IN THE COURT OF APPEALS
STATE OF GEORGIA

WELLSTAR KENNESTONE HOSPITAL,	)	
	)	
Appellant,	)	
	)	Appeal No.
vs.	)	A17A1497
	)	
MARIO MOJICA ROMAN,	)	
	)	
Appellee.	)	

AMICUS CURIAE BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION

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AMICUS CURIAE BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION

COMES NOW the Georgia Defense Lawyers Association ("GDLA") and files this Brief as *amicus curiae* with regard to the issue in dispute between Appellant Wellstar Kennestone Hospital and Appellee Mario Mojica Roman, showing this honorable Court as follows:

I. INTRODUCTION AND STATEMENT OF INTEREST

The GDLA is an association of more than 700 Georgia lawyers, including sole practitioners and members of law firms of all sizes, who engage in litigation, primarily for defendants in civil lawsuits. The GDLA is dedicated to, among other purposes, supporting and improving the civil defense bar, improving the adversary system of jurisprudence in our courts, eliminating court congestion and delay in litigation, and otherwise promoting improvements in the administration of justice.

The GDLA submits this amicus brief in support of the trial court's decision approving Appellee Roman's subpoena to Appellant Wellstar seeking discovery of information regarding Wellstar's rates or charges for specific medical services provided to various classification of patients. The trial court's decision is in keeping with Georgia's well-established and intentionally broad standard for permissible discovery in civil litigation. Affirmation of the trial court's decision by this Court will further protect that standard, and help preserve a level-playing field

for civil litigants on all sides. Contrary to the position taken by Appellant, the discovery ruling by the trial court poses no threat to the collateral source rule. Rather than seeking to radically change Georgia tort law, the GDLA joins Appellee in asking this Court to ensure that defendants in personal injury litigation can fully and equally avail themselves of our discovery process.

II. ARGUMENT AND CITATION OF AUTHORITY

A. Standard of Review

As an initial matter, Appellant takes this appeal from the trial court's order denying Appellant's motion to modify Appellee's subpoena. (R. 117). There is no question that Appellee's subpoena, and Appellant's subsequent motion to modify, constitutes a discovery dispute between Appellant and Appellee. "The standard of review of the trial court's ruling on discovery disputes is abuse of discretion." *Hickey v. Kostas Chiropractic Clinics, P.A.*, 259 Ga. App. 222, 223 (2003).

B. The scope of discovery under the Civil Practice Act is broad and liberally construed.

The arguments made by Appellant and the Georgia Trial Lawyers Association (GTLA) as *amicus curiae* focus largely on whether the information sought by Appellee's subpoena would be admissible at trial. At risk of being lost in their presentations is the actual question to be resolved on this appeal—whether the trial court abused its discretion by denying Appellee's motion opposing

Appellant's nonparty discovery request. This is a discovery dispute, and its resolution is controlled by Georgia's well-established law defining and controlling the civil discovery process.

Georgia law is clear that the rules and process of discovery are to be broadly construed. *R.J. Reynolds Tobacco Co. v. Fischer*, 207 Ga. App. 292, 293 (1993), citing *Int'l Serv. Ins. Co. v. Bowen*, 130 Ga. App. 140 (1973). "The discovery procedure is to be given a liberal construction in favor of supplying a party with the facts…" *Armstrong v. Strand*, 167 Ga. App. 723, 724 (1983), quoting *Bullard v. Ewing*, 158 Ga. App. 287 (1981). "The courts of this State have long recognized the overriding policy of liberally construing the application of the discovery law." *Deloitte Haskins & Sells v. Green*, 187 Ga. App. 376 (1988).

The scope of discovery in Georgia courts is outlined in O.C.G.A. § 9-11-26(b), which permits parties to "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party…." O.C.G.A. § 9-11-26(b)(1). It has long been understood that under Georgia's Civil Practice Act, whether something is "discoverable" is determined without reference to whether it would be admissible at the time of trial. See, e.g., *Bridges v. 20th Century Travel, Inc.*, 149 Ga. App. 837, 838 (1979). The standard for discoverability under O.C.G.A. § 9-11-26(b)(1)

is not whether the information sought would be admissible at trial, but whether it "is relevant to the subject matter involved in the pending litigation." Of course, requests for production served on nonparties are subject to the same general scope of discovery as are any other discovery request. O.C.G.A. § 9-11-34(a)(1), (c). And the Supreme Court of Georgia has explained that "[s]ince decisions as to relevance to the subject matter of the action are made for discovery purposes well in advance of trial, a flexible treatment of relevance is required" in considering the propriety of a discovery request, notwithstanding whether the item sought may be relevant and admissibility at the time of trial. *Bowden v. Medical Ctr., Inc.*, 297 Ga. 285, 293 (2015), citing Fed. R. Civ. P. 26 Advisory Comm. Note. See also *McMillian v. McMillian*, 310 Ga. App. 735, 740 (2011).

In this case, Appellant and the GTLA contend that the information sought by Appellee is not discoverable now because it would not be admissible at trial later. Even if they were correct in contending that the information and documents requested could not be admissible at trial, Georgia law expressly disapproves this analysis for purposes of determining discoverability under O.C.G.A. § 9-11-26(b).

Indeed, although Georgia revised its evidence code in 2013 to more closely follow the Federal Rules of Evidence, the applicable standard for permissible discovery under O.C.G.A. § 9-11-26 has remained unchanged. For instance, Georgia did not adopt the amended federal Rule 26 and its "proportionality

standard." See FED. R. CIV. P. 26(b)(1). In short, despite changes in the Federal Rules and technological changes in the way much of civil discovery is conducted, Georgia made the conscious decision to continue defining the scope of discovery in the broad and liberal terms of O.C.G.A. § 9-11-26(b). Applying Georgia law regarding the permissible scope of discovery, the trial court properly denied Appellant's motion to modify Appellee's subpoena.

