

Blog Post

# The Treating Physician: Entitled to Expert Witness Fees at Trial?

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When is a treating physician considered an expert witness and therefore entitled to expert witness fees when he testifies at trial? Apparently, the Florida District Courts of Appeal have formulated the typical lawyer response – it depends!

The trial court's determination that treating physicians could not be considered experts because they had treated the plaintiff was clarified by the Second District Court of Appeal on August 25, 2017. The court explained that a treating doctor can be considered an expert where the doctor provides expert opinion testimony. In that case, the court determined that one of the treating doctors in fact should be considered an expert for the purposes of awarding fees because he was, in fact, listed as an expert and provided expert testimony.

The Second District Court reasoned that the concept of fairness in trial is paramount. If a party is prejudiced in the ability, primarily, to mount a defense because the party had no notice of the substance of an expert's testimony, the testimony is generally excluded. However, in the past the Third District Court has noted that "a treating doctor . . . while unquestionably an expert, does not acquire his expert knowledge for the purpose of litigation but rather simply in the course of attempting to make a patient well." *Franz v. Golebiewski*, 407 So. 2d 283,

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285 (Fla. 3d DCA 1981). While a treating physician is not generally classified as an expert witness, it is not an absolute rule and he may be deemed an expert in certain circumstances. *Fittipaldi USA, Inc. v. Castroneves*, 905 So. 2d 182, 186 (Fla. 3d DCA 2005). If a party is fully aware that the treating physician's role could be that of an expert, they are on notice and should not be able to claim prejudice.

Under the Florida law, Florida Statutes § 92.231(2) (2017), "Any expert or skilled witness who shall have testified in any cause shall be allowed a witness fee . . . and the same shall be taxed as costs." Therefore, if a treating physician is an expert, determined by the facts of the case, and following both statutory and Florida case law, the physician can be awarded a much higher rate for their testimony than simply responding to a subpoena to testify at trial.

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