

**Wong v Kaley**

2025 NY Slip Op 31484(U)

April 14, 2025

Supreme Court, New York County

Docket Number: Index No. 805288/2023

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. JOHN J. KELLEY PART 56M**

*Justice*

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JESSICA WONG and CHI LAI,  
Plaintiffs,

- v -

THOMAS KALEY, M.D., and MEMORIAL HOSPITAL FOR  
CANCER AND ALLIED DISEASES,

Defendants.

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INDEX NO. 805288/2023

MOTION DATE 03/27/2025

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 57, 58, 59

were read on this motion to/for DISCOVERY.

In this action to recover damages for medical malpractice based on alleged departures from good and accepted practice and loss of consortium, the plaintiffs move pursuant to CPLR 3124 to compel the defendants to provide an audit trail and metadata in connection with the medical records that they generated with respect to the care and treatment of the plaintiff Jessica Wong (hereinafter the patient). The defendants oppose the motion, and cross-move pursuant to CPLR 3103 for a protective order prohibiting the plaintiffs from obtaining the audit trail and metadata. The plaintiffs oppose the cross motion. The plaintiffs' motion is granted to the extent that they may take the deposition of a person employed by or affiliated with the defendants, who manages, and has knowledge of information technology and recordkeeping referable to the generation, accessing, and tracking of access to and amendment of the defendants' electronic medical records. Such deposition shall be limited to three hours, and further limited to questions concerning the details regarding the generation, accessing, and tracking of the access to and amendment of those records. The motion is otherwise denied, albeit without prejudice to renewal after the plaintiffs have taken the depositions both of that witness and of the defendants themselves, and upon a showing that the depositions did not

yield sufficient information concerning the integrity and veracity of those records. The cross motion is denied, without prejudice to renewal after the completion of those depositions.

According to the medical records that the defendants provided to the plaintiffs in the course of discovery, the defendants advised the patient that she should consider undergoing radiation therapy to treat her meningioma. The plaintiffs, however, do not recall that the defendants ever made that recommendation and, thus, question the integrity and veracity of the electronic chart.

To establish entitlement to an audit trail or metadata referable to electronic medical records, a plaintiff must demonstrate that the information to be gleaned therefrom is material, relevant, or necessary to the prosecution of the action, and must show, “beyond mere conjecture, that there is relevant information to be gleaned from metadata and audit trails which cannot be obtained from other sources, including the medical records and deposition testimony,” a showing that they have yet to make here (*Punter v New York City Health and Hosps. Corp.*, 2019 NY Slip Op 31065[U], \*7, 2019 NY Misc LEXIS 1906, \*16 [Sup Ct., N.Y. County, Apr. 12, 2019] [Silver, J.], *affd* 191 AD3d 563 [1st Dept 2021]; see *Dennehy v Harlem Hosp. Cent.*, 2018 NY Slip Op 32496[U], 2018 NY Misc LEXIS 4370, \*13 [Sup Ct, N.Y. County, Oct. 2, 2018]; *Czyz v Scherl*, 2017 NY Slip Op 31465[U], 2017 NY Misc LEXIS 2651, \*8 [Sup Ct, N.Y. County, Jul. 10, 2017] [Shulman, J.]; see generally *Aguilar v Immigration & Customs Enforcement Div. of U.S. Dept. of Homeland Sec.*, 255 FRD 350, 354 [SD NY 2008]; cf. *Vargas v Lee*, 170 AD3d 1073 [2d Dept 2019] [on renewal, plaintiff sustained the threshold burden of demonstrating that the portion of the audit trail at issue was reasonably likely to yield relevant evidence]). As the Appellate Division, First Department, explained in *Punter*, “the reversal of a Kings County trial order [in *Vargas v Lee* denying production of an audit trail] mentioned in the order on appeal did not effect a change in the law; the Second Department simply applied long settled principles of discovery” (*Punter v New York City Health and Hosps. Corp.*, 191 AD3d at 563). For a court to direct the production of an audit trail before other discovery methods are

exhausted, a plaintiff must make a good faith showing that the subject electronic records clearly had pages missing or lost, or were altered or amended (*see Punter v New York City Health and Hosps. Corp.*, 2019 NY Slip Op 31065[U], \*7-8, 2019 NY Misc LEXIS 1906, \*16-17; *see generally Heinrich v State of New York*, 73 Misc 3d 650, 656 [Ct Claims 2021]; *Moss v Mumford*, 2021 NY Slip Op 30427[U], \*5, 2021 NY Misc LEXIS 578, \*8 [Sup Ct, N.Y. County, Feb. 11, 2021] [Kelley, J.]; *Carbone v Mount Sinai Beth Israel Med. Ctr.*, 2020 NY Misc LEXIS 45032, \*5 [Sup Ct, N.Y. County, Dec. 23, 2020] [Kelley, J.]). The plaintiffs' allegation that they did not remember something that was set forth in the patient's electronic medical records is insufficient to trigger the production of an audit trail or metadata at this juncture.

Rather, the procedure that the court concludes is warranted would be for the plaintiffs to conduct the deposition of the defendants whose records are in dispute, and also a short deposition of any information technology employee or agent who managed and had knowledge of those records, in which the plaintiffs would question those witnesses about any alleged incompleteness or disparities in the records that had been produced. If the plaintiffs could thereafter show that the answers given at the depositions were insufficient fully to explain such incompleteness or disparities, then the court, upon renewal, would direct the production of an audit trail and metadata and, upon a further proper showing, might also direct a further limited deposition of those witnesses after the audit trail is produced.

Accordingly, it is,

ORDERED that the plaintiffs' motion is granted to the extent that the plaintiffs may take the deposition of a person employed by or affiliated with the defendants, who manages and has knowledge of information technology and recordkeeping referable to the generation, accessing, and tracking of access to and amendments of the defendants' electronic medical records, with the deposition of the information technology witness limited to three hours, and further limited to questions concerning the details regarding the generation, accessing, and tracking of the access to and amendment of those records, and the motion is otherwise denied, without

prejudice to renewal after the plaintiffs have taken the depositions both of the defendants and of that witness, and upon a showing that the depositions did not yield sufficient information concerning the integrity and veracity of those records; and it is further,

ORDERED that the defendants' cross motion is denied, without prejudice to renewal after the plaintiffs have conducted their depositions and the deposition of an appropriate information technology employee or agent; and it is further,

ORDERED that the depositions of the defendants and of the information technology specialist employed by or affiliated with the defendants, as described above, shall be conducted on or before June 24, 2025.

This constitutes the Decision and Order of the court.

4/14/2025  
DATE

  
JOHN J. KELLEY, J.S.C.

MOTION:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE
CROSS MOTION:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE