IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

CYNTHIA AND BRAD HAWKINS, Individually and as natural parents and guardians of BRYCE HAWKINS, a Minor, and KENNETH HAWKINS, a Minor,	)	
Plaintiffs,	)	
v.	)	**No. 05-2570 B/P**
FEDERATED DEPARTMENT STORES, INC., RICH'S DEPARTMENT STORES, INC. d/b/a GOLDSMITH'S DEPARTMENT STORE, and KONE, INC.,	)	
Defendants.	)	

ORDER DENYING MOTIONS TO EXCLUDE AND GRANTING MOTION FOR PROTECTIVE ORDER REGARDING DEPOSITION OF DR. PHILLIP WRIGHT

Before the court by order of reference are the defendants' Motions to Exclude or Alternatively, Limit Testimony of Plaintiffs' Experts/Treating Physicians (D.E. 55 and 87) and Motion for Protective Order Regarding Deposition of Dr. Phillip Wright (D.E. 77). The court held a hearing on these motions on October 5, 2006. For the reasons below, the motions to exclude are denied at this time. The motion for protective order is granted.

I. BACKGROUND

This case arises from personal injuries sustained by minor

Bryce Hawkins on July 29, 2004. On that day, Bryce, who was four years old at the time, caught his hand in an escalator located at Goldsmith's department store in Memphis, Tennessee, which resulted in severe damage to his left hand. His brother, then seven-year-old Kenneth Hawkins, witnessed the accident. In their Rule 26(a)(2) expert disclosures, the plaintiffs identified four physicians and one social worker as potential expert witnesses for trial. Two of the physicians, Dr. Jeffrey A. Dlabach and Dr. John W. Womack, treated Bryce when he was brought to the emergency room on July 29, while the other two physicians, Dr. Phillip Wright and Dr. Nicole Feeney, provided and continue to provide treatment to Bryce for injuries to his hand. Veldon Reedy, a licensed clinical social worker with the Family Enrichment Center, is currently treating Bryce and Kenneth Hawkins for mental injuries as a result of the accident.

The scheduling order in this case required the plaintiffs to disclose their experts under Fed. R. Civ. P. 26(a)(2) by May 31, 2006, and required defendants to disclose their experts by June 30, 2006. On May 30, the plaintiffs identified Dlabach, Womack, Wright, Feeney, and Reedy as experts, but did not provide any expert reports. Plaintiffs summarized the experts' testimony as follows:

> 1. Jeffrey A. Dlabach, M.D., . . . is a treating physician who is expected to testify regarding Bryce Hawkins' injuries at issue in this litigation on or around the date of the incident, July 29,

2004. The subject matter and the facts on which Dr. Dlabach is expected to testify are contained in the medical records provided to Defendants by Plaintiffs in response to Request for Production.

2. John W. Womack, M.D., . . . is a treating physician who is expected to testify regarding Bryce Hawkins' injuries at issue in this litigation on or around the date of the incident, July 29, 2004. The subject matter and the facts on which Dr. Womack is expected to testify are contained in the medical records provided to Defendants by Plaintiffs in response to Request for Production.

3. Phillip Wright, M.D., . . . is a treating physician who is expected to testify regarding Bryce Hawkins' injuries at issue in this litigation and any impairment as a result of these injuries. The subject matter and the facts on which Dr. Wright is expected to testify are contained in the medical records provided to Defendants by Plaintiffs in response to Request for Production. As Dr. Wright's treatment of Bryce Hawkins is still ongoing, Dr. Wright's opinions may change or he may develop new opinions, at which point Plaintiffs will supplement their interrogatories as provided under the Federal Rules of Civil Procedure. As this treatment is still ongoing, any opinion by Dr. Wright as to anatomic impairment will be supplemented.

4. Veldon Reedy . . . is a licensed clinical social worker who is treating Bryce Hawkins and Kenneth Hawkins and is expected to testify regarding Bryce and Kenneth Hawkins' mental injuries as a result of the incident at issue in this litigation. As Veldon Reedy's treatment of Bryce and Kenneth Hawkins is still ongoing and no final diagnosis has been given, Veldon Reedy's opinion as to Bryce and Kenneth Hawkins' injuries will be supplemented.

