

LaFurge v Cohen

2006 NY Slip Op 30605(U)

September 20, 2006

Supreme Court, New York County

Docket Number: 113990/03

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. EILEEN BRANSTEN**

PART 6

Justice

Index Number : 113990/2003
LAFURGE, BARBARA
vs.
COHEN, RICHARD
SEQUENCE NUMBER : 004
COMPEL DISCLOSURE
4

INDEX NO. 113990/03
 MOTION DATE 9-12-06
 MOTION SEQ. NO. 04
 MOTION CAL. NO. _____

this motion to/for compel disclosure

PAPERS NUMBERED	
1	_____
2, 3	_____
4	_____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
 Answering Affidavits — Exhibits _____
 Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
 OCT 03 2006
 COUNTY CLERK'S OFFICE
 NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 9-20-06

Eileen Bransten
 J.S.C.

Check one: FINAL DISPOSITION **HON. EILEEN BRANSTEN** NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART SIX

-----X
BARBARA LAFURGE,

Plaintiffs,

-against-

Index No. 113990/03
Motion Date: 9/12/06
Motion Seq. No.: 04

RICHARD COHEN, GEORGE VARSOS, HORTON
MEDICAL CENTER, "JOHN DOE" and "JANE DOE"
(said names being fictitious but intended to represent
physicians, radiation oncologists and technicians who
rendered care to the Plaintiff),

Defendants.

-----X
PRESENT: EILEEN BRANSTEN, J.

FILED
OCT 03 2006
COUNTY CLERK'S OFFICE
NEW YORK

Plaintiff Barbara LaFurge ("Ms. LaFurge") moves to compel disclosure from defendants Richard Cohen ("Dr. Cohen"), Horton Medical Center ("Hospital") and George Varsos ("Dr. Varsos"). In a stipulation dated September 12, 2006, Dr. Cohen and the Hospital agreed to produce the materials that Ms. LaFurge requested. Thus, the only issue that remains is whether Dr. Varsos must be produced for an additional session of his examination before trial and answer questions that were asked but not answered at his deposition.

Background

In the 1970's, Ms. LaFurge underwent gender reassignment surgery, and using scrotal or penile tissue, doctors created a neovagina. In November 2000, at age 50, she was diagnosed with squamous-cell cancer of the neovagina. Ms. LaFurge came under the

care of Dr. Richard Cohen at the Horton Medical Center in Middletown New York for curative radiation or radiotherapy.

Dr. Cohen, after consulting with, among others, Dr. George Varsos, created a treatment plan. The first phase of treatment that Dr. Cohen administered was External Beam Radiation Therapy ("EBRT"), which involves treatment of the tumor using a linear accelerator that delivers multiple beams of radiation to the tumor and its margins.

After EBRT was provided, an examination of Ms. LaFurge revealed that there was residual tumor within the neovaginal sidewall. Thus, Dr. Cohen planned to proceed with High Dose Rate ("HDR") brachytherapy, which is administered through a Syed template (a device implanted into the vaginal wall for delivery of radiation directly into the tumor via catheters through which the radioactive source is introduced).

Dr. Cohen had limited experience in surgically placing the template and catheters, he therefore requested Dr. Varsos' assistance in facilitating the brachytherapy. Dr. Varsos operatively inserted the Syed template and catheters. Dr. Varsos also provided a recommendation for the brachytherapy fractions and radiation dose. His recommendation was that Ms. LaFurge "be administered three radiation dose fractions (separate treatment events) consisting of 600cGy per fraction to comprise the HDR treatment." Reply Affirmation ("Varsos Opp."), at 4. He did not actually participate in delivery of the HDR, which was handled by Dr. Cohen using a computer-generated plan.

At his deposition, Dr. Cohen testified that the HDR plan was developed based, among other things, on recommendations by Dr. Varsos. Supp., Ex. 11, at 221. Dr. Cohen, Dr. Varsos and a physicist (Dr. Luo) conferred for an hour to an hour and a half to develop the HDR plan. *Id.*, at 223, 228. The three doctors sat at a computer screen and reviewed dosimetry (the accurate measurement of dosage). *Id.*, at 225.

