NO.

In The
Supreme Court of the United States

LYUDMILA LERNER,

Petitioner
v.

STANLEY COWEN,

Respondent

On Petition For Writ Of Certiorari To The Court of Appeal
Second Appellate District Of The State of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In the case at bar, Petitioner's Treating Physician was precluded from testifying as a Fact Witness and as an Expert Witness because the Treating Physician was not designated as an Expert Witness. Where a Treating Physician is situated to testify as both a Fact Witness and an Expert Witness, can the Treating Physician be barred from testifying as a Fact Witness simply because the Treating Physician was not designated as an Expert Witness?

2. If allowed to testify as a Fact Witness absent an Expert Designation, can a Treating Physician also provide Expert Testimony?

LIST OF PARTIES

1. All parties below are listed in the caption.

2. Superior Court of California Central MOSK State of California

RELATED CASES

- Supreme Court of California
  L. Lerner v S. Cowen S260633
  Petition for Review Denied Mar. 25, 2020

- Court of Appeal for the Second District
  L. Lerner v S. Cowen B298222 Decided on April 1, 2020

- California Superior Court County of Los Angeles West District
  L. Lerner v S. Cowen BC 632653 Decided on February 15, 2019

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In The
Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI

Petitioner LYUDMILA LERNER ("Petitioner") respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

1. The Opinion of the Supreme Court of California

Before: CANTIL-SAKAUYE Chief Justice.

En Bank decision appears at Appendix A to this Petition. Decided on March 25, 2020. UNPUBLISHED.;

2. **The opinion of the Court of Appeal for the Second District of California.** The Court's Ruling appears at Appendix B.

Decided on January 8, 2020. UNPUBLISHED.

JURISDICTION

The Supreme Court of California decided this case on March 25, 2020. It appears at appendix A to this petition. The jurisdiction of this Court is invoked under Jurisdiction 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rules of Civil Procedure 26(a)(2)(A)(B)(C)

Federal Rule of Evidence 700,702, 703, & 705

California Code of Civil Procedure, Section 2034.210(b)

STATEMENT OF THE CASE

I. In What Capacity Can a Treating Physician Testify Where the Physician Was Not Designation as an Expert Under the Code of Civil Procedure Sections 2034, *et seq*? Can He Testify As Both, a Fact Witness and an Expert Witness, Without an Expert Witness Designation?

Petitioner Lyudmila Lerner ("Petitioner" or "Ms. Lerner") appeals the California Supreme Court affirmation of a Court of Appeal holding on her claim of medical malpractice against Respondent Dr. Stanley Cowen, M.D. ("Respondent"). The California Supreme Court did not provide any explanation as to the reason that it denied the Petition for Review. Petitioner contends that the California Supreme Court erred in affirming the Appellate Court's ruling affirming exclusion of the Petitioner's treating physician's, Dr. Suzuki's, testimony in its entirety solely because Petitioner did not designate Dr. Suzuki as an expert witness. The trial court excluded Dr. Suzuki's testimony in any capacity, even as a fact witness, despite the fact that he was timely designated before trial by Petitioner as a treating physician and as a fact witness. The Appellate Court affirmed that holding. In her appeal to California Supreme Court, Petitioner relied on the California Supreme Court case *Schreiber v. Estate of Kiser* (1999) 22 Cal.4th 31, 35 ("*Schreiber"*). Petitioner contends that the California Supreme Court in its denial of the Petition, failed to recognize its own holding that in *Schreiber,*" which states that a treating physician does not require an expert designation entirely in order to testify as both, a fact witness and expert witness.

A. *Schreiber v. Estate of Kiser* (1999) 22 Cal. 4th 31

In *Schreiber*, the California Supreme Court held that a treating physician does not need to be designated as an expert and thus, no declaration (which is a part of a designation) is required from the treating physician. The *Schreiber* plaintiff designated his treating physician as an expert, but failed to produce his

declaration. For that reason, the trial court precluded the treating physician from testifying as an expert, but allowed him to testify as a fact witness. In *Schreiber,* the Supreme Court reversed and remanded to the trial court.

In this case, the Court of Appeal held that because Appellant did not designate Dr. Suzuki as "an expert," under Code of Civil Procedure sections 2034, and thus, *Schreiber* does not apply and affirmed the trial court's exclusion of Dr. Suzuki even as a fact witness.