5. Nicole Feeney, M.D., . . . is a treating physician who is expected to testify regarding Bryce Hawkins' injuries related to the incident at issue in this litigation. Dr. Feeney's opinions are unknown at this time as treatment just began on May 15, 2006, and any opinion by Dr. Feeney will be supplemented.

In their motions to exclude, defendants argue that plaintiffs' treating physicians are required to provide expert reports to the extent they intend to testify about causation, prognosis, permanency, and medical costs related to future medical care. Since none of the witnesses created expert reports, defendants ask the court to prohibit these witnesses from testifying on subject matters that go beyond their actual treatment of Bryce and Kenneth. In the motion for protective order, defendants seek to quash the upcoming evidentiary deposition scheduled for Dr. Wright on the basis that they were not provided with an expert report for him. At the October 5 hearing, plaintiffs stated that they only intend to use Dr. Wright and Mr. Reedy as expert witnesses, and that because both Wright and Reedy fall under the category of "treating physicians," neither of them are required to provide an expert report.[1] Plaintiffs further stated that the expert testimony will be limited to causation, prognosis, and permanency, and that there will not be any testimony regarding future medical costs since those costs are unknown.

II. ANALYSIS

Federal Rule of Civil Procedure 26(a)(2)(A) states that "a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703,

[1]Because plaintiffs do not intend to use Drs. Dlabach, Womack, or Feeney as experts at trial, the court need only consider defendants' motions with respect to Dr. Wright and Mr. Reedy.

or 705 of the Federal Rules of Evidence." Rule 26(a)(2)(B) provides as follows:

> Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Fed. R. Civ. P. 26(a)(2)(B). The Advisory Committee notes to Rule 26(a)(2)(B) state that experts who are treating physicians are not required to provide written reports:

> The requirement of a written report in paragraph (2)(B), however, applies only to those experts who are retained or specially employed to provide such testimony in the case or whose duties as an employee of a party regularly involve the giving of such testimony. A treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report.

Fed. R. Civ. P. 26 Advisory Committee's note (1993).

Although the federal Courts of Appeals have not squarely addressed the issue of whether treating physicians are required to provide an expert report if they intend to offer an expert opinion on causation, prognosis, or permanency, see, e.g., Hamburger v. State Farm Mut. Auto. Ins. Co., 361 F.3d 875, 883 (5th Cir. 2004);

Musser v. Gentiva Health Services, 356 F.3d 751, 757 n.3 (7th Cir. 2004), the majority of the District Courts have held that generally an expert report is not required if the treating physician's testimony about causation and prognosis is based on personal knowledge and on observations obtained during the course of care and treatment, and the physician was not specially retained in connection with the litigation or for trial. Garcia v. City of Springfield Police Dept., 230 F.R.D. 247, 249 (D. Mass. 2005). The Garcia court explained its reasoning as follows:

> Two practical realities support this approach. First, the Rules require any party to identify as a witness any treating physician who may be testifying. This disclosure will give the opposing party an opportunity to obtain written discovery regarding this potential witness, and, if necessary, to depose the witness. Prejudice arising from the lack of a report will therefore be minimal.
>
> Second, as plaintiff points out, the requirement that a treating physician submit an expert report under Rule 26 may provoke refusal from the treating physician. Preparation of an expert report under Fed. R. Civ. P. 26(a)(2) is a substantial undertaking. Where the treating physician has not been specially retained and paid to prepare a report, he or she may simply, and understandably, decline to do so. As a result, it may be awkward, or even impossible, for a plaintiff to offer important medical testimony.
>
> It is important to underline that a party who wishes to offer the opinion of a treating physician without providing a report must accept something of a risk. If the witness's opinion strays beyond the boundaries described, the court will have the power to exclude it.

Id. at 249-50 (citing Sullivan v. Glock, Inc., 175 F.R.D. 497, 501 (D. Md. 1997) ("To the extent that the source of the facts which

