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RECENT DEVELOPMENT

FOOD LION, INC. V. MCNEILL: AN INADEQUATE RESPONSE TO AN INTERROGATORY MUST BE CHALLENGED DURING THE DISCOVERY PHASE AND WILL NOT SERVE AS GROUNDS TO EXCLUDE EXPERT TESTIMONY WHEN RAISED AT TRIAL.

By: Gillian Flynn

The Court of Appeals of Maryland held that Maryland Rule of Civil Procedure 2-402(f)(1)(A) will not exclude expert testimony at trial for failure to provide adequate information if no claim of deficiency was made during discovery. *Food Lion, Inc. v. McNeill*, 393 Md. 715, 717, 904 A.2d 464 (2006). The Court held that a party who provides a timely answer to a discovery request may rely on the absence of a challenge during discovery as an indication that the answer is in compliance with the discovery rules. *Id.* at 736, 904 A.2d at 477.

Daniel McNeill (“McNeill”), a meat cutter employed by Food Lion, began experiencing pain and numbness in his hands. McNeill consulted Dr. Fulton who diagnosed the condition as carpal tunnel syndrome. McNeill initially filed a claim with the Worker’s Compensation Commission (“the Commission”), alleging that his condition was an occupational disease caused by his work as a meat cutter. The Commission denied his claim.

McNeill sought judicial review of the Commission’s decision in the Circuit Court for Anne Arundel County. During discovery, Food Lion sent an interrogatory to McNeill requesting that he identify each expert witness he expected to call at trial, the subject matter on which the expert was expected to testify, the substance of the expert’s findings and opinions, and a summary of the grounds for those opinions. McNeill submitted a timely answer listing Dr. Fulton, his address and copies of Dr. Fulton’s reports from all of McNeill’s medical appointments. McNeill’s answer also included a statement that Dr. Fulton would testify as to the contents of the medical reports and the cause of McNeill’s condition. McNeill later forwarded an April 4, 2002 letter from Dr. Fulton stating that it was Dr. Fulton’s opinion that

McNeill's condition was caused by the repetitive work as a meat cutter at Food Lion.

Food Lion recognized the filing of Dr. Fulton's records but did not challenge the adequacy of the interrogatory response, either during or after the discovery phase. Food Lion did not file a motion to compel discovery or a motion for summary judgment prior to trial.

On the day of the trial, Food Lion argued a motion to prohibit Dr. Fulton from testifying as to his expert opinion on the cause of McNeill's condition, citing Maryland Rule of Evidence 5-702. The court granted Food Lion's motion and, at the conclusion of McNeill's case, granted summary judgment in Food Lion's favor.

McNeill sought review of the judgment by an en banc panel of the circuit court. The panel reversed the judgment of the trial court. The panel held that the trial court's exclusion of Dr. Fulton's testimony on causation was clearly erroneous. The panel concluded that Dr. Fulton's report had given sufficient indication of the causal connection between McNeill's work as a meat cutter and his medical conditions as required under Maryland Rule of Civil Procedure 2-402(f)(1)(A). The panel also found that Food Lion's motion at trial was untimely because Food Lion had not filed a motion to compel or taken the expert's deposition during discovery.

Food Lion noted an appeal to the Court of Special Appeals of Maryland. The Court of Appeals, on its own initiative, granted certiorari. The Court affirmed the circuit court's en banc judgment in favor of McNeill.

The Court stated that Maryland Rule of Evidence 5-702 dictated the outcome of this case. *Food Lion*, 393 Md. at 730, 904 A.2d at 473. According to Maryland Rule 5-702, the trial court is required to determine that the witness is qualified "by knowledge, skill, experience, training or education" to testify as an expert witness; the issue about which the expert will testify is appropriate; and that there is a "sufficient factual basis to support the witness's testimony." *Food Lion*, 383 Md. at 730, 904 A.2d at 473. Food Lion argued, under Maryland Rule 5-702, the trial court was required to address the adequacy of a discovery response to determine whether a sufficient factual basis existed to permit the introduction of expert testimony at trial. *Food Lion*, 393 Md. at 731, 904 A.2d at 474. Food Lion reasoned that although the expert's inadequate discovery response was a substantive violation of the discovery rules, it was not the type of violation that required Food Lion to object to its deficiency, take a deposition, or move to compel under the rules of discovery. *Id.* at 731,

904 A.2d at 474. Instead, the violation should be addressed under the rules of evidence at trial. *Id.* The Court rejected Food Lion's arguments. *Id.*

The Court found no previous case law where the rules of discovery and the rules of evidence had been merged to permit expert testimony to be excluded at trial due to the insufficiency of a discovery response when the moving party had not objected during the discovery phase to the sufficiency of the discovery response or deposition. *Id.* The Court reviewed *Giant Food, Inc. v. Booker*, 152 Md. App. 166, 831 A.2d 481 (2003), the case upon which Food Lion relied. *Food Lion*, 393 Md. at 731, 904 A.2d at 474. The Court distinguished *Booker*, stating that in that case Rule 5-702 had been applied in its usual manner, as a rule of evidence. It had not been applied as a challenge to discovery practices. *Food Lion*, 393 Md. at 731, 904 A.2d at 474 (citing *Booker*, 152 Md. App. at 185, 831 A.2d at 492)(holding that the expert testimony regarding causation as presented at trial was insufficient and the case should not have gone to the jury).

The Court also reviewed *Wood v. Toyota Motor Corp.*, 134 Md. App. 512, 760 A.2d 315 (2000), upon which *Booker* relied, and concluded that, in *Wood*, the trial court had properly excluded the expert's testimony at trial because the expert's testimony at deposition lacked a sufficient factual basis and the expert lacked the necessary qualifications. *Food Lion*, 393 Md. at 732, 904 A.2d at 475 (citing *Wood*, 134 Md. App. at 523-26, 760 A.2d at 321-24).

The Court declined to support Food Lion's attempt to merge the rules of discovery and the rules of evidence. *Food Lion*, 393 Md. at 733, 904 A.2d at 475. The Court held that allowing a party to wait to challenge the sufficiency of a discovery response until trial undermined the very purpose of discovery which was to encourage the full disclosure of all issues before trial in order to avoid unnecessary delays and unfair surprises at trial. *Id.* at 733, 904 A.2d at 475. The Court also noted that Food Lion should have made a timely objection under Rule 2-432 to the sufficiency of the expert's discovery report during the discovery phase, which would have allowed McNeill the opportunity to correct the response prior to trial or be subject to sanctions. *Food Lion*, 393 Md. at 735, 904 A.2d at 476.

The finding in *Food Lion* provides positive guidance to practitioners by clarifying when objections to discovery responses must be made. After *Food Lion*, a Maryland court must find a motion made at trial to exclude expert testimony based on the inadequacy of a

discovery response to be untimely if no objection was raised during discovery. Furthermore, parties may rely on the absence of a challenge during discovery regarding the adequacy of the answer to an interrogatory as an indication that the answer complies with the discovery rules. The ruling reminds practitioners that the discovery rules direct crucial pre-trial procedures that should be as closely followed as all other trial procedures and that a failure to do so could result in irreparable harm to a client's case.