separated and divorced after the instant suit was filed.

Martin and Mr. Lessack altered the agreement to provide that he would receive fifty per cent of any recovery after expenses and legal fees. On July 30, 1997, this agreement was memorialized in writing. On October 17, 1997, the agreement was incorporated into a property settlement between Mr. Lessack and Ms. Martin in connection with their pending divorce with a proviso that Mr. Lessack continue to provide full cooperation in the prosecution of the instant lawsuit. The property settlement agreement was part of a final divorce decree entered on June 8, 1998.

TGI contends that Mr. Lessack should be precluded from testifying because the agreement with his former wife is contrary to Pennsylvania law and public policy.²

Under Pennsylvania law, a non-party witness is competent to testify even if he has a financial interest in the outcome of the action. See Pa. R. Evid. 601(a); 42 Pa. C.S.A. § 5921; Bates v. Commonwealth, 397 A.2d 851, 852 (Pa. Commw. Ct. 1979) ("[A] witness' interest may be considered when judging his credibility, but that interest does not render him incompetent to testify."). See also College Watercolor Group v. William H. Newbauer, Inc., 360 A.2d 200, 204 (Pa. 1976); Anderson v.

² TGI also asserts that the agreement violates the federal bribery statute. It is not apparent, however, that the agreement was formed with a corrupt intent or to influence Mr. Lessack's testimony rather than to provide for the division of contingent income from a claim which accrued prior to a marital separation as part of a divorce settlement or otherwise to compromise a potential marital property claim.

Pittsburgh Ry. Co., 225 A.2d 548, 550 (Pa. 1967). To support its position, TGI primarily relies on Belfonte v. Miller, 243 A.2d 150 (Pa. Super. 1968) and In re Mushroom Transp. Co. Inc., 70 B.R. 416, 418 (Bankr. E.D. Pa. Feb. 20, 1987).

The court in Belfonte refused on public policy grounds to enforce a contract to compensate a real estate appraiser by a percentage of a recovery in an eminent domain action in which he gave expert testimony. Id. at 154. The issue before the court was one of contract law. The court did not hold that the appraiser should have been prohibited from testifying.

In the case of In re Mushroom Transp. Co., the Bankruptcy Court precluded an expert witness subject to a contingent fee arrangement from testifying unless the method of compensation was altered. Id. at 418. The Bankruptcy Court relied on Belfonte which, as noted, did not address the question of competency to testify, and on the Code of Professional Responsibility DR-109(C). DR-109(C) provides in pertinent part that "[a] lawyer shall not pay, offer to pay or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case."³

By definition, an expert witness is expressing an opinion about something jurors cannot adequately understand

³ The Code of Professional Responsibility was superseded on April 1, 1988 by the Rules of Professional Conduct. The proscription in DR-109(C) is now part of Rule 3.4(b).

without assistance from one with specialized training or knowledge. See Fed. R. Evid. 702. An expert witness almost invariably presents impressive credentials to the jurors, and is permitted in formulating an opinion to rely on matters ordinarily inadmissible in evidence. See Fed. R. Evid. 703. While a party presumably would not call as a witness an expert who reached unfavorable conclusions, that an expert has been professionally objective in formulating his opinions is an implicit assumption in permitting widespread use of expert testimony.

The testimony of interested lay witnesses about historical facts generally does not pose a risk of the same proportion as that of an expert with a contingent financial interest. The concealment of a contingent financial arrangement with a witness would be unconscionable. With the disclosure of such an arrangement, an opinion proffered by an expert would likely be so undermined as to be deprived of any substantial value. See Gediman v. Sears, Roebuck & Co., 484 F. Supp. 1244, 1248 (D. Mass. 1980) ("[a]n agreement to give an opinion on a contingent basis, particularly on an arithmetical scale, attacks the very core of expert testimony"). Jurors, however, routinely take and assess the testimony of parties and persons related to them who have a direct financial interest in the outcome of a case. "With many witnesses and, of course, parties, interest is unavoidable. An expert, however, whose only relevance is his

expertise, should not have that expertise flawed." Id.⁴

The Courts in Belfonte and In re Mushroom Transp. Co. noted the particular concern regarding contingent fee arrangements with expert witnesses. See Belfonte, 243 A.2d at 153 ("dangers which surround so-called expert testimony are well understood by the profession and it is the manifest duty of our courts to carefully scan all special contracts relating to the employment of experts"); In re Mushroom Transp. Co., 70 B.R. at 417 (contingent payment agreements "have been criticized with respect to expert witnesses in particular").⁵

Even assuming that plaintiff's counsel has acquiesced in the payment of a witness in a manner which may implicate the Rules of Professional Conduct, it does not follow that the testimony of Mr. Lessack is inadmissible. "[T]he Code does not

⁴ In the one case referenced by movant in which fact witnesses were barred, the Circuit Court found that the District Court had not abused its discretion in precluding their testimony as a sanction for violation of a state bar rule prohibiting payments to witnesses. See Golden Door Jewelry v. Lloyds Underwriters, 117 F.3d 1328, 1335 n.2 (11th Cir. 1997). The Court did not hold that the exclusion of the testimony was required or that it would have been an abuse of discretion to have allowed it. In that case, defense counsel had "played an active and extensive role" in the payment of \$120,000 to two witnesses with connections to the perpetrator of a theft of \$9,000,000 of gold insured by defendant in return for testimony "helpful to Lloyds in its defense of the [pending] civil action" to obtain insurance proceeds. See Golden Door Jewelry v. Lloyds, 865 F. Supp. 1516, 1526 (S.D. Fla. 1994).

⁵ The instance of the appraiser in Belfonte was particularly egregious and dangerous as he stood to profit in direct proportion to the amount of his appraisal.

delineate rules of evidence but only sets forth strictures on attorney conduct." Universal Athletic Sales Co. v. American Gym, Recreational & Athletic Equipment Corp., 546 F.2d 530, 539 (3d Cir. 1976) (testimony of lawyer with interest in outcome of case was admissible although discountable for bias and contrary to Code of Professional Responsibility).

The court expresses no opinion on the record presented about the propriety of conditioning payment on cooperation in the lawsuit or the enforceability of that or any other provision of the agreement between Ms. Martin and Mr. Lessack. The court similarly expresses no opinion on whether plaintiff's counsel have or may run afoul of Rule 3.4(b) or any other professional stricture. The court does not believe, however, that the Pennsylvania Supreme Court would hold on the record presented that Mr. Lessack must be precluded as a fact witness in this case arising from a contract which he helped to negotiate and from which he was to receive royalty payments.

The court does not suggest that the agreement between Ms. Martin and Mr. Lessack is not pertinent. Even if it is properly a part of a marital property settlement and not intended to compensate Mr. Lessack as a witness or to influence his testimony, it is highly relevant. See Fed. R. Evid. 601 advisory committee's note (interest in outcome of litigation is "highly relevant to credibility"). It is ultimately for a jury, however,

to determine the credibility of Mr. Lessack's testimony in view of his financial interest.

Accordingly, defendant TGI's motion will be denied. An appropriate order will be entered.

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O R D E R

ACCORDINGLY, this day of March, 1999, upon
consideration of the Motion of defendant Thomas Group, Inc. to
Preclude Robert Lessack from Testifying for Plaintiff (Doc. #58)
and plaintiff's response thereto, consistent with the
accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is
DENIED.

BY THE COURT:

JAY C. WALDMAN, J.