

Grady v Bolognese

2019 NY Slip Op 34762(U)

November 6, 2019

Supreme Court, Nassau County

Docket Number: Index No. 607417-16

Judge: Jerome C. Murphy

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**SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. JEROME C. MURPHY,
Justice.**

TRIAL/IAS PART 13

BRENT GRADY and KRISTINE GRADY,

Plaintiffs,

- against -

Index No.: 607417-16

Motion Date: 8/22/19

Sequence No.: 001

**MD
DECISION AND ORDER**

**PAOLO A. BOLOGNESE, M.D., HAROLD
REKATE, M.D., SALVATORE INSINGA, M.D.,
NORTH SHORE UNIVERSITY HOSPITAL,
NORTH SHORE-LONG ISLAND JEWISH
HEALTHCARE, INC., NORTHWELL
HEALTHCARE, INC., NORTHWELL INC.,
NORTH SHORE LIJ MEDICAL GROUP,
THE CHIARI INSTITUTE, an unincorporated
entity of North Shore University Hospital and
CUSHING NEUROSCIENCE INSTITUTE-BRAIN
& SPINE SPECIALISTS OF NEW YORK,
an unincorporated entity of North Shore
University Hospital,**

Defendants.

The following papers have been read on this motion:

Notice of Motion, Affirmation and Exhibits.....	1
Affirmation in Opposition.....	2
Reply Affirmation.....	3

PRELIMINARY STATEMENT

In motion sequence 003, Plaintiff, brings this application for an order (1) pursuant to CPLR §3124 compelling Defendant North Shore University Hospital to produce; (a) copies of

any and all radiologic images saved on the computer system of THE CHIARI INSTITUTE OF DEFENDANT NORTH SHORE UNIVERSITY HOSPITAL pertaining to the Plaintiff, BRENT GRADY, including but not limited to any images containing markings, measurements and/or angles; (b) copies of any Doppler ultra sound images, which pertain to the Plaintiff, and which were saved on the hard drives of the Doppler Ultrasound machines at Defendant North Shore University Hospital; (c) copies of any fluoroscopic images which were taken during the Plaintiff's surgery at Defendant North Shore University Hospital; or (d) an Affidavit or Affidavits from persons with knowledge as to the searches done for the materials set forth above, and the last date when it is believed that the materials existed, if it is going to be alleged that the materials no longer exist; (2) for an order compelling defendant Bolognese to appear for a second deposition to answer questions which were blocked during the first session of the Deposition; (3) for an Order compelling Defendant Bolognese to appear for a second deposition session for the purpose of recreating the computerized measurements/angles on the digitized radiological studies, which the Defendant made during the first deposition session but which his attorney did not permit him to save although he had the computerized ability to do so; (4) for an Order pursuant to CPLR §3126 precluding Defendant Bolognese from making any measurements or placing any angles on any films at the time of the trial of this matter to allegedly demonstrate that the Plaintiff had cranio-cervical instability at the time of his presentation to the Chiari Institute, unless Defendant Bolognese appears for a re-deposition to recreate the same measurements and/or angles on the films which he made at the first session of his deposition, through the use of computer software, which images his attorney did not permit him to save; (5) and for any other relief the Court deems just and proper. Opposition and reply have been submitted.

DISCUSSION

This action involves neurosurgery performed by Paolo A. Bolognese, M.D. on Brent Grady on March 27, 2014 at North Shore University Hospital. Plaintiff contends that the surgical procedure was based on an erroneous diagnosis of Chiari 1 Malformation and cranio-cervical instability. Chiari 1 Malformation is a congenital brain condition in which the lower part of the brain, called the cerebellar tonsil, herniates down through the skull and into the spinal canal. The herniated tissue blocks the normal flow of cerebrospinal fluid (CSF), causing a buildup of fluid

in the spinal cord or in the brain. Chiari 1 develops because the back of the skull is too small or deformed, and a crowding of the brainstem, cerebellum, and tonsils occurs. As the tonsils push out, they block the flow of CSF, causing neurological symptoms, which may include headaches, imbalance, dizziness, fatigue, as well as other symptoms and complaints.

Plaintiff went to see Dr. Bolognese on February 23, 2014, with complaints of occipital headaches, neck pain, bilateral ear pressure, and tinnitus. Dr. Bolognese diagnosed him with a variant of Chiari 1 Malformation and cranio-cervical instability, and recommended he undergo posterior fossa decompression, with cranio-cervical fusion. Exh. "C" to the motion is the record of The Chiari Institute, a component of North Shore University Hospital. Electronically signed by Dr. Bolognese, the report indicates that based on imaging, he was diagnosed with CM1 variant, elevated CSF pressure(28), craniocervical instability, and EDS.

