

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

JONATHAN PORTER, a minor,)
by and through his mother)
and next friend)
JEANETTE PORTER, and)
JEANETTE PORTER, individually,)
)
Plaintiffs,)
)
vs.)
)
HAMILTON BEACH/ PROCTOR SILEX,)
INC. and SHAW INDUSTRIES, INC.,)
)
Defendants.)

No. 01-2970-MaV

ORDER DENYING PLAINTIFFS' MOTION TO COMPEL
DEFENDANT'S EXPERT CHRISTOPHER ZACHWIEJA TO ANSWER QUESTIONS
PROPOUNDED UNDER RULE 30

Before the court is the motion of the plaintiffs, Jonathan Porter, a minor, by and through his mother, Jeanette Porter, and Jeanette Porter, individually, pursuant to Rule 37(a)(2) of the Federal Rules of Civil Procedure, to compel Christopher Zachwieja, the defendant Hamilton Beach/Proctor-Silex, Inc.'s ("HBPS") expert, to answer certain questions propounded to him during his deposition that relate to his compensation by HBPS. The motion was referred to the United States Magistrate Judge for determination. For the reasons that follow, the motion is denied.

This product liability suit arises out of a house fire in which Jonathan Porter sustained burn injuries. The house fire

allegedly started because of a faulty iron manufactured by defendant HBPS. HBPS designated Zachwieja to serve as their expert in this case. Zachwieja is employed by HBPS as Vice President of Quality and has been so employed since 2002. He has been employed with HBPS or their affiliates since May of 1984, and he is a salaried employee. In the last four years, he has testified on behalf of HBPS at trial or by deposition in over twenty-five cases involving HBPS.

Zachwieja was deposed by the plaintiffs on June 12, 2003. At his deposition, he was asked about his current salary and the value of his 401(k) plan. Zachwieja refused to answer the questions about his salary and benefits on grounds of relevancy because, as an employee, he is not being compensated for his expert testimony. The plaintiffs then filed the instant motion. The plaintiffs are willing to allow Zachwieja's answers to be placed under seal in order to protect his privacy interests.

Rule 26(a)(2)(B) requires that, unless otherwise directed by the court, the disclosure of the identity of an expert must be accompanied by a written report if the expert witness is retained or specially employed to give expert testimony or if, employed by the party, his duties as an employee "regularly involve giving expert testimony." Fed. R. Civ. P. 26(a)(2)(B). Among other things, the report shall include "the compensation to be paid for

the study and testimony." *Id.*

The Porters insist that in light of the fact that Zachwieja has testified in over twenty-five cases in the preceding four years, his duties as an employee of HBPS involve regularly giving testimony. The court agrees. The frequency of Zachwieja's testimony over the preceding four years meets or exceeds that of many experts specially retained to give testimony.

Even though Zachwieja's duties as an employee of HBPS involve regularly giving expert testimony, the court sees no reason to require Zachwieja to disclose his salary and the value of his 401(K) plan in this case. It is well-settled that examining an expert's compensation is relevant to bias and is permissible. See *Amister v. River Capital Int'l Group, LLC*, No. 00 Civ. 9708(DCDF), 2002 WL 2031614, at *1 (S.D.N.Y. Sept. 4, 2002). "The normal and appropriate function of cross-examination into the compensation an expert witness earns, either for services rendered in the case at bar or from forensic activities generally, is to expose bias--any personal interest the witness may have in arriving at the stated opinion." *Wrobleski v. de Lara*, 727 A.2d 930, 938 (Md. 1999). Indeed, the plaintiffs' sole stated reason for requiring this information is to use to show bias for impeachment purposes.

It is equally well-settled that the scope of cross-examination of an expert witness's compensation is largely within

the control and discretion of the trial judge and should be controlled to prevent the other party from "rummaging" through personal and financial records of the expert. *Cary Oil Co., Inc. v. MG Ref. & Mktg., Inc.*, 257 F. Supp. 751, 757 (S.D. N.Y. 2003).

Here, the fact that Zachwieja is a full-time, salaried employee of HBPS is sufficient to demonstrate bias. There is no showing that Zachwieja's opinion may be influenced by the amount of his salary or the value of his 401(k) plan. In other words, the amount of his salary or value of his 401(k) plan would not affect a jury's determination of credibility or bias because his full-time, salaried position indicates that he has an interest in the outcome.

Accordingly, the court directs that HBPS's expert report need not include Zachwieja's compensation, and the plaintiffs' motion to require Zachwieja to answer deposition questions about his compensation and 401(k) plan is denied.

IT IS SO ORDERED this 27th day of August, 2003.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE