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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:

HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x TRIAL TERM PART: 45

LISA FALCONE, as surviving spouse and Administratrix of the goods, chattels and credits which were STEVEN FALCONE, deceased, LISA FALCONE, as mother and natural guardian of infant plaintiff ERICA FALCONE and LISA FALCONE, individually,

INDEX NO.: 1773/08

Plaintiff,

MOTION DATE:8-9-10
SUBMIT DATE:8-9-10
SEQ. NUMBER - 004

-against-

GEORGE KARAGIANNIS, M.D., JAMES T. LANIOTIS, M.D., and THE MEDICAL ASSOCIATES,

Defendants.

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The following papers have been read on this motion:

Order to Show Cause, dated 6-24-10.....1
Affirmation in Opposition, dated 7-29-10.....2
Affirmation in Reply, dated 8-5-10.....3

This motion by the defendants for an open commission authorizing the defendants to take the oral deposition of Charles V. Wetli, M.D. as a non-party witness; for an order permitting defendants to examine any notations, records, reports and policies and procedures

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created by Dr. Wetli during the autopsy performed on plaintiff's decedent on November 6, 2006; precluding the plaintiff from offering any evidence obtained as a result of the autopsy until defendants' examination of the related materials sought; and staying the trial of this matter for 45 days following the determination of this motion, is granted to the extent that the plaintiff shall, within 20 days of the date of this order, turn over copies of all materials created by or in the possession of Dr. Wetli regarding the autopsy he performed on the plaintiff's decedent, Steven Falcone, which materials may be redacted to prevent disclosure of Dr. Wetli's opinions and conclusions. The trial of this matter is stayed until October 4, 2010, subject to further order of the Justice presiding in the Calendar Control Part. The motion is otherwise denied.

In this medical malpractice and wrongful death action, the issue presently before the Court is one with which it is familiar, as it entertained oral argument on a related motion based upon spoliation of evidence. Briefly, plaintiff's decedent was buried in accord with his faith, and after plaintiff hired her attorney, present counsel, a decision was made to exhume the body for an examination by a pathologist. An autopsy was performed by Dr. Wetli, the subject of the present motion, in November, 2007, prior to the commencement of the action. As noted by the undersigned in giving the Court's decision denying defendant's spoliation motion (Decision, June 24, 2010), "it was probably a prudent thing to do to try to determine whether or not there was a possibility of a cause of action before bringing" the case. Transcript of Decision, at 19. The action was commenced in or about January, 2008.

After plaintiff's deposition in September, 2008 revealed that the autopsy had been performed, a redacted copy of a report written by Dr. Wetli was provided to defendants'

attorneys in October, 2008 (his name had been omitted pursuant to CPLR 3101(d)1.(i)). It should be noted that in that same response to defendants' notice for discovery and inspection plaintiff's counsel also transmitted a copy of the 50- h hearing transcript conducted pursuant to a Notice of Claim filed against the City of New York, which at p. 40 revealed Dr. Wetli's name as the pathologist who had performed the autopsy. [1] However, no request for Dr. Wetli's deposition was made until after the note of issue had been filed and the plaintiff stated, by way of her response to defendants' demand for expert disclosure (response dated January 20, 2010), that the pathologist who had performed the autopsy (*i.e.*, Dr. Wetli) would serve as plaintiff's expert.

In addition to seeking the deposition of Dr. Wetli, defendants seek certain materials created by him during the autopsy. These include "notations, records, reports and policies and procedures." Finally, defendants seek preclusion of the use of any evidence from Dr. Wetli until his examination can be taken, and a stay of the trial for 45 days after this motion is decided.

Defendants' position is that Dr. Wetli, as the only physician who performed an autopsy, is an indispensable fact witness, and possesses information which cannot be obtained other than by a deposition and disclosure of his records. They argue that they were

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[1] Defendants' attorney states at paragraph 14 of her affirmation that there were two autopsies. However, the other appears to be an external examination of decedent's body conducted by the New York City Medical Examiner shortly after the decedent's death in April, 2007. No issue has been raised regarding this examination. The record also reveals that the claim against the City of New York was not pursued.

denied an opportunity to conduct or to be present at the autopsy, and that they are entitled to know, prior to trial, what methods were used, including specimen collection, what his observations were, who else might have been present, and which portions of the body were re-interred afterwards. The defendants contend that the requisite "special circumstances" have been shown as a predicate to obtaining his deposition as a non-party witness. Plaintiff vigorously opposes the application, primarily on the ground that as she has designated Dr. Wetli as her expert a higher standard applies than it would regarding a simple non-party witness, and under that standard the defendants have not met their burden.

