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Disclosure of Treating Physicians as Expert Witnesses News

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News

Disclosure of Treating Physicians as Expert Witnesses

In the trial of a personal injury lawsuit, the plaintiff may produce a treating physicianas an expert witness to give testimony as to the plaintiff's injuries, their causation, their significance, consequences and manifestations, and future prognosis.

The question may arise, what, if anything, need be disclosed about such a witness?

Pursuant to CPLR 3101(d)(1), other than in a medical malpractice case, upon request, a party must identify the names and qualifications of those people expected to testify as expert witnesses, and disclose the substance of the facts and opinions to be offered. However, where the plaintiff in a personal injury case plans on calling treating physicians as expert witnesses, there need be no compliance with these requirements.

No Disclosure Necessary

In *Nesselbush v. Lockport Energy Associates, LP*,[1] the court held that treating physicians need not be disclosed as experts retained to testify at trial under CPLR 3101(d)(1)(i) to the extent that they will be testifying at trial, if at all, as percipient fact witnesses

The court noted that:

The role of a treating physician has nothing inherently to do with the process of litigation. The role of the treating physician is, instead, to care for and heal the patient. At some point, of course, if the patient's condition gives rise to litigation, a treating physician may be called upon to testify at trial, but this would be an entirely secondary role.

In *Hunt v. Ryzman*,[2] the court held that it is well settled that the disclosure requirements of CPLR 3101(d)(1)(i) do not apply to treating physicians.[3] Disclosure with respect to treating physicians is governed by CPLR 3121 and 22 NYCRR 202.17, and not CPLR 3101(d)(1).[4]

Pursuant to 22 N.Y.C.R.R. 202.17(b)(1), medical reports of treating providers are to be exchanged between the parties. [M]edical reports may consist of completed medical provider, workers' compensation, or insurance forms that provide the information required by this paragraph.[5]

When the plaintiff's intended expert is a treating physician whose records and reports have been disclosed pursuant to CPLR 3121 and 22 NY.C.R.R. 202.17, the preclusion of the expert's testimony on the issue of causation based on the failure to serve CPLR 3101(d) notice constitutes an improvident exercise of the court's discretion.[6]

Giving Testimony

In *Holshek v. Stokes*,[7] the Appellate Division, Second Department, affirmed the trial court for allowing plaintiff's doctor to give testimony as to the permanence of plaintiff's condition, despite the fact that the physician's report stated that it was not determinable whether the injuries were permanent. The appellate court noted that:

[W]hile the doctor's report did not state that the injuries were permanent, it did not foreclose this possibility; therefore the defendant cannot claim surprise or prejudice by this testimony. Moreover, permanency cannot be considered an injury or condition. Rather, it relates to the severity of the knee injuries put into issue in the medical report. Further, the doctor's testimony as to the possibility of arthritis in the future was properly admitted as a valid medical opinion as to a possible complication of the injuries. Again, the defendant cannot claim surprise or prejudice by this testimony, especially in light of the fact that the condition was raised in the bill of particulars. Lastly, we find that the doctor's testimony that the plaintiff's present symptoms could indicate the onset of arthritis was properly admitted as the plaintiff testified as to these symptoms at trial; therefore the doctor was merely giving his opinion as a medical doctor as to the significance of these symptoms.

Thus, where the plaintiff's doctor's report did not indicate that his injuries were permanent, testimony as to permanence may still be admissible where the plaintiff alleged that the injuries were continuing and permanent in his Bill of Particulars, thereby placing the defense on notice of the claim.[8]

A physician may testify as to the details of functional consequences of previously reported injuries or conditions despite the fact that his report did not mention these functional consequences.[9] A plaintiff's medical witness may properly be permitted to testify about possible future surgery without defendant ever having been advised of that possibility prior to trial in a narrative report.

Rule 22 N.Y.C.R.R. 202.17(h) does not

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preclude a medical witness from detailing the functional consequences of previously reported injuries or conditions, and may relate a conclusion that can have been reasonably anticipated from the injuries that were fully disclosed to the defendant.[10]

No Report Served

In *Schwartz v. Tab Operating Co., Inc.*,[11] the Appellate Division, First Department, held that the trial court properly exercised its discretion in allowing plaintiff's expert to testify where such testimony was limited to what was contained in the expert's records that defendants could have obtained well before trial, having been furnished with authorizations therefor.

Thus, defendants could have been surprised or otherwise prejudiced only because they did not avail themselves of such authorizations. Nor do we find reversible error in the trial court's permitting this expert to testify that the accident in question was the cause of plaintiff's injury and that the injury was the cause of her symptomolgy.[12]

Where the plaintiff does not obtain and serve a report from a treating doctor, and the defendant fails to make a motion prior to the filing of a Note of Issue to compel production of such a report, the defendant's failure to make a timely motion may constitute a waiver of its right to seek preclusion of the physician's testimony at trial.[13]

Assuming that the plaintiff's failure to provide a medical report is not willful, such as actually possessing a report and intentionally refusing to serve a copy of it on defense counsel, the court may find that the intent of 22 N.Y.C.R.R. 202.17 has been complied with: that the adversary has been provided with information necessary to defend the action and to prevent surprise, and had not been put at an unfair disadvantage.[14]

In *Mendola*, the court found that the defense was sufficiently apprised of the nature and substance of the proposed testimony of the plaintiff's treating doctors, and could hardly claim surprise or prejudice at trial because the plaintiff did not supply medical reports from her treating doctors. The court noted that the defense extensively questioned the plaintiff during her examination before trial about her various doctors and the treatment she received, and the defense acknowledged that it was aware of the names of the plaintiff's treating doctors well in advance of trial, had been provided with medical authorizations to obtain plaintiff's medical records from those doctors, and in fact had the plaintiff's medical and hospital records in its possession prior to the start of trial.

