

<b>Gordineer v Kavinsky</b>
2021 NY Slip Op 33348(U)
October 5, 2021
Supreme Court, Westchester County
Docket Number: Index No. 56543/2019
Judge: Joan B. Lefkowitz
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER - COMPLIANCE PART

.....X  
BEVERLY GORDINEER, as Executrix of the Estate of  
RICHARD GORDINEER, Deceased, and BEVERLY  
GORDINEER, Individually,

Plaintiffs,

**DECISION & ORDER**  
**Index No. 56543/2019**  
**Seq. No. 2**

-against-

BENJAMIN KAVINOKY, M.D., ELIZABETH ELSON  
M.D., KEI KO, M.D., VINCENT ZAYAS, M.D., HANA  
PUTTERMAN, M.D., ERIC SOMMERS, M.D., ROY  
OOMMEN, M.D., ROBERT PRESTIANO, M.D.  
GEORGE GANDEV, M.D., RONALD NUTOVITS, M.D.,  
MICHELLE GORDON, M.D., KARTIK PRABHAKARAN,  
M.D., LEANDRA KROWSOSKI, M.D., PATRICE  
ANDERSON, M.D., ANTHONY POLICASTRO, M.D.,  
JOSE DOMINGUEZ, M.D.,<sup>1</sup> ANGELICA JARAMILLO, M.D.,  
JORGE CON, M.D., JOHN GALENO, M.D., JEAN GEORGE,  
D.O. EMERGENCY MEDICAL ASSOCIATES, PLLC,  
EMERGENCY PHYSICIAN SERVICES OF NEW YORK, P.C.,<sup>2</sup>  
NORTHERN WESTCHESTER SURGICAL ASSOCIATES,  
LLP, WESTCHESTER MEDICAL CENTER ADVANCED  
PHYSICIAN SERVICES, P.C. a/k/a ADVANCED PHYSICIAN  
SERVICES P.C., NEW YORK-PRESBYTERIAN/HUDSON  
VALLEY HOSPITAL, CENTER d/b/a HUDSON VALLEY  
HOSPITAL, and WESTCHESTER COUNTY HEALTHCARE  
CORPORATION d/b/a WESTCHESTER MEDICAL CENTER,

Defendants.

.....X  
LEFKOWITZ, J.

The following papers were read on this motion by plaintiffs for an order (a) compelling defendant Benjamin Kavinsky, D.O. i/s/h/a Benjamin Kavinsky, M.D. (“Dr. Kavinsky”) to reappear for a deposition and answer questions that counsel allegedly improperly and in violation of CPLR 3115 and 22 NYCRR 221.1, et seq. directed him not to answer; (b)

<sup>1</sup> Pursuant to the October 23, 2019 Decision and Order of this Court (Ecker, J.) the complaint was dismissed against defendants Westchester Health Care Corporation d/b/a Westchester Medical Center, Jose Dominguez, M.D., Angelica Jaramillo, M.D., and Jean George, D.O. (NYSCEF Doc. 110).

<sup>2</sup> This action was discontinued against defendant Emergency Physician Services of New York, P.C. (NYSCEF Doc. 98).

compelling defendant Elizabeth Elson, M.D. (“Dr. Elson”) to answer questions relating to the decedent Richard Gordineer (the “decedent”), that counsel allegedly improperly and in violation of CPLR 3115 and 22 NYCRR 221.1 et seq. directed her not to answer; and (c) such other and further relief as this Court deems proper:

Notice of Motion; Affirmation in Support; Exhibits 1-9  
Affirmation in Opposition by Counsel for Dr. Kavinoky; Exhibits A-G  
Affirmation in Opposition by Counsel for Dr. Elson; Exhibits A-C  
Reply Affirmation

Upon the foregoing papers, the motion is decided as follows:

Plaintiffs commenced this medical malpractice action on or about April 25, 2019, by the filing of a summons and verified complaint seeking to recover damages for injuries and the death of the decedent arising from the alleged negligent and careless treatment provided by defendants (Ex. 1). Issue was joined by the service of defendants’ answers (Ex. 2).

For the purposes of this motion, the relevant allegations against Dr. Kavinoky concern his failure, on January 18, 2018, to timely and appropriately diagnose and treat the decedent’s intraperitoneal bleed in Hudson Valley Hospital’s Emergency Department. Specifically, plaintiffs allege that Dr. Kavinoky failed to appreciate and act upon the existence of symptoms consistent with internal bleeding when he performed a preliminary interpretation of an x-ray of the decedent’s chest.

Plaintiffs state that the allegations against Dr. Elson relevant to this motion concern her failure to timely and appropriately diagnose and communicate with co-defendants regarding the decedent’s condition on January 18, 2018 and January 24, 2018.