Dr. Cohen explained that the computer-generated radiation plan is based on information determined by doctors. He stated:

“What we require from the plan is dose distribution to encompass the tumor plus a margin to a certain depth.

“Those parameters are input into the computer, and then the computer will generate a plan to accomplish that. And that’s accomplished by having the source move down each one of the needles and sit in certain positions for a certain amount of time. And that’s what we call dwell time.

“So the dwell time is calculated by the computer based on the dose and distribution we require.”

Supp., Ex. 11, at 230 (emphasis added). Dr. Cohen further indicated that information from a prescription would be entered into the computer for purposes of generating the treatment plan. *Id.*, at 368-369. Dr. Cohen made clear: “You tell the computer that you want to deliver 600 Centigrade to a point that’s .5 centimeters from the peripheral needles.” *Id.*, at 369. He further elaborated that he and Dr. Varsos “arrived at the 0.5 from peripheral needles.” *Id.*

In this medical malpractice action, commenced in August 2003, Ms. LaFurge alleges that the doses of EBRT and HDR were too high, causing radiation damage to Ms. LaFurge's neovagina and bladder. Ms. LaFurge contends that defendants' malpractice caused her injuries, including surgical closure of her vagina, ulcers, fecal incontinence, abdominal pain, and burns and ulcerations to her thighs.

Specifically, in opposition to a summary judgment motion that was recently denied, Ms. LaFurge submitted expert evidence setting forth that "[her] neovagina and bladder were damaged by the delivery of too much radiation. The recommendation by Dr. Varsos of the HDR dose which he recommended to Dr. Cohen for delivery by HDR and which was in fact executed by Dr. Cohen, also deviated from the standard of care. * *

* Both Drs. Varsos and Cohen, in the delivery, prescription and recommendation of the EBRT and HDR doses, caused too much radiation energy to be deposited into the patient in the treatment of her tumor. Thus, a lot more tissue beyond the tumor was exposed and treated rendering the overall treatment plan much too 'hot' causing unnecessary damage not only to the neovagina but other anatomical structures." Affirmation (in Support) ("Supp."), Ex. 3, at 8.

Dr. Varsos appeared for his deposition in September and November 2005. At his deposition, the following ensued:

Plaintiff's Counsel: "Did you intend in the administration of HDR to keep the maximum dose to any particular point on the bladder to be under 7,000?"

* * *

Varsos' Counsel: " * * * Based on what this witness has told you so far today, he did not do anything with respect to dose calculations, and all those dose calculations, the dwell times, all those parameters were defined after he left by others and done. So this is a backdoor way of eliciting expert testimony, and that's impermissible under *Carvalho v. New Rochelle Hospital*, and it's a bona fide objection, and that's why I objected."

Supp., Ex. 12, at 176-177.

* * *

Plaintiff's Counsel: "In recommending your parameters, before you recommended those parameters which you mentioned earlier, were you aware of the maximum dose to the bladder by EBRT? Is that something you were aware of?"

Dr. Varsos: "Yes."

Plaintiff's Counsel: "And what were you aware of with respect to that?"

Dr. Varsos: "I was aware of * * * the graphic depiction of the isodoses during the external beam phase of therapy, which I requested be shown to me prior to commencing with the brachytherapy, and I was aware that the recommended--the prescribed dose to the target region during the external beam phase of radiotherapy was 5400 cGy in 100 cGy fractions, and that a portion of the field received approximately 10 percent more, as is very often the case, and I saw the bladder's proximity to that area, and I had an idea of the bladder's dose during the external beam phase."

Plaintiff's Counsel: "Were you physically aware of the total dose 5821 cGy as the maximum bladder dose after EBRT before you recommended your parameters?"

Dr. Varsos: "Yes, I was aware."

