

Bernard v Graham

2025 NY Slip Op 34921(U)

December 16, 2025

Supreme Court, New York County

Docket Number: Index No. 805303/2023

Judge: John J. Kelley

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

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

-----X

ANDRE BERNARD and PAULA BERNARD,

Plaintiffs,

- v -

SCOTT GRAHAM, M.D., JAVD LODHI, CRNA,
ALEXANDER GRIF, M.D., THE NEW YORK AND
PRESBYTERIAN HOSPITAL and NEW YORK
PRESBYTERIAN-LAWRENCE HOSPITAL,

Defendants.

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MOTION DATE 09/15/2025

MOTION SEQ. NO. 002, 003, 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 92, 93, 94, 95, 96, 97, 98, 118, 123, 126

were read on this motion to/for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 99, 100, 101, 102, 103, 104, 105, 119, 124

were read on this motion to/for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 120, 125, 127

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, lack of informed consent, and loss of spousal consortium, the defendant Alexander Grif, M.D., moves pursuant to CPLR 3124 and 22 NYCRR Part 221 to compel the plaintiff Andre Bernard to answer questions, at a continued deposition, pertaining to the facts underlying his plea of guilty to certain criminal charges (MOT SEQ 002). The defendant Scott Graham, M.D., separately moves for the same relief (MOT SEQ 003). The defendant New York Presbyterian-Lawrence separately moves for the same relief as well (MOT SEQ 004). The plaintiffs oppose the motions. The motions are granted, and, on or before

January 30, 2026, the plaintiff Andre Bernard is directed to appear for a continued deposition, limited to questions concerning the facts underlying his pleas of guilty, as further described herein, and he shall fully respond to those questions.

CPLR 4513 provides that

“[a] person who has been convicted of a crime is a competent witness; but the conviction may be proved, for the purpose of affecting the weight of his testimony, *either by cross-examination*, upon which he shall be required to answer any relevant question, or by the record. The party cross-examining is not concluded by such person’s answer.”

(emphasis added). Although this statute makes proof that a witness was convicted of a crime admissible on the issue of his or her credibility, it does not establish an absolute and unqualified right to adduce evidence of a witness’s conviction in every situation (see *Tripp v Williams*, 39 Misc 3d 318, 320, 322 [Sup Ct, Kings County 2013], citing *Feldsberg v Nitschke*, 49 NY2d 636 [1980] [applying that principle to statutory recognition of admissibility of party deposition transcripts pursuant to CPLR 3117]). Rather, the trial court retains discretion as to whether to preclude evidence of a witness’s conviction, subject to review by the Appellate Division for an improvident exercise or abuse of that discretion (see *Davis v McCullough*, 37 AD3d 1121, 1122 [4th Dept 2007]; *Acunto v Conklin*, 260 AD2d 787, 789 [3d Dept 1999]; *Tripp v Williams*, 39 Misc 3d at 320-322). “A trial court is not without power to ensure the orderly and fair administration of justice merely because a particular item of evidence is technically admissible” (*Feldsberg v Nitschke*, 49 NY2d at 643; see *Cheatham v Ostrow*, 100 AD3d 819, 819 [2d Dept 2012]).

In a well-reasoned decision, the court in *Tripp* explained that

“[a]ppellate authority weighs in favor of permitting impeachment in a civil action with the criminal convictions of a party or witness. Where the trial court permitted the impeachment, the ruling has been upheld on appeal. (See *Morgan v National City Bank*, 32 AD3d 1264, 1265 [4th Dept 2006]; *Pope v New York City Tr. Auth.*, 244 AD2d 263, 264 [1st Dept 1997]; *Scotto v Daddario*, 235 AD2d 470 [2d Dept 1997]; *Murphy v Estate of Vece*, 173 AD2d 445, 446-447 [2d Dept 1991]; *Able Cycle Engines v Allstate Ins. Co.*, 84 AD2d 140, 142-143 [2d Dept 1981]; see also *Vernon v New York City Health & Hosps. Corp.*, 167 AD2d 2521 [1st Dept 1990].) Where the trial court precluded impeachment with a criminal conviction, and there were other grounds for reversal, the preclusion contributed to reversal (see *Sansevere v United Parcel Serv.*, 181 AD2d 521, 522-523, [1st Dept 1992];