The interests of justice and good cause requirement to avoid preclusion, is concerned less with the excuse offered for the failure to timely serve the report than it is with a party's need for the medical proof, the availability of alternate resources and the adverse party's preparedness to cross-examine with respect to the evidence based upon a report which was not provided in accordance with the rules.[15]

With respect to the interests of justice, the court noted that without the testimony of her treating doctors, the plaintiff would be unable to offer any evidence in support of her case, and plaintiff's non-compliance with 22 N.Y.C.R.R. 202.17 did not operate to bar the admission into evidence of the testimony proffered by the plaintiff's treating doctors.

Recent Examinations

In *DeStefano v. Gonzalez*,[16] five years prior to trial, plaintiff furnished defendant with a copy of a medical report by a treating physician. The Bill of Particulars made it clear that 'Plaintiff claims that the injuries to her cervical and lumbo sacral spine are permanent in nature. As is the usual practice, the treating physician examined the plaintiff shortly before trial some five years later.

No updated or recent medical report was furnished to the defendant. Defense counsel objected to the doctor giving testimony as to the results of the examination, conducted two weeks prior to trial, and as to the permanence of plaintiff's injuries. The trial court properly exercised its discretion in allowing said testimony.

In *Iasello v. Frank*,[17] plaintiff's physician and chiropractor were properly permitted to testify concerning their recent examinations of plaintiff even though reports of such examinations were not served on defendant because the physician's testimony described no new injuries or claims but merely the consequences of the injuries described in previously served medical reports.

Conclusion

The courts are loath to interfere with the plaintiff's right to offer the expert testimony of treating doctors, as long as they have been identified and authorizations to obtain their records have been exchanged, and some notice of the substance of their expected testimony has been provided in a bill of particulars.

FN[1] 169 Misc. 2d 742, 745 (Sup. Erie 1996).

FN[2] 292 A.D.2d 345, 346 (2nd Dept. 2002), lv. to app. den., 98 N.Y.2d 697 (2002).

FN[3] See *Rook v. 60 Key Centre, Inc.*, 239 A.D.2d 926, 927 (4th Dept. 1997); *Bonner v. Lee*, 255 A.D.2d 1005 (4th Dept. 1998).

FN[4] *McGee v. Family Care Services*, 246 A.D.2d 308 (1St Dept. 1998).

FN[5] Where the defendant does not seek to have a physician examine the plaintiff, 22 N.Y.C.R.R. 202.17 may not be applicable; the rule contemplates a reciprocal exchange of medical reports and not a unilateral exchange. *Diamantstein v. Friedman*, 199 A.D.2d 458, 459 (2nd Dept. 1993); *Dorato v. Schilp*,130 A.D.2d 348, 349-350 (3rd Dept. 1987). Moreover, the plaintiff may not have to obtain and furnish reports for physicians that plaintiff does not intend to call to testify at trial. *Peterson v. Wert*, 134 A.D.2d 668 (3rd Dept. 1987).

FN[6] *Ryan v. City of New York*, 269 A.D.2d 170 (1st Dept. 2000). See *Overeem v. Neuhoff*, 254 A.D.2d 398 (2nd Dept. 1998)(failure to serve CPLR 3101(d)(1) notice, and failure of report exchanged to discuss causation of injuries should not preclude a treatingphysician from being allowed to give expert testimony with respect to these issues on the plaintiff's behalf in a medical malpractice case).

FN[7] 122 A.D.2d 777 (2nd Dept. 1986).

FN[8] *Serpe v. Eyris Productions, Inc.*, 243 A.D.2d 375, 380 (1st Dept. 1997).

FN[9] *Shehata v. Sushiden American, Inc.*, 190 A.D.2d 620 (1st Dept. 1993).

FN[10] *Taylor v. Daniels*, 244 A.D.2d 176 (1st Dept. 1997).

FN[11] 239 A.D.2d 244 (1st Dept. 1997).

FN[12] See *Lombardi v. Wlazlo*, 170 A.D.2d 653 (2nd Dept. 1991)(plaintiff's furnishing an authorization enabling the defendant to obtain access to, or copies of, the results of all diagnostic tests performed on him fully complies with the requirements of CPLR 3120 and 22 N.Y.C.R.R. 202.17).

FN[13] *Mendola v. Richmond OB/GYN Associates*, 191 Misc. 2d 699, 700-701 (Sup. Richmond 2002)[citing 22 N.Y.C.R.R. 202.17(j)]; *Freeman v. Kirkland*, 184 A.D.2d 331 (1st Dept. 1992). See *Valenti v. Chanice*, 75 A.D.2d 850 (2nd Dept. 1980).

FN[14] *Mendola v. Richmond OB/GYN Associates*, 191 Misc. 2d at 701.

FN[15] 191 Misc. 2d at 701[quoting *McDougald v. Garber*, 135 A.D.2d 80, 94 (1st Dept. 1988), mod. on other grnds, 73 N.Y.2d 246 (1989)].

FN[16] 38 A.D.2d 532 (1st Dept. 1971),

FN[17] 257 A.D.2d 362 (1st Dept. 1999).