Plaintiff's Counsel: "And was that presumably a document in the chart--"

* * *

Plaintiff's Counsel: "So, you were aware that she had external beam radiation of a total of 5400 as the prescribed dose, you were aware of that from her chart?"

Dr. Varsos: "Yes."

Plaintiff's Counsel: "And you were aware specifically of the maximum rectal dose of 5797 and a maximum bladder dose of 5575?"

Dr. Varsos: "I certainly was aware within, within a range of 50 cGy yes, from the information in the chart."

Plaintiff's Counsel: "But before you recommended your parameters, you reviewed--is it fair to say--all of the entries or the salient or important entries in the chart concerning maximum bladder dose, maximum rectal dose, total dose to the bladder, total dose to the rectum from EBRT; is that fair to say?"

Dr. Varsos: "Yes."

Varsos' Counsel: "I object--okay."

Plaintiff's Counsel: "The parameters that you recommended, you've indicated were three fractions of HDR. You've already indicated that."

Dr. Varsos: "Yes, three fractions."

Plaintiff's Counsel: "Yes. Specifically with respect to the bladder, would that be within your parameters or outside of your parameters?"

Dr. Varsos: " * * * that question really can't be answered."

Plaintiff's Counsel: "Okay. And why is that you can't answer that?"

Varsos' Counsel: "I don't think that's a fair question. He told you he can't answer the question, so * * * it's clearly designed to elicit expert testimony.

"I'll let him answer the one. I shouldn't have even let him answer that one. You're referring to a chart created by Dr. Cohen subsequent to his involvement pursuant to a deliberate amount, and you're asking him whether it's now outside his parameters."

Plaintiff's Counsel: "I think that's fair."

Varsos' Counsel: "I don't think it's fair, but I don't know where you're going with it. But, you know, he said he can't answer that question."

Cohen's Counsel: "And I would object on the [*Carvalho*] grounds."

Plaintiff's Counsel: "In the administration of your parameters, did you intend, during any given fraction of HDR, for any portion--any point on the bladder to receive 3.675 Gy?"

Varsos' Counsel: "No, I'm going to object to that question. He already told you what he defined as his parameters, and he clearly told you that his--what they were. You've repeated it seven times now."

Plaintiff's Counsel: "I'm just asking him a question that I never asked, which I think is appropriate, whether 3.675 during one fraction of HDR to any point of the bladder is within or without his parameters. That's a fair question."

Varsos' Attorney: "No. See, I think that's a very well disguised, blatant attempt to elicit expert testimony. I'm not going to permit it."

Plaintiff's Counsel: "Well, we're going to have to mark that."

Varsos' Counsel: "That would be fine, and we'll make an argument to the Judge about it."

* * *

Plaintiff's Counsel: "Let me ask you one more question. My other question for you, Doctor, is in any fraction of the administration of HDR, would 0.821 to the surface of the bladder, and that's a Gy value, of course, exceed or not exceed the parameters per fraction of HDR that you had recommended?"

Varsos' Counsel: "Yes, I'm going to object to that as well for the same basis, and we can do the same argument with the Judge."

Plaintiff's Counsel: "Please, I think that's the collegial way to handle it."

Supp., Ex. 13, at 227-232.

* * *

Plaintiff's Counsel: "Did you ever review them after you left, the isodose HDR, isodose distributions to determine whether the parameters that you recommended were delivered and received by this patient?"

Varsos' Counsel: "Prior to the inception of this lawsuit?"

Plaintiff's Counsel: "Yes. Thank you."

Dr. Varsos: "No."

Plaintiff's Counsel: "And how about after?"

Cohen's Counsel: "Objection to form."

Varsos' Counsel: "Yeah. I'm going to object to that."

Plaintiff's Counsel: "Let me ask you this, a point of reference. Do you have an objection to me inquiring or eliciting opinion questions concerning his review of the isodose, the HDR isodose distributions that he after the

lawsuit was commenced for the purpose of asking him questions concerning do they reflect information that is consistent or inconsistent with the parameters that were recommended?"

