

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ELLEN EVE and MATTHEW EVE,)	
)	
Plaintiffs,)	
)	
vs.)	CAUSE NO. IP 98-1429-C (Y/S)
)	
SANDOZ PHARMACEUTICALS CORP.,)	
)	
Defendant.)	

ENTRY REGARDING MOTION TO COMPEL

This cause is before the magistrate judge on defendant's Motion to Compel Plaintiff, Ellen Eve, to Sign Authorization Allowing Informal Private Interviews With Her Physicians. The motion is fully briefed, and the magistrate judge, being duly advised, **GRANTS** the motion for the reasons set forth below.

This is a product liability action in which plaintiff Ellen Eve alleges that drugs she took following childbirth caused her to suffer an intra cerebral hemorrhage. In the instant motion, the defendant seeks to compel 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.

Ms. Eve objects to this request for several reasons. First, she correctly notes that such ex parte contacts are prohibited under Indiana law. See Cua v. Morrison, 626 N.E.2d 581 (Ind. App. 1993), aff'd, 636 N.E.2d 1248 (Ind. 1994). However, even in a diversity case this court is not bound by state law regarding discovery and pretrial procedure. See Shots v. CSX Trans., Inc., 887 F. Supp. 206 (S.D. Ind. 1995) (holding that, under federal law, the trial court has discretion to permit ex parte conferences with treating physicians). Second, Ms. Eve argues that the

defendant impermissibly is trying to extend the discovery period in this case, which closed on August 4, 2000. This is not the case to the extent that the interviews sought by the defendant are of doctors who will testify at trial; such interviews are in the nature of trial preparation, and therefore fall outside of the discovery deadline. However, if neither Ms. Eve nor the defendant intends to call a particular doctor as a witness at trial (either live or by deposition), and the defendant simply is seeking to obtain information from the doctor by means of an ex parte interview, the time for doing that was during the discovery period, and the defendant may not now do so without seeking leave of court and showing good cause.

Next, Ms. Eve argues that the defendant improperly is seeking to influence the doctors' testimony and convert them into expert witnesses by providing them information about the drugs in question and prepping them as to how they should answer questions at trial. Ms. Eve can rest assured that the court will not permit the defendant to elicit expert testimony from her treating physicians; as fact witnesses, they will be limited to testifying about Ms. Eve's medical condition and their treatment of her.

Finally, while Ms. Eve acknowledges that she has waived any patient-physician privilege with regard to any health condition that is relevant to her claims in this lawsuit, she argues that permitting the defendant ex parte contact with her doctors will risk revealing private information about her medical history that is irrelevant to the instant case and therefore still privileged. The magistrate judge is sensitive to the fact that Ms. Eve's physicians may have information about her which is irrelevant to the instant case, and that it is possible that Ms. Eve might be uncomfortable or embarrassed by the prospect of defense counsel obtaining that information. However, the magistrate judge must weigh that risk against the defendant's right to prepare for

trial and have equal access to witnesses with relevant information. Since the plaintiffs' attorneys have unfettered, *ex parte* access to her treating physicians as they prepare for trial, it would be unfair to deny defense counsel that same access. The magistrate judge trusts that defense counsel will not inquire into areas of Ms. Eve's medical history beyond those that are relevant to her claims in this case, and warns that any attempt to introduce into evidence any irrelevant medical information will be at the risk of sanctions. In addition, the magistrate judge believes that physicians are very sensitive to their patients' right to and desire for confidentiality, and therefore finds the risk of disclosure of irrelevant medical information to be minimal.


Accordingly, the magistrate judge determines that the defendant is entitled to conduct *ex parte* interviews with any of Ms. Eve's treating physicians which either the defendant or Ms. Eve intends to call at trial, to the extent that Ms. Eve's physicians agree to do so. Ms. Eve shall provide the defendant with a signed release form for each such physician. The parties shall work together to develop a release form which describes the type of information that is relevant to this case.¹ The release form shall also inform the physician that the court has ruled that he or she may, but is not obligated to, speak to defense counsel outside the presence of Ms. Eve and her counsel.

Finally, the defendant strenuously objects to the fact that Ms. Eve's counsel sent a letter to her physicians asking them not to meet with defense counsel and informing them that such

¹The magistrate judge assumes that the defendant has conducted sufficient discovery about Ms. Eve's medical history to be able to do this. The permissible areas of inquiry are, of course, broader than just the incident at issue in this case and its aftermath, inasmuch as the defendant is entitled to information about any previous or subsequent medical conditions or treatment which may be relevant to the damages claimed by Ms. Eve. However, such inquiry must be reasonably limited in both time and subject matter, and the magistrate judge trusts that the parties will be able to agree on the appropriate limits.

contact is inappropriate under Indiana and Kentucky law. Ms. Eve is, of course, free to express to her physicians her personal desire that they not speak to defense counsel. However, Ms. Eve's counsel shall send a letter to each of the physicians which includes a copy of this Entry and which expressly states that Ms. Eve has been ordered by the court to consent to her physicians providing any and all relevant information to defense counsel and that she does, in fact, so consent. The letter shall further state that because Ms. Eve has so consented, there is no legal impediment to the physician talking to or otherwise providing relevant information to defense counsel. Plaintiff's counsel shall obtain defense counsel's approval of this letter (or the court's approval, if the parties are unable to agree) before sending it.

Dated this 17th day of Sept., 2001.


V. Sue Shields, Magistrate Judge
United States District Court
Southern District of Indiana

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