<u>Gutierrez v. Vargus</u>: Are "Treating Physicians" Considered "Expert" Witnesses in Medical Malpractice Trials?

The Florida Supreme Court's opinion in *Gutierrez v. Vargus,* __ So. 3d __ (Fla, March 22, 2018) resolved conflict among the District Courts of Appeal in distinguishing the status of treatment physicians and retained expert physicians giving testimony during trial where they render opinions based upon their specialty, training and experience.

Facts: During the litigation, the trial judge issued a pretrial order that "[e]ach party is limited to one (1) retained expert per specialty. No other expert testimony shall be permitted at trial." Notwithstanding the order, and over Defense objection, the trial court permitted the Plaintiff to present testimony from four pathologists: the hospital pathologist who examined the Plaintiff's kidney biopsy; another hospital pathologist who examined the Plaintiff's kidney after removal; and two retained pathology expert witness, one who testified during the Plaintiff's case in chief and another who served as an rebuttal expert for the Plaintiff. The four pathologists rendered the same basic opinions concerning the Plaintiff's diagnoses and the disease progression. The Defense had but one retained pathologist expert per the court order. The jury rendered a verdict in favor of the Plaintiff.

Appeal: The Defense appealed the verdict, claiming that the trial court abused its discretion in permitting the four pathologists to testify as part of the Plaintiff's case in chief and rebuttal, when all four rendered opinions regarding the Plaintiff's diagnosis and disease progression. The Third District Court of Appeal, finding that the trial court abused its discretion, reversed and remanded for a new trial.

Florida Supreme Court: The Florida Supreme Court granted review under its constitutional authority to resolve direct conflicts between District Courts of Appeal. The Supreme Court quashed the decision of the third district, holding that, despite the trial court's order allowing testimony of only one retained expert per party, it did not abuse its discretion by permitting the Plaintiff's "treating physicians" to testify during trial as to their diagnosis and opinions, or by permitting Plaintiff to present rebuttal evidence from a second pathology expert. Recognizing that testimony of treating physicians "blurs the boundary between fact testimony and expert testimony, because both treating physicians and retained physician experts possess 'scientific, technical or other specialized knowledge' which informs their testimony," (*citing* sec. 90.702, Fla. Stat. (2017)) the Supreme Court distinguished the two categories of witnesses as follows: "while an expert witness assists the jury to understand the facts, a treating physician testifies as a fact witness, 'concerning his or her own medical performance on a particular occasion and is not opinion about the medical performance of another.'" *Citing Fittipaldi USA Inc., v. Catroneves,* 905 So. 2d 182, 186 (Fla. 3d DCA 2005). Further, the court explained, even though a treating physician's testimony addresses technical matters about which the jury lacks basic knowledge, such testimony is generally based upon facts personally known to the physician at the time of treating the patient. By contrast, an expert witness forms new opinions based upon hindsight acquired for the purpose of litigation. The Supreme Court acknowledged that a treating physician may cross the line and become an expert witness, if he or she testifies to "a medical opinion formed for the purpose of litigation rather than treatment." Finally, the Supreme Court acknowledged that although cumulative evidence that is unduly prejudicial may be excluded, the four pathologists who testified on behalf of the Plaintiff did not rise to the level of "unnecessary cumulativeness." Instead, the court found, the four witnesses gave "relevant confirmatory testimony," which a trial court does not have discretion to exclude. The Supreme Court observed that although the treating pathologists had testified to the same medical conclusion, they did so on separate

facts gleaned from their own independent examinations of the Plaintiff during their involvement with the Plaintiff's care.

Conclusion: The Supreme Court's opinion and holding permits parties in medical malpractice litigation to call treating physicians of a particular specialty as witnesses, in addition to the number of retained experts of the same specialty limited by court order, even if the treating physicians render opinions that parallel many of the opinions of retained experts.