Dr. Kavinoky’s deposition occurred via Zoom on April 20, 2021 pursuant to a Cross-Notice of Deposition (Ex. 5).<sup>3</sup> Dr. Elson was deposed via Zoom on May 4, 2021.

On this motion, brought pursuant to a discovery motion briefing schedule issued on June 25, 2021 (Ex. 9), plaintiffs argue that counsel for Dr. Kavinoky and Dr. Elson improperly blocked questions posed to those defendants in violation of the Uniform Rules of the Trial Courts 22 NYCRR 221.2.

*Allegations Concerning Dr. Kavinoky’s Deposition:*

With respect to Dr. Kavinoky, plaintiffs contend they are entitled to a further deposition of Dr. Kavinoky concerning the lines of inquiry discussed below. Plaintiffs state that Dr. Kavinoky

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<sup>3</sup> The deposition notice stated in part that: “In the event that special hardware and/or software is/are required to interpret images and/or give responsive answers to questions to his/her/its involvement in the care of Plaintiff-Decedent, RICHARD GORDINEER, the Defendant(s) must notify our office before the Preliminary Conference so that appropriate arrangements can be made with the Court. Any failure to do so when notified of the depositions of these answering Defendants will result in an action for sanctions.”

refused to interpret or answer questions concerning the January 18, 2018 x-ray contending that the quality of the films as projected during the deposition was of poor quality. Plaintiffs contend that based on the language contained in the deposition notice Dr. Kavinsky's counsel should have known he would be asked to interpret certain imaging films. It is plaintiffs' contention that Dr. Kavinsky's refusal to answer these questions based on the quality of the films was a strategic attempt by Dr. Kavinsky's counsel to avoid questioning concerning Dr. Kavinsky's interpretation of the abdominal studies.

The opposition states that Dr. Kavinsky is an Emergency Medicine Physician and that his treatment and care of the decedent was limited to his presentation to the emergency room of co-defendant Hudson Valley Hospital ("HVH") on January 18, 2018 as the Emergency Department Attending Physician. Dr. Kavinsky's counsel states that he is not a radiologist and has no specialized training in the field of radiology, including the reading and interpretation of x-rays, CAT scans, MRI, and other diagnostic imaging studies. Dr. Kavinsky's counsel asserts that he did not see, visit, treat, examine, consult, contact or participate in the medical care and treatment of the decedent in any manner following his presentation to HVH on January 18, 2018.

Dr. Kavinsky's counsel further states that Dr. Kavinsky testified that he ordered a chest x-ray, for which he performed a preliminary "wet" read pending the official read, interpretation, and report of the Radiology Department. However, Dr. Kavinsky contends that it was Dr. Elson, the radiologist, who performed the comprehensive assessment of the chest x-ray, and who authored and issued the official final radiological report detailing her findings and impressions of the decedent's chest x-ray (Ex. A). Additionally, Dr. Kavinsky contends that he has answered the questions that are the subject of this motion and that the questions were improper. Dr. Kavinsky's counsel contends that plaintiffs failed to establish that Dr. Kavinsky was qualified to interpret the chest x-ray and that any questions asking him to interpret the x-ray or comment on Dr. Elson's findings are not within Dr. Kavinsky's expertise as an emergency medicine physician.

Dr. Kavinsky's counsel denies the allegations that she "strategically waited" until the deposition to inform plaintiffs' counsel that the imaging quality of the chest x-ray over Zoom would not be clear enough for Dr. Kavinsky to read and interpret. Dr. Kavinsky's counsel contends that since she believed asking Dr. Kavinsky to read and interpret the x-ray would be prohibited by *Carvalho* she was unaware that plaintiffs' counsel would attempt to question him in this regard. Moreover, Dr. Kavinsky's counsel asserts that lines of inquiry 10-13 were improper pursuant to *Carvalho*. Dr. Kavinsky's counsel further states that his testimony was that Dr. Elson's review completely superseded that of Dr. Kavinsky. Dr. Kavinsky's counsel argues that asking Dr. Kavinsky to read or interpret the chest x-ray film or comment on Dr. Elson's findings and impression is objectionable pursuant to *Carvalho*. Additionally, counsel contends that plaintiffs' counsel had a full opportunity to question Dr. Elson concerning the chest x-ray.

In reply, plaintiffs state that the deposition notice was sufficient to give notice of the subject of questioning concerning x-ray images. Plaintiffs state that in any event Dr. Kavinsky testified that he would not answer questions about the x-ray even if the appropriate technology was provided.

