

September 2004

EXCLUSION OF EXPERT WITNESSES “SANDBAGGING”

It is well settled in Florida law that a witness cannot state on deposition that he or she does not intend to testify on a particular subject and then at trial be allowed to testify on that subject. Such a practice has been termed “sandbagging.” That rule has been extended to include opinions stated in reports rendered under RCP 1.360(b) pursuant to a Court Ordered examination. In Suarez-Burgos v. Morhaim, 745 So. 2d 368 (Fla. 4th DCA 1999), a physician rendered a report which did not include an opinion concerning the causation of the plaintiff’s injury. Shortly before trial, without disclosing it to plaintiff’s counsel, defense counsel provided the witness with additional medical records and then put him on the stand to testify regarding causation. The appellate court affirmed the granting of a mistrial based upon surprise, pointing out that a party has a right to rely upon a report rendered pursuant to RCP 1.360(b). At Page 370, the Court held:

Clearly the *purpose* of Rule 1.360(b) is to require disclosure of the opinions of expert witnesses so that the other side may take these opinions into account in defending or prosecuting the case. A party can hardly prepare for an opinion that it doesn’t know about, much less one that is a complete reversal of the opinion it has been provided.

We agree with the trial court that the spirit and purpose of Rule 1.360(b) requires the disclosure of a substantial reversal of opinion such as occurred here, if a party intends to offer that changed opinion at trial. Parties who fail to

make such disclosure do so at their peril, depending on the circumstances of the particular case. In this case, allowing the presentation of the changed opinion was tantamount to permitting an undisclosed adverse witness to testify as in *Binger*.

Some trial judges have concluded that the holding in Suarez-Burgos, supra, extends to reports rendered by treating physicians and have excluded the testimony of such a treater even when defense counsel have not bothered to take a deposition to find out the opinions to be expressed at trial. The opinion in Suarez-Burgos and cases which have followed make it clear that the rule set forth in Suarez-Burgos relates to reports rendered under RCP 1.360 and not to treating physician's records.

The Suarez-Burgos Court itself distinguishes treating physicians and their records from reports rendered under RCP 1.360. In discussing Ganey v. Goodings Million Dollar Midway, Inc., 360 So. 2d 62 (Fla. 1st DCA 1978), the Court makes it clear that the rule announced in Suarez-Burgos was not intended to cover treater's records.

Appellant cites *Ganey v. Goodings Million Dollar Midway, Inc.*, 360 So. 2d 62 (Fla. 1st DCA 1978), as being analogous. It is distinguishable and was decided well before the *Binger* case. In *Ganey*, plaintiff's treating physician testified at trial that her injury was permanent and a result of the accident at question in the case. The defendant moved for a new trial, claiming surprise as to this testimony which had not been revealed in pretrial discovery even though the doctor's deposition had been taken. The trial court granted the motion for new trial. The appellate court reversed because the plaintiff had never asked in the deposition whether

she had suffered a permanent injury. *See id.* at 63. Thus, defendant could not claim surprise. However, the court noted specifically that the defense had not sought a physical examination pursuant to Rule 1.360(a). *Ganey* did not deal with the testimony of an expert who performed a compulsory medical examination and was required to furnish the opposing party with a report of the expert's opinions. *Suarez-Burgos* at 371. (Emphasis by the court).

Exclusion of expert witnesses is a drastic remedy reserved only for cases in which there has been a clear attempt to sandbag and would rarely apply to a treating physician. In *Ryder Truck Rental v. Perez*, 715 So. 2d 289 (Fla. 3rd DCA 1998), the Court made it clear that treating physicians are not hired experts and should not be subject to a trial court's limitation to one expert witness per side in a medical malpractice case.

To exclude a witness because a party has chosen not to take the deposition of that witness when it is clear that the witness will most likely testify on crucial issues is not appropriate. The Court so held in *Santos v. Carlson*, 806 So. 2d 539 (Fla. 3rd DCA 2002). There a trial court excluded a witness because the defense had not provided the plaintiff with a copy of his report even though at the time the report was requested it did not exist. The trial court incorrectly concluded that a party has an obligation to update discovery. In reversing, the District Court pointed out that a party cannot quietly sit back in blissful ignorance and then successfully deprive his opponent of a crucial witness. The Court pointed out that counsel had known that the witness was going to testify for

almost two years yet never took a deposition. In reversing the trial court's exclusion of the witness, the Court held at Page 541:

The right to call witnesses is one of the most important due process rights of a party; accordingly, the exclusion of the testimony of expert witnesses must be carefully considered and sparingly done.

A party does not have a duty to educate that party's opponent concerning matters which could be easily learned through discovery. In Binger v. King Pest Control, 401 So. 2d 1310 (Fla. 1981), the Supreme Court in a footnote states:

Nothing in this concept of trial practice requires that one party disclose his case to the other in full. We are dealing only with an exchange of witnesses' names. It remains the obligation of each attorney to learn through interrogatories, depositions or any other means he selects, the nature of the testimony which will be offered and the extent to which he intends to meet or deal with it at trial. Negligence in discovery is not an issue in this case.

That is not to say that a party can allow a witness' deposition to be taken and the witness' opinions to be obtained and then put the witness on without notice that the opinions have changed or have been newly formed. In Gouveia v. Phillips, 823 So. 2d 215 (Fla. 4th DCA 2002), a witness' pretrial deposition made it clear that the witness had no opinion regarding informed consent. At trial, the plaintiff sought to put the witness on on that subject and the trial court excluded the testimony. In affirming, the Court at Page 222 colorfully sets forth the rule:

In the memorable line by Strother Martin in *Cool Hand Luke*, "[w]hat we have here is a

failure to communicate.” If plaintiff’s purpose in designating Dr. Garrod as an expert was to have him testify as to the standard among physicians for obtaining consent when the patient is visibly intoxicated, then it was incumbent on him to communicate that intent at the deposition. Plaintiff could not sit silently by while the witness disclaims any opinion on something that might include a subject on which the expert would be expected to testify at trial.

Viewing the cases as a whole, it is apparent that the rule regarding exclusion of expert witnesses is one of reasonableness. The rule set forth in Suarez-Burgos applies to reports under RCP 1.360 not to the records of a treating physician. A party cannot sit back knowing full well that a treating physician is going to testify regarding the treatment of the plaintiff, refuse to take the deposition and then move to exclude the testimony. The exclusion of witnesses based upon surprise is limited to those cases in which there has been a clear attempt at subterfuge by hiding the witness’ opinion and a good faith effort by opposing counsel to perform the responsibility of adequate discovery.

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