SUPREME COURT OF THE STATE OF NEW YORK **Index No.:100502/2006**
COUNTY OF RICHMOND PART DCM 3 **Motion No.:001**

AMANDA ASSENZA, an infant under the age of 14 years, by her father and natural guardian, DAVID ASSENZA, and DAVID ASSENZA, individually,

Plaintiff

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

MARK HOROWITZ, M.D., and STATEN ISLAND UNIVERSITY HOSPITAL,

Defendants

The following items were considered in the review of this motion for a

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers
Memorandum of Law	

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Plaintiffs' motion to compel defendant, Mark Horowitz, M.D. to submit to further examination before trial is granted.

Facts

Plaintiff, Amanda Assenza was admitted to Staten Island University Hospital ("SIUH") on October 11, 2005 to undergo corrective surgery to fix a of vascular renal reflux. Defendant Dr. Horowitz performed the surgery at SIUH. On July 23, 2007 defendant Dr. Horowitz submitted to an examination before trial by counsel for plaintiffs and co-defendant.

During that deposition plaintiffs' attorney questioned Dr. Horowitz regarding an order he gave prior to him October 13, 2005 visiting Amanda Assenza. Dr. Horowitz testified that he instructed a nurse to insert a catheter in Amanda Assenza to assist in the voiding urine after her surgery. Dr. Horowitz then testified that the order was not carried out by the nurse. Plaintiffs' attorney asked Dr. Horowitz "Do you know why that order was not carried out?" Dr. Horowitz's

attorney clarified the question by asking: "At present time do you know why that order wasn't carried out?" Dr. Horowitz testified that he had "an idea." The following exchange took place between plaintiffs' counsel and Dr. Horowitz:

> BY MR. FITZGERALD
>
> > Q. What is that idea?
> > A. The order was given. The nurse then went into the room even after I spoke with the mother, and the mother had informed the nurse that the child had urinated a small amount. At which time I was told the nurse then called the pediatric attending for this patient, and was told that the child did not need to be catheterized.

The record does not indicate when Dr. Horowitz learned that his order was not carried out. Amanda Assenza's pediatric attending physician, was Dr. Bounaspina. Plaintiffs' attorney then asked: "Do you agree with Dr. Bounaspina's decision to not catheterize Amanda at that time?" The following objections were placed on the record:

> MR. KELLER: Objection.
> MR. MESSINA: Objection.
> MR. FITZGERALD: What is the basis of the objection?
> MR. MESSINA: Carvalla (phonetic).
> MR. FITZGERALD: Carvalla applies to codefendants. And Dr. Buonaspina is not a codefendant in this case.
> MR. MESSINA: Dr. Buonaspina in certain circumstances is an employee of the hospital and they are defendants.
> MR. FITZGERALD: Just mark for a ruling.

Dr. Horowitz testified that on October 13, 2005 when he examined Amanda Assenza he noted that she was in a state of urinary tension and that her intestines and were not fully functioning. Dr. Horowitz also testified that on October 14, 2005 he examined Amanda Assenza and found her dressing saturated with urine. He further testified that Amanda Assenza suffered a bladder perforation.

Subsequent to Dr. Horowitz's examination before trial, the plaintiffs moved this court for an order compelling Dr. Horowitz to answer the marked question, which Dr. Horowitz opposes. But defendant, SIUH takes no position on this issue.

Discussion

This court previously discussed the holding of *Carvalho v. New Rochelle Hospital*[1],in *Giventer v. Rementeria*[2]. In *Giventer*, defendants argued that *Carvalho* prevented testimony at trial by a co-defendant. This court stated *Carvalho* applied specifically to examinations before trial; and further interpreted the case as holding

> ...that a codefendant may be deposed to give expert opinions about the services of a co-defendant. Where, 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...[3] [citations omitted]

Here, there is an open issue of whether Dr. Buonaspina was employed by SIUH. Timothy J. Sheehan, Esq., SIUH's counsel stated in a letter with respect to Dr. Buonaspina's employment status " . . . it will be up to a jury to assess what 'hat' Dr. Buonaspina was wearing during his encounters with the infant plaintiff..."

But the employment status of Dr. Buonaspina is irrelevant. Even if Dr. Buonaspina is determined to be an employee this court in *Giventer*, cited to the treatise *New York Medical Malpractice,* that at trial

> ... where a physician declines response to a question because it assertedly deals with the treatment by a codefendant, it is his burden to persuade the court that the question 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...[4] [citations omitted]

Here, defendant Dr. Horowitz gave an order to catheterize Amanda Assenza which Dr.

---

[1] 53 A.D.2d 635 (2nd Dep't. 1976).

[2] 181 Misc.2d 582 (Sup. Ct. Richmond County 1999).

[3] *Id.* at 584.

[4] *Id.* at 586.

Bounaspina cancelled. Dr. Buonaspina's actions directly effected the course of treatment prescribed by Dr. Horowitz; as such, Dr. Horowitz should answer questions concerning how his patient was treated by a fellow doctor, who altered his treatment orders.

Conclusion

In *Giventer*, this court said that "[a] trial is a search for truth. The fact that the truth might come out of the mouth of a co-defendant should not preclude it from being uttered."[5] The same is true for the entire trial litigation process. Parties in the pretrial stages of litigation are given a wide berth for obtaining discoverable material.

The Court of Appeals stated in *Allen v. Crowell-Collier Publishing Co.*[6], that the statutory phrase of "material and necessary" in CPLR 3101(a) shall be

> ...interpreted liberally to require disclosure upon request, of any facts bearing on the trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason.[7]

Defendants' objection to plaintiffs' question seeks to drastically limit this liberal standard.

Carvalho is inapplicable to this case. Defendants' objections during Dr. Horowitz's examination before trial are completely without merit. Given *Carvalho's* extremely limited application this court can only assume that these objections were meant only to disrupt plaintiffs' counsel's questioning of the witness.

The ultimate goal of the discovery process is to uncover the facts in search for the truth. To achieve this goal this state provides a liberal standard for pretrial disclosure. Therefore, Dr. Horowitz shall answer questions concerning the care of this infant plaintiff.

Accordingly, it is hereby:

ORDERED, that plaintiffs' motion to compel Defendant Mark Horowitz, M.D. to appear for further Examination Before Trial in the office of Plaintiffs' counsel is granted and that he shall answer questions concerning Dr. Buonaspina's treatment which altered his treatment

---

[5] 181 Misc.2d 582 (Sup. Ct. Richmond County 1999).

[6] 21 NY2d 403 (1968).

[7] *Id.*

orders; and it is further

ORDERED, that all parties return to DCM 3 at 9:30AM on January 23, 2008 for a compliance conference.

ENTER,

DATED: January 22, 2008

Joseph J. Maltese
Justice of the Supreme Court