The steps in the surgical plan were as follows:

Posterior Fossa Decompression (PFD) under Color Doppler Ultrasound and SSIP monitoring, to address the Chiari 1 Malformation.

The PFD will be attempted through a C1 laminotomy, in order to decrease the possible risk of post-surgical Cranial Settling

Posterior Fossa Revision (PFR), under Color Doppler, Ultrasound, and SSEP monitoring, to address the Chiari 1 Malformation.

In hospital trial of Invasive Cervical Traction (ICT), to be conducted under fluoroscopic guidance , to assess for Functional Cranial Settling.

Craniocervical Fusion (CCF) in extraction, under fluoroscopic and SSEP monitoring, to address the Basilar Impression.

Initially, plaintiff's motion seeks (a) copies of any and all radiologic images saved on the computer system of the Chari Institute of defendant North Shore University Hospital pertaining to Brent Grady, including any images containing markings, measurements and/or angles; (b) copies of any Doppler ultrasound images, which pertain to the plaintiff, and which were saved on the hard drive of the Doppler Ultrasound machines at defendant North Shore University Hospital; (c) copies of any fluoroscopic images which were taken during the plaintiff's surgery at North

Shore University Hospital; or (d) an Affidavit or Affidavits from persons with knowledge as to the searches done for the above materials, the last date when it is believed that the materials existed, if it is alleged that the materials no longer exist.

In response, defendants contend that, upon receipt of this motion, they conducted performed a search for all fluoroscopic images in possession of the hospital for the March 27, 2014 surgery, and that the results have been exchanged with plaintiff's counsel. Plaintiff disputes this to the extent that none of the imaging has actually been produced.

Defendant also contends that North Shore University Hospital (NSUH) continues to search for available Doppler Ultrasound images, and that they will exchange its findings in this regard. Plaintiff notes that no Doppler imaging has been provided, although originally requested on August 1, 2018. Plaintiff also contends that defendants have not addressed the demands for copies of all radiologic images saved on the computer system of The Chiari Institute, including images containing markings, measurements and/or angles. Dr. Bolognese's diagnosis of cranio-cervical instability, they contend, is largely based upon radiographic diagnosis.

Plaintiff addresses Dr. Bolognese's deposition testimony to the effect that plaintiff was invited to send existing films, which were uploaded into the computer at The Chiari Institute, and measurements were made with specialized software, and maintained on an Apple Computer, with dedicated software "to store and analyze the images coming from these patients." These images were reviewed pre-operatively.

Clearly, the demanded fluoroscopic, Doppler ultrasound, and uploaded films from plaintiff which were uploaded to the Apple Computer, including any markings or measurements done in connection with the diagnosis of plaintiff's condition are relevant, and defendant does not contend that they are not. The Court directs that defendants provide to plaintiff's counsel all the fluoroscopic images, Doppler Ultrasound images, and the films maintained on the Apple Computer at The Chiari Institute within 30 days of service of a copy of this Decision and Order with Notice of Entry. In the event that any such material cannot be located, defendants are to provide an Affidavit by an individual with knowledge as to the circumstances surrounding its deletion or loss from the records of North Shore University Hospital or The Chiari Institute.

Plaintiff also seeks an Order compelling Dr. Bolognese to appear for a second deposition to “answer questions which were blocked during the first session of the Deposition”; “for the purpose of recreating the computerized measurements/angles on the digitized radiological studies, which the Defendant made during the first deposition but which his attorney did not permit him to save although he had the computerized ability to do so”; and “precluding Defendant Bolognese from making any measurements or placing any angles on any films at the time of the trial of this matter to allegedly demonstrate that the Plaintiff had cranio-cervical instability at the time of his presentation to the Chiari Institute, unless Defendant Bolognese appears for a re-deposition to recreate the same measurements and/or angles on the films which he made at the first session of his deposition, through the use of computer software, which images his attorney did not permit him to save.”

Plaintiff contends that Dr. Bolognese was improperly directed by his attorney from answering the following questions:

- “Why were your privileges suspended for ‘15 days in the second half of April 2009, pending investigations’ ”? (Exh. “D” at pp.19—20);
- “Were you ever advised by the neurological board, that one of the reasons they were not inviting you to take the oral boards, was because you were always listed as the assistant surgeon on all surgeries that you performed at North Shore University Hospital”? (Exh. “D” at p. 29); and
- “In February of 2014, was there any requirement in place at North Shore University Hospital, requiring you to discuss your surgical plan with another neurosurgeon at the facility, before moving forward with surgery”? (Exh. “D” at p. 173);

The issue of Objections at Depositions are dealt with a 22 NYCRR 221.1 and 221.2, which provide as follows:

Section 221.1. Objections at depositions

(a) *Objections in general.* No objections shall be made at a deposition except those which, pursuant to subdivision (b), (c) or (d) of Rule 3115 of the Civil Practice Law and Rules, would be waived if not interposed, and except in compliance with

subdivision (e) of such rule. All objections made at a deposition shall be noted by the officer before whom the deposition is taken, and the answer shall be given and the deposition shall proceed subject to the objections and to the right of a person to apply for appropriate relief pursuant to article 31 of the CPLR.

