

**Boyer v Zonno**

2016 NY Slip Op 32857(U)

April 6, 2016

Supreme Court, Onondaga County

Docket Number: 2014EF3248

Judge: Donald A. Greenwood

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This opinion is uncorrected and not selected for official publication.

**At a Motion Term of the Supreme  
Court of the State of New York,  
held in and for the County of  
Onondaga on March 1, 2016.**

**PRESENT: HON. DONALD A. GREENWOOD  
Supreme Court Justice**

**STATE OF NEW YORK  
SUPREME COURT COUNTY OF ONONDAGA**

**MARIA BOYER AND CHRISTOPHER BOYER,  
INDIVIDUALLY AND AS HUSBAND AND WIFE,**

**DECISION AND ORDER  
ON MOTION**

**Plaintiffs,**

**Index No.: 2014EF3248  
RJI No.: 33-15-0439**

**v.**

**ALAN ZONNO, MD, INDIVIDUALLY AND AS  
AGENT, OFFICER AND/OR EMPLOYEE OF  
UPSTATE ORTHOPEDICS, PLLC, AND AS AGENT,  
OFFICER OR EMPLOYEE OF "THE UPSTATE BONE  
AND JOINT CENTER"; AMY ROE, PA, INDIVIDUALLY  
AND AS AGENT, OFFICER AND/OR EMPLOYEE OF  
UPSTATE ORTHOPEDICS, PLLC AND AS AGENT,  
OFFICER, AND EMPLOYEE OF "THE UPSTATE BONE  
AND JOINT CENTER"; UPSTATE ORTHOPEDICS, PLLC;  
"THE UPSTATE BONE AND JOINT CENTER"; MA  
VICTORIA CABUCUNGAN CHANLIECCO , MD,  
INDIVIDUALLY AND AS AGENT, OFFICER, OR  
EMPLOYEE OF EMERGENCY PHYSICIAN SERVICES  
OF NEW YORK, PC; AND FAXTON-ST. LUKE'S  
HEALTHCARE,**

**Defendants.**

**APPEARANCES: ROBIN ZIMPEL-FONTAINE, ESQ.  
CHERUNDOLO LAW FIRM, PLLC  
For Plaintiffs**

**ROBIN PHELAN, ESQ.  
TIMOTHY P. TRIPP, ESQ.  
PHELAN, PHELAN AND DANEK, LLP  
For Defendant Emergency Physician Services of New York, PC**

**KATHARINE A. BUCKLEY, ESQ.**  
**GALE, GALE AND HUNT, PC**  
**For Defendants MA Victoria Cabacungan Chanliecco and Faxton-St.**  
**Luke's Healthcare**

**DANIELLE MIKALAJUNAS FOGEL, ESQ.**  
**SUGARMAN LAW FIRM, LLP**  
**For Defendants Alan Zonno, MD, Amy Roe, PA and Upstate Orthopedics, LLP**

In this medical malpractice action, plaintiffs move to compel the defendants to produce surveillance materials or in the alternative for an *in camera* inspection of those materials. *See, CPLR §3124*. In addition, plaintiff seeks to depose the defendants' investigator. On the same date, defendant Emergency Physician Services of New York, PC (hereinafter EPS) moved for a protective order pursuant to CPLR §3103. All defendants have opposed plaintiffs' motion and the remaining defendants join in EMS' motion.

On May 13, 2015, plaintiffs served defendants with a demand for production of surveillance materials and the request instructed defendants that the demand was continual in nature. *See, CPLR §3101(h) and (i)*. Plaintiffs received separate responses to the demands for surveillance materials, photographs and statements and on May 20, 2015, defendants Chanliecco and Faxton St. Luke responded that they were not in possession of any of the materials responsive to the request. On May 29, 2015 defendants Zonno, Roe and Upstate likewise responded. Defendant EPS responded on July 2, 2015 that it was not in possession of any of the materials. On November 30, 2015 plaintiffs' counsel received an email from a legal secretary at counsel's office for EPS, which discussed splitting a fee between all defendants owed to Frank Sardino Investigative Service. An invoice was attached for surveillance of the plaintiff Maria Boyer on October 3, 2015 and October 10, 2015. Shortly thereafter, a second email was sent

correcting the fee amount. A third email was then sent, instructing plaintiffs' counsel to disregard the email. Plaintiffs' counsel responded that she had previously sent a demand for surveillance materials. In response counsel for defendants Zonno, Roe and Upstate again responded they were not in possession of any documents. Defendants Chanliecco and Faxton-St. Luke responded the same. Plaintiffs' counsel renewed the demands and then received a letter dated December 12, 2015 from EMS, admitting that counsel was in possession of the Sardino investigative report, but refused to produce same, citing a number of objections, including that the demand was overly broad, exceeded the scope of CPLR §3101(i) and sought disclosure of privileged material.

