

Ericson v Benton
2016 NY Slip Op 32937(U)
January 21, 2016
Supreme Court, Albany County
Docket Number: 2325-11
Judge: Kimberly A. O'Connor
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

COPY

DAVID ERICSEN as the Administrator of the Estate of
LEONA A. ERICSEN (Deceased), and ANTHONY
ERICSEN,

Plaintiffs,

-against-

DECISION AND ORDER

Index No.: 2325-11

RJI No.: 01-11-105099

ROBERT E. BENTON, M.D.; CAPITAL CARDIOLOGY
ASSOCIATES, P.C.; JOSEPH FAROOQ, M.D.;
PULMONARY & CRITICAL CARE SERVICES, P.C.;
DARSHAN S. ARORA, M.D.; NORTHEAST
NEPHROLOGY ASSOCIATES, P.C.; YUSUF N. SILK,
M.D.; CAPITAL DISTRICT SURGICAL ASSOCIATES,
PLLC; JAMES P. ARAM, M.D.; BRUNSWICK FAMILY
MEDICAL PRACTICE, PLLC; JOHN J. O'BRYAN,
M.D.; TROY FAMILY PHYSICIANS, P.C.; and
SAMARITAN HOSPITAL OF TROY, NEW YORK;

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Defendants.

(Supreme Court, Albany County, All Purpose Term)

(Justice Kimberly A. O'Connor, Presiding)

APPEARANCES:

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O'CONNOR, J.:

In this medical malpractice and wrongful death action, defendants Robert E. Benton, M.D.; Capital Cardiology Associates, P.C. (hereinafter CCA); Darshan S. Arora, M.D.; Northeast Nephrology Associates, P.C. (hereinafter Northeast); and Samaritan Hospital of Troy, New York (hereinafter Samaritan) move for various relief based on plaintiffs' alleged discovery violations.

Pursuant to CPLR 3101(d)(1)(i), a party may move for such relief as is "just" based on noncompliance with discovery rules. It is well established that expert disclosure is "intended to provide timely disclosure of expert witness information between parties for the purpose of adequate and thorough trial preparation" (*McColgan v Brewer*, 84 AD3d 1573, 1576 [3d Dept. 2011] [internal quotation marks and citation omitted]; *Silverberg v Community Gen. Hosp. of Sullivan County*, 290 AD2d 788, 788 [3d Dept. 2002]). CPLR 3101(d)(1)(i) obligates parties to:

Identify each person whom the party expects to call as an expert witness at trial and...disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion.

(see also *Mary Imogene Bassett Hosp. v Cannon Design, Inc.*, 97 AD3d 1030, 1031-1032 [3d Dept. 2012]). In *Mead v Dr. Rajadhyax' Dental Group*, the Third Department reiterated that "virtually all information regarding expert witnesses and their anticipated information is discoverable under CPLR 3101(d)(1)(i), unless the request is so detailed that disclosure would have the net effect of disclosing the experts' identities" (34 AD3d 1139, 1140 [3d Dept. 2008] [internal quotation marks omitted]). Where a party fails to comply with a request for expert disclosure, preclusion may be appropriate

provided there is a showing of prejudice and evidence of a willful failure to disclose (*see* CPLR 3126; *McColgan v Brewer*, 84 AD3d at 1576; *Mead v Dr. Rajadhyax' Dental Group*, 34 AD3d at 1140).

I. Benton and CCA's Motion

Benton and CCA seek an order striking a portion of plaintiffs' expert response as overly broad. The paragraph at issue is as follows:

It is expected that the expert will testify that based on the deviations as specifically set forth herein above, the defendant Dr. Benton deviated from accepted medical practice in failing to have the requisite training, knowledge and experience to render care to plaintiff decedent; in failing to properly evaluate, diagnose, monitor and treat the plaintiff decedent's condition; in failing to coordinate or properly understand plaintiff decedent's history, test results and physical findings; in failing to use due and reasonable care under the circumstances in order to diagnose, evaluate and appreciate the progression of the symptoms and conditions which existed in order to make a proper diagnosis and in order to perform the necessary treatment; in failing to properly identify, examine, determine, recognize, observe, obtain, record, interpret, respond and treat each of plaintiff decedent's signs, symptoms, medical conditions and complaints. More specifically, with regard to these deviations, it is expected that the expert will opine that the defendant Dr. Benton deviated from the standard of care when continuing Mrs. Ericson in the RELY study (on Dabigatran) without vigilantly observing her BUN and Creatinine levels between March 22, 2009 and April 26, 2009. Had Mrs. Ericson's chemical levels been properly monitored in a timely and appropriate manner by a physician with the requisite training, knowledge and experience, the Dabigatran would have been discontinued. It is expected that the plaintiff's expert will opine that the standard of care required that Leona Ericson not be discharged from Samaritan Hospital on March 22, 2009 because her renal status was unstable with rising BUN (i.e. her BUN went from 31 on March 16, 2009 to 48 on March 22, 2009) and rising Creatinine levels (i.e. her Creatinine level went from 1.9 on March 16, 2009 to 2.4 on March 22, 2009) and defendant Dr. Benton's failure with respect to this standard of care was a substantial cause of Leona Ericson's injuries, pain and suffering, and ultimately her death. Additionally, the standard of care required that defendant Benton discontinue Mrs. Ericson on Dabigatran when she was discharged from Samaritan

Hospital on March 22, 2009 due to her worsening renal status. Defendant Benton's failure with respect to this standard of care was a substantial cause of Leona ERicsen's injuries, pain and suffering, and ultimately her death (McGrath Aff., Ex. D, p. 11).