Section 221.2. Refusal to answer when objection is made

A deponent shall answer all questions at a deposition, except:

- (a) to preserve a privilege or right of confidentiality;
- (b) to enforce a limitation set forth in an order of a court; or
- (c) when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney shall not direct a deponent not to answer except as provided in CPLR Rule 3115 or this subdivision. Any refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefor. If the deponent does not answer a question, the examining party shall have the right to complete the remainder of the deposition.

Defendants contend that the information sought in the forgoing questions is not subject to discovery pursuant to Education Law § 6527 and Public Health Law Art. 28. § 6527 provides in part as follows:

Neither the proceedings nor the records relating to performance of a medical or a quality assurance review function or participation in a medical and dental malpractice prevention program nor any report required by the department of health pursuant to section twenty-eight hundred five-1 of the public health law described herein, including the investigation of an incident reported pursuant to section 29.29 of the mental hygiene law, shall be subject to disclosure under article thirty-one of the civil practice law and rules except as hereinafter provided or as provided by any other provision of law.

Public Health Law § 2800 states the policy and statement of purpose of Art. 28 to be the public interest in hospital and related services being of the highest quality, efficient provision and proper utilization at reasonable cost. § 2801-b deals with staff appointments and extension of professional privileges. It provides at subd. 1 "[i]t shall be an improper practice for the

governing body of a hospital to refuse to act upon an application for staff membership or professional privileges or to deny or withhold from a physician, . . . membership or professional privileges in a hospital, or to exclude or expel a physician . . . from staff membership in a hospital or curtail, terminate or diminish in any way a physician's . . . professional privileges in a hospital, without stating the reasons therefor . . .”

Subd. 3 provides that information received with respect to actions taken with respect to investigations of personnel with respect to privileges “ . . . shall be kept confidential and shall be used solely for the purposes of this section and the improvement of the standards of patient care and patient welfare.” It further provides that “[t]he records of such proceedings shall not be admissible as evidence in any other action of any kind in any court or before any other tribunal, board, agency, or person.”

Inquiry as to Dr. Bolognese's 15-day suspension, what he may have been told about a reason for his not being invited to submit to oral boards for certification by the neurological board, and any requirement that he discuss his surgical plan with another neurosurgeon before proceeding, if true, are all for the purpose of insuring the highest standards of care for patients, in the public interest, and are not subject to discovery pursuant to the Education Law and Public Health Law.

Plaintiff's motion to compel Dr. Bolognese to appear for a further deposition to answer the designated questions is denied.

Plaintiff also seeks to compel Dr. Bolognese to appear for a further deposition for the purpose of recreating the computerized measurements/angles on the digitized radiological studies, which the Defendant made during the first deposition. Counsel for defendant states at ¶ 12 of his Affirmation in Opposition that plaintiff's counsel asked Dr. Bolognese to “markup” plaintiff's June 2013 cervical MRI to demonstrate how he determined that plaintiff's clivo-axial angle when diagnosing him with cranio-cervical instability, which he permitted the doctor to do. But defense counsel objected, and directed Dr. Bolognese not to save these images on the computer.

The issue in this action is whether Dr. Bolognese properly diagnosed plaintiff's condition

in 2014, not how he measures it more than five years later. Any such markings which Dr. Bolognese may have made in rendering a diagnosis, which resulted in the March 27, 2014 surgery are relevant and discoverable, as directed in this Decision and Order. A saved markup of a 2013 MRI, done in 2019 is not evidence of any issue raised in this action, and is plainly improper, and may subject defendant to significant prejudice, as the standards of measurement may well not be the same currently as they were in 2014.

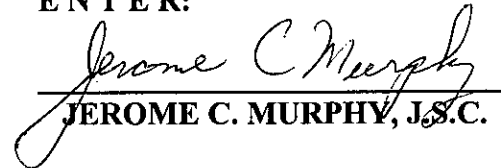
Plaintiff's motion to compel a further deposition of Dr. Bolognese for the purpose of compelling him to recreate the previously performed measurements and save them for potential use by plaintiff at a trial of this matter, or, alternatively, precluding him from demonstrating the manner in which he performed measurements at trial, is denied.

To the extent that relief has not been granted, it is expressly denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
November 6, 2019

ENTER:


JEROME C. MURPHY, J.S.C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE