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MUST TREATING PHYSICIANS BE PAID FOR THEIR TESTIMONY?

By Michael L. Forte and Sara M. Klco

Whether treating physicians must be paid for their testimony depends on whether they are expert witnesses, or merely fact witnesses. As a practical matter, however, the issue is not always clear-cut.

In personal injury cases, the plaintiff's treating physicians generally charge a fee for their testimony.¹ Although Florida Rule of Civil Procedure 1.390 entitles "expert" witnesses to a reasonable fee, an open question remains as to whether treating physicians are really experts for purposes of this rule.² If they are simply fact witnesses explaining their medical observations, then a fee for their testimony may not be required.

The only Florida appellate court to address this issue essentially ruled a fee is unnecessary, but the opinion offers limited reasoning. In *Comprehensive Health Center, Inc. v. United Automobile Insurance Company*,³ a healthcare center sued its patient's insurer in county court for PIP benefits. When the insurer sought to depose two of the center's doctors, the center filed a motion for a protective order seeking prepayment of the doctors' deposition fees. At the hearing on the motion, the insurer argued the doctors were not entitled to fees because they were mere fact witnesses who would explain their treatment of the center's patient. The county court disagreed, and ordered the insurer to pre-pay \$350 to each doctor.

The appellate division of the circuit court reversed. It reasoned the treating physicians were not experts "because they do not obtain their information for the purpose of litigation but rather in the course of treating their patients."⁴ The healthcare center then sought certiorari in the Third District Court of Appeal, which denied the petition. The Third District stated, without discussing Rule 1.390 or offering further explanation, "The circuit court correctly decided to

apply *Frantz*."⁵

In *Frantz v. Golebiewski*,⁶ a plaintiff sued a doctor for malpractice. The defendant's attorney then obtained a sworn statement from the plaintiff's subsequent doctor without first giving the plaintiff notice. When the plaintiff learned of the statement, she filed a motion to compel its production. The trial judge granted the motion and ordered the defendant to produce the statement. The defendant refused. The trial court then fined the defendant, prohibited the use of the statement by the defendant for any purpose, and ordered that the plaintiff be given notice before any such further statements were taken.

The Third District granted the defendant's petition for certiorari. It rejected the plaintiff's argument that a treating physician is governed by Florida Rule of Civil Procedure 1.280(b)(5), which controls discovery of opinions from testifying experts. The court noted the rule is limited to expert opinions "acquired and developed in anticipation of litigation or for trial, as in the case of an expert retained by counsel."⁷ It reasoned the plaintiff's subsequent doctor did "not acquire his expert knowledge [of plaintiff] for the purpose of litigation but rather simply in the course of attempting to make his patient well."⁸ As such, he essentially was a fact witness—albeit with specialized training—who had observed the plaintiff's medical condition. Therefore, the defendant's ability to obtain information from a treating physician was not limited to the methods allowed by Rule 1.280(b)(5) and the doctor's statement enjoyed the same work product protection as any other nonparty witness statement.⁹

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Courts citing the *Frantz* decision stop short of ruling treating physicians always are fact witnesses. In *Clair v. Perry*,¹⁰ the court in a footnote acknowledged *Frantz* but stated “the rule is not absolute, and a treating physician may be deemed an expert in certain circumstances.”¹¹ Similarly, in *Fittipaldi USA, Inc. v. Castroneves*,¹² the court cited *Frantz* and its progeny, but stated “the holdings in those cases address the categorization of treating physicians as ordinary witnesses but do not address the limits of such testimony. It is entirely possible that even a treating physician’s testimony could cross the line into expert testimony.”¹³

In addition, neither *Comprehensive Health* nor *Frantz* address the potential effect, if any, of Florida Rule of Civil Procedure 1.390. That rule provides: “An expert or skilled witness whose deposition is taken shall be allowed a witness fee in such reasonable amount as the court may determine.” It defines “expert witness” as

a person duly and regularly engaged in the practice of a profession who holds a professional degree from a university or college and has had special professional training and experience, or one possessed of special knowledge or skill about the subject upon which called to testify.¹⁴

Absent from this rule is any requirement that the witness’s opinions were “acquired or developed in anticipation of litigation or for trial.” Practitioners are left without sufficient guidance regarding how this rule reconciles with *Comprehensive Health*.

Still, a defendant should be able to assemble a technical argument against being required to pay a treating physician. As an initial matter, the Third District’s decision in *Comprehensive Health*—as the only appellate court decision on this issue—is binding upon all circuit courts in Florida.¹⁵

And aside from the *Frantz* situation, at least two other useful analogies exist. First, when courts at trial limit the number of experts per discipline, treating physicians generally do not count as experts.¹⁶ For example, in *Ryder Truck Rental, Inc. v. Perez*,¹⁷ a defendant in a car accident case retained an orthopedist and neurologist to perform compulsory medical examinations of the plaintiff. Before trial, the court limited each party to one medical expert per specialty. The defendant objected because, as it turned out, the plaintiff’s own treating physicians (one of whom was an orthopedist) had opined the plaintiff did not sustain a permanent injury. As such, the defendant sought to present testimony of its own CME doctors as well as that of the plaintiff’s treaters. The defendant argued the treating physicians were not experts but rather fact witnesses. The trial court rejected this argument and precluded the defendant from calling the treaters.

