DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
January Term 2011

MARIA L. CLAIR,
Appellant,

v.

LINDI E. PERRY,
Appellee.

No. 4D09-2214

[February 16, 2011]

LEVINE, J.

The issue presented is whether appellee's treating physician would be considered an expert witness and subject to the requirements of Florida Rule of Civil Procedure 1.280(b)(4). Under the facts of this case, we find the trial court correctly determined that appellee's treating physician was not subject to the pretrial notification requirements of Rule 1.280(b)(4). We, therefore, affirm.

Appellee was injured in a motor vehicle accident. Appellant admitted to negligence, and the matter proceeded to trial on the issue of damages. At trial, appellee wanted to introduce the testimony of her treating physician, Dr. Theophilos. Appellant objected to a portion of Dr. Theophilos's testimony regarding whether appellee sustained a permanent injury on the basis that his testimony constituted an expert opinion, which would have required appellee to notify appellant of the opinion before trial pursuant to Rule 1.280(b)(4). The trial court agreed and excluded that portion of Dr. Theophilos's testimony.

After the jury determined that appellee sustained no permanent injury, appellee filed a motion for new trial and once again reiterated that a treating physician was not an expert witness and was not subject to Rule 1.280(b)(4). The trial court agreed, determined that exclusion of Dr. Theophilos's testimony regarding permanency of the injury was error, and granted a new trial. As a result, this appeal ensues.

We review the trial court's order granting a new trial for an abuse of discretion. *Brown v. Estate of Stuckey*, 749 So. 2d 490, 497-98 (Fla.

1999).

Rule 1.280(b)(4), governing discovery of expert witnesses, provides that a party is entitled to the "facts known and opinions held by experts" retained by the other party to testify at trial. This rule, however, applies only to facts and opinions "acquired or developed in anticipation of litigation or for trial." *Id.* "[A] treating doctor . . . while unquestionably an expert, does not acquire his expert knowledge for the purpose of litigation but rather simply in the course of attempting to make his patient well." *Frantz v. Golebiewski*, 407 So. 2d 283, 285 (Fla. 3d DCA 1981). Therefore, a treating physician is not normally classified as an expert for the purposes of Rule 1.280(b)(4) but rather will be treated as an ordinary witness. *Id.*; *accord Avis Rent-A-Car Sys., Inc. v. Smith*, 548 So. 2d 1193, 1194 (Fla. 4th DCA 1989).

In the present case, Dr. Theophilos was appellee's treating physician. The record reflects that his opinions were not, as we interpret the phrase, "acquired or developed in anticipation of litigation or for trial." Appellant argues at length that Dr. Theophilos's opinions are "needed only to meet legal criteria for claims being made in litigation," but appellant concedes that a treating physician could develop these opinions based on his expertise and through his treatment of the patient.

Appellant has not demonstrated an abuse of discretion in the trial court's decision to hold a new trial. Had appellant shown that Dr. Theophilos derived his permanency opinion by reviewing, as part of litigation preparation, the medical records or conclusions of other physicians, we might find otherwise.[1] Further, a new trial was warranted, since the trial court found that Dr. Theophilos was a "critical witness" for appellee as her current treating neurosurgeon. Without a new trial, appellee would be substantially prejudiced in her ability to present her case.

Based on all the foregoing reasons, we affirm the trial court's granting of a new trial and find Dr. Theophilos, appellee's treating physician, was not subject to Rule 1.280(b)(4) governing disclosure of expert witnesses.

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[1] This rule is not absolute, and a treating physician may be deemed an expert under certain circumstances. For instance, where a treating physician opines "about the medical performance of another" physician, that testimony may be deemed an expert medical opinion subject to pretrial disclosure under Rule 1.280(b)(4). *Fittipaldi USA, Inc. v. Castroneves*, 905 So. 2d 182, 186 (Fla. 3d DCA 2005); *accord Lion Plumbing Supply, Inc. v. Suarez*, 844 So. 2d 768, 771 (Fla. 3d DCA 2003).

Affirmed.

POLEN and CIKLIN, JJ., concur.

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Appeal from the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County; Burton C. Conner, Judge; L.T. Case No. 56-2008-CA-003118.

Elizabeth K. Russo of Russo Appellate Firm, P.A. Miami, and Williams, Leininger & Cosby, P.A., Stuart, for appellant.

Marjorie Gadarian Graham of Marjorie Gadarian Graham, P.A., Palm Beach Gardens, and Paul P. McMahon of Gary, Williams, Finney, Lewis, Watson & Sperando, P.L., Stuart, for appellee.

Not final until disposition of timely filed motion for rehearing.