

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

730

CA 24-01525

PRESENT: LINDLEY, J.P., CURRAN, OGDEN, GREENWOOD, AND HANNAH, JJ.

JERRY MURPHY, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

KALEIDA HEALTH, DOING BUSINESS AS
MILLARD FILLMORE SUBURBAN HOSPITAL,
DEFENDANT-RESPONDENT.

CAMPBELL & ASSOCIATES, HAMBURG (JASON M. TELAAK OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

CONNORS LLP, BUFFALO (JOHN T. LOSS OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (J. David Sampson, A.J.), entered August 30, 2024. The order, among other things, denied the motion of plaintiff seeking, inter alia, to strike the answer, granted that part of the cross-motion of defendant for a protective order and directed plaintiff to send letters to his treating physicians rescinding prior letters containing language that Supreme Court deemed "confusing, misleading and/or intimidating."

It is hereby ORDERED that the order so appealed from is modified on the law by granting the motion in part and compelling defendant to disclose its staffing plan, staffing schedule and attendance records of employees who worked in the intensive care unit during the month of November 2017, and by denying that part of the cross-motion seeking a protective order, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this medical malpractice action seeking damages resulting from a large pressure ulcer that allegedly developed on his lower back during the 20 days he was admitted to a hospital operated by Kaleida Health, doing business as Millard Fillmore Suburban Hospital (defendant). The amended complaint, as amplified by the bill of particulars, alleges that defendant was negligent and deviated from the applicable standard of care in a number of ways, including by failing to provide a complete and proper physical exam, failing to take steps to minimize the risk of developing ulcers, and failing to properly monitor plaintiff and his condition.

During discovery, plaintiff requested that defendant provide him with its staffing plan, staffing schedule, and attendance records of employees who worked in the intensive care unit (ICU) during the month

of November 2017, which covered his 20-day admission. Defendant objected to the demand on grounds that it was vague, overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of relevant information. According to defendant, the records requested by plaintiff were irrelevant because, among other reasons, there were "no allegations of improper staffing in the bill of particulars."

Plaintiff thereafter served an amended bill of particulars alleging that defendant was negligent "in failing to properly hire, staff, train, educate, supervise and/or monitor its agents, servants, and/or employees, thereby exposing the [p]laintiff to serious physical injuries." Four days after serving the amended bill of particulars, the propriety of which is not challenged by defendant, plaintiff moved to strike the answer due to defendant's refusal to comply with his discovery request. In the alternative, plaintiff asked for other "appropriate relief," which Supreme Court interpreted as including an order compelling defendant to disclose the requested staffing records.

Defendant opposed the motion and cross-moved for a protective order with respect to the requested staffing records, an order requiring plaintiff to rescind correspondence forwarded to treatment providers for whom defense counsel has sought speaking authorizations pursuant to *Arons v Jutkowitz* (9 NY3d 393 [2007]), and an order precluding plaintiff from sending litigation-related correspondence to his past and present treating providers. The court denied the motion in its entirety and granted the cross-motion in part. Specifically, the court granted a protective order to defendant and directed plaintiff to send correspondence to his treating physicians rescinding all prior letters containing language that the court "deemed to be confusing, misleading and/or intimidating."

With respect to plaintiff's request for the ICU staffing records, CPLR 3101 (a) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." As the Court of Appeals has advised, "[w]hat is material and necessary is left to the sound discretion of the lower courts and includes any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" (*Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 746 [2000] [internal quotation marks omitted]). " 'The test is one of usefulness and reason' " (*id.*).

Here, defendant's staffing plan, staffing schedule and time records for the ICU for the month of November 2017 are material and necessary to the prosecution of plaintiff's negligence and malpractice causes of action. More specifically, the numbers of doctors, nurses and physician assistants who were working in the ICU when plaintiff allegedly developed his ulcer are relevant to his claim in the amended bill of particulars that defendant failed to hire enough medical personnel to staff the ICU (see *Grant v PALJR, LLC*, 64 AD3d 750, 751 [2d Dept 2009]; *Parise v Good Samaritan Hosp.*, 36 AD3d 678, 680 [2d Dept 2007]). It is also material and necessary for plaintiff to know which employees were scheduled to be on duty in the ICU during the 20 days of his admission and which ones actually showed up for work.

