Do Not Let The Defense Fool You – Why Treating Physicians Are Different Than Retained Experts For Purposes Of Expert Discovery

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Are treating physicians treated differently then retained experts for purposes of expert discovery under Florida law? The short answer is yes. This article will address how to counter defense arguments that treating physicians are not different than retained experts and therefore must answer expert discovery pursuant to the Florida Supreme Court Rulings in Elkins v. Syken, 672 So.2d 517 (Fla. 1996), Allstate Ins. Co. v. Boecher, 733 So.2d 993 (Fla. 1999) and F. R. Civ. P. 1.280(b)(4)(A).

First, it should be noted that Florida courts have long recognized the distinction between treating physicians and retained experts. In Frantz v. Golebiewski, 407 So.2d 283 (Fla. Dist. Ct. App. 1981), the defendant took a sworn statement from plaintiff's treating physician. Plaintiff's counsel then sought to compel production of the statement arguing that the treating physician was an expert witness to whom Fla. R. Civ. P. 1.280(b)(3) would apply. Id. at 285. The Third District held that the rule did not apply to the situation because a treating physician was different than a retained expert. Id. at 285.

The Frantz court stated that the aforementioned rule concerned only those opinions "acquired and developed in anticipation of litigation or for trial." Id. The Frantz court went on to explain the contrast by stating that contrary to an "examining physician", a treating doctor "does not acquire his expert knowledge for the purpose of litigation but rather simply in the course of attempting to make his patient well." Id. As such, the Frantz court went on to cite the corresponding Federal Rule of Civil Procedure and found that any of the plaintiff's treating physicians were to be "treated as an ordinary witness" for purposes of the Florida Rules of Civil Procedure. Id.

Similarly, in Ryder Truck Rental v. Perez, 715 So.2d 289 (Fla. Dist. Ct. App. 1998), the Third District held that the plaintiff's treating physicians should not have been classified as expert witnesses for purposes of the "one expert per specialty rule." The Ryder court cited Frantz and stated that the trial court had abused its discretion in denying the defendant "the right to elicit fact testimony" from plaintiff's treating physicians on the issue of whether the plaintiff had suffered a permanent injury. Id. at 290. As such the defendant was permitted to call retained experts and the treating physicians to testify regarding the issue of permanency. Id. at 291.

Second, it is important to use the Fifth District case of Winn-Dixie Stores, Inc. v. Miles, 616 So.2d 1108 (Fla. Dist. Ct. App. 1993) when dealing with this issue. In Winn-Dixie, defense counsel served a subpoena duces tecum upon a treating chiropractor requesting Elkins, Fla. R. Civ. P. 1.280(b)(4)(A), and Boecher "type" discovery. Id. at 1109. The Winn-Dixie court held that the trial court did not err in precluding the discovery sought by the defendant. Id. at 1111.

The Winn-Dixie court applied a balancing test in reaching its decision. Id. at 1110. Specifically, the court stated that where discovery is sought from an "expert witness" the trial court must balance "the competing interests of relevancy of the discovery information sought as impeachment information, against the burdensomeness of its production." Id. In applying the first prong of the test, the Winn-Dixie court stated that although the type of information sought "could be highly relevant in that it might tend to establish bias" the record contained no contention that the defendant had any "any information whatsoever" that this was the case. Id. As such, the court stated that this fact "necessarily" limited the weight the court should give to relevance under the aforementioned test. Id.

In applying the second prong, the Winn-Dixie court reiterated the distinction between an expert witness retained for purposes of litigation and a treating physician. Id. at 1111. The court reasoned that "expert witnesses inject themselves into litigation and, by so doing, impliedly waive any right to object to invasive discovery requests designed to reveal bias." Id. On the other hand, the chiropractor in the Winn-Dixie case was a "treating physician" and therefore did not choose to participate in the litigation "but merely agreed to treat a patient." Id. As such, the court found that as a treating physician, the chiropractor did not waive any confidentially concerns and that his confidentiality concerns as a treating physician should be given "substantial weight" in the balancing test. Id.

In applying the third prong, the Winn-Dixie court stated that the doctor's affidavit establishing that compliance would be "overburdensome" was unrefuted and therefore the treating physician was entitled to the protective order he sought. Id. Of note, the Winn-Dixie court also went onto state that defendant's reliance on cases involving expert witnesses and not treating physicians was "unwise." Id. Consequently, the trial court did not abuse its discretion in determining that the defendant's opposition to the treating physicians motion for protective order was unjustified thereby warranting an award of attorney's fees. Id.

Third, it is important to realize that the defense attorney's will often rely upon cases such as Flores v. Miami-Dade County, 787 So.2d 955 (Fla. Dist. Ct. App. 2001) in trying to obfuscate the distinction between retained experts and treating physicians. In Flores, the Third District held that it was permissible for the defendant to cross-examine a treating physician regarding: (1) A referral relationship between the treating physician and the client's attorney; (2) The fact that the treating physician and the client's attorney shared a runner; and (3) That the treating physician paid the runner a fee for each patient he referred. Id. at 957. In making this decision, the Flores court ruled that the cross-examination was pertinent to the physician's bias and therefore admissible pursuant to the Florida Evidence Code. Id.

Although the Flores court cites Elkins, F. R. Civ. P. 1.280(b)(4)(A), and Boecher in its decision, it should be noted that the Flores court used said cases in dicta. Id. at 958-9. The Flores court holding deals with an evidentiary ruling and not a discovery ruling. Moreover, there is no discussion in Flores as to how the aforementioned materials used in defendant's cross were obtained. Therefore, the Flores court does not purport to obliterate the distinction between treating physicians and retained experts for purposes of discovery under Florida law.

In conclusion, treating physicians are treated differently than retained experts for purposes of expert discovery under Florida law. The Franz, Winn Dixie, and Ryder Truck line of cases are useful in establishing that treating physicians are not retained experts, and therefore not subject to discovery requests pursuant to Elkins, Boecher, and F. R. Civ. P. 1.280(b)(4)(A).