Varsos' Counsel: "Yeah, I do. I think that's eliciting expert opinion testimony, so I'm not going to allow you to do that. He didn't participate in that."

Supp., Ex. 13, at 258-259.

* * *

Plaintiff's Counsel: "Do you know whether your parameters that you discussed early on today were actually delivered on this patient during the three fractions of HDR? Was your stated or was your parameter dose or recommended dose, was it actually a dose that was delivered?"

Varsos' Counsel: "Well, you know, I don't know how he can possibly answer that question based on all the questions that you've asked to this point in time and the answers that you've elicited without referencing either privileged material that occurred after the inception of this litigation--"

Plaintiff's Counsel: "Exclude that."

Varsos' Counsel: "--or--because he's told you that he gave parameters and he left. He was not involved in any of the dose distribution."

* * *

Plaintiff's Counsel: "I think I'm entitled to ask him based upon his review of the chart do you have an opinion based on the information in the chart whether the parameter or recommended dose was the dose that was delivered to this patient during HDR, and that's my question. I think that's an appropriate question."

Cohen Counsel: "Note my objection."

Varsos' Counsel: "I think * * * we're going to have to have to have the Judge rule on whether you can elicit expert testimony to get that answer."

* * *

Plaintiff's Counsel: "I appreciate that. We'll take it up with the Judge, but let me just narrowly focus the question."

Varsos' Counsel: "Fine."

Plaintiff's Counsel: "Are you able to tell us based upon your review of the chart whether your recommended or parameter dose for HDR was the dose that was received by this patient during HDR? And that's the question."

Varsos' Counsel: "Before he answers--before we go further, so I understand your question now, are you asking him whether, based on your review of the chart, he's capable of offering an opinion."

Plaintiff's Counsel: "Yes."

Varsos' Counsel: "--as to whether they followed the parameters or not?"

Plaintiff's Counsel: "Whether the parameters, recommended or parameter dose was received by or delivered to this patient by the HDR that was received."

Varsos' Counsel: "So, I don't have a problem with the question of whether he's capable of making that determination, but when you ask him the follow-up question as to whether or not they did, that's where the question we're going to object to."

Plaintiff's Counsel: "Let's have him answer the predicate question."

Dr. Varsos: "Yes."

Plaintiff's Counsel: "And what is your answer to that question?"

Varsos' Counsel: "That's the one I'm going to object to."

* * *

"As to [*Carvalho*], and the eliciting expert testimony as to a co-defendant."

Plaintiff's Counsel: "Okay."

Varsos' Counsel: "--whose care he's not predicated on, you know, and is--"

* * *

Plaintiff's Counsel: "In the administration of HDR on this patient, can you tell us--"

* * *

"Can you tell us 'yes' or 'no' whether the patient received a BED [biologically equivalent dose] in excess of the recommended parameter dose?"

Cohen's Counsel: "Objection."

Varsos' Counsel: "I'd object to that. You don't have to answer the question--"

Plaintiff's Counsel: "I'm not asking for the substance--hold on. I'm not asking for an answer in substance of the question, I just want to know can you tell us based upon--"

"Can you tell us whether Barbara received a BED in excess of your recommended or parameter dose?"

Dr. Varsos: "Am I capable?"

Plaintiff's Counsel: "Yes."

Dr. Varsos: "Yes."

Plaintiff's Counsel: "And did that occur?"

Varsos' Counsel: "No, I'm going to object to that question."

Plaintiff's Counsel: "That's our same position?"

Varsos' Counsel: "Sure."

Plaintiff's Counsel: "Are you able to determine the total composite dose of all radiotherapy delivered to this patient? Is that something you're able to do?"

Dr. Varsos: "Yes."

Plaintiff's Counsel: "Can you tell us what the total composite dose was that the patient received?"

Dr. Varsos' attorney did not permit him to answer the question.

Plaintiff's Counsel: "Did Barbara receive a BED greater than your recommended or parameter dose?" (Emphasis added.)

Again, Dr. Varsos' attorney did not permit him to answer the question.