In granting the protective order, the court stated, *inter alia*, that "[w]ithout the patient census, which has not been requested, the staffing records are meaningless." There is no indication in the record, however, that plaintiff did not independently know how many other patients were in the ICU with him, which could obviate the need for a census. In any event, as plaintiff points out, the note of issue had not yet been filed, and plaintiff therefore still had the opportunity to request a patient census prior to the close of discovery, assuming for the sake of argument that a census was required to render the staffing records useful to plaintiff.

We therefore conclude that the court abused its discretion in denying plaintiff's motion to the extent that it sought an order compelling defendant to disclose the requested records, and in granting defendant's cross-motion to the extent that it sought a protective order for such records, and we therefore modify the order accordingly. Because defendant's failure to comply with the discovery request was not willful, contumacious or in bad faith, however, we conclude that there was no basis for the court to strike defendant's answer (*see Harms v TLC Health Network*, 215 AD3d 1295, 1296 [4th Dept 2023]), especially considering that plaintiff's motion was filed only four days after he amended the bill of particulars to allege that the ICU was inadequately staffed.

Plaintiff further contends that the court abused its discretion in granting that part of defendant's cross-motion seeking an order directing plaintiff to rescind a letter he sent to his primary care physician regarding an Arons speaking authorization later executed by plaintiff (*see Arons*, 9 NY3d at 415-416). In the letter, plaintiff stated that he was required "to provide defense counsel with authorizations permitting them to . . . request an interview with you concerning the care and treatment you have rendered to me regarding the injuries sustained in the above-referenced incident." After advising the physician that he was under no obligation to speak to defense counsel, plaintiff added: "I am writing to advise you that in the event defense counsel does contact you in connection with this matter, I would prefer that you choose not to speak with them. I value and wish to protect the confidentiality of our physician-patient relationship." Finally, plaintiff stated, "Should you choose to disregard my request, I ask that you notify me of the date and time of your correspondence with defense counsel so that I may attend the interview."

Although plaintiff did not send a copy of the letter to defendant, opposing counsel somehow learned of its content. Defendant contended in its cross-motion that the letter was "nothing more than an improper attempt to undermine Arons and a defendant's ability to defend itself by unduly prejudicing and interfering with [defendant's] right to conduct *ex parte* interviews with plaintiff's treating providers." As a remedy, defendant asked the court to direct plaintiff to rescind any litigation-related correspondence to treating physicians from whom defendant has sought speaking authorizations.

Defendant sought other relief that was not granted and is not at issue on this appeal.

In opposition to the cross-motion, plaintiff argued that Arons did not create a *right* for a defendant's attorney to conduct a private interview with a plaintiff's treating physicians and that there is nothing wrong with a party asking a nonparty witness to refrain from voluntarily providing information to other parties in the litigation. Plaintiff did not address the other language in the letter that defendant alleged constituted an improper attempt to discourage ex parte interviews, such as plaintiff's request to be present for any informal interview of the physician by defendant's attorney.

The court generally agreed with defendant, concluding that the letter was confusing and misleading to the extent that plaintiff stated that he wished to protect the confidentiality of the physician-patient relationship. The court further concluded that the phrase "[s]hould you choose to disregard my request" (i.e., that the physician not speak to opposing counsel) was intimidating and thus improper. The order thus directed plaintiff "to send correspondence to his treating physicians rescinding all prior letters sent containing the language that the [c]ourt has deemed to be confusing, misleading and/or intimidating." On appeal, plaintiff contends that there was nothing confusing, misleading, intimidating or improper about his letter, and that the court therefore abused its discretion in directing him to rescind it. We find no abuse of discretion in the court's ruling.