*Allegations Concerning Dr. Elson's Deposition:*

Plaintiffs contend a further deposition of Dr. Elson is necessary because her counsel improperly blocked questioning concerning an abdominal CT scan performed on the decedent on January 24, 2018. Plaintiffs contend that Dr. Elson's counsel objected to this line of inquiry on the grounds that it violated the holding in *Carvalho v. New Rochelle Hospital*, 53 A.D.2d 635, (2d Dept 1976). Plaintiffs argue that the objected-to questions did not violate the limitations set forth in *Carvalho*, because Dr. Elson was not asked to opine concerning whether other physicians met or deviated from the applicable standard of medical care. Rather, plaintiffs argue, Dr. Elson was questioned concerning her interpretation of the x-ray based upon her training and experience as a radiologist and because she was identified as someone with whom co-defendant Dr. Hana Putterman ("Dr. Putterman") discussed the January 24, 2018 imaging study. Plaintiffs contend that their questions related to the decedent's condition and treatment and are relevant to the claims of this case.

In opposition, Dr. Elson asserts that the motion should be denied because plaintiffs' counsel failed to comply with 22 NYCRR 202.20 (b) despite two attempts by Dr. Elson's counsel to meet and confer with plaintiffs' counsel.

Dr. Elson states that plaintiffs' counsel has mischaracterized Dr. Elson's counsel's objections to questions about the January 24, 2018 CT scan. Dr. Elson's counsel acknowledges that she did object to questions posed to Dr. Elson concerning the interpretation of the January 18, 2018 and January 24, 2018 x-rays on the basis of *Carvalho*, but asserts that this was not the basis of counsel's objections to questions concerning the January 24, 2018 CT scan. Dr. Elson's counsel maintains that the basis for the objections concerning the January 24, 2018 scan<sup>4</sup> was that Dr. Elson did not interpret the scan and cannot be questioned regarding the scan that was interpreted by non-party Dr. Daniel Solomon. Dr. Elson further argues that for her to reinterpret the January 24, 2018 CT scan would be improper because her testimony established that she did not interpret that scan and any additional questions would be based on speculation. Dr. Elson contends that plaintiffs' counsel is using Dr. Putterman's<sup>5</sup> deposition testimony in an attempt to have Dr. Elson reinterpret the study. Dr. Elson argues that plaintiffs' failure to question Dr. Elson concerning page 29 of the decedent's chart should not provide a basis for allowing a further deposition of Dr. Elson.

In reply, plaintiffs maintain that Dr. Elson's counsel directed her not to answer any questions about the January 24, 2018 CT scan based upon *Carvalho*. Plaintiffs state that the questioning did not implicate *Carvalho* but only sought Dr. Elson's interpretation of the scan based on her training and experience as a radiologist, based on Dr. Putterman's testimony that Dr. Elson reviewed the scan, and because the answer is relevant to the decedent's medical treatment.

*Applicable Legal Principles*

It is well accepted that pursuant to CPLR 3101(a), a party is entitled to "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts

<sup>4</sup> Lines of inquiry 14-18.

<sup>5</sup> Dr. Putterman was deposed on May 14, 2021 at which time she testified after reviewing page 29 of the decedent's HVH chart that she had discussed the January 24, 2018 CAT scan with Dr. Elson (Ex. C, p. 208-209)

bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason” (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968] [internal quotation marks omitted]). The party seeking disclosure has the burden to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims (*Foster*, 74 AD3d at 1140). The court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]).

Additionally, part 221 of the Uniform Rules of the Trial Courts, also known as the Uniform Rules for the Conduct of Depositions (hereinafter the “Rules”) was enacted in 2006. Part 221 was “designed to combat obstructive behavior during a deposition” (*Pedraza v New York City Tr. Auth.*, 2016 WL 270825 8 [Sup Ct, NY County 2016]). Pursuant to these rules, a deponent shall answer all questions at a deposition except to preserve a privilege or right of confidentiality, to enforce a court ordered limitation, or when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney shall not direct a witness not to answer except under these limited circumstances or pursuant to an objection set forth in CPLR 3115 (*see Parker v Ollivierre*, 60 AD3d 1023 [2d Dept 2009]). Every objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent. “[G]enerally, the proper procedure is to allow a witness to answer all questions subject to objections which are reserved for trial in accordance with CPLR 3115” (*Walter Karl, Inc. v Wood*, 161 AD2d 704 [2d Dept 1990]).

Indeed, the strong presumption of our law is that a deponent shall answer all questions at a deposition, subject to the strictly limited number of enumerated exceptions contained in Rule 221.2. Even where deposition questions do not seem reasonably calculated to lead to discoverable evidence, it is improper for deponent’s counsel to block those questions (*Molinoff v Tanenbaum*, Sup Ct, Westchester County, March 31, 2014, Lefkowitz, J., 51064/2013). The proper analysis under 22 NYCRR 221.2 (iii) is whether the objected to questions are “plainly improper and ... if answered, cause significant prejudice to any person” (22 NYCRR 221.2 [c]; (*Rodriguez v Goodman*, 2015 N.Y. Slip Op. 31412[U] [Sup Ct, NY County 2015]).