form the basis for a treating physician's opinions derive from information learned during the actual treatment of the patient – as opposed to being subsequently supplied by an attorney involved in litigating a case involving the condition or injury – then no Rule 26(a)(2)(B) statement should be required."); Wreath v. United States, 161 F.R.D. 448, 450 (D. Kan. 1995) ("[W]hen the physician's proposed opinion testimony extends beyond the facts made known to him during the course of the care and treatment of the patient and the witness is specially retained to develop specific opinion testimony, he becomes subject to the provisions of Fed. R. Civ. P. 26(a)(2)(B)."); Washington v. Arapahoe County Dept. of Social Servs., 197 F.R.D. 439, 442 (D. Colo. 2000) ("If a treating physician offers expert testimony concerning matters which are not based on his or her observations during the course of treating the party designating them, however, an expert report which complies with the requirements of Rule 26(a)(2)(B) is required."); Sprague v. Liberty Mut. Ins. Co., 177 F.R.D. 78, 80 (D.N.H. 1998) ("The majority of . . . courts in the country have concluded that Rule 26(a)(2)(B) reports are not required as a prerequisite to a treating physician expressing opinions as to causation, diagnosis, prognosis and extent of disability where they are based on the treatment."); Shapardon v. West Beach Estates, 172 F.R.D. 415, 417 (D. Hawaii 1997) ("The relevant question is whether these treating physicians acquired their opinions as to the cause of the

plaintiff's injuries directly through their treatment of the plaintiff."); Salas v. United States, 165 F.R.D. 31, 33 (W.D.N.Y. 1995) (same)); see also Kirkham v. Societe Air France, 236 F.R.D. 9, 11-12 (D.D.C. 2006) (collecting cases); Williams v. Asplundh Tree Expert Co., No. 305cv479J33MCR, 2006 WL 2868923, at *6 (M.D. Fla. Oct. 6, 2006); Fielden v. CSX Transp. Inc., No. C2-03-995, 2006 WL 2788207, at *7 (S.D. Ohio Sept. 22, 2006); Kallassy v. Cirrus Design Corp., No. Civ.A. 3:04-CV-0727N, 2006 WL 1489248, at *7 (N.D. Tex. May 30, 2006); Leathers v. Pfizer, Inc., 233 F.R.D. 687, 696-97 (N.D. Ga. 2006); Philbert v. George's Auto and Truck Repair, No. 04-CV-405 (DRH), 2005 WL 3303973, at *2 (N.D.N.Y. Dec. 6, 2005); Martin v. CSX Transp., Inc., 215 F.R.D. 554, 557 (S.D. Ind. 2003); Hawkins v. Graceland, 210 F.R.D. 210, 211-12 (W.D. Tenn. 2002); McCloughan v. City of Springfield, 208 F.R.D. 236, 242 (C.D. Ill. 2002). But see Sowell v. Burlington Northern and Santa Fe Railway Co., No. 03-C-3923, 2004 WL 2812090, at *7 (N.D. Ill. 2004).

A similar conclusion was reached by this court in Hawkins v. Graceland, 210 F.R.D. 210 (W.D. Tenn. 2002) (Breen, M.J.). In that case, the defendant sought to exclude the testimony of plaintiff's treating physician regarding causation, based on plaintiff's failure to provide an expert report. The court, citing the Salas case, held that no expert report was required:

> Thus, "to the extent that a treating physician testifies only to the care and treatment of the patient, the

> physician is not considered to be a 'specially employed' expert and is not subject to the written report requirements of Rule 26(a)(2)(B)." Salas v. United States, 165 F.R.D. 31, 33 (W.D.N.Y. 1995); . . . "However, when the doctor's opinion testimony extends beyond the facts disclosed during care and treatment of the patient and the doctor is specially retained to develop opinion testimony, he or she is subject to the provisions of Rule 26(a)(2)(B)." Salas, F.R.D. at 33. Thus, the application of the Rule 26 disclosure requirements depends on the substance of the treating physician's testimony rather than his or her status. . . .
>
> The relevant question is whether these treating physicians acquired their opinions as to the cause of the plaintiff's injuries directly through their treatment of the plaintiff. If so, then they must be treated as treating physicians, who can be deposed under the amendments of Rule 26 but who cannot be forced to file the written report as required by Rule 26(a)(2)(B).
>
> As a general rule, a treating physician considers not just the plaintiff's diagnosis and prognosis, but also the cause of the plaintiff's injuries. In this case, there is no indication that these treating physicians reviewed any medical records other than those involved in their care and treatment of the patient. . . . Accordingly, questioning these physicians as to whether the injuries for which they treated the plaintiff can be causally related to the accident would appear to be within the scope of the patient's care and treatment.

Graceland, 210 F.R.D. at 211-12 (internal citations omitted).

