

DENNIS M. MILLER,	:	IN THE COURT OF COMMON PLEAS OF
LORI MILLER, his wife,	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiffs	:	
	:	
vs.	:	NO. 99-00,389
	:	
SUSQUEHANNA IMAGING	:	
ASSOCIATES, INC.; RICHARD D.	:	
WALTER, M.D.; and PATRICK	:	
J. CAREY, D.O.,	:	
Defendants	:	MOTION IN LIMINE

Date: September 11, 2001

OPINION and ORDER

This Order is entered regarding Plaintiffs’ Motion in Limine to preclude Defendant’s from attempting to enter Dr. Rene Rigal’s report of his examination of Plaintiff Dennis Miller (hereafter “Plaintiff”) on January 10, 2001, into evidence or from making any reference to the report at trial. For the reasons to be explained in this opinion, the Motion will be DENIED.

Facts

Plaintiff’s claims in this case are based upon allegations that Defendants failed to diagnose a femur fracture he suffered in a bowling alley accident on March 13, 1997 resulting in his leg being shortened, on-going pain and other maladies.

Dr. Rene Rigal, a pain management specialist, had treated the Plaintiff on several occasions beginning on November 20, 1997, and into 1998. All parties had obtained copies of Dr. Rigal’s clinic records of those visits. Defendant Dr. Walter had listed Dr. Rigal as a witness on his Pretrial Memorandum submitted to the Court on December 13, 2000, as to damages. Dr. Rigal was not listed as a witness on Plaintiff’s pretrial memo, filed December 11, 2000. The Pretrial Order filed December 19, 2000 scheduled the case for trial in the January 8-20,2001 trial term. When Dr. Rigal’s examination of Plaintiff was conducted on January 10,

2001, the trial of the case had been expected to commence the following week. On January 12th the case was continued to the May 2001 trial term. *See*, Order filed February 2, 2001.

During the deposition of Albert G. Liddell, M.D., on April 6, 2001, Defendants first learned that Dr. Rigal had examined the Plaintiff on January 10, 2001. After the examination Dr. Rigal had forwarded his clinic notes of the exam to Dr. Liddell, as well as to other physicians. During his deposition, Dr. Liddell made copies of Dr. Rigal's clinic notes of the January 10, 2001, examination and gave them to all counsel, including Plaintiff. It was a standard note written on Susquehanna Health Systems stationery. The notes and examination basically concluded that all the findings from Mr. Miller's physical examination were normal.

Defendants then issued (on April 10, 2001 the trial having been continued again until September 17, 2001) a notice to take Dr. Rigal's deposition. Plaintiff, prior to the deposition taking place, filed a Protective Order and a Motion in Limine on April 16, 2001, to prevent the deposition of Dr. Rigal. This Court issued an order on April 20, 2001, denying Plaintiff's Motion to Prohibit the Deposition. The Order permitting the deposition to proceed also permitted counsel to make inquiries during the deposition which would first allow this Court to determine if Dr. Rigal was utilized as a treating physician or an expert witness or both when he performed the January 10, 2001 examination. Upon direction of the Court, once the deposition was completed, Plaintiff was to supplement the Motion in Limine by filing a further motion and specifically identifying the portions of Dr. Rigal's deposition that Plaintiff believed should be excluded. The deposition was held April 23, 2001. Plaintiff filed the additional motion and a brief in support of the Motion on May 9, 2001. Defendants filed their brief in opposition on May 18, 2001.

In his deposition, Dr. Rigal did note a measurement of his quadriceps, demonstrating that his left quad was bigger than his right quad in the measurement of his left leg as compared to the right leg. *D.T., April 23, 2001, p.25-26.* Dr. Rigal indicated that his diagnostic impression regarding the cause of Mr. Miller's low back pain was that the low back pain was secondary to severe arachnoiditis. *Id.* Dr. Rigal noted that arachnoiditis would not relate to the femur fracture, but it likely resulted from Mr. Miller ____ means that the patient develops a significant amount of reactive scar tissue, which probably resulted from the surgical operations in the back. *Id. at 27.*