The Court of Appeal erred in interpreting *Schreiber*. While *Schreiber* discussed whether a designation was deficient because a "declaration" was not filed, the Court in *Schreiber,* in fact, found that for a treating physician any designation under Code of Civil Procedure sections 2034, *et seq* (with or without a declaration) is not required.

Thus, the California Supreme Court and a Court of Appeal erred on two issues:

1. Whether an expert declaration was required in order for the treating physician to testify as both, a fact and an expert witness; and
2. Whether a treating physician can be precluded from testifying, at the very least, as a fact witness.

DISCUSSION

Courts are split on several levels of issues:

1. Some courts have held that designation as an expert witness under state rules, similar to Cal. Code of Civil Procedure sections 2034, *et seq* or Federal Rule 26(a)(2) is required for retained and not-retained witnesses. Federal courts mandate under Fed.R.Civ.P. 26(a)(2)(B), which requires "a written report" from the witnesses categorized as "expert witnesses," i.e., the witnesses "retained or

specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony."

2. Some courts are confused and unsure what is appropriate where:

- When a party has to provide a thorough Rule 26(a)(2)(B) report for a non-retained witness;
- When a party has to provide a summary Rule 26(a)(2)(C) report for a non-retained witness; and,
- What to do when a party has failed to provide either report for a non-retained witness.

Under Fed.R.Civ.P. 26(a)(2)(A), a party has to disclose "the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705." That means *every* witness "who is qualified as an expert" under Fed.R.Evid. 702, *regardless* of whether the expert was hired by a party to testify as an expert.

Under Fed.R.Civ.P. 26(a)(2)(C) ("*Witnesses Who Do Not Provide a Written Report*"): Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state: (i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and (ii) a summary of the facts and opinions to which the witness is expected to testify. Obviously, Rule 26(a)(2)(C)'s requirements for disclosure of "the subject matter" and "a summary of the facts and opinions to which the witness is expected to testify" is far less onerous and thorough than the detailed reports that paid experts have to provide under Rule 26(a)(2)(B). Before 2010, the majority of courts held that treating physicians providing opinions on

causation, diagnosis, prognosis, and the extent of disability were not required to provide Rule 26(a)(2)(B) reports if their opinions were formed during the course of treating their patients. However, if a treating physician's opinions were based on information provided by an attorney or others that were not reviewed during the course of treatment, a Rule 26(a)(2)(B) report was required "insofar as their additional opinions are concerned." (*Goodman v. Staples The Office Superstore, LLC*, 644 F.3d 817, 826 (9th Cir. 2011)). The 2010 amendments to Rule 26(a)(2) now mandate that non-retained experts, like treating medical providers, who offer opinions based on their "knowledge, skill, experience, training or education" under Federal Evidence Rules 702, 703, or 705, make the disclosures required by Rule 26(a)(2)(C). Rule 26(a)(2)(C) requires disclosure of "(i) the subject matter on which the written witness is expected to present evidence under Federal Evidence Rule 702, 703 or 705; and (ii) a summary of facts and opinions to which the witness is expected to testify." Fed. R. Civ. P. 26(a)(2)(C)(i), (ii).

The disclosure obligation stated in 26(a)(2)(C) "does not apply to facts unrelated to the expert opinions the witness will present." Fed. R. Civ. P. 26 Advisory Comm. Notes (2010). A treating physician is still a percipient witness of the treatment rendered and may testify as a fact witness and also provide expert testimony under Federal Evidence Rules 702, 703, and 705. However, with respect to *expert opinions offered*, a Rule 26(a)(2)(C) disclosure is required. *Alfaro v. D. Las Vegas, Inc.*, No. 215CV02190MMDPAL, 2016 WL 4473421, at *11 (D. Nev. Aug. 24, 2016.

Thus, there is a conflict between the California state law and Federal law. It can be summarized as the following: As discussed below, it may be true that California law does not require any designation. At the same time, under Federal law, it is unclear whether the designation is required and if required, when does a non-retained expert witness, like a treating physician, need to provide the report per Rule 26(a)(2)(B) instead of the summary report under Rule 26(a)(2)(C)?

In *Kondragunta v. Ace Doran Hauling & Rigging Co.*, No. 1:11–cv–01094–JEC, 2013 WL 1189493, at *10 (N.D.Ga. Mar. 21, 2013), the court held that the "traditional" test still applied in determining whether a witness with special expertise was required to disclose their opinions with a Rule 26(a)(2)(B) report:

> [I]f a physician's opinion regarding causation or any other matter was formed and based on observations made during the course of treatment, then no Subsection B report is required, albeit the Subsection C report discussed above will be required. If, however, the physician's opinion was based on facts gathered outside the course of treatment, or if the physician's testimony will involve the use of hypotheticals, then a full subsection B report will be required.