Plaintiffs now move to compel the production of the report, contending that surveillance materials are fully discoverable pursuant to CPLR §3101(i) and that such materials are not exempt from discovery as work product or material prepared in anticipation of litigation. Plaintiffs further argue that the investigative report is discoverable as a transcript or memorandum pursuant to CPLR §3101(i). Plaintiffs also claim that even if defendants are correct that an investigative report must only be produced if it references films, photographs, videotapes or audiotapes, this Court should perform an *in camera* inspection to make that determination. According to plaintiffs, even if the information is not discoverable pursuant to CPLR §3101(i), the liberal disclosure policy of CPLR §3101(a) requires its disclosure. In addition, plaintiff seeks to compel the deposition of the investigator Frank Sardino. In opposition to plaintiffs' motion and in support of their motion for a protective order, defense counsel did provide the Sardino report as a privileged and confidential document for *in camera* inspection.

Article 31 of the CPLR mandates full disclosure of all matter material and necessary to the prosecution or defense of an action. *See, CPLR §3101(a); see also, Andon v. 302-304 Mott St. Associates*, 94 NY2d 740 (2000). CPLR §3101(i) provides that “...in addition to any other matters which may be subject to disclosure, there shall be full disclosure of any films, photographs, videotapes or audiotapes, including transcripts or memorandum thereof...There shall be disclosure of all portions of such material, including out takes rather than only those portions a party intends to use.” *CPLR §3101 (i)*. Prior to the statute’s enactment, the Court of Appeals classified surveillance videotapes as material prepared in anticipation of litigation. *See, DiMichel v. South Buffalo Railway Co.*, 80 NY2d 184 (1992). Plaintiffs’ demand pursuant to CPLR §3101(i) is predicated upon two cases. *See, Rotundi v. Massachusetts Mut. Life Ins. Co.*, 263 AD2d 84 (3<sup>rd</sup> Dept. 2000); *see also, DiNardo v. Koronoswki*, 252 AD2d 69 (4<sup>th</sup> Dept. 1998). The defendants have demonstrated that no material contemplated under the statute exists and that neither the plain language of the statute or the cases relied upon by plaintiffs suggest that investigative reports are subject to the statute. In *DiNardo*, the court’s analysis was limited to whether that plaintiff was entitled to the surveillance tapes upon demand prior to plaintiff’s deposition and the court found that plaintiff was entitled to the surveillance tapes upon demand. *See, DiNardo, supra*. In *Rotundi* the issue was limited to video surveillance tapes and the timing of their disclosure, and the court found that the video surveillance materials are subject to full disclosure as a liberal disclosure policy and are no longer cloaked with the qualified privilege attaching to materials prepared in anticipation for litigation under CPLR §3101(d)(2). *See, Rotundi, supra*. The court noted therefore that CPLR §3101(i) supplants and replaces §3101(d)(2) and the judicial interpretation thereof is the statutory basis for disclosure of, *inter*

*alia*, video surveillance materials, limiting the issue to video surveillance material contained in the express language of §3101(i) . *See, id.* In contrast to those cases, in plaintiffs' additional demand, no surveillance material as specifically defined in §3101(i) exists, including films, photos, videotapes or audiotapes. Investigative reports are not set forth in the statute and no case law exists to demonstrate that such reports would be subject to disclosure under §3101(i) .

*Rotundi, supra* demonstrates that the enactment of subdivision (i) replaces the §3101(d)(2) analysis for disclosure of video surveillance materials and other materials expressed in §3101(i) . Here, however, the report is not subject to disclosure pursuant to §3101(i) and whether the report is discoverable requires an analysis under §3101(d)(2) as the report was prepared exclusively in anticipation of litigation. That subsection provides that "materials otherwise discoverable under subdivision (a) of this section and prepared in anticipation of litigation or for trial by or for another party or by or for the other party's representative...may be obtained only upon a showing the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.." *CPLR §3101(d)(2)*. The burden to establish the material is indeed material prepared in anticipation of litigation falls on the party seeking to preclude disclosure. *See, Mold Maintenance Service v. General Accident and Fire Life Insurance Corp.*, 56 AD2d 134 (4<sup>th</sup> Dept. 1977). The defendants have met their burden in this regard. Plaintiffs, on the other hand must successfully demonstrate that they are unable to obtain the substantial equivalent without undue hardship when the opportunity to perform a meaningful investigation on their own that could produce the same information expired prior to the notice of the action. *See, Lamitie v. Emerson Electric Co.-White Rodgers Division*, 208 AD2d 1081 (3<sup>rd</sup> Dept. 1994). Plaintiffs have made no

showing whatsoever and it is clear that they can obtain the substantial equivalent regarding plaintiff Marie Boyer's daily activities and injuries inasmuch as they were aware of the action at the time of the investigation and had a greater opportunity to evaluate the extent of her injuries and limitations. Therefore, any information obtained by the investigator summarized within a report would be accessible to the plaintiffs as well.