Disputed lines of inquiry concerning Dr. Kavinoky’s testimony:

**Line of inquiry # 1:**

Q. So, those numbers<sup>6</sup> to the surgeon, as far as you're concerned, has some type of value?

A. It's just in any -- When you're dealing with trauma, those are the numbers that they need before they'll perform a procedure.

Q. Okay. Because it informs them as to the patient’s risk of bleeding?

MS. YUEN: Objection to the form. I’m going to direct him not to answer the question, because you’re asking him about state of mind of the surgeon and what a surgeon would consider in their evaluation of whether or not to perform a procedure, and he will not

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<sup>6</sup> Referring to INR, PT, or PTT values.

answer that question. So, I'm sorry, Counsel; I'm going to ask him not to answer that question. (Ex. 6, p. 36-37)

Dr. Kavinoky contends that this question impermissibly sought testimony concerning areas beyond his knowledge and expertise and sought testimony concerning care and treatment provided by co-defendant surgeons Eric Sommers, M.D. and Michelle Gordon, M.D., prohibited by *Carvalho*. Nonetheless, Dr. Kavinoky contends that he subsequently answered the question (see p. 37-8) rendering this objection moot.

The court disagrees that this question asked Dr. Kavinoky to testify concerning areas beyond his expertise and knowledge. Dr. Kavinoky testified at length concerning the issues regarding internal bleeds as presented by patients who were on anticoagulant medications. Additionally, insofar as this question does not speak solely to the alleged negligence of a codefendant *Carvalho* is inapplicable. Accordingly, the objections interposed by Dr. Kavinoky were improper. However, insofar as Dr. Kavinoky's subsequent testimony, as asserted by his counsel, appears to have answered the question, a further deposition on this question is not necessary.

**Line of inquiry # 2:**

A. Is this pertaining to the patient we're talking about -- or we haven't talked about yet?

Q. We're talking generally, here.

A. Right. I'm asking you if it's in reference to the patient.

Q. No; we're talking about generally, where a rib injury causes injuries to an adjacent organ, whether that type of injury can result in blood accumulating slowly?

MS. YUEN: I'm going to direct him not to answer, because it's asked and answered. You asked Dr. Kavinoky earlier. Let me just state why I'm objecting and directing the witness not to answer.

MR. CLARKE: I've got the basis for your direction not to answer. I'm going to move on.

(Ex. 6, p. 114)

Dr. Kavinoky states that he answered this question multiple times making any request for a ruling moot and any further questions unnecessary.

It is well established that "asked and answered" is not one of the articulated grounds in the Rules for directing a witness not to answer (*see Brightman v Corizon*, 72 Misc3d 1213[A] [Sup Ct, NY County 2021]). Accordingly, the direction not to answer was improperly asserted. However, insofar as plaintiffs' counsel was able to complete this line of inquiry, a further deposition on this question is not necessary.

**Line of inquiry # 3:**

A. No. That's why I'm waiting for the radiology report.

Q. When you say, "That's why I'm waiting for the radiology report," so, you're arriving at certain impressions based on what you're seeing on the CAT scans; right?

A. I don't have the ability to make impressions on CAT scans.

Q. So, Doctor, are you just looking at them for fun?

MS. YUEN: Note my objection. And don't even answer that. Don't answer it. Don't answer it. Call the court on it. Call the court. We'll ask the judge. (Ex. 6, p. 153-4)

**Line of inquiry # 4:**

Q. So, a general curiosity; you're looking at the CAT scans in order to become a more informed and more well- rounded physician; correct?

A. Yes.

MS. YUEN: Note my objection.

Q. And you're learning as time goes by; right? With each CAT scan you look at, you're learning?

MS. YUEN: Note my objection. Don't answer the question. It's ridiculous; it's absurd; it's inappropriate; you know it's inappropriate. And I'm directing him not to answer. Call the court if you'd like. (Ex. 6, p. 155)

**Line of Inquiry # 5:**

Q. Would you ever research topics in medicine relating to diagnosing acute conditions on CT in an E.R. setting?

THE WITNESS: What was my answer?

(Whereupon the following answer was read back by the reporter:

A. Well, I'm not a radiologist; so, I'm not required to know those things.)

THE WITNESS: Right.

Q. So, is the answer to that question, "No"?

A. Correct, yeah.

Q. Okay. And the reason the answer's "No," was because you're not a radiologist, and you're not required to know those things; right?

MS. YUEN: Asked and answered, Counsel.