Id. at *12; *accord In re C.R. Bard, Inc.*, 948 F. Supp. 2d 589, 615 (S.D.W. Va. 2013), on reconsideration in part (June 14, 2013). For a contrary view, see *Kristensen ex rel. Kristensen v. Spotnitz*, No. 3:09–CV–00084, 2011 WL 5320686, at *4 (W.D.Va. June 3, 2011).

In *Trinidad v. Moore*, No. 2:15CV323-WHA, 2016 WL 5341777, at *3 (M.D. Ala. Sept. 23, 2016), the court concluded that the doctor couldn't talk about issues *beyond* their medical records or the report they provided, but everything in the medical records or their report was allowed.

In *Patrick v. Henry Cty* No. 1:13-CV-01344-RWS, 2016 WL 2961103, at *2 (N.D. Ga. May 23, 2016), the court held that when a treating physician testifies as to the cause of an injury or illness, he or she testifies as an expert. However, Plaintiff's treating physicians may testify about *facts*. Allowing Plaintiff to call his treating physicians as fact witnesses does not cause the same kind of incurable prejudice to Defendant. Defendant was aware of the fact of Plaintiff's diagnosis and accordingly can be prepared to defend against that."

In the case at bar, Plaintiff provided Dr. Suzuki's report well in advance, but Defendant admitted that he deliberately chose not to depose Dr. Suzuki so he could seek to exclude him as a witness before the trial. The trial court held that it was Defendant's prerogative to not take Dr. Suzuki's deposition and Defendant's conscious decision does not preclude the Court from excluding Dr. Suzuki. That is a secondary issue and courts disagree: in *Easterby v. Clark* (2009) 171 Cal.App.4th 772, held that where the opposing party *is made aware* of the change in the expert's testimony, and *provided notice and an opportunity* to take that expert's deposition again, exclusion of the treating physician's changed opinion testimony may amount to reversible error.) Accordingly, the Court of Appeal reversed the trial court's exclusion of treating physician.

A treating physician is usually a practitioner who has provided medical treatment for the plaintiff, independent of litigation. Of course, such physicians may testify as percipient witnesses; however, while "[a] treating physician is a percipient expert, . . . that does not mean that his [or her] testimony is limited to only personal observations." (*Ibid.*) Evidence Code, section 700, allows for the admission of expert opinion testimony where the witness "has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates."

In 1997, the California Court of Appeal, in *Plunkett v. Spalding* held that if a party intended to elicit opinions from a treating physician on matters relevant to a lawsuit, beyond that physician's diagnosis and prognosis related to the patient, such treating physicians were considered "retained" experts requiring declarations at the time of the offering party's expert disclosure. (*Plunkett v. Spaulding* (1997) 52 Cal.App.4th 114.) However, in 1999, the California Supreme Court overruled *Plunkett* in *Schreiber v. Estate of Kiser* (1999) 22 Cal.4th 31, 39-40, holding that a non-retained treating physician, like any other expert, may provide "both fact and opinion testimony" without the need of a declaration.

In *Schreiber*, the CA Supreme Court held that a treating physician does not become a "retained" expert within the meaning of former Code of Civil Procedure section 2034(a)(2) (now Code of Civil Procedure, section 2034.210(b)) simply by testifying to opinions he is qualified to render by virtue of those opinions relating to matters beyond the scope of diagnosis and prognosis. (*Schreiber v. Estate of*

Kiser, *supra*, 22 Cal.4th at 39.) Thus, treating physicians "may testify as to any opinions formed on the basis of facts independently acquired and informed by his training, skill, and experience." (*Ibid.*) The California Court of Appeal further expanded admissibility of the non-retained expert opinions in *Ochoa v. Dorado* (2014) 228 Cal.App.4th 120. In that case, the court made clear that non-retained experts may provide opinions concerning *any matter* to which they are qualified to testify. In its opinion, the court gave examples: A treating physician who has gained special knowledge concerning the market value of medical services through his or her own practice or other means independent of the litigation may testify on the reasonable value of services that he or she provided or became familiar with as a treating physician, rather than as a litigation consultant, without the necessity of an expert witness declaration. (*Ochoa*, *supra*, 228 Cal.App.4th at 140.)