Prior to 1996, when the Health Insurance Portability and Accountability Act of 1996 ([HIPAA] 42 USC § 1320d et seq.) was enacted by Congress, a defendant's attorney in New York was permitted to conduct post-note-of-issue ex parte interviews with the plaintiff's treating physicians in actions where the plaintiff waived the physician-patient privilege by placing their medical condition at issue (see generally *Koump v Smith*, 25 NY2d 287, 293 [1969]). That practice was called into question by the Privacy Rule (45 CFR parts 160, 164) "promulgated by the United States Department of Health and Human Services" pursuant to HIPAA (*Matter of Miguel M. [Barron]*, 17 NY3d 37, 41-42 [2011], *rearg denied* 17 NY3d 872 [2011]), which forbids physicians from disclosing a patient's protected health information "without the patient's authorization" (*id.* at 42).

In *Arons*, the Court of Appeals held that defense attorneys may permissibly engage in informal ex parte conversations with the treating physicians of any plaintiff who has executed HIPAA-compliant authorizations. As we noted in *Sims v Reyes* (195 AD3d 133, 136 [4th Dept 2021]), "few disputes concerning the specific wording of an authorization have made their way to the appellate courts," perhaps due in part to plaintiffs' use of the standard authorization form adopted by the Office of Court Administration (OCA). Here, the dispute does not concern language in the Arons authorization, but instead language in the letter plaintiff sent to his primary care physician regarding the HIPAA authorization.

We agree with the court's interpretation of plaintiff's letter, which is clearly intended to discourage his doctor from speaking informally to defendant's attorney. In *Sims*, we determined that the trial court did not abuse its discretion in compelling the plaintiff to execute revised Arons authorizations that are consistent with OCA's standard form. At the heart of the dispute in *Sims* was the following language in the authorizations, which is not included in OCA's standard form: " 'If you [physicians] decide to meet with their lawyers, I [the plaintiff] would ask that you let me know, because I would like the opportunity to be present or to have my attorneys present' " (195 AD3d at 135). Almost identical language is included in plaintiff's letter to his primary care physician, and we can discern no reason for allowing plaintiff to include language in his letter that is prohibited in an authorization. It stands to reason that the court here did not abuse its discretion in directing plaintiff to rescind the letter he sent to his primary care physician.

Another problem with the letter is that it includes a request from plaintiff that the physician not speak to defendant's attorney. Even assuming, arguendo, that a plaintiff may express a preference in the authorization (or a letter) that a treating physician not speak to opposing counsel (see *Charlap v Khan*, 41 Misc 3d 1070, 1085 [Sup Ct, Erie County 2013]), we note that plaintiff in this case expressed his preference in the form of a request ("Should you choose to disregard my request . . ."). In our view, a plaintiff who signs an authorization allowing a treating physician to speak to defense counsel about the plaintiff's medical condition at issue should not be allowed to send a letter separately to the same physician requesting that the physician not speak to defense counsel. Permitting plaintiffs to make such a request would undermine the purpose of the Arons authorization and, at the very least, be confusing to the physician (see *Arons*, 9 NY3d at 409, quoting *Kish v Graham*, 40 AD3d 118, 129 [4th Dept 2007, Pine, J., dissenting], revd 9 NY3d 393 [2007]).

Adding to the confusion is the statement "I value and wish to protect the confidentiality of our physician-patient relationship," which may lead the physician to conclude that, notwithstanding plaintiff's execution of the speaking authorization, plaintiff was not actually waiving the physician-patient privilege or the privacy protections afforded by HIPAA. While that language, standing alone, may not have warranted rescission of plaintiff's letter, it lends support to the court's determination that the letter, as written, constitutes an impermissible "attempt to circumvent the Court of Appeals' holding in *Arons*."