In *Kooper v Kooper,* 74 AD3d 6 (2d Dept. 2010), the Appellate Division, Second Department departed from previous law in this jurisdiction by specifically disapproving of the "special circumstances" standard regarding disclosure from non-party witnesses – "except with respect to the limited area in which it remains in the statutory language, i.e., with regard to certain discovery from expert witnesses (*see* CPLR 3101([d][1[iii]). " *Id.,* at 16. Accordingly, prior law affecting disclosure from an adverse party's expert witnesses still applies.

In that regard, it is clear that a mere demonstration of relevancy is insufficient to meet the "special circumstances" standard where disclosure is sought from an expert. *Ruthman, Mercadante & Hadiis, P.C. v Nardiello,* 288 AD2d 593 (3d Dept. 2001). As a general proposition, special circumstances exist where there is a "unique factual situation" such as proof that the information sought to be discovered cannot be obtained from other sources. *Brooklyn Floor Maint. Co. v Providence Washington Ins. Co.,* 296 AD2d 520 (2d Dept.

2002).

In this case, the Court agrees with the plaintiff that a deposition of her expert is unwarranted because the information may be obtained from other sources – Dr. Wetli's records, as discussed below. It is only where a true showing of need is coupled with an insurmountable barrier to disclosure that an examination of the sort requested here is available. *See, Dixon v City of Yonkers,* 16 AD3d 542 (2d Dept. 2005) [deposition of botanist who examined tree which fell on plaintiff's decedent allowed where tree had been removed 48 hours after accident; Appellate Division notes that subpoenas served on him predated his designation as expert]; *see also Taft Partners Dev. Group v Drizin,* 277 AD2d 163 (1st Dept. 2000). The defendant's reliance on a Second Department decision in which a commission was granted for the deposition of a non-party physician is not persuasive, as it did not concern an expert witness. *Kekis v Park Slope Emergency Physician Serv., P.C.,* 244 AD2d 463 (2d Dept. 1997).

With respect to the materials sought from the autopsy, plaintiff contends that defendants have sufficient material to prepare for trial, in that they were given the expert's report and pathology slides. Anything else Dr. Wetli prepared as the result of the autopsy, she argues, is protected as materials prepared in anticipation of litigation. CPLR 3101(d)2. However, defendants' attorney had represented to the Court on oral argument of the spoliation motion (transcript annexed to Reiser Aff., ex. B, at 7) that their expert had indicated that certain other slides were missing, and plaintiff's counsel could not state whether any such material was in fact missing. (*Id.,* at 8).

In order to permit a party access to materials prepared in anticipation of litigation, the

party seeking such materials must demonstrate that it has a "substantial need" and is unable to obtain a "substantial equivalent" by other means. CPLR 3101(d)2. Once a demand is made, the initial burden is on the party in possession of the information to demonstrate that it is protected under the statute. *Friend v SDTC - The Center For Discovery, Inc.*, 13 AD3d 827 (3d Dept. 2004); *see also, Martino v Kalbacher,* 225 AD2d 862 (3d Dept. 1996). If that burden is met, the party seeking disclosure must its own test, as stated above. *Id.*

The Court finds that both parties have met their burdens. The record is clear that the only reason Dr. Wetli was hired was because plaintiff was anticipating litigation, and thus all materials he produced would be for that purpose. However, the defendants have demonstrated that because they have a "substantial need" of these materials to prepare the defense, in that cause of death and the decedent's general condition is obviously critical. Further, no other "substantial equivalent" is available from another source, as they have no way to conduct an examination of their own and no other autopsy was performed from which equivalent information may be gleaned.

The Court notes that in resisting an EBT of Dr. Wetli plaintiff advanced a case claimed to be "identical" to the one at bar. *Stoianoff v Kauver,* NYLJ, Mar. 2, 2010, at 28, col 1 (Sup Ct, Westchester County, Scheinkman, J.). However, in quashing a subpoena for the deposition of the physician (Dr. Roh) who had performed an autopsy of plaintiff's decedent, and who later was designated as an expert by the plaintiff, Justice Scheinkman indicated that the information could be obtained from other sources – because "defendants have been granted access to ***all of Roh's records*** and report. They provide a clear idea of the nature of Roh's testimony which, according to plaintiffs as stated in their Notice of Expert,

will be in accordance with the findings in his autopsy report." (Emphasis supplied.) Here, the plaintiff is resisting turning over *all* of Dr. Wetli's records, notwithstanding that his report and some pathology slides were disclosed, and which were also created in anticipation of litigation. In view of the circumstances present and applicable law, the Court finds that the defendants should have access to all such information, with redactions of Dr. Wetli's opinions, if needed.

The stay of trial is granted to abide the exchange, as set forth above.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: August 16, 2010

HON. DANIEL PALMIERI
Acting Supreme Court Justice

TO: Debra S. Reiser, Esq.
Attorney for Plaintiff
100 Park Avenue, 15th Floor
New York, NY 10017

Helwig, Henderson, Ryan & Spinola, LLP
Attorneys for Defendants
One Old Country Road, Ste. 428
Carle Place, NY 11514