

TEXAS EASTERN TRANSMISSION CORP., Plaintiff vs.  
MODERN ELECTRIC COMPANY, J. L. ALLEN CO., and  
PSD, ONC., d/b/a POWER SYSTEMS DEVELOPMENT,  
Defendant, C.P. Franklin County Branch, Civil Action - Law,  
No. A.D. 1995-366

*Texas Eastern Transmission Corp. v. Modern Electric Company*

*Scope of discovery of experts under Pa.R.C.P. 4003.5*

1. Plaintiff filed motion to compel answers to interrogatories requesting defendants to provide list of all cases in which their experts testified in the past four years; plaintiff argues that Pa.R.C.P. 4003.5 permits such discovery because it is based on F.R.C.P. 26 which requires such disclosure.
2. Pa.R.C.P. 4003.5 only provides for discovery of identification of experts, the subject matter on which they will testify, the substance of the facts and opinions, and a summary of the grounds for each opinion.
3. Explanatory Note to Pa.R.C.P. 4003.5 provides that it "closely parallels" F.R.C.P. 26(b)(4); however, at the time the Explanatory Note was written, F.R.C.P. 26 was almost identical to Pa.R.C.P. 4003.5. and did not provide for discovery of a list of cases in which the experts had testified.
4. While the federal rule was expanded to allow additional discovery, PA Supreme Court did not; it is assumed the Supreme Court specifically choose not to expand expert discovery in Pennsylvania.
5. This court and other Courts of Common Pleas have refused to allow any discovery of experts beyond the information specifically provided for in Pa.R.C.P. 4003.5
6. Supplemental discovery may be permitted only upon cause shown; such cause exists only where the information previously obtained through interrogatories does not provide an adequate basis on which to prepare for trial.

*Joseph L. Luciana III, Esquire, Counsel for Plaintiff*

*Thomas E. Brenner, Esquire, Counsel for Defendant Modern  
Electric Company*

*Timothy I. Mark, Esquire, Counsel for Defendant J.L. Allen Co.*

*William A. Addams, Esquire, Counsel for Defendant PSD*

#### OPINION AND ORDER

WALKER, P.J., February 5, 1999:

#### Factual and Procedural Background

This case involves a suit by Plaintiff Texas Eastern Transmission Corporation ("Texas Eastern") which owns and operates a natural gas compressor station located in

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#### BAR NEWS ITEM

Announcement to: Members of Franklin County Bar  
Association

President Carol Van Horn has announced that the 1999 Bench/Bar Conference will take place on Friday, October 8, 1999, at the Chambersburg Country Club. She asks that you reserve this date on your calendar, now. Further details and registration will be coming later.

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Chambersburg, Franklin County. On August 22, 1993, at 3:00 a.m., a fire occurred in the switchgear building of the Chambersburg station. Texas Eastern alleges that the fire was caused by the improper electrical work performed by Defendants J.L. Allen Co. ("Allen") and Modern Electric Co. ("Modern Electric").

On December 8, 1998, Texas Eastern served upon all defendants interrogatories and requests for production of documents. Texas Eastern requested defendants to list all cases in which their proposed experts had testified in the previous ten years, as well as the production of any reports that were submitted by the experts in those proceedings and the transcripts of the experts' trial or deposition testimony. Defendants objected to the discovery requests. By letter dated January 28, 1999, plaintiff's counsel informed this court of the dispute regarding the discovery requests and stated that Texas Eastern had modified its discovery requests to a list of cases in which the experts had been involved in the last four years. Plaintiff's attorney furthermore requested a telephone conference with this court, which was scheduled for February 2, at 2:30 p.m. The attorneys for Texas Eastern, Modern Electric, and Allen participated in the conference. Counsel for Defendant PSD, Inc. was unable to participate and had informed the parties that since PSD has not listed any experts as witnesses for trial, the parties could proceed with the conference in his absence. This court has considered the arguments made by counsel and for the reasons set forth below, finds that the discovery requested by plaintiff is not permitted by the Pennsylvania rules.

#### Discussion

The discovery of expert testimony is governed by Pa.R.C.P. 4003.5, which provides in relevant part:

(a) Discovery of facts known and opinions held by an expert, otherwise discoverable under the provisions of Rule 4003.1 and acquired or developed in anticipation of litigation or for trial, may be obtained as follows:

(1) A party may through interrogatories require

(a) any other party to identify each person whom the other party expects to call as an expert witness at trial and to state the subject matter on which the expert is expected to testify at trial and

(b) the other party to have each expert so identified by him state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

Pa.R.C.P. 4003.5(a)(1).