* * *

Plaintiff's Counsel: "Do you know whether your recommended or parameter dose was delivered through the means or the delivery system of the Syed applicator to this patient?" (Emphasis added.)

Again, Dr. Varsos' attorney did not allow Dr. Varsos to answer the question. Dr.

Varsos' counsel further refused to allow his client to calculate the BED delivered at any geographic point on Ms. LaFurge's body. Dr. Varsos' attorney would not allow answers to the following questions submitted by plaintiff's counsel as well:

- “Are you able to tell us whether the BED in the administration of HDR on this patient is higher than your recommended or parameter dose?”
- “Do you have an opinion whether the BED of the HDR doses that you recommended, we called it the parameter dose, is equal to or in excess of the actual or stated dose that was delivered to this patient during HDR?”
- “I want you to assume that after you no longer were involved in the care and treatment of this patient, her bladder was surgically removed because it was irreparably damaged. * * * Assuming that, do you have an opinion as to whether the recommended or parameter dose that you recommended to Dr. Cohen explains in any way the damage to her bladder.”
- “Same question with respect to the neovagina.”

Supp., Ex. 13, at 258-274 (emphasis added).

In addition, the following questioning took place:

Plaintiff’s Counsel: “Well, while you were involved in the treatment of the patient, was there anything about her medical condition or anatomy that rendered that impossible of being achieved, to keep the dose to under 7,000 to any particular point of her bladder?”

* * *

Varsos’ Counsel: “My objection is what I just articulated to you, that there is no predicate for him to know what the anatomical configuration of her bladder was during the HDR which occurred subsequent to his involvement in her care.”

Supp., Ex. 13, at 302-303.

* * *

Plaintiff’s Counsel: “* * * What is the minimum HDR dose that was delivered to the area of the neovagina where this exophytic tumor was located?”

Varsos' Counsel: "Right Objection to that."

* * *

Plaintiff's Counsel: "** * * You would object to the same questions about repeating them as to the vulva; fair to say?"

Varsos' Counsel: "True."

* * *

Plaintiff's Counsel: "Do you have an opinion as to whether a BED of 3375 cGy would be beyond the standard of care in the delivery of HDR?"

Dr. Varsos' attorney objected on the "same basis." Supp., Ex. 13, at 322-323.

* * *

Plaintiff's Counsel: "If I were to -- a point of inquiry. If I were to have reference made by Dr. Varsos to the isodose curves from the HDR, would you allow me to question him about those?"

Varsos' Counsel: "I'm not sure what you're referring to now. I thought we did those already with respect to the--"

Dr. Varsos: "External, we did."

Varsos' Counsel: "--external. We did; right? Let me--show me what you're talking about. If it has to do with doses administered, then no, he's not going to answer those questions."

Plaintiff's Counsel: "That's why I'm raising those because it would be isodose distributions of HDR. Assuming that there's such an item in the chart, you would prohibit me from questioning him about that?"

Varsos' Counsel: "To the extent of you can ask him whether--what they are, to identify them, but he didn't deliver them, so, sure."

Plaintiff's Counsel: "Well, beyond that?"

Varsos' Counsel: "No, then I'm not--"

Plaintiff's Counsel: "To interpret them."

Varsos' Counsel: "Right. No, I'm not going to let him answer that."

Supp., Ex. 13, at 327-328.

* * *

Plaintiff's Counsel: "You had indicated earlier the amount of radiotherapy during the EBRT and then your recommendations with regard to your recommended or parameter dose for HDR. My question is this: Do you have an opinion as to whether the radiotherapy delivered during both phases has a composite dose which would produce any damage to any portion of the bladder?"

Varsos' Counsel: "I'm going to object to that question."

* * *

Plaintiff's Counsel: "So, my final question before you leave would be that same questions with regard to the neovagina?"

"Same objection?"

Varsos Counsel: "Sure."

Supp., Ex. 13, at 336-337.