Q. But, to that end: You're not a radiologist, and you're not required to understand how to diagnose a bleed in the brain, but you went to lengths to inquire of the medicine in that regard. So, if you could explain to me why you pursued one type of CT evaluation and not the other.

MS. YUEN: Note my objection; asked and answered. I'm going to direct him not to answer your question, Mr. Clarke. You've asked it many times.

MR. CLARKE: Yes, and I just don't -- I don't have an understanding of why he has an understanding as to one, but not the other. I know he's given --

MS. YUEN: He provided you with a response. Let's add it to the list of things to be addressed with Ms. Clerkin tomorrow at the conference. There's a conference tomorrow, if not earlier today if they respond.

MR. CLARKE: So, you're directing him not to answer that?

MS. YUEN: I am, because it's been asked and answered multiple times.

(Ex. 6, 167-169)

With respect to lines of inquiry 3-5, Dr. Kavinsky contends that plaintiffs' counsel repeatedly asked Dr. Kavinsky whether it was part of his custom and practice to review CAT scans and whether he did so in the case of the decedent. Dr. Kavinsky states that he testified multiple times that he only had the ability to review brain CT scans for the presence of blood accumulation, that he was not qualified to, and it was not his custom or practice to furnish findings or an

impression concerning scans of the chest/abdomen/pelvis. Additionally, Dr. Kavinoky asserts that since he has answered questions 3-5, no further deposition concerning the CAT scans on January 18, 2018 is necessary.

Dr. Kavinoky's counsel failed to specify a basis for the objection to question #3 and directed her client not to answer in violation of the Rules. To the extent that Dr. Kavinoky subsequently testified that he looked at the CAT scans for his own general curiosity (see 4<sup>th</sup> line of inquiry), there is no reason to seek a further deposition on this point. Counsel for Dr. Kavinoky asserted bases (ridiculous, absurd, inappropriate, and asked and answered) for objecting to lines of inquiry #4 and #5 are not countenanced by the rules. He subsequently did testify that as an emergency room physician he is not required to do either. In any event, the questioning does not satisfy the threshold requirement of relevancy to plaintiffs' claims or damages.

**Line of Inquiry # 6:**

Q. So, the only context a radiologist would have at Hudson Valley Hospital as to the reasoning for why you would be ordering a CAT scan, would be in information that accompanies the order?

MS. YUEN: Objection to form.

A. Yes.

Q. And so, if you didn't include information to accompany the order, the radiologist wouldn't have an understanding as to why you would be ordering a particular study?

A. No; they would --

MS. YUEN: Objection to the form. Don't answer that question, Dr. Kavinoky.

Mr. Clarke, your question also presupposes that the radiologist doesn't have access to other records in the patient's chart, which I think is an unfair question to Dr. Kavinoky.

He can't get into the mind of the radiologist, nor can he testify as to what the radiologist sees on his or her end when he or she receives an order. He can only testify as to what he does on his end in placing the order.

MR. CLARKE: Are you done with your --

MS. YUEN: So, I'm going to direct him not to answer your question as you have asked it.

MR. CLARKE: Are you done with your speaking objection?

MS. YUEN: I've directed him not to answer.

(Ex. 6, pp. 172-173)

The objection asserted is not among those included in the Rules and was therefore improperly asserted as was the direction not to answer. Insofar as Dr. Kavinoky subsequently testified that he did not know what records radiologists relied on or what records, including EMR, that they had access to, additional testimony on this line of inquiry is not necessary.

**Line of Inquiry # 7:**

Q. So, did you make a determination that he did not need a hematology consult?

A. Yes.

Q. And so, that was based on objective findings; correct?

A. It was based on the CT findings, the lab findings, the presentation; everything.

Q. And it was also based on some subjective findings; right?

A. Such as...?

Q. Such as, this is a situation where you felt like he didn't necessitate an opinion?

MS. YUEN: Objection to the form. Don't answer the question. The question's improper, Counsel.

A. Well, you already asked me if I --

MS. YUEN: Please don't mischaracterize the testimony. Ask a proper question.

MR. CLARKE: Okay. Another direction not to answer and a speaking objection.

(Ex. 6, pages 180-181)

Dr. Kavinoky subsequently testified concerning the factors he relied upon relating to a determination of the necessity of a hematology consult. Therefore, although the objection and direction not to answer on the basis that it was improper, no further inquiry in this regard is needed.

**Line of Inquiry # 8:**

Q. So, in order to properly guide him as to postdischarge instructions, you need to tell him where his rib is fractured; right?

A. You could give him instructions for all things in which to return for. You don't have to pigeonhole it to one rib.

Q. Right. So, would you tell him, "Mr. Gordineer, we've diagnosed you with a fractured rib. We don't know which one it is. It's on the left side somewhere. So, just be aware --"

MS. YUEN: Objection to the form. It's not a proper hypothetical. I think -- You're making up a new patient, which doesn't exist, with a set of clinical presentation --

MR. CLARKE: This, again, is a speaking objection.