C. Appellee's subpoena seeks discoverable information and material within the scope of O.C.G.A. § 9-11-26.

Appellee's subpoena for records and witness testimony related to Appellant's billing practices seeks discoverable material within the parameters of O.C.G.A. § 9-11-26(b). The key question in whether something is discoverable is its relevance to the claims, defenses, and issues in the case, and it is difficult to imagine something more relevant to the amount of a plaintiff's claimed damages in a personal injury case, when those damages consist largely of amounts billed for medical treatment, than the amounts charged and accepted by a hospital for such medical treatment. Even if this Court were to accept Appellant's contention that the material sought by Appellee in its subpoena would be inadmissible at trial, inadmissibility does not preclude discovery. In fact, routine civil discovery in personal injury cases like this one is replete with examples of areas where

information is undeniably discoverable even though the inadmissibility of that same information is nearly always conceded.

For example, both plaintiffs and defendants will, in virtually every personal injury case, propound interrogatories and cross-examine on deposition to obtain information regarding the opposing party's criminal record and history of prior lawsuits (including bankruptcies and divorces). This type of information only becomes admissible at trial in the most exceptional of circumstances, yet it is routinely requested *and provided* during the discovery phase. Another example is a party's social security number, which would never be provided to the jury, and, indeed, is required under state and federal law to be redacted from disclosures and publicly-filed documents. While clearly not admissible, still seek their opponents' social security information, and provide their own, during discovery because they are integral for many purposes, such as obtaining medical records and Medicare eligibility information.

Similarly, the GTLA's argument regarding potential questions and answers in a hypothetical deposition misses the mark. The fact that discoverable information could be used to elicit deposition testimony which would not be admissible certainly does not make the information undiscoverable. Furthermore, the way to resolve such hypothetical deposition testimony if it actually occurs would be file a motion *in limine* to exclude the inadmissible testimony at trial.

Such arguments simply do not apply in determining whether information or documents are properly discoverable.

Arguments that the discovery sought by Appellee from Appellant Wellstar in this case run afoul of the collateral source rule also misapply Georgia law. Georgia's collateral source rule, by definition, goes to the admissibility of evidence at trial, not the discoverability of information under O.C.G.A. § 9-11-26. See, e.g., *Polito v. Holland*, 258 Ga. 54, 56 (1988) ("Because of the substantive consequences of the [collateral source] rule, evidence of collateral benefits is not generally material."). As Appellee correctly states, "[a]ny argument as to the ultimate admissibility of evidence obtained in the deposition and to the applicability of the collateral source rule is premature."

In this case, Appellee seeks to discover information about what Appellant, one of Plaintiff's treating medical providers, charges for medical services and supplies to different classifications of patients. Since this is a personal injury case alleging medical expenses as part of the damages, the reasonableness of those expenses is an issue of fact to be determined by the jury. O.C.G.A. § 51-12-7. Appellee has every right to fully investigate and discover information relevant to this issue, even if the information might potentially be inadmissible at trial.

The Georgia Supreme Court recently addressed a similar question of relevancy in *Bowden v. Medical Ctr., Inc.*, 297 Ga. 285, 293 (2015). In that case,

the dispute centered on whether the amounts charged for certain medical services were reasonable. The Supreme Court correctly found that evidence of what the provider charged other patients for the same or similar services was probative of the reasonableness of the Bowden's own charges, and thus "relevant to the subject matter in the pending action." *Bowden*, supra, at 291-293. See also *Houston v. Publix Supermarkets*, 2015 U.S. Dist. LEXIS 102093 (N.D. Ga. 2015).

The same conclusion is demanded in this case. Appellee has sought information from Appellant that is clearly relevant and within the scope of discovery without regard to whether it might be admissible. This Court's task in this case is simple: to examine the trial court's discovery order in the context of the record and to determine whether the trial court abused its discretion in denying Appellant's motion regarding the discoverability of certain information. To the extent that Appellant would have this Court look to potential admissibility of the information as evidence, they put the proverbial cart before its horse. Regardless of whether and to what extent the collateral source rule might later preclude admission of the discovered information at trial, information about what Appellant charges others for the same services provided to Plaintiff *is* relevant and discoverable under O.C.G.A. § 9-11-26(b). The trial court correctly denied the Appellant's motion, and this Court should affirm.

CONCLUSION

Georgia has a long history of favoring full, open, and honest discovery in civil litigation. Broad and liberal discovery erring on the side of disclosure promotes judicial economy by (1) supplying the parties with information needed to fairly and accurately evaluate, and potentially resolve, their cases and (2) giving the parties and their counsel the information necessary to efficiently examine witnesses and present evidence at trial. The scope of discovery as defined by O.C.G.A. § 9-11-26 and the corresponding rules governing the discovery process were deliberately established, and have since been purposefully protected, by Georgia's legislature and courts.

Defendants, like Appellee, have the right, if not a duty, to avail themselves of the civil discovery process to the fullest extent contemplated by the law. This is the same right afforded to plaintiffs. Likewise, trial courts have wide discretion in determining whether a particular discovery activity is permissible. Here, the trial court correctly applied the law and exercised its discretion in denying Appellant's motion to limit Appellee's subpoena. Since there was no abuse of discretion, the trial court's judgment should be affirmed by this Court.

Respectfully submitted, this 29th day of September, 2017.

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CERTIFICATE OF SERVICE

I have this day served the following counsel of record in this case with a copy of the *Amicus Curiae Brief of the Georgia Defense Lawyers Association* via the Court of Appeals' electronic filing and service system:

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