Dr. Rigal stated that observing patients when they walk in, when they walk out, and how they disrobe, is all part of the exam. *Id. at 31.* Dr. Rigal testified that during his observations of Mr. Miller, he noted that while the patient was in his office and under direct observation that Mr. Miller had a limp. However, when the patient was not knowingly being observed, and he walked away from the office in the corridor and into the parking lot, Mr. Miller resumed what appeared to be a normal gait. He was able to pivot on the left leg and then he kicked some ice off the fender of his car. *Id. at 30-31.* The conclusion that Dr. Rigal drew from his observation of Mr. Miller was that these differences in physical conduct could not be explained in a rational fashion. *Id. at 32.*

Discussion

Plaintiff's Motion in Limine requests the Court to preclude the Defendants from attempting to enter Dr. Rigal's report of his examination of Plaintiff on January 10, 2001. Plaintiff relies upon Pennsylvania Rule of Civil Procedure 4003.5(a)(3) which states:

A party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, except a medical expert as provided in Rule 4010(b) or except on Order of Court as to any other expert upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means, subject to such restrictions as to scope and such provisions concerning fees and expenses as the Court may deem appropriate. (Emphasis added) Plaintiff's Brief in Support of Motion in Limine to Exclude any Reference to Dr. Rigal's Report of this Examination of the Plaintiff on January 10, 2001, p. 3, May 9, 2001).

Plaintiff asserts that defendant may not discover facts known or opinions held by Dr. Rigal because Dr. Rigal was specially employed by plaintiff in preparation for trial and is now a plaintiff's expert who will not be called to testify at trial.

Plaintiff's motion filed May 9, 2001, further states, in paragraph 4, that Plaintiff's counsel arranged for and had the examination of Mr. Miller by Dr. Rigal on January 10, 2001, conducted with the intent that he would likely not testify as an expert witness for the Plaintiffs at the trial of this matter, but rather would assist Plaintiffs' counsel with regard to issues that arose concerning the "consequences" of Mr. Miller's leg shortening as a result of the missed femur fracture.

Plaintiff cites *Cruz v. Wannamaker*, 18 Pa. D&C 4th 410 Common Pleas Court of Bradford County, Pa. (1993), stating,

. . . it has been recognized that defendants are not entitled to discovery of a treating physician with regard to that part of his testimony which is based on his being hired by the other party as a non-trial witness. Plaintiff's Brief in Support of Motion in Limine to Exclude any Reference to Dr. Rigal's Report of this Examination of the Plaintiff on January 10, 2001, p. 3, May 9, 2001).

In *Cruz*, plaintiff sought a second opinion from a Dr. Presper. Subsequently, plaintiff's counsel retained Dr. Presper as an expert witness who was not expected to testify at trial. The trial court concluded that the defendants could not obtain testimony from Dr. Presper. The decision was based on Federal Rule of Civil Procedure 26 and the doctrine of "unfairness." *Cruz v. Wannamaker*, 18 Pa. D&C 4th 410, 413-415, (C.P. Bradford Co. (1993). "Discovery would result in unfairness to the party from which discovery is sought, in that it is unfair for that person to pay the cost of obtaining expert knowledge and opinions and require him to disclose them to his opponent." *Id.*¹ At 415.

The defense contends the report of the examination and Dr. Rigal's observations made during, as well as before and after his clinical exam, are admissible as those of a treating physician under Rule 4010(b) and also pursuant to *Crossin v. Huffman*, 21 Lyc. 123 (2000). The defense theory is such testimony that supports their claim that the incident causing Plaintiff's leg fracture and the subsequent medical care by Defendants (the subject of this litigation) are not substantial factors in causing Plaintiff to suffer any injury or current

¹ *Cruz* cites *U.S. v 23.76 Acres of Land*, 32 F.R.d. 593, 596 (D.Md. 1963) (Cited in F.R.C.P. 26 advisory Committee's notes).

disability. In other words, defense asserts the testimony of Dr. Rigal including his January 10, 2001, examination is admissible to show Plaintiff has no consequences nor leg shortening as a result of the Defendant's alleged misdiagnosis of the femur fracture but rather that Plaintiff's current complaints are related to physical maladies predating the March 13, 1997 incident and subsequently treated by Dr. Rigal.

Our case is clearly distinguishable from *Cruz*. First, Dr. Rigal had treated Plaintiff on several occasions beginning November 20, 1997, through March 1998. While Dr. Rigal was asked by Plaintiff's counsel to examine Plaintiff on January 10, 2001, the evidence does not establish that Dr. Rigal was retained as an expert for the purposes of this examination.

