

Plaintiff Permitted to Redesignate Rule 213(f)(3) Controlled Expert to Consultant

Healthcare Alert | 2 min read

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Issue

Can a party who has disclosed a physician as a controlled expert witness pursuant to 213(f)(3) later redesignate that expert as a consultant pursuant to Rule 213(b)(3)?

Alexis Dameron v. Mercy Hospital and Medical Center, Case No. 2020 IL 125219

Case Summary

In a medical negligence suit, plaintiff disclosed Dr. Preston as a controlled expert witness pursuant to Rule 213(f)(3) and indicated that he would testify regarding a comparison electromyogram (EMG) study he performed on plaintiff. Approximately two months after plaintiff's expert disclosure, she filed a motion to withdraw Dr. Preston as a controlled expert witness and to preclude discovery of facts and opinions known by Dr. Preston. Plaintiff maintained that Dr. Preston was not her treating physician and instead was a non-testifying consultant pursuant to Rule 201(b)(3). The trial court denied plaintiff's motion to designate Dr. Preston as a consulting expert and ordered her to produce his records. Plaintiff refused to do so and was found in contempt. The case was ultimately appealed to the Illinois Supreme Court.

The Illinois Supreme Court found that plaintiff's redesignation of Dr. Preston as a Rule 201(b)(3) consultant was permissible. The court noted that defendants would not suffer any undue surprise as they had been given almost one year of advance notice that Dr. Preston would not be testifying at trial. Furthermore, because Dr. Preston's EMG report had not yet been disclosed, defendants had not relied on the report and would not be prejudiced by Dr. Preston's withdrawal. The court commented that if a party were irrevocably bound by its initial Rule 213(f) disclosures, that it would frustrate a party's obligation to supplement or amend their discovery responses when new or additional information becomes available.

Further, the court held that defendants were not entitled to Dr. Preston's report or the results of the EMG study absent a showing of exceptional circumstances. The court held that Rule 201(b)(3) protects both the consultant's opinions as well as the facts informing the consulting expert's opinions. Defendant did not show any exceptional circumstances warranting production of the EMG results or report because the same study could have been performed by another physician.

Finally, the court found that Dr. Preston was not plaintiff's treating physician given that he was paid by plaintiff's counsel for his time and for the EMG study he performed. Because Dr. Preston was consulted for the purpose of providing testimony and not for the purposes of treatment, he was deemed to be a consultant, and therefore his records were not discoverable.

Takeaway

A party may redesignate a 213(f)(3) controlled expert witness as a consultant IF sufficient notice is given before trial. Absent a showing of exceptional circumstances, a consulting expert will not be required to produce factual or conceptual information.

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