MS. YUEN: Mark it for a ruling. I'm directing him not to answer the question, which is not even posed as a question.

MR. CLARKE: Okay. So, we'll continue.

MS. YUEN: Mark it for a ruling. Thank you. I have no issue, Counsel, with you asking Dr. Kavinoky concerning the chart --

MR. CLARKE: I don't need to hear what you have to say. I really don't.

MS. YUEN: Well, I need to say what I have to say in order to properly represent my client in the face of questions that are improperly formulated, improperly phrased, difficult to understand, borderline *Carvalho*, and asked and answered. So, I hope that's the last time I have to restate that again.

(Ex. 6, pages 220-222)

In this instance, counsel for Dr. Kavinoky's assertion of an objection before plaintiffs' counsel had finished articulating the question was clearly improper. Although an objection to form is allowable, it is not grounds to direct a witness not to answer (*see Veloso v Scaturro Brothers, Inc.*, 68 Misc3d 1024 [Sup Ct, NY County 2020]). The additional grounds provided by counsel (improperly phrased, difficult to understand, and something that might encroach upon the prohibitions of *Carvalho*) are not among the limited bases for directing a witness not to answer. Plaintiffs are entitled to a further deposition of the witness on this line of inquiry.

**Line of Inquiry # 9:**

Q. Okay, but I'm not asking what that says; right? I'm asking different questions; right?

A. You mean, hypothetically, what I would say at the time of discharge? And I'm telling you, I'm referring you to my note.

Q. Well, I'm going to present you a hypothetical: If you were an E.R. physician and you're reviewing a record, and the record doesn't specify which rib is fractured and you're trying to figure that information out, what are you going to do?

MS. YUEN: Objection to the form.

MS. YUEN: I'm also going to direct him not to answer that, because you're asking him a question within a scenario that doesn't include a clinical and physical assessment of the patient at the time of a presentation, and you can't ask him that.

It's speculative. It's inappropriate. Mark it for a ruling.

(Exhibit 6, pages 224-225)

Dr. Kavinsky contends that lines of inquiry #8 and #9 were impermissibly speculative and lacked adequate foundation or evidence in the record to support either hypothetical. Dr. Kavinsky asserts that despite these objections his testimony fully answered these questions.

As asserted during the course of the deposition, the objection was improper as it fails to include one of the limited bases upon which an objection and direction not to answer may be directed. Here, counsel has also asserted that there was lack of an adequate foundation for question #9. This is also not a basis for directing a witness not to answer (*Simmons v Minerly*, 16 Misc3d 1128[A] [Sup Ct, Dutchess County 2007]). However, to the extent it appears that Dr. Kavinsky ultimately answered question #9, no further deposition is necessary in this regard.

Dr. Kavinsky argues that the remaining questions in issue were "asked and answered" and were an attempt to badger, annoy, embarrass, and/or confuse him rendering them moot.

**Line of Inquiry # 10:**

Q. Does that impair the value of the particular study, if you know?

MS. YUEN: Note my objection. You can answer.

A. I don't know. That's a question for the radiologist.

Q. Okay. You know enough about it to know that it's a question for the radiologist?

A. That's right.

MS. JOHN: Just note my objection to that question.

MS. YUEN: Objection to the question. Don't answer it.

(Ex. 6, pages 261-262)

Although the objection to this question was improper as it did not specify grounds for the objection, the witness answered the question before counsel interposed the objection.

**Line of Inquiry # 11:**

Q. Do you know whether, based on your wet read, you reviewed this chest x-ray?

A. Based on the note, yes. Based on my note, it says that I put a wet read in.

Q. And looking at the wet read findings, are those consistent with what you see here on the screen?

MS. YUEN: You're asking him to interpret the chest x-ray as we sit here today?

MR. CLARKE: I'm not so sure what you're asking me.

MS. YUEN: You're asking him to read a chest x-ray, which you're throwing up on a screen during a Zoom deposition, which just doesn't have

the same resolution, nor can you visualize the same way one would necessarily at the time if the wet read was done, if one was done. And you're asking my client to interpret this via Zoom today at his deposition. I will direct him not to do that. (Ex. 6, pages 238-239)

**Line of Inquiry # 12:**

Q. And looking at the wet read findings, are those consistent with what you see here on the screen?

A. I'm not going to reread the x-ray today for multiple reasons. You can refer to my note, which has my wet read and has an attending read that supersedes anything that I have read.

Q. Okay. Are you refusing to answer my questions, Doctor?

A. In regards to reading this x-ray today: As my counsel pointed out, the image quality is poor; you can't Zoom in and out. All those things that I would have in a normal procedure. Second of all, my reading on that day is in the note, and so is the radiologist's.

