

**Page v Napier**

2009 NY Slip Op 30325(U)

January 30, 2009

Supreme Court, Nassau County

Docket Number: 1563-07

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN  
J. S. C.

ELIZABETH C. PAGE,  
  
Plaintiff,  
  
- against -  
  
DIANA L. NAPIER and HENRY J. NAPIER,  
  
Defendant.

TRIAL / IAS PART 32  
NASSAU COUNTY  
  
Index No. 1563/07  
  
Motion Sequence No. 002

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits . . . . .	<u>1</u>
Answering Affidavits . . . . .	<u>2</u>
Replying Affidavits . . . . .	_____
Briefs: Plaintiff's / Petitioner's . . . . .	_____
Defendant's / Respondent's . . . . .	_____

The defendants move for orders vacating a September 22, 2008 court order which granted the plaintiff's motion for a preclusion order, rearguing the plaintiff's motion on the ground the Court misapprehended relevant facts and law, and upon reargument denying the plaintiff's motion. The plaintiff opposes this motion. The underlying personal injury action seeks damages for a two-vehicle accident on January 26, 2004, at the intersection of Bellmore Avenue and Natta Boulevard, in Nassau County. This Court has carefully reviewed all of the papers submitted with respect to this motion. CPLR 2221 provides: "A motion for leave to reargue: shall be based upon matters of fact or

law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion.”

The defense attorney states, in a supporting affirmation dated October 28, 2008, the Court erroneously determined the defendant operator waived the patient physician privilege, and put the defendant operator’s medical condition in controversy. The defense attorney asserts, once it has been demonstrated the defendant operator’s physical or mental condition is in controversy, the plaintiff must demonstrate the information sought has been waived, and is not subject to the patient physician privilege. The defense attorney avers the defendant operator has not waived the patient physician privilege by denying the allegations of a condition in the answer nor raising an affirmative defense. The defense attorney argues the plaintiff failed to meet the burden that the defendant operator’s medical or mental condition is in issue. The defense attorney notes the plaintiff failed to adduce any facts which would place the defendant operator’s medical or mental condition in issue. The defense attorney points out the plaintiff, in the moving papers, merely stated, without evidentiary support, the defendant operator took antidepressants. The defense attorney submits the plaintiff provided only an attorney’s sworn statement on that issue.

The defense attorney also states the plaintiff never established the relevance of the defendant operator’s cell phone records nor the request regarding claims made under the defendants’ insurance policy. The defense attorney notes the defendant operator

indicated being unaware of the cell phone carrier. The defense attorney points out the defendant operator testified, during a deposition, she was not on the cell phone at the time of the accident.

The plaintiff's attorney states, in an opposing affirmation dated November 13, 2008, no new insights raised in the instant defense motion. The plaintiff's attorney argues there is no showing the Court overlooked nor misapprehended the facts or the law. The plaintiff's attorney notes the moving papers raise, for the first time, issues which were not presented to the Court in the defendants' original scant, *pro forma* opposition papers. The plaintiff's attorney points out the defense opposition to the plaintiff's motion concentrated on whether the plaintiff's discovery demand was "overly broad," demanded "improper and privileged information," and whether the defense authorization for the plaintiff to obtain copies of records relative to the defendants' underinsurance claim against an insurer constituted full compliance. The plaintiff's attorney asserts the new factual arguments by the defense, include, but are not limited to: the defense objection to the defendant operator's deposition testimony identifying medication; the defendant operator's emergency room statements and blood test results as privileged; the defense claim the unknown drugs did not affect the defendant operator's alertness nor make the defendant operator sleepy; and the defense claim the defendant operator did not waive privacy rights. The plaintiff's attorney avers the defense ignores the defendant operator's deposition testimony while contending the plaintiff attorney's affirmation as insufficient

to establish the defendant operator's medical or mental condition in issue. The plaintiff's attorney challenges the defendants' assertion that the defense failure to seek a protective order is not a waiver of the patient physician privilege.

