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

PRESENT: HON. SHEILA ABDUS-SALAAM PART 13
Justice

Donna Quinter-Dolenz

INDEX NO. 103874/05

MOTION DATE 1/25/07

- v -

MOTION SEQ. NO. 002

Daniel Choy, M.D. and The Laser Spine Center

MOTION CAL. NO. _____

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

PAPERS NUMBERED

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 by plaintiff for a protective order against providing authorizations for records of certain healthcare providers and the application by plaintiff, first made at the compliance conference on November 20, 2007, to compel defendant Daniel Choy, M.D. to answer a question posed to him at his deposition but that he was instructed not to answer are decided as follows:

In this medical malpractice action, plaintiff alleges, among other things, that defendant Dr. Choy improperly performed laser disc decompression surgery on plaintiff's spine while treating her between April and July 2003, which resulted in plaintiff developing Horner's Syndrome. According to plaintiff, "Horner's Syndrome is an eye condition that causes extreme pain radiating from the base of the skull along the ocular nerve to the back of the eye, visual disturbances and ptosis (eyelid drooping)." (Shatynski affirmation, ¶ 3). Plaintiffs bill of particulars also claims that in addition to the Horner's

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

Syndrome and its attendant symptoms, plaintiff has sustained injuries which include increased right lateral neck pain, nerve trauma and exacerbation of migraine headaches, exacerbation of neck pain and exacerbation of stiffness, as well as attendant emotional pain and suffering. Plaintiff also alleges that defendant failed to inform her of all of the risks, benefits and alternatives to laser disc compression surgery.

Plaintiff seeks a protective order against providing authorizations for records of seven of her doctors: Dr. Culp, who performed a rhinoplasty on plaintiff in 1971 in Philadelphia; Dr. Daniel Baker, the New York surgeon who did revisions of Dr. Culp's rhinoplasty in the 1980's and early 1990's and who performed an eye lift simultaneously with one of the rhinoplasty revisions in the 1990's; Dr. Schuller, who performed a breast augmentation in 1996 in New York; Dr. Garth Fisher, the California surgeon who did a revision in 2005 of the original breast augmentation; Dr. Sam Sher, who performed a lower eye lift on plaintiff in the early 1980's and who plaintiff testified at her deposition is now deceased; Dr. Edward Sigal, plaintiff's California ob/gyn; and Dr. Patricia Allen, her New York ob/gyn. Plaintiff objects to providing the requested authorizations because these cosmetic surgeries are too remote from the treatment provided by defendant and because these surgeries as well as the gynecological care are irrelevant to the neck surgery performed by defendant and will not lead to any admissible evidence.

Defendant, on the other hand, argues that the records of these seven healthcare providers are relevant to the injuries plaintiff claims she has sustained as a result of defendant's alleged malpractice and which she has placed in issue in this lawsuit, specifically plaintiff's migraine headaches, Horner's Syndrome, ptosis, and emotional pain and suffering. With the exception of plaintiff's ob/gyn records, I agree.

Plaintiff testified at her deposition that she had a long history of migraine headaches, dating back to her teens (plaintiff is now 52), and that

she still occasionally suffers from them. The records of plaintiff's previous surgeons are relevant (or may lead to information relevant) to assessing whether and to what extent plaintiff's migraines have increased in severity. Similarly, the records of the surgeons who performed rhinoplasty and eye lifts are relevant to the condition of plaintiff's eyes before defendant's alleged negligence. Indeed, the records of all the plastic surgeons who performed cosmetic procedures on plaintiff are relevant to plaintiff's familiarity with the risks involved in surgery, given plaintiff's allegations of lack of informed consent.

However, while relevant, some of these records for which authorizations are sought date back more than 15 to 30 years and are not likely to still exist. In one case, the doctor has died and there is no indication that his records going back more than 20 years survive. It seems futile to compel plaintiff to provide authorizations for records that probably no longer exit. Thus, plaintiff is granted a protective order as to the records of Drs. Culp, Sher and Baker. The motion is denied as to the records of Drs. Schuller and Fisher. Plaintiff is directed to provide HIPAA-compliant authorizations for the records of these two surgeons within 20 days of service of a copy of this order with notice of entry.

Plaintiff's motion is granted as to the records of her gynecologists. Defendant contends that plaintiff's claim of emotional pain and suffering places in issue plaintiff's mental status before and after defendant's alleged malpractice. Defendant states that Dr. Patricia Allen in February 2004 referred plaintiff for psychological or mental health care. Even if plaintiff has consulted or is being treated by mental healthcare providers, plaintiff's garden variety emotional pain and suffering claim (as distinguished from a specific claim for psychological or psychiatric damages) does not necessitate discovery of plaintiff's psychiatric or psychological records, much less plaintiff's gynecological records. Defendant's other argument, that the records of plaintiff's gynecologists (and the other five doctors) bear on

plaintiff's credibility because plaintiff gave a medical history of only one prior surgery when she was first seen by Dr. Choy, is insufficient to compel plaintiff to provide authorizations for plaintiff's gynecologists' records.

I turn now to plaintiff's verbal application made at the November 16, 2006 compliance conference to compel Dr. Choy to respond to a question posed to him at his deposition that defendant's counsel instructed him not to answer. Preliminarily, I note that plaintiff memorialized the application in a letter to defense counsel dated November 17, 2006, which indicates that this issue would be addressed at the oral argument of plaintiff's motion for a protective order, then returnable on November 20, 2006. The oral argument was scheduled to coincide with the status conference scheduled for January 11, 2007, which was adjourned until January 25, 2007. On the adjourned date, counsel agreed to submit the motion without oral argument. Thus, the application is being decided with this motion.

At his deposition Dr. Choy was asked: "Do you think Ms. Quinter-Dolenz did anything to cause the development of horner (sic) syndrome?" Plaintiff's counsel asked this question because defendant has asserted an affirmative defense of culpable conduct. Dr. Choy's attorney objected to the question as improper and would not allow Dr. Choy to answer it. As defendant's counsel explained to plaintiff's counsel when he objected to the question, Dr. Choy "may not be aware of the defenses that have come to me from certain experts [and] ... horner's syndrome is not within his area of expertise ... nor should my client be bound before a jury where for instance you've elicited and (sic) opinion from him that he is not aware of any contributory culpable contact (sic) of your client and then I put a witness on the stand to explain why your client's conduct was a contributory cause and then you in summation say to a jury, even Dr. Choy doesn't believe that there was contributory culpable conduct but his expert does." (Choy deposition excerpt, p. 1, lines 23-25 through p. 2, lines 2-15).

Counsel's reasoning is insufficient to prevent defendant from

answering what is essentially a factual question. Even if the question calls for an expert opinion from Dr. Choy, the question is proper. If defendant is concerned about contradicting what his expert may ultimately testify to at trial and thereby helping plaintiff to score points with the jury on summation as defense counsel suggests, then defendant should carefully craft his response to the question to avoid this result. Plaintiff's application is therefore granted and Dr. Choy is directed to appear for a further deposition to answer the above question within 20 days of service of a copy of this order with notice of entry, or at plaintiff's discretion, Dr. Choy may answer the question in writing within the same 20-day time frame. Accordingly, it is

ORDERED that plaintiff's motion for a protective order is granted only to the extent indicated above and is otherwise denied; and it is further

ORDERED that plaintiff's application to compel defendant Dr. Daniel Choy to answer the question posed to him at his deposition which he was directed by counsel not to answer is granted.

Counsel are directed to appear for a status conference on May 3, 2007, at 11:00 A.M.

Dated: April 5, 2007

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE