

**Giampa v Shelton**

2007 NY Slip Op 30841(U)

April 17, 2007

Supreme Court, New York County

Docket Number: 0104070/2004

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE  
*Justice*

PART 10

Sloan Giampa  
Marvin L. Shelton, MD, PC  
et al

INDEX NO. 104070104  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 004  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 5 were read on this motion to/for disqual & compel est

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

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**FILED**

APR 23 2007

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: APR 17 2007

[Signature]  
**HON. JUDITH J. GISCHE** *J.S.C.*

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10**

-----X  
Sloan Giampa,  
Plaintiff(s),

**DECISION/ORDER**  
Index No.: 104070/04  
Seq. No.: 004

-against-

Present:  
Hon. Judith J. Gische  
J.S.C.

Marvin L. Shelton, M.D., P.C.,  
Marvin L. Shelton, M.D., sued herein as  
Arden B. Shelton, Executrix of Estate of  
Marvin Shelton, and  
Columbia Presbyterian Medical Center,

Defendant(s).  
-----X

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

<b>Papers</b> . . . . .	<b>Numbered</b>
Notice of Motion (Shelton) disqualify or compel EBT, w/HM affirm, exhs	1
X/Motion (CP) disqualify or compel EBT w/JO'S affirm, exhs	2
RLG in opp	3
CP reply w/JO'S affirm	4
Shelton reply w/HM affirm	5

**Gische, J.:**

This is an action for medical malpractice and negligence against Marvin L. Shelton, a medical doctor ("Dr. Shelton") and Columbia Presbyterian Medical Center, a hospital ("Columbia Prebyterian"). Dr. Shelton is now deceased and this case is being defended by the Executrix of his estate. The doctor has moved and the hospital has cross moved for the disqualification of Richard L. Giampa, Esq. as plaintiff's attorney ("Mr. Giampa"). Mr. Giampa is the plaintiff's father.

Though separately moving for disqualification, the doctor and hospital raise similar, if not identical, arguments as to why Mr. Giampa must be disqualified as

plaintiff's counsel. Therefore, unless one defendant makes a distinctive argument not raised by the other defendant, hereinafter the arguments are addressed collectively as being those of the "defendants."

### **Background**

Plaintiff is now an adult, but in 1997, when she was 12 years old, she suffered a fracture to her right ankle while at school. She was taken to a local hospital in her community, but her parents had her transferred to Columbia Presbyterian where they were referred to Dr. Shelton, an orthopedic surgeon. Dr. Shelton performed surgery on plaintiff's ankle and later provided follow up care. Plaintiff contends that Dr. Shelton improperly casted her ankle and she suffered an infection because he departed from good and accepted standards of medical and surgical care and practice. She contends Columbia Presbyterian was negligent in referring her to this particular doctor.

The complaint alleges that plaintiff was in a great deal of pain after she was casted and that she visited Dr. Shelton's office twice; the office visits were two weeks apart. Within as many weeks, Dr. Shelton made two home visits to examine plaintiff's casted ankle. Plaintiff's mother has testified she was only present at one of these visits. She has also testified that her husband (Mr. Giampa) was present at the other. It is alleged that the doctor arrived for the visit (at which Mr. Giampa was present) without the proper supplies and that he instructed the plaintiff's father to go out and buy an antiseptic cream from the pharmacy. Plaintiff's mother testified that she observed (at the other visit) how infected her daughter's ankle was around the screws that had been placed.

The Executrix contends that since Dr. Shelton is deceased, plaintiff was a child

when the allegedly negligent treatment occurred, and Mr. Giampa talked to the doctor, was given instructions by him, and observed what there was to see, Mr. Giampa's testimony about what happened at that second home visit is material and relevant to the claims in the case.

Columbia Presbyterian separately argues that because the plaintiff was a minor at the time of the alleged malpractice, and her father (Mr. Giampa) signed the informed consent form for her, he is a material witness about the allegations made against the hospital.

Mr. Giampa opposes both motions. He contends that his testimony is not substantially different than his wife's and that although there were occasions when he was present, but she was not, no one occasion is definitive as to when the alleged negligence occurred. Mr. Giampa also contends that defendants have failed to meet their burdens of proof on these motions which is to show that he "ought" to be called as a witness because his testimony "is necessary." Talvy v. American Red Cross in Greater New York, 205 A.D.2d 143 (1<sup>st</sup> Dept 1994). Mr. Giampa contends that the defendants can establish their defenses through the other available witnesses - his wife and plaintiff herself - and that his testimony is simply cumulative. He argues that he knows of no exculpatory facts that another witness cannot also testify to. Finally, Mr. Giampa contends that disqualifying him from the case at this stage will prejudice the plaintiff who will have to bring new counsel up to speed, and also deprive plaintiff of having a lawyer of her choice. Mr. Giampa makes similar arguments in opposition to the cross motion by Columbia Presbyterian. He does not deny that he signed the consent form before his daughter underwent surgery.

## Discussion

An attorney witness "ought" to be called "only when it is likely that the testimony to be given by the witness is necessary." Talvy v. American Red Cross in Greater New York, 205 AD2d at 152 (*citing S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp.* 69 N.Y.2d 437 (1987)). "Merely because an attorney has relevant knowledge or was involved in the transaction at issue does not make that attorney's testimony necessary. Talvy v. American Red Cross in Greater New York, *supra* at 152 (*citing S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp.*, *supra* at 445). Thus, the court has to take into account a number of factors, including the significance of the matters, weight of the testimony, and availability of other evidence. Id.

In evaluating these motions, the court considers that Dr. Shelton is deceased, plaintiff was only 12 years old when he treated her, and her parents were in charge of her care whenever she had a doctor's visit because she was a minor. Although Mr. Giampa speculates that his wife knows just as much about their daughter's treatment as he does, evidently they do not know the exact same thing. Mr. Giampa has acknowledged his presence at one of the post-op visits and in the bill of particulars this is listed as one of the visits where the negligence occurred. His wife has testified (hearsay evidence) about what Mr. Giampa told her about the visit and how the doctor was unprepared to examine and clean the plaintiff's wound. Though no one visit by itself is evidence of negligence (according to plaintiff), there were only two home visits, and Mr. Giampa was present at one of them.

The court will order that Mr. Giampa appear for his deposition so that defendants can examine him because they have established that he was involved in the relevant

events attendant to plaintiff's claims. S&S Hotel Ventures Limited Partnership v. 777 S.H. Corp., *supra*. At this juncture, however, their motion for his disqualification is premature and it is denied without prejudice. Defendants have not yet proved that Mr. Giampa's testimony is "necessary" to their defense. *Compare: Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher*, 299 A.D.2d 64 (1<sup>st</sup> Dept 2002). They may renew the request, if appropriate, after Mr. Giampa's deposition.

Mr. Giampa's deposition shall take place on May 18, 2007 at 10 a.m. or such other date and time as the parties shall so stipulate in writing which shall be presented to the court for so-ordering.

### Conclusion

The motion and cross motion are granted in part and partly denied, without prejudice.

Any relief not expressly addressed herein has been nonetheless considered and is hereby denied. This shall constitute the decision and order of the court

Dated: New York, New York  
April 17, 2007

So Ordered:

  
\_\_\_\_\_  
Hon. Judith J. Gische, J.S.C.

**FILED**

APR 23 2007

COUNTY CLERK'S OFFICE  
NEW YORK