The plaintiff's attorney states the defendant operator admitted, during the deposition, antidepressant medication was required, and the defendant operator took it on the day of the accident. The plaintiff's attorney points out the defendant operator visited Dr. Barry Holzer, who specializes in the treatment and management of mental health disorders, on the day of the accident prior to its occurrence, and argues the defendant operator placed her condition in controversy by the deposition testimony. The plaintiff's attorney contends the defendant operator made an issue of the pharmaceutical intake and medical condition when the defendant operator twice claimed against the plaintiff, first in an insurance claim against the plaintiff's carrier, and then in an underinsurance claim against State Farm Insurance Company. The plaintiff's attorney maintains the defendant operator waived the HIPAA privacy rights by raising those claims. The plaintiff's attorney asserts the defendant operator made an issue of the pharmaceutical intake and medical condition when the defense attorney provided the plaintiff with an authorization to obtain the entire legal contents of the defendant operator's underinsurance claim, and then proceeded to withhold those records. The plaintiff's attorney contends the defendant operator made an issue of the pharmaceutical intake and medical condition by being non-responsive and evasive at the deposition, and in response to the plaintiff's April 30, 2008

discovery demands regarding medications at the time of the accident.

The plaintiff's attorney states the defense points to deposition testimony, in this instant motion, which was not mentioned by the defense in the original opposition affirmation, to wit the defendant operator was not on the cell phone at the time of the accident. The plaintiff's attorney claims, without a copy of the defendant operator's August 15, 2005 deposition testimony, the ambulance and emergency room records, Dr. Holzer's January 26, 2004 office notes, an authorization for the defendant operator's cell phone records, and without authorizations for the details of the defendant operator's pharmacy records, the plaintiff will be unable to fully and fairly prosecute the underlying personal injury action, nor to establish a time line for the defendant operator's pre-accident activities.

The plaintiff seeks to show a correlation between the defendant driver's operation of the motor vehicle and the defendant driver's use of antidepressant medication. The defendant operator testified to taking an antidepressant medication before the accident, but is not able to recall what medication was taken which left an impression that the medication may have affected the defendant's operation of the motor vehicle. Under these circumstances, plaintiff would be entitled only to that portion of defendant operator's pharmaceutical intake and medical condition records, which would disclose the medication and its effect upon the defendant operator, limited to the subject accident. Such limited disclosure, obtained via *in camera* review, would protect privacy, while

revealing any medication and its effect upon the defendant operator within proximity to the accident, and would be relevant to the issue of negligence (*see Klein v. McDermott*, 6 A.D.3d 664, 775 N.Y.S.2d 562).

The standard to be applied in determining the discoverability of the requested cell phone records is whether they are “material and necessary” in the prosecution or defense of this action, which is to be interpreted liberally, and really amounts to whether they are relevant (*see* CPLR 3101 [a]; *Allen v. Crowell-Collier Publishing Company*, 21 N.Y.2d 403, 406-407, 288 N.Y.S.2d 449, 235 N.E.2d 430). Vehicle and Traffic Law § 1225-c (2) (a) provides: “Except as otherwise provided in this section, no person shall operate a motor vehicle upon a public highway while using a mobile telephone to engage in a call while such vehicle is in motion.” Vehicle and Traffic Law § 1225-c (2) (b) further provides:

An operator of a motor vehicle who holds a mobile telephone to, or in the immediate proximity of his or her ear while such vehicle is in motion is presumed to be engaging in a call within the meaning of this section. The presumption established by this subdivision is rebuttable by evidence tending to show that the operator was not engaged in a call.

This statutory provision prohibited the defendant driver here from using a cell phone while operating the motor vehicle. However, there is no evidence here that the defendant operator held a cell phone to, or in the immediate proximity of her ear while her vehicle was in motion. So, the mere fact this defendant operator “was in the possession of a cell phone at the time of an accident, without any witness testimony as to it being used at that

time, would not entitle the plaintiff to said defendant's cell phone records, since such a discovery request would amount to nothing more than a fishing expedition [citations omitted]" (*Morano v. Slattery Skanska, Inc.*, 18 Misc.3d 464, 846 N.Y.S.2d 881 (N.Y.Sup., 2007).


This Court determines the defense has not met its burden under CPLR 2221 with respect to the defendant operator's physical or mental condition, but the defense has met that burden with respect to the discoverability of the requested cell phone records . The defense has not shown matters of fact or law were overlooked or misapprehended by the Court in determining the prior motion as it relates to the defendant operator's physical or mental condition.

Accordingly, the defense motion is granted only to the extent of this decision. The defendants are directed to comply with the September 22, 2008 court order, in accord with this decision, within 30 days after service of a copy of this order with notice of entry.

So ordered.

Dated: **January 30, 2009**

ENTER:



**ENTERED**

FEB 05 2009

NASSAU COUNTY  
COUNTY CLERK'S OFFICE

FINAL DISPOSITION    NON FINAL DISPOSITION    XXX