The range of subject matters within which the non-retained expert may opine at trial extends beyond the scope of their treatment of the plaintiff. "[T]o the extent a physician acquires personal knowledge of the relevant facts independently of the litigation . . . no expert witness declaration is required, and he may testify as to *any* opinions formed on the basis of facts independently acquired and informed by his training, skill, and experience." (*Id.* at 140, emphasis supplied.) Thus, pursuant to these California courts' opinions, parties are allowed to offer treating physicians' testimony into evidence at trial on any matter, without serving a declaration setting forth the scope of his/her testimony and expertise, or requiring production of prior reports, and without requiring the offering party to make the non-retained expert

available for deposition. (*Huntley v. Foster* (1995) 35 Cal.App.4th 753, 756 ["The disclosures are not required for treating doctors even if the doctors may be presented with questions at trial that call for an expert opinion."].) Requiring an attorney to analyze the witness's anticipated testimony and submit the analysis to the opponent "would invade the absolute protection given by the work product doctrine to the thought processes of an attorney in preparation for trial." (*Ibid.*)

Ultimately, in Federal Courts—even if the court finds that a disclosure under Rule 26(a)(2)(C) is required—the end result is to limit the treating physician's testimony to the medical records and to opinions formed in the course of treatment. In California courts, pursuant to *Schreiber,* a treating physician can provide any testimony, including expert opinions, without any designation under Code of Civil Procedure sections 2034, *et seq*.

In the case at bar, Petitioner intended to elicit testimony from Dr. Suzuki related to his observations at the time when he first observed Petitioner in an Emergency Room at the Hospital. Dr. Suzuki was not appointed for the purpose of litigation and he formed his opinion on the basis of what he observed at the time of treatment. He was not aware of any future litigation and was not appointed for the purpose of litigation. By all standards, he was not an expert witness. With that in mind, it is even more puzzling that the trial court precluded Dr. Suzuki from providing ***ANY*** testimony and the Appeal Court and the Supreme Court affirmed that paradoxical ruling.

REASONS FOR GRANTING THE WRIT

A. These Issues Are Vitally Important.

In the instant case, and the issues raised herein, are critical to all practicing attorneys, especially in personal injury cases. In every case involving personal injury, it is inevitable that treating physicians will take the stand to testify as to what they saw when they evaluated the patient, what were their first impressions, their diagnoses, etc. at the time they admitted the patient. Further, doctors will be asked what they thought would be the best way of treatment, their prognosis, what their modality of treatment was and their evaluation of the treatment's progress. Treating physicians in such cases are crucial witnesses, without which, the jury would never understand what happened and the extent of the injured person's suffering. It would be a devastating blow to the injured parties if treating physicians are to be precluded from testifying because they were not designated as expert witnesses or their expert designation was deficient due to lack of a declaration. In other words, without treating physicians' testimony the cases would be lost and great injustice would occur. Petitioner prays this Court to address this issue and clarify whether the Expert Designation is required for the treating physician to testify as a fact witness.

B. This Case Is An Ideal Vehicle.

It is not often when a State Court disregards its own decision so bluntly. The trial court was negligent in implementing the modified 1999 Supreme Court holding in *Schreiber*. This case clearly falls under *Scheiber* and the California higher courts should have noticed an error in the trial court's ruling. The Federal courts, albeit different in some respect, nonetheless uniformly recognized that excluding treating physician's testimony in totality, even as a fact witness, is tantamount to the dismissal of the case. Federal courts acknowledged that such remedy is too harsh and excessive. Under the California law, it is simply incorrect

and contradictory to all case law, State and Federal as well. This case was lost and no reasonable explanation was provided.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

Dated: June 24, 2020

/s/ Leon Ozeran

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APPENDICES

APPENDIX A Opinion of The Supreme Court of California
L. Lerner v S. Cowen S260633
Petition for Review Denied March 25, 2020

Court of Appeal, Second Appellate District, Division Two - No. B295916

S260633

IN THE SUPREME COURT OF CALIFORNIA

En Banc

LYUDMILA LERNER, Plaintiff and Appellant,

v.