The plaintiffs' motion to depose the investigator is likewise denied. First, the record shows that plaintiff has moved to compel the deposition without having first formally served a notice for same. *See, CPLR §3107*. In addition, this Court has determined that the investigator's report constitutes privileged material and likewise any answers at the deposition concerning the report would likewise be privileged. While it has previously been determined that a defendant seeking a deposition of plaintiff's investigator was proper, there defendants demonstrated that they had a substantial need and were unable without due hardship to obtain the substantial equivalent of the information by other means. *See, Laimite, supra*. Plaintiffs did not make the requisite showing here and therefore any information obtained by the investigator and summarized in his report is readily accessible to plaintiffs as well.

The Court has granted the plaintiffs' application for an *in camera* inspection of the investigator's report and has reviewed this submission. This Court's *in camera* inspection of the report finds that it does not reference films, photographs, videotapes or audiotapes made during surveillance. Therefore the report is not discoverable for this reason as well.

**NOW**, therefore, for the foregoing reasons, it is

**ORDERED**, that the plaintiffs' motion to compel the defendants to produce surveillance materials is denied, and it is further

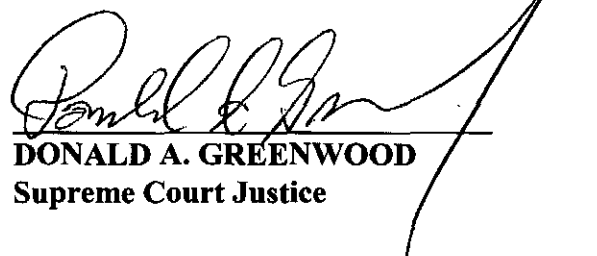
**ORDERED**, that the plaintiffs' motion to compel a deposition of defendants' investigator is denied, and it is further

**ORDERED**, that the motion of defendant Emergency Physician Services of New York, PC for a protective order is granted, and it is further

**ORDERED**, that plaintiff shall file a Trial Note of Issue by no later than May 6, 2016.

**ENTER**

**Dated: April 6, 2016**  
**Syracuse, New York**

  
**DONALD A. GREENWOOD**  
**Supreme Court Justice**

Papers Considered:

1. Plaintiffs' Notice of Motion, dated December 16, 2015;
2. Affidavit of Robin Zimpel-Fontaine, Esq. in support of plaintiffs' motion, dated December 16, 2015, and attached exhibits;
3. Plaintiffs' Memorandum of Law, dated December 16, 2015;
4. Defendant Emergency Physician Services of New York, PC's Notice of Motion for a Protective Order, dated December 16, 2015;
5. Affirmation of Timothy Tripp, Esq. in support of defendant's motion, dated December 16, 2015, and attached exhibits;
6. Memorandum of Law in support of motion for a protective order, dated December 16, 2015;

7. Plaintiffs' Memorandum of Law in opposition to motion for protective order, dated January 4, 2016;
8. Affidavit of Robin Zimpel-Fontaine, Esq. in opposition to motion for protective order, dated January 8, 2016;
9. Affirmation of Timothy P. Tripp, Esq. in further support of motion for protective order, dated January 13, 2016;
10. Reply Affidavit of Robin Zimpel-Fontaine, Esq., dated February 5, 2016;
11. Affidavit of Katherine A. Buckley, Esq. in opposition to plaintiffs' motion to compel, dated February 22, 2016;
12. Defendants MA Victoria Cabucungan Chanliecco, MD and Faxton-St. Luke's Healthcare's Memorandum of Law, dated February 22, 2016;
13. Affidavit of Daniel Mikalajunas Fogel, Esq. in opposition to plaintiffs' motion, dated February 23, 2016;
14. Affirmation of Timothy P. Tripp, Esq. in opposition to plaintiffs' motion to compel, dated February 23, 2016; and
15. Memorandum of Law in support of opposition to plaintiffs' motion to compel, dated February 23, 2016.