Q. With respect to the quality of the image, could you explain to me why the quality of this particular image is substandard?

MS. YUEN: Note my objection.

A. It's a copy. It's -- I don't -- I'm not -- The radiology system is much different than a picture -- a copy of a picture. I mean, my reading is in the note. That's my read.

And then, you have an attending radiologist, who read it after me.

(Ex. 6, pages 240-241)

**Line of Inquiry # 13:**

Q. Are you able to identify on this image whether or not there's subcutaneous air?

A. Didn't we just say that I wasn't going to read this x-ray?

Q. That's your answer?

A. I'm not reading it. We just said it's not -- I'm not reading it.

Q. On this particular x-ray, are you able to identify the left ribs?

A. I'm not reading this x-ray.

MS. YUEN: Mr. Clarke, the witness has advised you that he will not, and cannot, read this copy of a chest x-ray that you're showing everyone on screen, via Zoom.

(Ex. 6, p. 248)

Questions 11-13 concern counsel's objection and direction to the witness not to answer questions concerning his interpretation of the chest x-ray during the deposition. In analyzing these questions, it is helpful to note that prior to question 11, Dr. Kavinsky had testified that he ordered the chest x-ray because his physical examination of the decedent Dr. Kavinsky caused him to suspect a rib fracture (Ex. 6, p. 234). He then authored a "wet read" or preliminary note concerning that exam (p. 234). His note indicated a "questionable pulmonary contusion. no subcu air" (p. 235) but did not include a rib fracture because based on his custom and practice if he had seen a rib fracture, he would have included it in his note (p. 236). He then testified that he could not recall if after seeing the CT scan report that showed a rib fracture whether he reviewed the x-ray to see if he could identify a rib fracture on the x-ray. It was in response to his inability to recall this information that plaintiffs' counsel sought to use the x-ray in an attempt to elicit testimony responsive to his question. Counsel improperly asserted a lengthy speaking objection concerning

the resolution and clarity of the x-ray when viewed via Zoom. These concerns were adopted and asserted by the witness in his refusal to answer these questions. However, when plaintiffs' counsel asked whether the witness could answer these questions with improved technology, Dr. Kavinsky stated that he would not read the x-ray because his reading was contained in the note he authored in the decedent's chart and his note was superseded by that of the radiologist.

Dr. Kavinsky and his counsel improperly refused to answer these questions. These questions concern an x-ray ordered and reviewed by Dr. Kavinsky and concerning which he wrote a note. The questions sought testimony relevant to plaintiffs' allegations in the bill of particulars including defendants' failure to timely acknowledge symptoms consistent with internal bleeding and failure to arrange for the appropriate diagnostic studies that would have demonstrated internal bleeding (NYSCEF Doc. 115). The fact that a subsequent read of the x-ray superseded Dr. Kavinsky's read, while also relevant, does not negate the importance of Dr. Kavinsky's testimony concerning these lines of inquiry and a further deposition of him in this regard is appropriate.

Additionally, counsel for Kavinsky is directed to review the Uniform Rules for the Conduct of Depositions. As noted, many of the improperly objected-to questions were ultimately answered by the witness rendering them unnecessary for a further deposition. However, that should not be misinterpreted as countenance by the Court of counsel's unnecessary and improper speaking objections which delayed the proceedings and resulted in wasting the resources of the Court and opposing counsel. Counsel is cautioned to refrain from such conduct in the future.<sup>7</sup>

Disputed lines of inquiry concerning Dr. Elson's testimony:

**Lines of Inquiry # 14 and 15:**

So let me ask you some questions about the 1/24 CT scan. And I am going to ask you what you see.

MR. POLINSKY: No, she is not answering questions about the 1/24 scan.

MR. CLARKE: Okay. And what's the basis?

MR. POLINSKY: Same basis that I said before.

MR. CLARKE: But there is no definitive determination that she didn't look at them.

MR. POLINSKY: There is no definitive determination that she did look at them.

MR. CLARKE: Okay. And so that's why we want her to look at them now.

MR. POLINSKY: She is not looking at them now. Move on. Mark it for a ruling.

MR. CLARKE: Is this a direction not to answer any questions about the scan?

MR. POLINSKY: To the extent that you are going to ask her questions about the scan itself, yes, of 1/24.

Q. Okay. Just so the record is clear, Doctor, I am going to share with you on the screen, do you see on the screen this is the 1/24/2018 CAT scan of the abdomen?

MR. POLINSKY: Counsel, she is not going to answer questions about that scan.

MR. CLARKE: Okay. I just want to make sure that the record is clear and you direct her not to answer on the record. And I will ask her questions, and you can direct her not to answer, okay.