We also note that the letter as written might lead the physician to believe, wrongly, that plaintiff has a right to attend any informal interview with defense counsel. The Court of Appeals made it clear in *Arons* that a defendant's attorney may ask treating physicians to participate in ex parte interviews, which by definition do not involve the plaintiff. While a physician may insist that the plaintiff be present for such an interview, that is a decision for the physician alone to make. Just as a defendant's attorney has no right to

interview the physician informally (see *Sims*, 195 AD3d at 136 n), a plaintiff has no right to attend the interview (the plaintiff has only the right to ask the physician for permission to attend an interview).

Based on the above, we cannot conclude that the court abused its discretion in directing plaintiff "to send correspondence to his treating physicians rescinding all prior letters sent containing the language that the [c]ourt has deemed to be confusing, misleading and/or intimidating."

Finally, we note our disagreement with the dissent's assertion that the court lacked subject matter jurisdiction over this dispute because defendant was seeking an advisory opinion regarding the propriety of plaintiff's Arons letter. Of course, courts may not issue judicial decisions that "can have no immediate effect and may never resolve anything" (*New York Pub. Interest Research Group v Carey*, 42 NY2d 527, 531 [1977]). Thus, an action " 'may not be maintained if the issue presented for adjudication involves a future event beyond control of the parties which may never occur' " (*Cuomo v Long Is. Light Co.*, 71 NY2d 349, 354 [1988]).

Here, however, the court was presented with a real dispute between the parties regarding a letter that plaintiff sent to his primary care physician that was clearly intended to discourage cooperation with defense counsel. That is to say, the dispute involves an event that already occurred (plaintiff's sending of the improper letter), not an event that may never occur (the physician refusing to agree to an ex parte interview with defense counsel), and plaintiff did not suggest below (or even in his briefs on appeal) that defendant was seeking an advisory opinion or that the court otherwise lacked subject matter jurisdiction. We thus conclude that the controversy is justiciable (see generally *Matter of Fossella v Dinkins*, 66 NY2d 162, 166-167 [1985]).

Although it is true that defendant did not establish below that the physician actually received the letter or was dissuaded from speaking to defense counsel by the confusing and intimidating language contained therein, we believe that requiring such proof to establish the court's subject matter jurisdiction would be setting the bar too high for legal challenges to improperly worded Arons authorizations or letters, especially where, as here, the challenged language is clearly intended to discourage the physician from cooperating with opposing counsel. In many cases where the improper language serves its intended purpose, defendants would not be in a position to know why a treating physician refused to speak to defense counsel. Of course, defendants could seek an explanation from the physician at a formal deposition as to why the physician refused an informal interview, but that would be contrary to the purpose of Arons, where the Court of Appeals expressed a preference for "informal discovery practices in litigation—in particular, private interviews of fact witnesses" over costly and time-consuming depositions (9 NY3d at 406).

All concur except CURRAN, J., who dissents in part and votes to further modify in accordance with the following memorandum: I

respectfully dissent. While I agree with the modifications made by the majority to the order on appeal, I vote to further modify the order by denying defendant's cross-motion to the extent it sought an order requiring plaintiff to rescind correspondence forwarded to treatment providers, for whom defense counsel has sought "HIPAA-compliant authorizations" pursuant to *Arons v Jutkowitz* (9 NY3d 393 [2007]), which contained language Supreme Court "deemed to be confusing, misleading and/or intimidating." In my view, in the absence of any showing that defendant had been prejudiced or detrimentally affected by plaintiff's letter, the cross-motion with respect to the letter merely sought an advisory opinion and, thus, the court lacked subject matter jurisdiction to grant that portion of the cross-motion.