Texas Eastern argues that it is entitled to the information it requested because the Pennsylvania rule does not prohibit such discovery and because the explanatory note to Rule 4003.5 provides that the Pennsylvania rule "closely parallels" F.R.C.P. 26. The federal rule requires that the parties disclose, with regard to their expert witnesses, "a listing of any other cases in which the witness has testified as an expert at trial or deposition within the preceding four years." F.R.C.P. 26(a)(2)(B). Thus, Texas Eastern argues that the same information is discoverable under the Pennsylvania rule. Defendants argue that there is no Pennsylvania authority which permits such discovery and that even if it was permitted, such request would be overly burdensome because of the time involved to compose such a list.

Texas Eastern's statement that F.R.C.P. 26 currently requires disclosure of the cases in which experts have participated in the previous four years is correct. However, the federal rule was amended in 1993 at which time the mandatory discovery was expanded. The explanatory note to the Pennsylvania rule which states that it closely parallels F.R.C.P. 26(b)(4) was written in

1978, before the expansion of expert discovery in the federal rule. F.R.C.P. 26(b)(4) provided as follows in 1978:

(4) *Trial preparation: Experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained **only** as follows:

(A)(I) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

F.R.C.P. 26(b)(4) (emphasis added); *See* Wright, Miller & Marcus, 8 Federal Practice and Procedure: Civil 2d, at 21-22 (1994).

Thus, it appears that the federal rule, after which the Pennsylvania rule was modeled, only provided for the discovery of certain limited information regarding expert testimony and did *not* provide for discovery of a list of cases in which the experts had previously testified. While the federal rule has been amended in 1993 to expand discovery of expert information, the Pennsylvania Supreme Court has not followed federal practice by amending the Pennsylvania rules. It can be assumed that the Pennsylvania Supreme Court had knowledge of the federal amendments, and specifically choose not to expand discovery of experts in Pennsylvania.

This court has previously refused to permit discovery outside the limited scope of Rule 4003.5. *Kern v. Chambersburg Hospital*, 9 Frankl. Cou. L.J. 69 (1986). In *Kern*, the plaintiff had filed interrogatories requesting, among other things, the caption, including the court and docket numbers, of any case in which the

expert participated within the last ten years. This court first noted that the intent of the drafters of Rule 4003.5 was “to avoid unfair surprise by allowing counsel to evaluate their opponent’s position in advance. A party may then, through cross-examination and counter testimony, effectively discredit their opponent and posit their own version of the case.” *Kern*, at 72. This court further stated that in light of the intended purpose of the discovery rule, it is “difficult to believe that the drafters intended to encourage parties to slog through a morass of prior expert testimony, and delve into the vast pool of authorities that they have been exposed to, all for the sake of impeachment.” *Id.* This court found that the information discoverable under Rule 4003.5 was sufficient to provide an “adequate arsenal” for both sides to counter any expert testimony given at trial. Thus, this court held that the plaintiff was not entitled to the information requested. *Id.*

Other Courts of Common Pleas have followed the same reasoning. Judge Wettick of the Allegheny County Court of Common Pleas cited this court’s decision in *Kern* as well as a Philadelphia County decision to support his holding that interrogatories seeking supplemental information not provided for in Rule 4003.5 are not permitted. *Alston v. Outboard Marine Corp.*, 12 D. & C. 4th 297 (1991), citing *Monteiro v. Dow Chemical*, 19 Phila. 221 (1989) (holding that the “only discovery that is allowed as a matter of right are interrogatories, and these are expressly limited to the discrete subjects described in Rules 4003.5(a)(1)(a) and (b).”).

Supplemental information from an expert is discoverable only by court order “upon cause shown.” Pa.R.C.P. 4003.5(a)(2); *Alston*, 12 D. & C. 4th at 302. Such cause exists only where the information previously obtained through expert interrogatories does not provide an adequate basis on which to prepare for trial. *See* Goodrich-Amram 2d §4003.5(a):5. Supplemental discovery from an expert will not be permitted where the requesting party makes no attempt to challenge the adequacy of the expert’s report or to seek additional information concerning the substance of the expert’s facts and opinions to which he is expected to testify. Goodrich-Amram 2d §4003.5(a):5; *Alston*, 12 D. & C. 4th at 303. In the underlying case, plaintiff has not argued that the

reports it has received from the defendants' experts are not adequate or that more information regarding the substance of the experts' opinions is needed. Rather, plaintiff seeks the information in question solely for impeachment purposes. This is not sufficient to constitute "cause" to allow discovery of additional information.

The information requested by plaintiff goes beyond the boundaries of the discovery allowed by Rule 4003.5, and plaintiff has not shown any cause for this court to permit additional discovery. Therefore, Texas Eastern is not entitled to the information requested of defendants' experts and its motion to compel is denied.

#### ORDER OF COURT

February 5, 1999, upon consideration of plaintiff's motion to compel, this court finds that the discovery sought by plaintiff regarding defendants' experts goes beyond the boundaries of what is permitted by Pa.R.C.P. 4003.5 and therefore plaintiff is not entitled to a list of cases in which the defendants' experts have participated in the past four years. Plaintiff's motion to compel is denied.

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