Ms. LaFurge now seeks an Order compelling a continued deposition of Dr. Varsos and requiring him to answer “those questions objected to by his counsel * * * as well as relevant follow-up questions.” *See*, Notice of Motion, at ¶ 4.

Dr. Varsos objects to a further deposition, urging that “Dr. Cohen and the Horton Hospital physicist, engaged in computer modeling which generated a HDR isodose treatment plan which ‘fixed’ the duration and location of the radioactive source in the previously implanted catheters. This process sets the dose actually delivered to the plaintiff.” Varsos Opp., at 5. Dr. Varsos maintains that he “was not involved in the HDR isodose treatment plan nor did he administer the radioactive material to the tumor.” *Id.* According to him, the co-defendants determined the dose after he “concluded his role in the plaintiff’s care and physically left the facility.” *Id.* Because Dr. Varsos did not review the HDR isodose plan at the time of treatment, he contends that he should not be required to offer any opinions “as to whether the subsequently created plan exceeded tissue tolerance or whether the dose delivered violated standards of care.” Varsos Opp., at 5. Dr. Varsos asserts that plaintiff is improperly seeking expert testimony that “concerns solely the treatment of the co-defendant.” *Id.**

* Dr. Varsos also argues that plaintiff’s motion to compel additional disclosure should be denied as untimely since his deposition was completed on November 1, 2005 (more than nine months before this motion) and the note of issue was filed in January 2006 (more than six months before this motion), and additional disclosure should not be

Analysis

CPLR 3101 mandates that there “shall be full disclosure of all matter material and necessary in the prosecution or defense of an action.” The Court of Appeals has explained that the words “material and necessary” are to be liberally construed “to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason,” *Allen v. Crowell-Collier Pub. Co.*, 21 N.Y.2d 403, 406–07 (1968), and the “CPLR requires the disclosure of all evidence relevant to the case and *all information reasonably calculated to lead to relevant evidence.*” *See*, Siegel, *New York Prac.* § 344, at 525 (3d ed.) (emphasis added).

Consistent with this liberal standard for disclosure, the scope of permitted questioning at a deposition is broad. *White v. Martins*, 100 A.D.2d 805 (1st Dept. 1984) (scope of examination at deposition is broader than what may be admissible at trial); *see also*, *Orner v. Mount Sinai Hosp.*, 305 A.D.2d 307, 309-10 (1st Dept. 2003). Indeed, *all* questions asked at a deposition are to be answered unless they are “clearly violative of a witness’s constitutional rights, or of some privilege recognized in law [or are] palpably

permitted at this late date. Because the parties themselves stipulated to post-note-of-issue disclosure and because the trial of this action is months away, Dr. Varsos’ objection is misplaced and there is good cause for permitting Ms. LaFurge to obtain answers to questions that were improperly blocked.

irrelevant.” *Roggow v. Walker*, 303 A.D.2d 1003, 1004 (4th Dept. 2003); *see also*, *Dibble v. Consolidated Rail Corp.*, 181 A.D.2d 1040 (4th Dept. 1992); *Freedco Prods., Inc. v. New York Telephone Co.*, 47 A.D.2d 654, 655 (2d Dept. 1975).

Furthermore, it is well settled that “substantive questions relating to the expert opinions of the witnesses and the status of generally accepted community standards of medical practice [are] appropriate.” *Orner v. Mount Sinai Hosp.*, 305 A.D.2d 307 (1st Dept. 2003). The only time a party physician can object to offering an expert opinion at deposition, is if the questioning relates solely to the alleged negligence of a co-defendant and does not in any way pertain to the deponent.

In *Carvalho v. New Rochelle Hosp.*, 53 A.D.2d 635 (2d Dept. 1976), the Appellate Division stated that:

"In an action for malpractice brought against more than one physician, one defendant physician may not be examined before trial about the professional quality of the services rendered by a codefendant physician if the questions bear *solely* on the alleged negligence of the codefendant and not on the practice of the witness. * * * Where the opinion sought refers to the treatment rendered by the witness, the fact that it may also refer to the services of a codefendant does not excuse the defendant witness from deposing as an expert" (emphasis added). *See also, Claudino v. Mastellone*, 286 A.D.2d, at 698 (hospital witness could not be examined "*solely* about the professional quality of the services" rendered by a different defendant doctor).