Del Cerro v City of New York, 46 AD2d 898, 898-899 [2d Dept 1974]); or the preclusion was at least noted as error (see *Moore v Leventhal*, 303 NY 534, 538-539 [1952]; *Sauer v Diaz*, 300 AD2d 1136, 1137 [4th Dept 2002]). In two cases, the preclusion was found to be error, but ‘harmless.’ (See *Cruz v Long Is. R.R. Co.*, 22 AD3d 451, 454 [2d Dept 2005]; *Burton v New York City Hous. Auth.*, 191 AD2d 669, 670-671 [2d Dept 1993].)

“On the other hand, in *Acunto v Conklin* (260 AD2d 787 [3d Dept 1999]), the trial court ‘precluded cross-examination of plaintiff concerning a forgery conviction in an effort to impeach his credibility’ (see *id.* at 789). While ordering a new trial on other grounds, the Third Department noted that it could not say that the trial court ‘abused its discretion’ in precluding the cross-examination, stating, ‘It is within the sound discretion of Supreme Court to control the manner in which proof is presented at trial especially with regard to matters affecting a witness’s credibility and accuracy.’ (See *id.* at 790; see also *Davis v McCullough*, 37 AD3d 1121, 1122 [4th Dept 2007] [court did not abuse its discretion in curtailing cross examination concerning criminal convictions].) The Second and Fourth Departments have also spoken in terms of the trial court’s discretion in determining the use of criminal convictions for impeachment purposes. (See *id.*; *Morgan v National City Bank*, 32 AD3d at 1265; *Sauer v Diaz*, 300 AD2d at 1137; *Burton v New York City Hous. Auth.*, 191 AD2d at 670.)”

(*Tripp v Williams*, 39 Misc 3d at 320-321).

The overriding standard governing the “sound discretion” of the trial justice over the nature and extent of cross-examination is “whether the prejudicial effect of impeachment testimony far outweighs the probative worth of the evidence on the issue credibility” (*People v Sandoval*, 34 NY2d 371, 374 [1974]), a standard “easy of articulation but troublesome in many cases of application” (*id.* at 376). The principles articulated in *Sandoval* concerning the admission of evidence concerning prior convictions are applicable to civil, as well as criminal, actions (see *Badr v Hogan*, 75 NY2d 629, 634 [1990]; *McNeill v LaSalle Partners*, 52 AD3d 407, 409-410 [1st Dept 2008]; *Matter of Czop v Czop*, 21 AD3d 958, 960 [2d Dept 2005]; *Matter of Carlos V.*, 192 AD2d 661, 662 [2d Dept 1993] [“Whether the probative worth of evidence of specific criminal acts on the issue of credibility outweighs the risk of unfair prejudice is a matter for the hearing court”]; *Gedrin v Long Is. Jewish-Hillside Med. Ctr.*, 119 AD2d 799, 799 [2d Dept 1986]; *Tripp v Williams*, 39 Misc 3d at 322). As the Court of Appeals explained in *Sandoval* (34 NY2d at 376), “[e]vidence of prior specific criminal, vicious or immoral conduct should be admitted if the nature of such conduct or the circumstances in which it occurred bear logically

and reasonably on the issue of credibility.” “A demonstrated determination deliberately to further self-interest at the expense of society or in derogation of the interests of others goes to the heart of honesty and integrity” (*id.* at 377). “Lapse of time . . . will affect the materiality if not the relevance of previous conduct” (*id.* at 376), but “[c]ommission of perjury or other crimes or acts of individual dishonesty, or untrustworthiness (e.g., offenses involving theft or fraud, bribery, or acts of deceit, cheating, breach of trust) will usually have a very material relevance, whenever committed” (*id.* at 377).

