

New Jersey Law Journal

A Publication of American Lawyer Media, L.P.

VOL. CXL - NO. 11

JUNE 12, 1995

ESTABLISHED 1878

IN PRACTICE

TORT LAW

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Deposing Treating Physicians In Medical Malpractice Cases

The preparation of a medical malpractice case requires thorough discovery of the facts known and the opinions formed by the physicians who treated the plaintiff. These physicians will invariably play one of only two roles in the case — defendant or treating physician. In our recent article, "Deposing Defendants in Medical Malpractice Cases," 139 N.J.L.J. 723 (Feb. 20, 1995), we discussed the scope of discovery available from defendant/physicians.

The ability of a litigant to discover and use the opinions of the treating physician was expanded significantly by the Supreme Court's decision in *Stigliano v. Connaught Laboratories, Inc.*, A-55 (May 31, 1995). This article will review the scope of discovery available from treating physicians and discuss the opportunities provided to both plaintiffs and defendants by this decision. As the Supreme Court has previously noted, the testimony of treating physicians is of special value to the proponent of the opinion since, unlike that of a professional expert, the opinion is not tainted by the fact that the physician takes "the stand for a fee from one of the litigants." 6 Wigmore on Evidence, Sec. 1692, at 7 (Chadborn rev.1976), cited in *Jacobson v. St. Peter's Medical Center*, 128 N.J. 475, 495 (1992). Indeed, in *Stigliano*, supra, Justice Pollock noted that:

"Without impugning the expert witnesses who may testify for either plaintiffs or defendants, the treating doctors may be the only medical witnesses who have not been retained in anticipation of trial. A jury could find the treating doctors' testimony to be more impartial and credible than that of the retained experts."

Id., slip op. at 18.

In fact, the opinions of subsequent treating doctors carry special weight not merely because they do not take the stand for a fee, but

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also because the subsequent treating doctor often has specialized expertise in the medical condition at issue.

In *Stigliano*, plaintiffs brought a medical malpractice and product liability action on behalf of their daughter, Jessica, alleging that the child's seizure disorder was caused by the administration of a DPT vaccine. The child suffered a series of convulsive disorders about six-and-one-half hours after the defendant pediatrician administered a DPT shot. Plaintiffs alleged that defendant deviated from accepted standards by administering the vaccine while the child had a fever. The plaintiffs also alleged that the vaccine was "dangerous and defective."

Plaintiffs retained two experts who found a causal relationship between the DPT immunization and the seizure disorder. The defendants retained three experts who rendered opinions that the DPT vaccine did not cause the seizures. *Id.* at 5. Additionally, the defendant deposed the three pediatric neurologists who actually treated the child for the seizure disorder. These physicians testified that the child's condition was not caused by the DPT shot. One of the treating physicians testified that the child's condition was "not compatible with a pertussis encephalopathy." Another treating physician testified that the child's condition "was not consistent with a pertussis encephalopathy." A third treating physician testified that the child probably had a "congenital and possibly genetic epilepsy." *Id.* at 3. The defendants gave notice that they intended to call the child's treating physicians as experts at trial.

Treating Physicians and Causation

Plaintiffs moved to preclude defendants from making any reference at trial to the opinions of the treating doctors regarding the causation of the seizure disorder. Plaintiffs argued that the asserted "unsolicited opinions ... are protected from disclosure by the physicians' fiduciary duties" to the plaintiffs; that the treating physicians could not be called to testify because the defendants already had experts regarding causation and thus could not demonstrate an "exceptional need"; and that the causation testi-

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mony of the treating physicians would be "unduly prejudicial and should be excluded under Evid.R. 4 [now N.J.R.E. 403]." The trial court granted the plaintiffs' motion and barred the defendants from using the opinions of the treating doctors as to causation. The Appellate Division reversed the trial court, stating:

"We therefore see no reason to distinguish the doctors' testimony as to causation and their testimony as to diagnoses and prognoses. All arise out of and are inextricably linked to Jessica's treatment. Defendants are entitled to elicit that relevant and material evidence from the treating physicians.

Stigliano, 270 N.J. Super. at 379.

The Supreme Court, in a unanimous decision, affirmed the use of the opinions of the treating physicians. The Court started its analysis by noting that the exercise of any privilege results in the withholding of probative evidence and thus is contrary to the goal of seeking the truth. *Id.* at 7. The Court noted that the filing of a personal injury claim "extinguishes" the physician-patient privilege. *Id.*, at 8. In response to the plaintiffs' arguments that the treating physicians should be permitted to testify only as fact witnesses regarding their examination and diagnoses of the child, the Court noted that once a patient waives the physician-patient privilege, "it is a waiver of the privilege in regard to all of his knowledge." *Id.*, at 10. Therefore, the Court held that the treating doctors may "testify about their diagnosis and treatment ... including their determination of that disorder's cause. Their testimony about the likely and unlikely causes of Jessica's seizure disorder is factual information, albeit in the form of opinion." *Id.* at 13. (Emphasis supplied).