STANLEY COWEN, Defendant and Respondent.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

APPENDIX B Court of Appeal for the Second District
L. Lerner v S. Cowen B298222 Decided on April 1, 2020

Filed 1/8/20

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

LYUDMILA LERNER, Plaintiff and Appellant, v. STANLEY COWEN, Defendant and Respondent.	B295916 (Los Angeles County Super. Ct. No. BC632653)

APPEAL from an order of the Superior Court of Los Angeles County. Charles F. Palmer, Judge. Affirmed.

Ozeran Law Offices and Leon Ozeran for Plaintiff and Appellant.

Law + Brandmeyer, Kent T. Brandmeyer, Bryan C. Misshore, and Elizabeth A. Evans for Defendant and Respondent.

Lyudmila Lerner (appellant) appeals from a judgment entered following a jury trial on her claim of medical malpractice against Stanley Cowen, M.D. (respondent). Appellant contends that the trial court erred in excluding the testimony of Dr. Suzuki, who treated appellant upon admission to Cedars-Sinai Hospital, due to appellant's failure to designate Dr. Suzuki as an expert witness.[1]

The relevant case law supports the trial court's decision to exclude Dr. Suzuki's testimony at trial, therefore we affirm the judgment.

BACKGROUND

Appellant was treated by respondent for a wound on her leg from approximately 2014 through 2016. During the time of respondent's treatment, the wound grew in size and appellant experienced escalating discomfort. In March 2016, during an episode in which appellant was suffering heavy bleeding from the wound, she was admitted to Cedars-Sinai Hospital for an emergency procedure. Dr. Suzuki was appellant's treating physician upon her admission to the hospital. The treatment at the hospital resulted in fast and positive results. Appellant was discharged from the hospital within two weeks and has not suffered a relapse since.

Appellant's first amended complaint (FAC) against respondent and others was filed on October 31, 2016. Appellant alleged that the exacerbation of her wound and increased pain and suffering during the time of treatment with respondent was

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[1] The parties refer to Dr. Suzuki by different names throughout the briefs, including "Kazyo Suzuki,""Kozy Suzuki," "Kozu Suzuki," and "Kazu Suzuki." We refer to him as Dr. Suzuki.

caused by respondent's breach of the applicable standard of medical care.

Respondent answered the FAC on November 14, 2016. Respondent was the only remaining defendant at the time the matter came on for trial on January 14, 2019.

On January 3, 2019, respondent filed his motion in limine no. 1, seeking to preclude the testimony of Dr. Suzuki on the ground that he was an undesignated expert witness. Respondent argued that the present opinion of a physician not designated as an expert is irrelevant in a medical malpractice action. Respondent explained that appellant took the deposition of Dr. Suzuki on October 6, 2017, without notice to respondent. Thus, respondent did not attend the deposition or participate in any way. On December 13, 2017, appellant served an expert designation which listed one retained expert and one non-retained expert. She did not designate Dr. Suzuki as either a retained or non-retained expert witness. However, at the time of trial in early 2019, appellant indicated her intention to call Dr. Suzuki as a witness at trial.

On January 8, 2019, appellant filed an opposition to respondent's motion in limine, arguing that as a treating physician, Dr. Suzuki was permitted to testify to his understanding of the standards of medical care and their application to the plaintiff's treatment. Appellant also argued that respondent had been aware of Dr. Suzuki's role as a treating physician and had been given a copy of his deposition.

On January 14, 2019, the trial court heard argument and granted respondent's motion in limine no. 1, precluding the testimony of Dr. Suzuki.

On January 16, 2019, appellant submitted a further opposition to the motion in limine, which the trial court also denied.[2]

On January 24, 2019, the jury returned a defense verdict. Appellant filed her notice of appeal from the judgment on February 22, 2019.

DISCUSSION

I. Standard of review

A trial court's decision to exclude evidence is generally reviewed for abuse of discretion. (*People v. Peoples* (2016) 62 Cal.4th 718, 743.) In this case, the question of whether the trial court abused its discretion is limited to an analysis of relevant case law on the issue of whether a treating physician must be designated as an expert in order to testify. Our review is therefore limited to interpretation of that case law.[3]

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[2] Appellant states that she also intended to call certain other treating physicians to testify as to appellant's care. However, in light of the court's ruling excluding Dr. Suzuki's testimony, appellant declined to call these witnesses, as they were in the same position as Dr. Suzuki.

[3] Respondent argues that this court should decline to find an abuse of discretion because appellant has failed to provide a transcript of the lower court's proceedings. (*Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681, 690, fn. 5 ["many cases hold that the absence of a transcript precludes a determination that a trial court abused its discretion"].) We find that the record, with augmentation subsequently provided by the parties, is sufficient to review the issue raised on appeal, therefore we decide the issue on the merits.