In *Scotto v Daddario* (235 AD2d 470, 470 [2d Dept 1997]), the Appellate Division, Second Department, concluded that it was permissible for the trial court to allow the defendant to adduce evidence of the plaintiff’s prior conviction of driving under the influence of alcohol, even where the plaintiff’s sobriety was an issue relevant to the causation of the accident underlying the action. In holding that the prior conviction was relevant to the plaintiff’s credibility as a witness, and that these considerations of credibility outweighed the possible prejudice to the plaintiff, the Court explained:

“[w]e have held that in a criminal prosecution for driving while under the influence of alcohol as a felony ‘[t]he mere fact the defendant committed crimes similar to the one charged does not automatically preclude the prosecutor from using evidence of such crimes for impeachment purposes’ (*People v McAleavey*, 159 AD2d 646). In *McAleavey* we concluded that ‘the prior convictions were highly relevant on the issue of credibility and demonstrated the defendant’s willingness to deliberately further his self-interest at the expense of society’ (*People v McAleavey, supra*, at 646; see also, CPLR 4513; *Sansevere v United Parcel Serv.*, 181 AD2d 521, 522-523; cf., *People v Noonan*, 220 AD2d 811; *People v Moore*, 202 AD2d 966; *People v Marr*, 177 AD2d 964). Accordingly, the use of the prior criminal convictions to impeach the credibility of the plaintiff in this civil case was permissible notwithstanding that there was an issue with respect to his sobriety at the time of the accident which gave rise to this action”

(*Scotto v Daddario*, 235 AD2d at 470; see *Morgan v National City Bank*, 32 AD3d 1264, 1265 [4th Dept 2006] [“a court may, in its discretion, permit the use of a prior conviction of driving while intoxicated to impeach the credibility of a party who testifies at trial”]; *Reiner v City of New York*, 2011 NY Slip Op 30149[U], *4-5. 2011 NY Misc. LEXIS 561, *4-5 [Sup Ct, N.Y. County,

Jan. 24, 2011] [same]; see also *Ubiles v Halliwell-Kemp*, 167 AD3d 1611, 1612 [4th Dept 2018] [prior drug conviction admissible for the purpose of impeaching witness's credibility]).

Andre Bernard is now 73 years old. On June 12, 2017, when he was 65 years old, he pleaded guilty in the United States District Court for the Middle District of Florida to conspiracy to commit wire fraud, in violation of 18 USC § 1349, and making false statements in connection with enforcement of the federal Clean Air Act, in violation of 42 USC § 7413(c)(2)(A) and 18 USC § 2. Inasmuch as these convictions occurred a relatively short time ago, when Andre Bernard was an experienced adult, and involved crimes of individual dishonesty and untrustworthiness, there is a high likelihood that evidence of these convictions will be admissible at trial pursuant to CPLR 4513, and the particular facts underlying these convictions will likely be germane to a jury's assessment of his credibility (see *Burton v New York City Hous. Auth.*, 191 AD2d 669, 670 [2d Dept 1993] ["trial court improvidently exercised its discretion by entirely curtailing the defendant's cross-examination of the plaintiff and other of the plaintiff's witnesses concerning the underlying facts of his prior conviction of endangering the welfare of a minor and his alleged excessive corporal punishment of his former girlfriend's children"] [emphasis added]). The "cross-examination need not be limited strictly to the fact of a conviction, but may explore the nature of the underlying crime" (*Matter of B. Children*, 23 Misc 3d 1119[A], 2009 NY Slip Op 50841[U], *11, 2009 NY Misc LEXIS 1024, *32 (Fam Ct, Kings County, Feb. 5, 2009), citing *Able Cycle Engines, Inc. v Allstate Ins. Co.*, 84 AD2d 140, 145 [2d Dept 1981] [inquiry into the nature of the crime, not just the fact of the conviction itself, is proper to impeach the credibility of a witness at a civil trial; there is no exception for a crime for which a certificate of relief has been obtained]).