Moreover, where, as here, a physician declines to respond to questioning because it allegedly deals with the actions of a co-defendant, it is the deponent's burden to persuade the court:

“that the inquiry *solely* involves care rendered by another and is *wholly irrelevant* to what the witness himself did, did not do, knew or should have known. Significantly, where this issue has arisen, the courts typically ruled in favor of a response. It is a *rare case* where the medical witness can successfully argue that standards of practice in a related specialty are either *wholly unknown* to him, *totally irrelevant* to his own care and treatment of a patient, or *clearly immaterial* to the issue of causation, so justifying his refusal to respond.”

See, Giventer v. Rementeria, 181 Misc. 2d 582, 586 (Sup. Ct. Richmond County 1999) (emphasis added) (quoting Norman Bard & Lori A. Maran, *New York Medical Malpractice*, § 17.5.9.1 [Norman Bard 1994]).

Here, Dr. Varsos was not justified in refusing to answer the questions submitted. As a party to this action, Dr. Varsos is required, upon inquiry, to give his expert opinion and when he cannot answer a question it is his responsibility to provide an explanation for his inability to respond. *See, supra*, at 6-7. Many of the unanswered questions, moreover, directly relate to whether the radiation provided to Ms. LaFurge was consistent with Dr. Varsos' own recommendations.

Dr. Varsos has not met his burden of establishing that the objected-to questioning solely relates to the conduct of Dr. Cohen and in no way shape or form bares on the

radiation plan, which he himself allegedly had a role in designing. Although the record demonstrates that Dr. Varsos did not actually provide the radiation to Ms. LaFurge, he did play a part in setting the radiation dosage. In fact, the malpractice allegations largely center on the radiation dosage, not on the manner in which the radiation was dispensed. That Dr. Varsos “gave parameters and * * * left,” *see, supra*, at 9, does not erase his role in determining Ms. LaFurge’s course of treatment. Dr. Varsos’ lack of day to day participation in implementing the radiation plan does not divorce him from connection to the radiation dosage and inquiry into (1) whether Ms. LaFurge was exposed to too much radiation based on the plan that he allegedly helped formulate, (2) whether the plan in fact incorporated Dr. Varsos’ recommendations and (3) whether the plan (that was allegedly designed using Dr. Varsos’ parameters) was followed.

Because there is no legal basis for Dr. Varsos’ refusal to answer the questions and because it cannot be said as a matter of law that the questions asked *solely* relate to the actions of Dr. Cohen, *see, Harley v. Catholic Medical Center of Brooklyn*, 57 A.D.2d 827, 828 (2d Dept. 1977); *see also Forgays v. Merola*, 222 A.D.2d 1088 (4th Dept. 1995), Dr. Varsos must be produced again for a limited deposition (at plaintiff’s cost) during which plaintiff may ask all of the questions discussed in this Decision and Order as well as any related follow-up questions. Dr. Varsos’ continued deposition must take place within 45 days of the date of this Decision and Order.

Accordingly, it is

ORDERED that Dr. Cohen and the Hospital are to provide the materials set forth in the so-ordered stipulation dated September 12, 2006, within 45 days of September 12, 2006; it is further

ORDERED that Dr. Varsos is to be produced for an examination before trial within 45 days of the date of this Decision and Order and answer the questions that are the subject of this motion and any related follow-up questions; and it is further

ORDERED that the parties are to appear for trial on January 16, 2007 at 9:30 a.m., which is a firm and final date for jury selection that will not be adjourned.

This constitutes the decision and order of the Court.

Dated: New York, New York
September 20, 2006

ENTER



Hon. Eileen Bransten

FILED
OCT 03 2006
COUNTY CLERK'S OFFICE
NEW YORK