It is well settled that "[t]he courts of New York do not issue advisory opinions for the fundamental reason that in this State '[t]he giving of such opinions is not the exercise of the judicial function' " (*Cuomo v Long Is. Light Co.*, 71 NY2d 349, 354 [1988], quoting *Self-Insurer's Assn. v State Indus. Commn.*, 224 NY 13, 16 [1918, Cardozo, J.]). An advisory opinion is one that "ha[s] no immediate effect and may never resolve anything" (*id.* [internal quotation marks omitted]; see *New York Pub. Interest Research Group v Carey*, 42 NY2d 527, 531 [1977]). "It is therefore settled law that an action may not be maintained if the issue presented for adjudication involves a future event beyond control of the parties which may never occur" (*Cuomo*, 71 NY2d at 354 [internal quotation marks omitted]). The parties in an action "cannot by agreement confer subject matter jurisdiction upon [a] court where there is none" (*County of Monroe v City of Rochester*, 39 AD3d 1272, 1273 [4th Dept 2007] [internal quotation marks omitted]; see *Cuomo*, 71 NY2d at 351). Indeed, "a court's lack of subject matter jurisdiction is not waivable, but may be [raised] at any stage of the action" (*Financial Indus. Regulatory Auth., Inc. v Fiero*, 10 NY3d 12, 17 [2008] [internal quotation marks omitted]; see *Matter of Fry v Village of Tarrytown*, 89 NY2d 714, 718 [1997]).

Here, the majority and I agree that there is no record evidence that plaintiff's treatment provider ever received the letter that, according to defendant, contains misleading and confusing language. Moreover, there is no evidence that defendant ever reached out to plaintiff's treatment provider to schedule an interview, let alone any evidence that the treatment provider, or any other provider, refused to meet with defendant. Defendant also does not expressly contend on appeal—and the majority does not so conclude—that the letter constituted a revocation of the "HIPAA-compliant authorization" required by *Arons*. At most, defendant asserted in the cross-motion that the letter was an "attempt to undermine *Arons*" and an "attempt to discourage and impose conditions on permissible interviews" (emphasis added). Thus, at best, the issue presented by defendant involves a future event that "may never occur," the resolution of which has no immediate effect (*Cuomo*, 71 NY2d at 354 [internal quotation marks omitted]; see *Matter of New York State Inspection, Sec. & Law Enforcement Empls., Dist. Council 82, AFSCME, AFL-CIO v Cuomo*, 64 NY2d

233, 240 [1984])).

At its heart, this appeal involves nothing more than one letter addressed to one provider that, as the majority notes, defendant "somehow learned" existed, but which defendant never even bothered to confirm had been received by the provider. The majority does not cite any authority supporting its invocation of judicial power with respect to the mere existence of a letter that no one contends has had any legal significance, and it can be comfortably contended that no such precedent exists. The majority nevertheless concludes that the mere existence or sending of the letter creates a justiciable controversy. But the mere sending of the letter in itself does not cause any harm to defendant, and neither defendant nor the majority identifies any such harm.

Contrary to that point, the majority concludes that, because defendant may never know that a treating physician declined an interview due to plaintiff's discouragement, it must act on the existence, or sending, of the letter alone. But that conclusion simply highlights the speculative harm alleged by defendant here inasmuch as it is undoubtedly true that the treating physician may decline an interview for that reason, or for no reason at all, just as that physician might agree to an interview because of a request from defendant, an insurance carrier or a fellow medical professional. There is simply no reason to exercise judicial power here when defendant has failed to demonstrate that it is in a worse position now than before the letter existed or was sent.

The majority's expression of general agreement "with the court's *interpretation* of plaintiff's letter" (emphasis added), and its *sua sponte* raising of "[a]nother *problem* with the letter" (emphasis added), give an air of an advisory commentary premised on speculation, which should in itself dissuade the majority from acting here. Unfortunately, the majority accepts defendant's invitation to opine on a matter—which has undoubtedly delayed the underlying medical malpractice action—all to no perceptible effect.

Ultimately, defendant's request that plaintiff rescind his letter is nothing more than a request for the court to opine on the language of the letter before defendant has suffered any concrete injury in fact or aggrievement to support its request. Consequently, I conclude that the court lacked subject matter jurisdiction to grant that part of the cross-motion seeking an order requiring plaintiff to rescind his letter, and thus should have denied that part of the cross-motion (*see generally Board of Educ. of Palmyra-Macedon Cent. Sch. Dist. v Flower City Glass Co., Inc.*, 160 AD3d 1497, 1498 [4th Dept 2018]).