

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ENTERED

MAY 16 2002

U.S. CLERK'S OFFICE
INDIANAPOLIS, INDIANA

ELLEN EVE and MATTHEW EVE,)
)
Plaintiffs,)
)
v.)
)
SANDOZ PHARMACEUTICALS CORP.,)
)
Defendant.)

Cause No. IP 98-1429-C-Y/S

**ORDER AFFIRMING MAGISTRATE
JUDGE'S DECISION**

On September 17, 2001, Magistrate Judge V. Sue Shields issued an entry regarding defendant's motion to compel plaintiff Ellen Eve to sign an authorization allowing informal private interviews with her physicians. On October 5, 2002, the plaintiffs filed written objections to the Magistrate Judge's entry.

The court, having considered the written objections, all filed documents and relevant law, and being duly advised, hereby **OVERRULES** the objections to the Magistrate Judge's entry on motion to compel and **AFFIRMS** the decision of the Magistrate Judge.

This is a product liability action in which the plaintiffs allege that Ellen Eve took drugs which caused her to suffer an intra cerebral hemorrhage. In the motion before Magistrate Judge Shields, the defendant sought an order compelling Ms. Eve to sign an authorization form permitting her treating physicians who may be called to testify at trial to participate in ex parte interviews with defense counsel in preparation for that trial. It is

important to note that these physicians have already been deposed, and the defendant's counsel wishes to conduct additional conferences prior to the trial date for the purpose of clarifying the physicians' testimony.

Magistrate Judge Shields determined that the defendant was entitled to conduct the ex parte interviews subject to certain restrictions on the particular release form which would be given to the physicians as a part of the interview process.

Under 28 U.S.C. § 636(b)(1)(A), a district judge may set aside a magistrate judge's determination as to matters of pretrial procedure where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law. In this case, Magistrate Judge Shields concluded that such a procedure for ex parte communications with physicians has been previously approved in this district in *Shots v. CSX Transportation, Inc.*, 887 F.Supp. 206 (S.D. Ind. 1995). The plaintiffs argue that the Magistrate Judge's reliance upon *Shots* is clearly erroneous and contrary to law because the *Shots* decision itself is incorrect and is based on an erroneous interpretation of the Indiana case of *Cua v. Morrison*, 626 N.E.2d 581 (Ind.Ct.App. 1993). The plaintiffs argue that under Indiana substantive law, all ex parte contacts with a physician are prohibited.

The issue before this court is a close one. However, the Indiana Court of Appeals in *Cua* states as follows:

We note at the outset that this appeal is not about what information Paterson may discover, rather, it is about how Paterson may discover it.

Cua, 626 N.E.2d at 583. This court believes that the issue before *Cua* was whether a state trial court abused its discretion in the manner in which it allowed discovery to be conducted in the particular case before the state court. This court agrees with the plaintiffs that in an Indiana court, *ex parte* communications with a physician would rarely be allowed.

However, as *Shots* points out, when the issue before the court is not *what* may be discovered, but *how* discovery may be obtained, or (in this case) how trial preparation may be conducted, that issue is a matter of federal procedural law. Under *Hanna v. Plumer*, 380 U.S. 460 (1965), a federal procedural rule may be employed even though the federal rule differs from Indiana's state rule. *Patel v. Gayes*, 984 F.2d 214 (7th Cir. 1993).

Federal rules of civil procedure do give district courts wide discretion in the supervision of the discovery process. Magistrate Judge Shields was correct in determining that in this particular case, *ex parte* communications with physicians that are subject to certain restrictions would allow for more expeditious trial preparation. Specifically, the parties have conducted discovery depositions of these physicians. To require that the parties redepose each physician because the defendant wishes to clarify information as they prepare for trial would add an extra layer of costs to the trial preparation portion of this case, which is unwarranted. Should the physicians testify at trial, and should the physicians' testimony at trial differ from that in their depositions, the plaintiffs will be entitled to cross-examine any physician concerning why his or her opinion has changed, and whether that change came about as the result of communications with the defendant's counsel. This is a

safeguard which prohibits the plaintiffs from being at a disadvantage with respect to any change in the physicians' testimony.

This court believes that Magistrate Judge Shields properly exercised her discretion in determining that a second set of depositions was not required in this case, and that the restrictions provided in the release were sufficient to protect the plaintiffs while allowing the defendant to efficiently prepare for trial. There being no decision which is clearly erroneous and contrary to law in this case, the Magistrate Judge's decision is affirmed.

SO ORDERED the 16th day of May, 2002.



RICHARD L. YOUNG, DISTRICT JUDGE
United States District Court
Southern District of Indiana

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