The Court distinguished *Graham v. Gielchinsky*, 126 N.J. 373 (1991), where defendant wanted to utilize an expert that plaintiff had already consulted but did not intend to call at trial. In *Graham*, the Court discussed the several public policies which mandate the prohibition of the use of a litigation expert first consulted by the other side. In *Stigliano*, the Supreme Court noted that such policy issues were not in play, and that allowing the treating doctors to testify "will not affect either Jessica's medical treatment or counsel's search for experts." *Id.* at 11. The plaintiffs had also relied on *Spedick v. Murphy*, 266 N.J. Super. 573 (App. Div. 1993), wherein the Appellate Division set limits on the use of opinions of treating doctors. In *Spedick*, an automobile negligence action, defendant wished to present the testimony of doctors who had treated plaintiff, but whom plaintiff did not call as witnesses. The trial court ruled that these doctors would only be allowed to testify as to plaintiff's complaints, medical history, and their physical examinations and diagnoses, but not their prognoses, stating:

"Defendant, therefore, was properly permitted to call

these witnesses, not to obtain opinions about plaintiff's disabilities, but to testify concerning their physical examinations and diagnoses of plaintiff shortly after the injury. This testimony was clearly relevant and material. To bar such testimony of the initial treating physicians would only serve to hinder the search for truth. *Id.* at 592.

No Clear Distinction

The *Stigliano* Court was unable to distinguish *Spedick* clearly, merely stating, "In sum, plaintiffs misplace their reliance on *Graham* and *Spedick*. The treating doctors did not examine Jessica in anticipation of litigation or in preparation for trial, but for purpose of treatment." *Stigliano*, slip op at 12. However, the Court acknowledged that in *Spedick*, the plaintiff had also merely consulted the doctors for treatment and had not intended to call the doctors as witnesses. *Stigliano*, slip op. at 11. The Court simply disregarded *Spedick's* limitation on the scope of the treating doctors' testimony, stating:

"Unlike an expert retained to testify at trial, the treating doctors gained no confidential information about plaintiffs' trial strategy. Although the treating doctors are doubtless "experts," in this case they are more accurately fact witnesses. Their testimony relates to the their diagnosis and treatment of the infant plaintiff. In this context, moreover, the characterization of the treating doctors' testimony as "fact" or "opinion" creates an artificial distinction." *Id.* at 12.

This analysis is flawed. The distinction is not artificial in that an "opinion" which later turns out to be incorrect was never "fact." Moreover, if there is a legitimate debate within the scientific community regarding an issue of medical causation, or if the treating doctor subscribes to a radical or fringe viewpoint, the treating doctor's opinion may not be "factual information, albeit in the form of opinion" but simply wrong.

Nevertheless, the *Stigliano* opinion provides substantial opportunities for attorneys for both plaintiffs and defendants to proactively utilize the opinions of treating physicians which are favorable to their position. Initially, it becomes more important than ever for the plaintiff's attorney to instruct treating physicians that they may not disclose any records or discuss the plaintiff, even informally, with any representative of the defendant without strict compliance with the notice requirements of *Stempler v. Speidell*, 100 N.J. 368 (1985). The plaintiff's attorney should also meet with any treating physician who rendered substantial treatment to the plaintiff or who has particularly distinguished credentials. Since most physicians do not understand the legal defi-

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dition of proximate causation or the value of a lost chance as defined by *Scafidi v. Seiler*, 119 N.J. 93, 101 (1990), such a meeting may result in obtaining a favorable opinion regarding causation.

Sorting Out the Doctors

Additionally, plaintiff must determine and distinguish those treating physicians who are critical of the care rendered by a defendant physician from those who are not and must be certain to move to prohibit treating doctors from rendering the opinion that, for example, the defendant physician did not commit malpractice. *Stigliano*, slip op. at 13, citing *Piller v. Piller*, 194 N.J. Super. 392 (Law Div. 1984) and *Serrano v. Kovarsky*, 194 N.J. Super. 454 (Law Div. 1986). Finally, counsel for plaintiff should always compensate the expert for the time spent meeting with counsel. *Stigliano* does not resolve whether treating physicians who have also been consulted in anticipation of litigation may be turned into Graham experts who may be restrained from rendering harmful opinions.

The defendant should also always attempt to conduct an *ex parte* interview of the treating doctors pursuant to the procedure

outlined in *Stempler*. If the physician will not cooperate, the doctors can now presumably be compelled by subpoena to testify as "fact witnesses." *Stigliano*, slip op. at 12. Cf., *Hull v. Plume*, 131 N.J.L. 511, 516-517, 37 A.2d 53 (E. & A. 1944); *Genovese v. NJ Transit Rail Operations, Inc.*, 234 N.J. Super. 375, 380-381, 560 A.2d 1272 (App. Div.), cert. denied, 118 N.J. 195, 570 A.2d 960 (1989).

Furthermore, since parties may now use opinions of treating doctors without even naming the physician as an expert, both parties must serve interrogatories to discover whether any party intends to elicit "factual information, albeit in the form of opinions" from treating physicians. Additionally, since the Court did not address the scope of cross-examination of a treating doctor, both sides must be prepared to confront the treating doctor who renders unfavorable opinions with the same medical literature utilized against traditionally retained experts as sanctioned by *Jacober*, and N.J.R.E. 803(c)(18).

As with *Jacober*, the *Stigliano* decision represents another step away from the use of the professional witness. As such, *Stigliano* represents a positive change in the law and will assist the legal system in achieving its primary goal, "the search for the truth." *Stigliano*, slip op. at 7. ■