Karim Ruling May Change What is Allowable in Discovery Period of Litigation

When I first became a member of the Bar more than 30 years ago, it was common practice to instruct our defendant physician at depositions not to answer any questions that would elicit a conclusory medical opinion, including questions concerning the diagnosis the physician might have reached at the time he was providing the care in question. I recall my senior partner returning from a deposition enraged that a co-defendant radiologist not only answered questions about what his interpretation of the films was at the time he initially read them, but also provided his thoughts with regard to how he viewed the same images differently at the time of his deposition. I was told that under no uncertain terms if I allowed the same thing to happen, my separation from the firm would be swift.

Not long after that, the Superior Court's Opinion in *Neal v. Lu* changed the landscape and the general practice. Since *Neal v. Lu*, the plaintiff's counsel is entitled to elicit the opinions that the physician or healthcare provider held at the time that he or she was providing care, but not entitled to seek any opinions that have been developed at any other time.

Recently, Judge William J. Nealon of Lackawanna County, in *Karim v. Reedy*, wrote an opinion, which if followed by other courts, could create as significant a change as the *Neal v. Lu* opinion did almost 30 years ago. The *Karim* matter was an obstetrical malpractice case and the dispute primarily involved the interpretation of the fetal monitor strips. The obstetrician defendant and nurse were employed by the defendant, Moses Taylor Hospital. During the depositions of the doctor and nurse, it was revealed that the last occasion when the doctor saw the mother before the delivery of the baby was at 10:50 p.m. on July 30th, at which time the fetal monitoring strips appeared to be normal. Thereafter, the doctor returned to the physician's call room while the nurse remained with the mother to monitor her labor. Although the doctor reviewed the fetal monitor data "on and off" on the central monitor in the call room, he expected the nurse to document her ongoing interpretation of the fetal monitoring strips and to contact the doctor if the strips were non-reassuring. The nurse did not contact the doctor until almost 1:30 a.m. on July 31st. The nurse's entries in the hospital chart indicate that she contacted the doctor at 1:25 a.m., that the doctor arrived in the delivery room at 1:27 a.m. and that the baby was delivered at 1:31 a.m. The nurse testified that although the baby's head had crowned by the time of the doctor's arrival, the doctor actually delivered the child. However, the doctor recalled that by the time he entered the delivery room, the baby was in the nurse's hands and the feet were coming out.

It was discovered during the doctor's deposition that within a few hours of the baby's birth, he began preparing his own typed version of events concerning the labor and delivery. He also confirmed that as part of his retrospective analysis of those events, he reviewed the fetal monitor tracings in their entirety. The dispute before Judge Nealon was whether the doctor should be compelled at deposition to reveal his opinions and the typewritten notes that he created upon re-review of the strips. At the time of his deposition, the doctor was also not permitted to answer questions which might elicit opinions critical of other defendants. Judge Nealon instructed that both types of questions be answered. In short, he held that all opinions held by the defendants, whether developed at the time the care was being provided or any other time, were discoverable. What was unique to this case was the fact that the doctor had created his typewritten notes shortly after the delivery and the notes were apparently based, in part, on his review of a critical segment of the fetal heart monitor strips which he had not previously reviewed.

Comment: In this instance, there was obviously nothing counsel could do about these notes which had been created before representation. However, we must forewarn healthcare providers that any such notes they create may eventually be deemed discoverable. If there is real concern about the care provided and if

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there is a desire to perform such an analysis, it should be done with counsel so as to be protected by the attorney/client privilege. Moreover, we should be mindful that our witnesses may have to answer these types of questions and they should be prepared accordingly. At this point in time, it remains unclear whether other jurisdictions will follow Judge Nealon's approach. If so, it will mark a substantial change in what is permitted during the discovery phase of litigation.

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