The appellate court reversed and remanded for a new trial. It cited *Frantz* for the idea that treaters develop their opinions as a byproduct of trying to make their patients well, as opposed to developing them for litigation purposes. It ruled the plaintiff’s treaters “should not have been classified as expert witnesses, but as ordinary fact witnesses not impeded by the ‘one expert per specialty’ rule imposed by the trial court.”¹⁸

Second, treating physicians do not count as experts for the federal expert report requirement.¹⁹ Rule 26(a)(2) requires written reports of experts who are “retained or specially employed to provide expert testimony in the case.” The commentary to the 1993 amendments to Rule 26 specifies that “A treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report.” Similarly, the Middle District of Florida Discovery Handbook, Section II(E) observes:

The expert report is not required of a “hybrid” witness, such as a treating

physician, who was not specifically retained for the litigation and will provide both fact and expert testimony (though nonretained experts must still be disclosed and are subject to regular document and deposition discovery). The parties are encouraged to communicate openly about all opinions that a treating physician is expected to render in support of a party’s case.

Of course, practical considerations abound. If a court grants a motion to compel the testimony without a fee, the doctor likely would be unhappy to say the least, making the deposition or trial questioning more difficult. In addition, the plaintiff may become inspired to look at the fees charged by the defendant’s experts, and seek to limit those fees.²⁰ In that situation, the defendant often ends up paying the difference between the defense expert’s original fee and the fee set by the court, potentially resulting in an overall net increase of the defendant’s expert costs. Perhaps in the future a defendant will find itself in a situation conducive to fighting this fight, resulting in additional favorable case law from appellate courts.

¹ See, e.g., *Frantz v. Golebiewski*, 407 So. 2d 283, 285 n.1 (Fla. 3d DCA 1981) (“As a practical matter, medical professionals almost invariably insist—as every witness has the right to do—upon a formal deposition and the payment of an appropriate witness fee before giving a statement to the party adverse to his patient.”).

² Florida circuit court opinions on this issue are all over the board, and even some judges within the same circuit disagree. Compare *United Auto. Ins. Co. v. Flagler Med. Ctr., Inc.*, Nos. 08-535, 07-3529 (Fla. 11th Cir. Ct. July 22, 2010) (treating physician entitled to fee) with *Rodriguez v. Allstate Indemnity Co.*, No. ____ (Fla. 11th Cir. Ct. April 14, 2003) (treating physician not entitled to fee).

³ 56 So. 3d 41 (Fla. 3d DCA 2011).

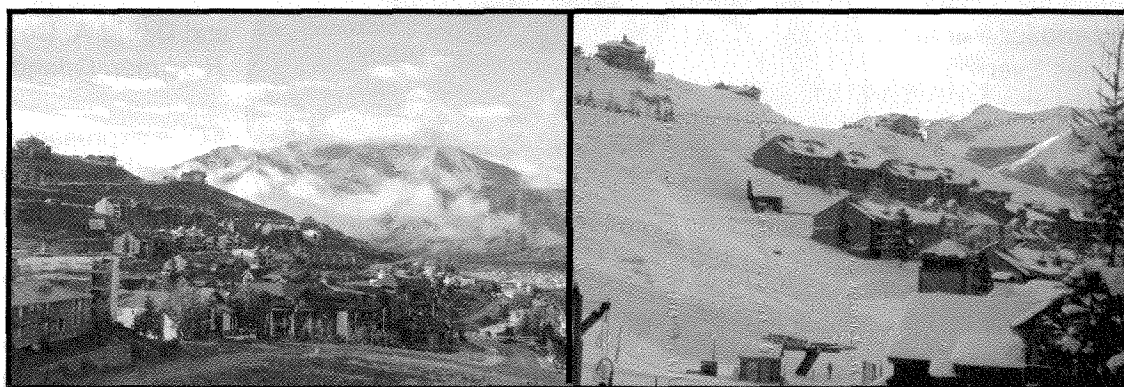
⁴ *Comprehensive Health Ctr., Inc.*, 56 So. 3d at 43.
⁵ *Id.* at 44.
⁶ 407 So. 2d 283 (Fla. 3d DCA 1981).
⁷ *Frantz*, 407 So. 2d at 285. Note that at the time of the decision, the rule in question was numbered 1.280(b)(3).
⁸ *Id.*
⁹ *Accord Avis Rent-A-Car Sys., Inc. v. Smith*, 548 So. 2d 1193, 1194 (Fla. 4th DCA 1989); *Coralluzzo v. Fass*, 435 So. 2d 262, 263 (Fla. 3d DCA 1983).

¹⁰ 66 So. 3d 1078 (Fla. 4th DCA 2011).
¹¹ *Id.* at 1080 n.1.
¹² 905 So. 2d 182 (Fla. 3d DCA 2005).
¹³ *Id.* at 18, n. 1.
¹⁴ Fla. R. Civ. P. 1.390 (emphasis added).
¹⁵ *Pardo v. State*, 596 So. 2d 665, 667 (Fla. 1992).
¹⁶ *E.g., Carpenter v. Alonso*, 587 So. 2d 572, 573 (Fla. 3d DCA 1991) (In a medical malpractice case, "permitting the defendant doctor to testify as to his care of the plaintiff would not be a violation of [the

trial court's] expert witness limitation.").
¹⁷ 715 So. 2d 289 (Fla. 3d DCA 1998).
¹⁸ *Ryder Truck Rental, Inc.*, 715 So. 2d at 291.
¹⁹ Interpretation of federal rules of procedure are persuasive on Florida state courts. *Eg. Carriage Hills Condominium, Inc. v. JBH Roofing & Constructors, Inc.*, 109 So. 3d 329, 334, n. 1 (Fla. 4th DCA 2013).
²⁰ Florida Rule of Civil Procedure 1.390 empowers courts to set a reasonable expert fee.



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