II. The trial court did not err in excluding Dr. Suzuki's testimony

A. Dr. Suzuki's opinions were not relevant because he was not designated as an expert witness

Dr. Suzuki was a doctor who treated appellant after the time of respondent's purportedly negligent care. Appellant did not designate Dr. Suzuki as an expert witness, but listed him as a potential witness for trial. Appellant argues that Dr. Suzuki was not an expert, but was listed as a percipient witness only.

The trial court correctly determined that testimony from a treating physician such as Dr. Suzuki is not admissible in a medical malpractice trial unless the physician is designated as an expert. (*County of Los Angeles v. Superior Court* (1990) 224 Cal.App.3d 1446, 1455 (*County of LA*).) Like other expert witnesses, treating physicians have knowledge "sufficiently beyond common experience," and their testimony is "[b]ased on matter (including . . . special knowledge, skill, experience, training, and education) . . . that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates." (Evid. Code, § 801, subds. (a), (b).)

The Supreme Court has articulated the status of a treating physician as a "percipient expert." (*Schreiber v. Estate of Kiser* (1999) 22 Cal.4th 31, 35 (*Schreiber*).) The high court explained:

> "[W]hat distinguishes the treating physician from a retained expert is not the content of the testimony, but the context in which he became familiar with the plaintiff's injuries that were ultimately the subject of litigation, and which form the factual basis for the medical opinion."

(*Schreiber, supra,* 22 Cal.4th at pp. 35-36.)

Thus, a treating physician such as Dr. Suzuki, who provided care to appellant subsequent to the purportedly negligent care, must be designated as an expert in order to testify at trial.

The *County of LA* court further explained the rationale behind this rule. In deciding negligence, a fact finder must consider the circumstances which the evidence shows ""may reasonably be supposed to have been known to [the defendant] and to have influenced his mind and actions at the time." . . .' [Citation.]" (*County of L.A., supra,* 224 Cal.App.3d at p. 1455.) In other words, "'[n]egligence is not to be determined by hindsight nor by what a party subsequently learns.' [Citation.]" (*Ibid.*)

Based on this rationale, questions to defendant physicians about their "impressions and reasons for their action or lack of action" at the time of the purportedly negligent treatment are entirely appropriate. (*County of LA, supra,* 224 Cal.App.3d at pp. 1455-1456.) However, "after-the-fact opinions and impressions" of physicians are only appropriate if the physicians offering such "after-the-fact" opinions are designated as defense experts "on the propriety of the procedures used." (*Id.* at p. 1456.) "Should they be so designated, a full inquiry into their present opinions would be entirely appropriate." (*Ibid.*) However, the *County of LA* court made it clear that "the inquiry is not appropriate until and unless there is such a designation." (*Ibid.*)

In *County of LA*, the Court of Appeal reversed a trial court order requiring party physicians to provide deposition testimony regarding their present opinions of the medical propriety of their previous acts. Appellant attempts to distinguish the case based on the status of those physicians as defendants in the case. Because Dr. Suzuki is not a defendant, appellant requests that

different rules be imposed here. We find the distinction unpersuasive. Regardless of whether Dr. Suzuki is a party to the lawsuit or not, his medical opinions are not relevant unless he is designated as an expert.[4]

Appellant's argument that Dr. Suzuki would be called merely as a fact witness is also unpersuasive. As the Supreme Court explained, the requirement that treating physicians be designated as experts "avoids assigning trial judges the near-impossible task of determining whether an expert witness treating physician is providing percipient or opinion testimony." (*Schreiber, supra,* 22 Cal.4th at p. 39.) *Schreiber* dictates that a trial court cannot be charged with the task of policing a treating physician's testimony to ensure that it remains purely percipient. Thus, appellant was not permitted to avoid designating Dr. Suzuki as an expert witness by claiming that Dr. Suzuki's testimony would be merely that of a percipient witness.

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[4] Appellant argues that in *County of LA*, because the physicians were defendants and under the control of defense attorneys, they could not testify as to their present opinions regarding their alleged malpractice without violating the attorney work product privilege and attorney-client privilege. This was not the rationale for the court's decision. The court held that the physician defendants could not testify about their present opinions regarding the propriety of their previous medical decisions because they had not been designated as experts. (*County of LA, supra,* 224 Cal.App.3d at p. 1457.) The court made it clear that regardless of communications with counsel, "once a defendant physician is designated as an expert for trial, . . . her present and previous opinion about the medical procedures at issue in the malpractice action would be proper subjects of discovery." (*Id.* at p. 1458.)