In support of their argument that plaintiffs' treating physicians were required to provide expert reports, the defendants cite two Sixth Circuit cases. See Mohney v. USA Hockey, Inc., 138 Fed.Appx. 804 (6th Cir. 2005); Harville v. Vanderbilt Univ., 95 Fed.Appx. 719 (6th Cir. 2003). The defendants' interpretation of the holdings in these cases, however, is incorrect. As an initial matter, it is unclear from the opinion in Harville whether the

physicians were excluded at trial based on plaintiff's failure to disclose them as expert witnesses or based on plaintiff's failure to provide expert reports. Id. at 724. Regardless, the physicians' expert testimony related to the standard of care in the community, which was clearly not within the scope of the physicians' treatment and care of plaintiff's minor child. In Mohney, the court affirmed the trial court's decision to exclude portions of plaintiff's treating physician's affidavit because his opinion on causation was based on his review of information outside the scope of his treatment and care:

> Despite Dr. Ramnath not being listed as an expert witness, he clearly was opining as to the manner in which Mohney's head rotated from a facial impact to a crown presentation, based in part on his viewing of the video. Dr. Ramnath's affidavit was not prepared until December 2002, long after the incident occurred. There is no evidence that Dr. Ramnath reached the same conclusions regarding causation at the time he treated Mohney. As such, it was reasonable for the district court to find that Dr. Ramnath was rendering an expert opinion that was subject to disclosure requirements and to exclude his affidavit for failing to satisfy those requirements. Moreover, by striking only Paragraphs 9-11 of Dr. Ramnath's affidavit, the district court left intact those matters over which Dr. Ramnath had personal knowledge.

Id. at 811. Thus, neither Harville nor Mohney stand for the proposition that a treating physician can never offer an expert opinion on causation, prognosis, or permanency unless an expert report is produced.

In the present case, it appears from the record currently before the court that neither Dr. Wright nor Mr. Reedy have been

retained as experts by plaintiffs, and that their testimony about causation, prognosis, and permanency will be based on their personal knowledge and on observations obtained during the course of care and treatment. Therefore, the motions to exclude are denied at this time. The court notes, however, that Dr. Wright and Mr. Reedy have yet to be deposed, and at the October 5 hearing, plaintiffs' counsel could only give the court a general description of their anticipated testimony. Thus, after these health care providers are deposed, defendants may renew their motion to exclude if the deposition testimony reveals that the opinions are based on knowledge or observations obtained outside the course of care and treatment.

Finally, since the defendants only have the medical records, and not detailed expert reports, the court will allow them to take a discovery deposition of Dr. Wright and Mr. Reedy before plaintiffs proceed with any evidentiary depositions.[2] Under the circumstances, it would be unfair to potentially bind the defendants to the providers' deposition testimony without

[2]At the October 5 hearing, counsel for defendant Federated Department Stores stated that because under T.C.A. § 24-0-101(6) a physician deponent is exempt from subpoena to trial, it would be unfair to require the defendants to depose Dr. Wright and Mr. Reedy without an expert report because the defendants would not have advance notice of their opinions and yet would be bound by their deposition testimony for trial purposes. The court is unaware of any authority that holds that the Tennessee statute prohibits a party from issuing a trial subpoena to a physician under the federal rules.

sufficient notice of their opinions and the bases for those opinions.[3] Therefore, defendants' motion to quash the evidentiary deposition of Dr. Wright is granted.

III. CONCLUSION

For the reasons above, the defendants' motions to exclude are DENIED at this time. Defendants' motion to quash the evidentiary deposition of Dr. Wright is GRANTED.

IT IS SO ORDERED.

s/ Tu M. Pham

TU M. PHAM

United States Magistrate Judge

October 26, 2006

Date

[3]Defendant Kone, Inc. also argues in its motion that although plaintiffs previously responded to Kone's interrogatories 19, 20, 21, 22, and 23, which ask for various information regarding plaintiffs' expert witnesses and their opinions, the plaintiffs have not supplemented their prior responses, and thus the experts should be excluded due to their failure to supplement. The court finds that this argument is not well taken. In their original responses to the interrogatories, the plaintiffs identified each of the five experts and the general subject matter of their testimony. While the plaintiffs perhaps could have provided more information, Kone did not previously challenge the sufficiency of these responses, nor did it file a motion to compel with the court. In any event, the court concludes that any deficiencies in the responses would not be a basis to exclude the witnesses at trial.