According to Benton and CCA, the foregoing paragraph fails to provide any specifics regarding the way(s) in which the expert is claiming Benton's observation, evaluation, assessment, diagnosis and treatment was improper, or what the expert is claiming should have been done and when. Without more specificity, Benton and CCA argue that they are placed in the unfair position of trying to prepare a defense against any number of possible theories plaintiffs may seek to raise at trial.

After reviewing plaintiffs' amended expert witness response, the Court is satisfied that plaintiffs' disclosure gives Benton and CCA adequate notice of the allegations of malpractice lodged against them and the basis for such allegations. In their papers, Benton and CCA misleadingly isolated the first part of the paragraph in question and neglected to mention that the remainder of the paragraph – the section beginning "More specifically..." – addresses the anticipated testimony of the expert in great detail (*see* McGrath Aff., Ex. D, p. 11-12). Accordingly, the Court declines to strike the requested portion of plaintiffs' amended expert witness response.

II. **Arora and Northeast's Motion**

Next, Arora and Northeast seek an order striking a portion of plaintiffs' expert response as overly broad and vague. The paragraph at issue is as follows:

It is expected that the expert will testify that based on deviations as specifically set forth herein, the defendant Dr. Arora deviated from accepted medical practices in rendering improper and insufficient medical care and attention to the plaintiff decedent; that the defendant Arora failed to have the requisite training, knowledge and experience to render care to plaintiff decedent; that the defendant Arora failed to properly and timely evaluate, diagnose, monitor and treat the plaintiff decedent's condition; failed to establish an accurate differential

diagnosis; failed to coordinate or properly understand plaintiff decedent's history, test results, and physical findings; failed to properly care for the plaintiff decedent; failed to call and have necessary, adequate and proper consultations; failed to properly identify, examine, determine, recognize, observe, obtain, record, interpret, respond and treat each [of] plaintiff decedent's signs, symptoms, medical conditions and complaints; failed to conduct a thorough examination of plaintiff decedent; failed to properly assess and appreciate the conditions of the plaintiff decedent on a timely basis; failed to make an accurate diagnosis of plaintiff decedent; and caused the plaintiff decedent unnecessary, severe and excruciating pain and suffering (Lostritto Aff., Ex. G, p. 22, ¶1).

Arora and Northeast assert that the foregoing allegations are deficient because they do not adequately disclose the means by which Arora failed to properly care for the decedent, or how he lacked the requisite training, knowledge and experience. After reviewing plaintiffs' amended expert response, the Court agrees that the paragraph in question is so general and nonspecific that it is insufficient to meet the standard set forth in CPLR 3101(d)(1)(i). Given Arora and Northeast's failure to allege that plaintiffs willfully violated the statute, the sanction of preclusion is unwarranted. Accordingly, plaintiffs are directed to supplement their expert disclosure within 20 days from the date of this Decision and Order.

III. Samaritan's Motion

Preliminarily, plaintiffs argue that Samaritan's motion should be rejected as untimely. At a conference held on April 30, 2015, the Court ordered plaintiffs to serve an amended expert witness response on or before May 15, 2015, with motions due 30 days thereafter. Since plaintiffs' amended expert witness response was served on May 15, 2015 by ordinary mail, Samaritan was permitted to add five days to the timeframe within which to respond (*see* CPLR 2103[b][2]). Accordingly, the Court concludes that Samaritan's motion, served on June 19, 2015, is timely.

Turning to the merits, Samaritan seeks an order precluding plaintiffs' nursing expert from offering any testimony unless his/her qualifications are disclosed. Indeed, Samaritan correctly notes

that plaintiffs have omitted any identifying information from their expert response, except that he/she “is a registered nurse duly licensed to practice nursing in the State of New York . . . certified in Advanced Cardiac Life Support, Trauma Nurse Core Course and Basic Life” (Ezick Aff., Ex. E, p. 36). In response to Samaritan’s motion, plaintiffs disclosed that their expert also “graduated with an RN from SUNY Plattsburgh” (Storm Aff., Ex. A, p. 36). However, Samaritan argues that deficiencies remain with regard to the expert’s work experience and training.

Bearing in mind that “a party responding to a request for information about expert witnesses in the context of a medical malpractice action, may omit the names of medical . . . experts but shall be required to disclose all other information, including his or her professional qualifications,” the Court finds that plaintiffs’ disclosure is insufficient (*Morris v Clements*, 228 AD2d 990, 991 [3d Dept. 1996] [internal quotation marks omitted]).¹ Accordingly, plaintiffs are directed to supplement their expert disclosure by providing all of the nurse’s professional qualifications within 20 days from the date of this Decision and Order.