Because appellant failed to disclose Dr. Suzuki as an expert in accordance with the law, the trial court did not abuse its discretion in declining to allow Dr. Suzuki to testify at trial.

B. The case law cited by appellant does not change the result

Appellant relies heavily on *Schreiber, supra*, 22 Cal.4th 31. *Schreiber* does not support appellant's position that a treating physician need not be designated as an expert. In *Schreiber*, the plaintiff "designated as expert witnesses, but did not submit expert witness declarations for, seven treating physicians." (*Id.* at p. 33.) The issue in *Schreiber* was whether the treating physicians were required to provide expert declarations under former Code of Civil Procedure section 2034.[5] *Schreiber* noted that treating physicians are percipient experts. (*Schreiber*, at p. 35.) A treating physician has the type of knowledge "'sufficiently beyond common experience'" to qualify as an expert. (*Id.* at p. 34; Evid. Code § 801, subd. (a).) As the *Schreiber* court pointed out, a treating physician "does not *become* an expert only when nonpercipient opinion testimony is elicited." (*Schreiber*, at p. 34.) A treating physician is an expert by virtue of his or her special knowledge and expertise.

The *Schreiber* court held that the treating physicians in that case did not have to provide expert declarations pursuant to former Code of Civil Procedure section 2034, subdivision (a)(2), because they were not "parties, employees of parties, or . . . 'retained by a party for the purpose of forming and expressing an

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[5] The current rules regarding the exchange of expert witness information are found under Code of Civil Procedure section 2034.210 et seq.

opinion in anticipation of the litigation or in preparation for the trial . . . .' [Citations.]" (*Schreiber, supra,* 22 Cal.4th at p. 34.)[6] While the *Schreiber* court confirmed that treating physicians need not always provide expert declarations, it did not undercut the basic rule that treating physicians must be designated as experts.[7]

Appellant also cites *Hurtado v. Western Medical Center* (1990) 222 Cal.App.3d 1198 (*Hurtado*), which does not change the outcome here. In *Hurtado,* a medical malpractice plaintiff designated three of her treating physicians as experts. (*Id.* at p. 1201.) After much back and forth between the parties regarding the treating physicians' depositions, the trial court dismissed the plaintiff's action for failure to obey a court order requiring her to produce the doctors for deposition. (*Id.* at p. 1202.) The *Hurtado* court reversed, noting that "[t]he burden to produce an expert for deposition is shifted from the noticing party to the designating party only if the expert is a retained expert." (*Id.* at p. 1203.)

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[6] The rule regarding expert declarations is now found in Code of Civil Procedure section 2034.210, subdivision (b), and includes the same categories as the former statute.

[7] *Huntley v. Foster* (1995) 35 Cal.App.4th 753 (*Huntley*) involved the same issue discussed in *Schreiber.* A plaintiff in a personal injury matter designated her treating physicians as experts, but did not provide expert witness declarations. The *Huntley* court held that expert witness declarations were not required for the treating doctors. Because the treating physicians were already designated as experts, the case did not discuss the issue of whether such treating physicians are required to be designated as experts.

The treating physicians were not retained experts, therefore the plaintiff was not obligated to produce them for deposition. (*Ibid.*)

The cases above confirm that treating physicians, as percipient experts, are treated somewhat differently from retained experts under the discovery rules. However, the cases do not support appellant's position that a treating physician need not be designated as an expert. Instead, as set forth in *County of LA*, treating physicians must be designated as experts, or their testimony is irrelevant. The trial court did not abuse its discretion in so holding.[8]

DISPOSITION

The judgment is affirmed. Respondent is awarded his costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST

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[8] Because we have found that the trial court did not commit error, we do not reach respondent's argument that appellant failed to show that any error was prejudicial. We also decline to comment on appellant's argument, raised for the first time in her reply brief, that she could have called Dr. Suzuki to impeach expert testimony under Code of Civil Procedure section 2034.310. Appellant provides no citation to the record indicating that she raised this point in the trial court, therefore it is forfeited. (*Natkin v. California Unemployment Ins. Appeals Bd.* (2013) 219 Cal.App.4th 997, 1011.)