At Defendant's deposition of Dr. Rigal on April 23, 2001, Defendant's counsel asked Dr. Rigal whether he had been retained by Attorney Rieders as an expert witness? Dr. Rigal answered, "No, I have not." *D.T. , 4/23/01, p.13,14*. Defendant's counsel subsequently asked, "and have you been paid by Attorney Rieders in connection with the January 10, 2001 office visit and report?" Dr. Rigal replied that he had not; his billing would go to Plaintiff's "Workers' Comp" over at Geisinger. *Id.* In other words, Dr. Rigal did not bill Plaintiff's counsel for the medical examination; instead he billed Plaintiff's workers' compensation carrier. At Dr. Rigal's deposition on April 23, 2001, Dr. Rigal testified that he saw Mr. Miller on January 10, 2001, at the request of his (Mr. Miller's) attorney, Mr. Cliff Rieders. *D.T. April 23, 2001, p. 22,52-53*. Plaintiff's counsel, Mr. Rieders stated while questioning Dr. Rigal: "And you recall by reading that sentence and maybe one later on that I called you because I was interested in whether he was still having left leg pain as a result of the femur fracture. Do you recall my discussing that with you? (Dr. Rigal responded) Yeah, something like that." *D.T. April 23, 2001 at 53 (emphasis added)*. Additionally, the report of the examination was

not sent to Plaintiff's attorney, but to Plaintiff's other treating physicians. Plaintiff argues he was going to use Dr. Rigal to help him review and discredit Defendants' expert witnesses. Nothing in Dr. Rigal's deposition or clinical exam notes verifies this. Nor is there any statement therein that expresses Dr. Rigal's opinion as to the opinions held by Defendants' experts.

It is clear that from our viewpoint Dr. Rigal examined Plaintiff (Mr. Miller), at the request of Plaintiff's counsel, to follow up on whether his current complaints were "consequences" of the femur fracture or stemmed from a prior condition. As a treating physician Dr. Rigal determined that Plaintiff's pain is attributable to former surgeries and not the femur fracture at issue in this case. That information from a treating physician is relevant, discoverable and admissible. Consequently, Pa.R.C.P. 4003.5(a)(3) is clearly not applicable in our case because there is no evidence to indicate that Dr. Rigal was retained or specially employed by Plaintiff in anticipation of litigation or preparation for trial.

Dr. Rigal was listed as a witness on Dr. Walter's Pretrial Memorandum prior to Dr. Rigal's examination of Plaintiff on January 10, 2001. It is clear that at the time that Plaintiff arranged for the January 10th examination of Mr. Miller, Dr. Rigal was already expected to testify at trial for Defendant Walters. Plaintiff cannot frustrate the presentation of relevant evidence by hiring a treating physician as an expert and intending at that time or later making a decision not to use the expert at trial. The purpose of the exam was obviously to permit Dr. Rigal to be thoroughly acquainted with Plaintiff's current physical condition on the eve of trial, after the December Pretrial Conference. Certainly it is relevant to, and an aid to, Dr. Rigal's testimony for him to have recently examined the Plaintiff. It would certainly have

been beneficial to Plaintiff to have his prior treating physician be able to say there were no present complaints attributable to his prior conditions. Just because the testimony works to the favor of Defendant is no basis to exclude the testimony.

In conclusion, the Court believes that Plaintiff's decision to make use of a prior treating physician on the eve of trial was a known risk to Plaintiff that the clinical exam might not be favorable and the physician's testimony could be obtained by Defendants, especially where the physician had already been identified as a defense witness. Since Plaintiff's current condition is relevant to the physician's testimony and whether it is attributable to the incident under litigation or a preexisting condition, the examination results cannot be precluded under the guise that the treating physician is now an expert hired by Plaintiff but not intended to be used at trial.

ORDER

For the foregoing reasons, the Plaintiff's Motion in Limine to exclude any reference by Defendant to Dr. Rigal's report of his examination of the Plaintiff on January 10, 2001 is hereby DENIED.

BY THE COURT:

William S. Kieser, Judge

cc: Rodney L. Knier, Esquire
Raymond E. Ginn, Esquire
Robert Seiferth, Esquire
Judges
Suzanne R. Lovecchio, Law Clerk
Gary L. Weber, Esquire (Lycoming Reporter)