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| <b>Bowman v St. Luke's-Roosevelt Hosp. Ctr.</b>  |
| 2011 NY Slip Op 32738(U)   |
| October 17, 2011   |
| Supreme Court, New York County   |
| Docket Number: 150213/09   |
| Judge: Alice Schlesinger   |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

**Alice Schlesinger**

PRESENT: Schlesinger  
Justice

PART IA PART 16

JOAN BOWMAN  
- v -  
ST, LULUES-ROOSEVELT  
HOSPITAL CTR

INDEX NO. 150213/09  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 1  
MOTION CAL. NO. \_\_\_\_\_

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

| PAPERS NUMBERED |
|-----------------|
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|                 |
|                 |

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion by defendant for  
a protective order is denied in accordance  
with the accompanying memorandum  
decision.

**FILED**

OCT 18 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: October 17, 2011  
OCT 17 2011

Alice Schlesinger  
**Alice Schlesinger** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

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

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

-----X  
JOAN BOWMAN, as the Administrator De Bonis Non  
of the Estate of MICHAEL E. BOWMAN,

Plaintiff,

Index No. 150213/09  
Motion Seq. No. 001

-against-

ST. LUKE'S-ROOSEVELT HOSPITAL CENTER,  
ANDREANA KWON, M.D., DAN WIENER, M.D.,  
ST. VINCENT'S HOSPITAL MANHATTAN a/k/a  
SAINT VINCENT'S CATHOLIC MEDICAL  
CENTERS OF NEW YORK AND ST. VINCENT'S  
HOSPITAL AND MEDICAL CENTER OF NEW  
YORK IPA NO. 1, INC., AND TARA DIRECTOR,  
M.D.,

Defendants.

**FILED**

**OCT 18 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
SCHLESINGER, J.:

In this medical malpractice action, a dispute has arisen regarding the scope of discovery of certain electronic documents. The dispute is between St. Luke's-Roosevelt Hospital Center ("Roosevelt") and the plaintiff Joan Bowman, administrator of the Estate of her son Michael E. Bowman.<sup>1</sup>

Michael Bowman was delivered by ambulance to Roosevelt's emergency room at 8:50 a.m. on Monday, July 7, 2008. He was seen and cared for primarily by a resident Dr. Andreana Kwon, but the Chief of the Department, Dr. Dan Wiener, also examined the patient and participated in his diagnosis and discharge.

Mr. Bowman was discharged several hours later after blood was taken and analyzed, as well as a Doppler ultrasound and D-dimer test administered. The primary diagnosis at his discharge was "Viral Gastroenteritis", despite the fact that the EMS call

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<sup>1</sup>Counsel for Roosevelt also represents Dr. Andreana Kwon, a third year resident in the Emergency Department at the time, and Dr. Dan Wiener, Chief of that Emergency Department in July 2008 and today.

sheet recorded the patient's chief complaint as "left leg hurts" and the triage note at the hospital recorded that his chief complaint was his left leg. Further, before reporting the viral gastroenteritis diagnosis, Dr. Kwon put down "pt also co (complains of) severe left calf pain, deep, worse with movement, associated with swelling of calf."

Mr. Bowman died on July 9, 2008, at defendant St. Vincent's Hospital, about 36 hours after leaving Roosevelt, of a severe bacterial infection in his left leg known as necrotizing fasciitis. Plaintiff's counsel claims that Roosevelt, via its Emergency Department, committed malpractice in framing its differential diagnosis to be one of a stomach flu and in failing to consider a diagnosis of bacterial infection and provide the patient with the attendant care for that condition. Counsel says that certain of the test results showed signs of an early bacterial infection.

Dr. Kwon was deposed at length on July 26, 2011. Immediately after that deposition, on July 27, 2011, counsel for plaintiff made a written demand for four items, all having to do with Roosevelt's EM-STAT system in use in the emergency room in July 2008 and testified to at length by Dr. Kwon. What was requested was a statement of the version of that system in use in July 2008, copies of Emergency Department "fever" templates, as testified to by Dr. Kwon, a list of all other Emergency Department options for templates, other than "fever" ones, and "screen shots of every stage of the data input process in the Emergency Department EM-STAT as testified by Dr. Kwon." (Exh H to OSC).

The above demand resulted in this motion by Roosevelt's counsel, brought by Order to Show Cause, for a protective order denying the production of these items pursuant to CPLR §3103. Defendant characterizes these demands as "overbroad", "patently improper on their face", "burdensome", "oppressive" and "premature". As to the last characterization,

"premature", counsel argues that the Chief of the Department Dr. Wiener has not yet been deposed and he should be able to provide all necessary information regarding the EM-STAT system. However, by the time of oral argument, that deposition had occurred on September 27, and plaintiff still wanted the documents and defendant still opposed.

