

**Yankowitz v Wlechowski**

2007 NY Slip Op 30254(U)

March 14, 2007

Supreme Court, New York County

Docket Number: 0108785

Judge: Sheila Abdus-Salaam

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

PRESENT: HON. SHEILA ABDUS-SALAAM  
*Justice*

PART 13

Paul Yankowitz

INDEX NO. 108785/05

MOTION DATE 3/1/07

- v -

MOTION SEQ. NO. 002

Michael J. Wiechowski, M.D., et al.

MOTION CAL. NO. 102

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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

PAPERS NUMBERED

**FILED**  
MAR 23 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion by plaintiffs for an order compelling the further deposition of defendant Joseph A. Nash, M.D., is granted. Dr. Nash's cross-motion for a protective order is denied.

In this medical malpractice action, plaintiffs allege that defendants failed to diagnose the colon cancer of plaintiff's decedent Ronald Yankowitz, which ultimately led to his death. Defendant Dr. Wiechowski, Mr. Yankowitz's primary care physician since 1995, referred him to Dr. Nash, a gastroenterologist. Dr. Nash first saw Mr. Yankowitz on April 30, 2003. On April 22, 2003 and again on May 6, 2003, Dr. Wiechowski ordered blood tests for Mr. Yankowitz. The lab results for these tests dated April 24, 2003, and May 8, 2003, respectively, were marked as exhibits at Dr. Nash's deposition conducted on December 21, 2006. The lab results were not included in Dr. Nash's chart for Mr. Yankowitz and Dr. Nash testified that he had not seen the results before they were shown to him at the deposition.

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

After the exhibits were marked and identified, plaintiffs' counsel asked Dr. Nash a series of questions as follows that were objected to by Dr. Nash's attorney, who instructed Dr. Nash not to answer the questions:

Q. Dr. Nash, I'm going to ask you - - I'm just going to point out to you that, by counsel, that the report generated by Shiel [Nash Exhibit 3, the April 24, 2003 lab results] indicates a hematocrit level that, according to Shiel, is out of range or abnormal and, again, looking at the hemoglobin level, that is abnormal or out of range. \*\*\*\* For purposes of this deposition, I want you to assume that Mr. Yankowitz, his hematocrit and his hemoglobin were low around 4/22 of '03. My question is: Had you been aware of these results at the visit Mr. Yankowitz had with you on 5/12, would your recommendations have changed with respect to any procedures you would have performed on Mr. Yankowitz? (Transcript p. 73, Lines 9-22)

\*\*\*\*\*

Q. Doctor, I'm going to ask a similar question: Had you seen the blood results prior to your visit with Mr. Yankowitz on 4/30 of '03 would your treatment plan have changed with respect to Mr. Yankowitz? (Transcript p. 74, Lines 23-25; p. 75, Lines 2-3)

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Q. This is plaintiff's Exhibit 4, Nash 4, [the May 8, 2003 lab results] for today. I'm going to represent to you, by counsel, that the hemoglobin was abnormal at 11.9 and that the Iron level was also abnormal via this Shiel Medical Laboratory analysis. My question is: Had you been aware of these blood results prior to the endoscopy performed on May 12<sup>th</sup> of 2003, would you have performed any additional procedures in conjunction with the endoscopy? (Transcript p. 75, Lines 9-17)

Dr. Nash's attorney based his objections and advice not to answer these questions on Carvalho v. New Rochelle Hospital (53 AD2d 635 [1976]). Dr. Nash argues in opposition to this motion and in support of his cross-motion that compelling him to give his opinion about changing the course of treatment had he seen these results of blood tests that were ordered by Dr. Wiechowski would inevitably lead to expert testimony

regarding Dr. Wiechowski's treatment.

Carvalho stands for the proposition that "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" (id. [citations omitted]). However, that is not the case here. As is evident from the questions themselves, plaintiff's attorney was attempting to elicit information about Dr. Nash's own treatment of the patient he shared with Dr. Wiechowski. Carvalho, in fact, allows such questions. As the Second Department held, "[w]here, however, 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" (id., p. 635 [citation omitted]; Harley v. Catholic Medical Center of Brooklyn, 57 AD2d 827, 828 [1977]). Moreover, it is irrelevant that the blood tests were ordered by Dr. Wiechowski rather than Dr. Nash. The results may well be relevant to Dr. Nash's actual care and treatment or the care and treatment he might have provided to Mr. Yankowitz had he been made aware of the tests results. Consequently, the questions posed "do not relate solely to the care rendered by co-defendant [Dr. Wiechowski] and are proper subjects of deposition testimony" (Palmeri v. Island Medical Care, P.C., 2002 NY Slip Op 50272 [U], \*2).

Accordingly, plaintiffs' motion is granted. Dr. Nash is directed to appear for a further deposition by the next pre-trial conference date, May 10, 2007, to answer the questions above and any reasonable follow-up questions. Defendant's cross-motion for a protective order is denied.

Dated: March 14, 2007

**FILED**

JA-A

MAR 23 2007

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

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