IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

JEANVOLMY,

Appellant,

v.

PROGRESSIVE EXPRESS INSURANCE COMPANY,

Appellee.
_____/

APPELLATE DIVISION (CIVIL)
CASE NO.: 502005AP000074XXXXMB
L.T.: 502000SC006124XXXXSBRD
Division: 'AY'

Opinion filed: MAY 23 2007

Appeal from the County Court in and for Palm Beach County, Florida Judge Laura S. Johnson.

For Appellant: Diego C. Asencio, Esq., 636 U.S. Highway One, Suite 106, North Palm Beach, FL 33408.

For Appellee: Douglas H. Stein, Esq., 4300 Bank of America Tower, 100 Southeast Second St., Miami, FL 33131.

PER CURIAM

Appellant, Jean Volmy, appeals a final judgment after a jury trial in favor of Appellant, Progressive Express Insurance Company, in this PIP case. We affirm.

Volmy was injured in a March 26, 1999 car accident. He sued Progressive alleging it improperly terminated his PIP benefits after a July 27, 1999 compulsory medical examination ("CME"). On appeal, he contends that the trial court erred in striking two of his expert witnesses and permitting Progressive's expert to give a previously undisclosed opinion.

The trial court's Order Setting Jury Trial and Directing Pretrial and Mediation Procedures required Volmy to disclose each expert witness's name, address, and cumculurn vitae and give a

brief summary of his opinion 45 days prior to calendar call. Progressive had to do likewise 40 days prior to calendar call.

Volmy did not file a witness list, though at an April 22, 2005 trial management conference, 14 days prior to calendar call, his counsel disclosed that he intended to call a chiropractor and neurologist as experts. The trial court granted a motion to strike the witnesses May 6, 2006. Though Volmy claims the trial court erred, he never proffered what the witnesses would testify to. See Fla. Stat. §90.104(1)(b). Consequently, he has failed to show that the decision to exclude the witnesses, even assuming it was an abuse of discretion, which we do not find, prejudiced him. See Ketterson v. Estate of *Bruns*, 711 So. 2d 613 (Fla. 4th DCA 1998); Smith v. Schlanger, 585 So. 2d 1152 (Fla. 4th DCA 1991).

Progressive first disclosed its expert, David Cafarelli, December 17, 2004. The disclosure stated, among other things, that Cafarelli would "discuss his review of the medical records provided to him, medical and factual histories provided to him, and the significance of any findings or information in his possession, along with the medical necessity of the bills submitted." Cafarelli had performed the CME. Volmy had both his original report and an addendum. He did not move to strike the disclosure as insufficient, nor did he depose Cafarelli.

Progressive served Volmy with an updated report from Cafarelli on April 27, 2005. The updated report noted that it appeared that the office notes from the treating chiropractor, Daniel Fortunato, were computer generated from a series of templates. In it, Cafarelli opined that a review of the notes "follows a systematic attempt to conceal the identical nature of the notes by altering the structure, altering the grammar and using synonyms to imply a normal variance that would be found in office notes taken in the course of a treatment protocol." It further stated that "based on my 23 years of clinical experience, the office notes that were provided for my review

presents (sic) a highly unlikely and unrealistic representation of the subjective findings, the objective findings, assessments and treatment plan that would occur in the normal course of treatment and patient/physician interaction that would occur in such a situation."

On the first day of trial, May 9, 2005, Volrny's counsel sought to prevent Cafarelli from "trash talking" Fortunato's medical records. The trial court held that Cafarelli could testify about how his review of Fortunato's record keeping affected his opinion as to the reasonableness and necessity of the treatment at issue, but that the updated report could not be offered into evidence.

At the trial, Fortunato testified that his records accurately reflected Volmy's clinical information. He further testified that he used a program called "A Random Computerized Text" to generate the records' text based on his responses to a series of check-offs he provided to his wife for input.

Cafarelli testified that he reviewed Fortunato's records and that they were computer-generated. Progressive's counsel then asked: "(s)ir, what were your opinions with respect to Dr. Fortunato's medical records that you reviewed?" Volmy's counsel objected on the grounds that "(i)t's not proper for one expert to comment on what another expert did." The trial court overruled the objection. Cafarelli then testified that he found the repetitive nature of the subjective and objective findings unusual because symptoms tend to vary daily.

One expert may not testify about his personal opinion of another expert's credibility, abilities; reputation, or competence. See Carver *v.* Orange County, 444 So. 2d 452 (Fla. 5th DCA 1983) (improper for one expert to testify what he thinks of another). It is perfectly proper, though, for an expert to comment on the factual predicate used by an opposing party's expert, or to criticize an opposing expert's methodology or compare it to his own. See *Scarlett v. Ouellette*, 948 So. 2d 859 (Fla. 3d 2007) (not improper for expert to testify that evidence viewed by

opposing expert was inconsistent with opposing expert's opinion); Carlton v. Bielling, 146 So. 2d 915 (Fla. 1st DCA 1962) (improper for one expert to opine about the validity of another expert's opinion; proper for expert to testify about his examination of the evidence and opinions based on that exam); *Mims* v. United States, 375 F. 2d 135 (5th Cir. 1967) (expert opinion may be rebutted by showing incorrectness or inadequacy of factual assumptions on which it is based); Gonzalez-Valdes v. State of Florida, 834 So. 2d 933 (Fla. 3d DCA 2003), rev. den. 851 So. 2d 728 (Fla. 2003) (same); See, also, C. Ehrhardt, Florida Evidence §702.5 (2004 Edition). Thus, in Network Publications, Inc. v. Bjorkman, 756 So. 2d 1028 (Fla. 5th DCA 2000), the trial court was reversed for erroneously instructing the jury that an expert may not testify about his opinion on the validity or invalidity of another expert's opinion. The Fifth District held that an expert may criticize another expert's methodology and may delineate the facts, factors, formulae, or rationale he used and contrast them with the opposing expert's predicates. In *Mathis* v. *O'Reilly*, 400 So. 2d 795 (Fla. 5th DCA 1982); rev. den. 412 So. 2d 468 (Fla. 1982), the trial court was reversed for not permitting an expert witness to testify how his computations differed from the opposing party's expert's.

We did not find that the trial judge abused her discretion in permitting Cafarelli to testify that it was unusual in his clinical experience for Volmy's objective and subjective findings not to vary and that he considered that factor in evaluating Volmy's medical records to reach his necessity opinion. Further, Fortunato himself admitted his records were computer generated. Progressive disclosed that Cafarelli would testify about how his review of Fortunato's records contributed to his opinion that the services sued for were not necessary. Finally, and perhaps most critically, Volmy objected to the testimony only as an improper comment on Fortunato's opinion. It was not a comment on Fortunato's opinion, but merely a statement of his own

opinion. The only portion of Cafarelli's testimony not corroborated by Fortunato was his opinion that it was unusual for Volmy's symptoms not to vary. He was competent to express that opinion. It was disclosed he would opine on the subject. He considered it in reaching his conclusions. That testimony as not "speculative," nor was it an improper comment on another expert's credibility.

The Final Judgment is Affirmed.

MAASS, STERN, and FRENCH, JJ., concur.