I have read the transcripts of both pre-trial examinations and, cognizant of the recognized guidelines for "full disclosure of all evidence material and necessary in the prosecution or defense of an action" (CPLR §3103), I believe the demanded material falls within this definition. In other words, after reading the testimony of the defendant doctors and understanding the claims of plaintiff in this wrongful death action, I find this material could be useful in developing those claims.

Dr. Kwon testified, as best as she could recall, as to the use and importance of "templates" in the emergency room. While Dr. Wiener rejected that word, his description of the process generally conformed to the resident's recollection.

According to Dr. Kwon's deposition testimony, these templates are "directed towards the chief complaint [which the doctor chooses] that also pertains to everything, your assessment and plan at the end of the chart" (pp 37-38). Here the chief complaint chosen by Dr. Kwon was "fever", even though she acknowledges that Mr. Bowman did not have a fever at the time. She indicated that she had no option regarding the use of a template: "you have to choose a template" (p 38), and by that choice, a screen pops up and provides the doctor with other options or choices to make. So for example, there are different templates for other chief complaints, which include, as examples, ones for chest pain or abdominal pain (p 37). Further, the chosen templates "have prompts as to certain medical information to be filled in" (p 38).

Dr. Wiener at his deposition agreed that the electronic process began with the selection by the doctor of a chief complaint, followed by a screen that has multiple elements of a history of present illness (p 75). While he eschewed Dr. Kwon's characterization of the pop-up material as "prompts", he did acknowledge that dependent on the choice of chief complaint, a particular screen comes up "with a series of boxes related to different elements of a history and present illness, each with a drop-down list of things you can pick and an option to enter free text" (p 80).

Unfortunately, neither doctor remembered or knew what specific items were on the list of choices, despite that both doctors used them. That is why, despite Dr. Wiener's supposedly knowing all about the system, counsel understandably does not know what information and choices and "picks" appeared on the screens.

I find that this system, with the use of multiple screens, acts as a kind of guide to the physician as he or she tries to arrive at a proper differential diagnosis. Here the claim is that a proper diagnosis was never arrived at because, in part, the chief complaint which began the process was wrong. Rather than "pain" or "pain in leg" or something consistent with the actual primary complaints made by Mr. Bowman, "fever" was chosen, something he did not appear to have.

Therefore, counsel wishes to explore the path of screens and options which the choice of fever takes you down, as well as other screens and picks that appear on an alternate path one might have followed if a different, more appropriate chief complaint had been chosen. This request is not speculative. Rather, it is a request to see the choices and/or "picks" and/or "prompts" available to the treating physicians on the morning of July 7, 2008, when confronted with Mr. Bowman's presentation.

Defense counsel points to the ability to "enter free text", meaning adding one's own words of text, which arguably was done here. However, that ability does not diminish the importance of seeing the information that was being presented to the doctors as their choices were being made before and at the time they decided to enter free text.

In other words, the electronic chart here of Mr. Bowman's care which, of course, was provided to counsel, is the end result of the process, but it does not constitute the entire process. As Dr. Weiner explained at his deposition, what appears in the chart is the information after the physician has "published" or "finished writing that entry and you decided to enter it into the record" (p 55). But to the extent possible, plaintiff should be able to see and understand the means by which the physician came to writing that entry.

Practically at this point, how does the defendant hospital provide this information? It would seem the first step is to establish which system of EM-STAT was used in July 2008. Perhaps this information could be provided via a written statement from a "tech" person with knowledge or via a deposition of such a person. After that information has been obtained, then the desired material should be provided via printouts of the various screens.

Finally, I do not find that this requested material is overly broad or particularly burdensome. Both defendant doctors testified that they utilized these materials in coming to their diagnosis, which diagnosis dictated or at least influenced their subsequent actions. That diagnosis and those actions, plaintiff claims, were wrong and led to Mr. Bowman's death. It is not a stretch to allow counsel to see and understand these materials.

Rather, I find that the information is material and very possibly necessary to the prosecution of this action.

Accordingly, it is hereby

ORDERED that the motion for a protective order is denied, and defendant is directed to respond to plaintiff's July 27, 2011 Demand for EM-STAT Information consistent with the terms of this decision before the November 16, 2011 status conference. Counsel shall come to the conference fully prepared to discuss any outstanding disputes relative to the production of the demanded material.

Dated: October 17, 2011

**OCT 17 2011**

  
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J.S.C.  
**ALICE SCHLESINGER**

**FILED**

**OCT 18 2011**

NEW YORK  
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