Samaritan also seeks an order striking certain portions of plaintiff’s amended expert response. The language at issue consists of two identical paragraphs relating to both plaintiffs’ internal medicine expert and nursing expert:

It is expected that the expert will testify that based on deviations as specifically set forth herein, the defendant Samaritan Hospital deviated from accepted medical practices in rendering improper and insufficient medical care and attention to the plaintiff decedent; that the defendant Samaritan Hospital failed to have the requisite training, knowledge and experience to render care to plaintiff decedent; that the defendant Samaritan Hospital failed to properly and timely evaluate, diagnose, monitor and treat the plaintiff decedent’s condition; failed to establish an accurate differential diagnosis; failed to coordinate or properly understand plaintiff decedent’s history, test

¹ Notably, plaintiffs did not cross-move for a protective order, or submit the disputed information for the Court’s in camera review.

results and physical findings; failed to properly care for the plaintiff decedent; failed to call and have necessary, adequate and proper consultations; failed to properly identify, examine, determine, recognize, observe, obtain, record, interpret, respond and treat each [of] plaintiff decedent's signs, symptoms, medical conditions and complaints; failed to conduct a thorough examination of plaintiff decedent; failed to properly assess and appreciate the conditions of the plaintiff decedent on a timely basis; failed to make an accurate diagnosis of plaintiff decedent; failed to assure patient care services were delivered by appropriately licensed professional staff; that the governing body of Samaritan Hospital failed to ensure compliance with generally accepted standards of professional practice in violation of 10 NYCRR 405(f)(1); that the medical staff failed to meet standard of care practices in violation of 10 NYCRR 405(a)(1)(i); defendants failed to provide, supervise, control adequately, inform and educate medical personnel to care for plaintiff decedent, Leona Ericson; and failed to properly supervise hospital employees to adequately monitor the plaintiff decedent (Ezick Aff., Ex. E, p. 35; 43-44).

According to Samaritan, the foregoing language fails to enlighten to any degree the expected testimony of plaintiffs' experts. In this regard, Samaritan argues that the statements are general, overly broad and leave the door open to virtually any testimony by plaintiffs' experts, thereby making it virtually impossible to adequately prepare for trial. After reviewing plaintiffs' amended expert response, the Court agrees that the paragraphs in question are so general and nonspecific that they are insufficient to meet the standard set forth in CPLR 3101(d)(1)(i). At this time, the Court declines to strike the aforementioned language; rather, plaintiffs are directed to supplement their expert disclosure within 20 days from the date of this Decision and Order.

Those arguments not specifically addressed herein were found to be unpersuasive, or were otherwise rendered academic.

Accordingly, it is hereby

ORDERED, that defendants Robert E. Benton, M.D. and Capital Cardiology Associates, P.C.'s motion is denied; and it is further

ORDERED, that defendants Darshan Arora, M.D. and Northeast Nephrology Associates,

P.C.'s motion is granted only insofar as plaintiffs are directed to supplement the paragraph in controversy within 20 days from the date of this Decision and Order; and it is further

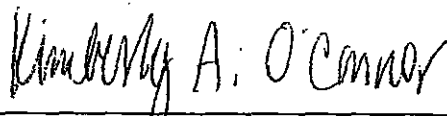
ORDERED, that defendant Samaritan Hospital of Troy, New York's motion is granted only insofar as plaintiffs are directed to supplement their expert nurse's professional qualifications, together with the paragraphs in controversy within 20 days from the date of this Decision and Order.

This memorandum constitutes the Decision and Order of the Court. The original Decision and Order is being returned to the Attorneys for Plaintiffs. A copy of this Decision and Order together with all other papers are being forwarded to the County Clerk for filing. The signing of this Decision and Order and delivery of the copy of the same to the County Clerk shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule with respect to filing, entry, and notice of entry of the original Decision and Order.

SO ORDERED.

ENTER.

Dated: January 21, 2016
Albany, New York



HON. KIMBERLY A. O'CONNOR
Acting Supreme Court Justice

Papers Considered:

1. Notice of Motion, dated June 12, 2015; "Affidavit" of Brendan S. McGrath, Esq., unsworn,² dated June 12, 2015, with annexed exhibits; Memorandum of Law, dated June 12, 2015;
2. Notice of Motion, dated June 12, 2015; Affidavit of Michael D. Lostritto, Esq. in

² The document submitted by Attorney McGrath is neither an affidavit because it does not bear a jurat showing that it was properly sworn, nor an affirmation because it is not subscribed and affirmed to be true under penalties of perjury (*see* CPLR 2106). Nevertheless, given plaintiffs' failure to object and finding no prejudice, the Court will overlook the document's defective execution and consider the exhibits annexed thereto (*see* CPLR 2001; *Sparaco v Sparaco*, 309 AD2d 1029, 1030 [3d Dept. 2003], *lv denied* 2 NY3d 702 [2004]).