Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D33948
O/kmb

_____AD3d_____ Argued - January 24, 2012

MARK C. DILLON, J.P.
ANITA R. FLORIO
CHERYL E. CHAMBERS
SHERI S. ROMAN, JJ.

2011-04206 DECISION & ORDER

Evelin Ceron, etc., respondent, v Anatoly Belilovsky, etc., et al., appellants.

(Index No. 15988/09)

Bartlett, McDonough, & Monaghan, LLP, White Plains, N.Y. (Edward J. Guardaro, Jr., of counsel), for appellants.

Susan M. Karten & Associates, LLP, New York, N.Y. (Craig H. Snyder of counsel), for respondent.

In an action, inter alia, to recover damages for medical malpractice, etc., the defendants appeal, as limited by their brief, from so much of an order of the Supreme Court, Kings County (Bunyan, J.), dated March 23, 2011, as granted the plaintiff's motion for a protective order pursuant to CPLR 3103(a) to the extent of staying the deposition of the plaintiff's infant daughter and directing them to submit their proposed written interrogatories to the plaintiff's counsel for submission to and review by the plaintiff's expert psychologist, who will advise which, if any, of the interrogatories may be answered by the plaintiff's infant daughter.

ORDERED that the order is modified, on the law, by deleting the provision thereof directing the plaintiff's counsel to submit the defendants' proposed written interrogatories for review by the plaintiff's expert psychologist, who will advise which, if any, of the interrogatories may be answered by the plaintiff's infant daughter, and substituting therefor a provision requiring the plaintiff's infant daughter to submit responses to the interrogatories, without prejudice to the defendants moving, if they be so advised, to compel the deposition of the plaintiff's infant daughter upon receipt and review of the responses to the interrogatories, and without prejudice to the plaintiff moving for an additional protective order, if she be so advised; as so modified, the order is affirmed

insofar as appealed from, without costs or disbursements.

Under the particular circumstances of this case, in which, inter alia, the plaintiff's expert psychologist opined that requiring her infant daughter to testify under oath would be detrimental to her health, the Supreme Court providently exercised its discretion in granting the plaintiff's motion for a protective order pursuant to CPLR 3103(a) to the extent of staying the deposition of the plaintiff's infant daughter (hereinafter the infant) and directing the defendants to submit their proposed written interrogatories to the plaintiff's counsel (*see Button v Guererri*, 298 AD2d 947; *Verini v Bochetto*, 49 AD2d 752). However, the Supreme Court improperly delegated its authority to determine the scope of discovery to a mental health professional. Accordingly, the infant must submit responses to the interrogatories, without prejudice to the defendants moving, if they be so advised, to compel the deposition of the infant upon receipt and review of the responses to the interrogatories, and without prejudice to the plaintiff moving for an additional protective order, if she be so advised (*see Button v Guererri*, 298 AD2d 947).

The issue of whether the protective order improperly reverses the priority of depositions, as contended by the defendants, cannot be determined, since the record is not clear as to whether the defendants in fact had priority of depositions in the first instance (*see* CPLR 3106[a]; *Business Envelope Mfrs., v Williams*, 40 AD2d 597).

DILLON, J.P., FLORIO, CHAMBERS and ROMAN, JJ., concur.

ENTER:

Aprilanne Agostino
Clerk of the Court