.....

<sup>7</sup> In the absence of a demand by plaintiffs' counsel, the Court refrains from awarding costs associated with making this motion.

Q. Doctor, are you able to access this scan and tell me what images on this scan depict copious quantity of blood pneumoperitoneum in the peritoneal and pelvic cavity?

MR. POLINSKY: She is not answering that question, Counsel. Objection.

MS. YUEN: Note my objection.

MR. CLARKE: Okay. That's a direction?

MR. POLINSKY: Counsel, we can make it easier, and I will have a standing objection as to any questions for this witness as to the 1/24/18 image. You can do it however you want to do it. You can ask her 100 questions. You can ask her the one question. I am standing on the objection that she is not to answer that question because she did not interpret that reading or that film.

MR. CLARKE: Okay. So there is a direction not to answer that question I just asked?

MR. POLINSKY: That's right.

(Ex. G, pages 105-108)

**Line of Inquiry # 16:**

Q. Can you access any image on this particular study that indicates there is increased density around the herniated segment of the stomach, findings are suspicious for ulceration or bleeding from the stomach?

MR. POLINSKY: Objection. She is not going to answer that question.

MR. CLARKE: Okay. That's a direction not to answer, yes?

MR. POLINSKY: That's correct.

(Ex. G, p. 108)

**Line of Inquiry # 17:**

Q. Can you access the image on this particular study that best depicts there is also blood and fluid around the spleen on the left side?

MR. POLINSKY: Objection to the form. Counsel, she is not answering the question.

MR. CLARKE: Okay. That's a direction not to answer?

MR. POLINSKY: Correct.

(Ex. G, p. 108-109)

**Line of Inquiry # 18:**

Q. Can you locate on this particular study the images that best depict that splenic injury is not ruled out?

MR. POLINSKY: Objection. Don't answer the question.

MR. CLARKE: Okay. That's a direction not to answer?

MR. POLINSKY: That's what I said.

(Ex. G, p. 109)

The Court disagrees that the motion should be denied due to plaintiffs' failure to comply with the meet and confer rule. As demonstrated by Elson's opposition, plaintiffs' counsel and Dr. Elson's counsel did meet and confer on June 15, 2021 at which time Dr. Elson's counsel reiterated that he would object to any questions regarding Dr. Elson's interpretation of the January 24, 2018 CT scan. When counsel appeared at the June 24, 2021 compliance conference, this position was once again maintained by Dr. Elson's counsel. Insofar as Dr. Elson's counsel has repeatedly indicated that they would continue to object to the very questioning that plaintiffs seek to conduct

on a further deposition, a position counsel still maintains, it is unlikely that a “meet and confer” conversation would have been productive.

Additionally, the objections posed by Dr. Elson to the above lines of inquiry are not found among the limited exceptions as set forth in the Rules. Insofar as the lines of inquiry are relevant to plaintiffs’ claims, plaintiffs are entitled to a further deposition limited to these questions and those that flow naturally from them.

All other arguments raised on this motion and evidence submitted by the parties in connection thereto, have been considered by this Court, notwithstanding the specific absence of reference thereto.

In light of the foregoing, it is:

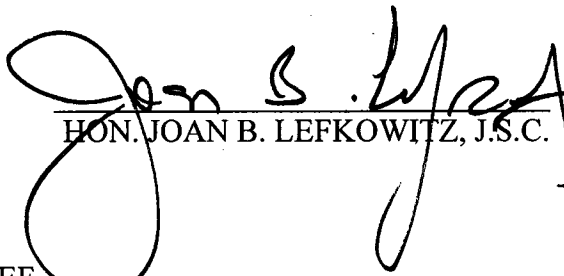
ORDERED that plaintiffs’ motion is granted to the extent that any time before November 5, 2021 as the parties may agree, defendants Dr. Kavinoky and Dr. Elson shall appear for a further deposition limited to the foregoing determinations and the questions which reasonably flow therefrom; and it is further

ORDERED that the parties are directed to appear for a virtual conference with Chief Court Attorney Referee Diane Clerkin via Microsoft Teams, or as the Court shall otherwise direct, in accordance with the Virtual Courtroom Protocol implemented in the Ninth Judicial District, on October 6, 2021 at 4:00 p.m. The parties will be contacted by the Court with further instructions concerning this appearance; and it is further

ORDERED that plaintiffs are directed to serve a copy of this Decision and Order, with notice of entry, upon defendants within five days of entry, with proof of such service filed to NYSCEF within three days thereof.

The foregoing constitutes the Decision and Order of this court.

Dated: White Plains, New York  
October 5, 2021

  
HON. JOAN B. LEFKOWITZ, J.S.C.

Service upon all counsel via NYSCEF  
CC: Compliance Part Clerk