Inasmuch as the facts underlying Andre Bernard's convictions may be established by cross examination at trial, there is no reason why they should not be a fair subject a pretrial

deposition.¹ In this regard, CPLR 3101 provides that “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.” “The words ‘material and necessary’ as used in CPLR 3101(a) are ‘to be interpreted liberally to require disclosure . . . of any facts bearing on the controversy’ (*Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 [1968])” (*Matter of Steam Pipe Explosion at 41st Sts & Lexington Ave.*, 127 AD3d 554, 555 [1st Dept 2015]). The test of whether evidence is discoverable

“is one of usefulness and reason. CPLR 3101 (subd.[a]) should be construed, as the leading text on practice puts it, to permit discovery . . . ‘which is sufficiently related to the issues in litigation to make the effort to obtain it in preparation for trial reasonable’ (3 Weinstein-Korn-Miller, N. Y. Civ. Prac., par. 3101.07, p. 31-13)”

(*Allen v Crowell-Collier Publishing Co.*, 21 NY2d at 407). The party seeking disclosure need only demonstrate that the discovery sought is reasonably calculated or reasonably likely to lead to the discovery of information bearing on the claims in dispute in the action (see *Forman v Henkin*, 30 NY3d 656, 661, 666 [2018]; *Matter of Icahn Partners, L.P. v AllianceBernstein, L.P.*, _____AD3d_____, 2025 NY Slip Op 06132, *1 [1st Dept, Nov. 6, 2025]; *Crazytown Furniture, Inc. v Brooklyn Union Gas Co.*, 150 AD2d 420, 421 [2d Dept 1989]). “Any matter which may lead to the discovery of admissible proof is discoverable” (*A.O. v Diocese of Brooklyn*, _____AD3d_____, 2025 NY Slip Op 06713, * [2d Dept, Dec. 3, 2025], quoting *Bigman v Dime Sav. Bank of N.Y., FSB*, 153 AD2d 912, 914 [2d Dept 1989]; see *Holloway v Orthodox Church in Am.*, 232 AD3d 773, 774 [2d Dept 2024]; *Cajamarca v Osatuk*, 163 AD3d 619, 620 [2d Dept 2018]). Since the facts underlying Andre Bernard’s conviction may indeed be admissible at trial in connection with the issue of his credibility, those facts thus are discoverable. Even if the

¹ Since proof of conviction also may be proven “by the record” (CPLR 4513), any relevant certificates of conviction are also admissible in evidence to establish the fact of Andre Bernard’s convictions (see generally *People v Cardillo*, 207 NY 70, 71-72 [1912] [applying former Code of Civil Procedure § 832, from which CPLR 4513 is derived, and former Code of Criminal Procedure § 392, which applied civil rules to criminal actions, and held that it is improper to adduce evidence of prior convictions other than by the written record of conviction or by an admission by the witness on cross examination; hearsay statement by a public official is inadmissible]).

justice presiding over the trial of this action ultimately determines that evidence of the convictions is not admissible, whether evidence is admissible has no bearing on whether the requested information is discoverable (see *J.L. v Archdiocese of N.Y.*, 236 AD3d 569, 570 [1st Dept 2025]; *Fell v Presbyterian Hosp. in City of N.Y. at Columbia-Presbyt. Med. Ctr.*, 98 AD2d 624, 625 [1st Dept 1983]; see also *Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 376 [1991]).

Accordingly, it is,

ORDERED that the motion of the defendant Alexander Grif, M.D. (MOT SEQ 002), to compel the plaintiff Andre Bernard to submit to a continued deposition for the purpose of answering questions concerning the facts underlying his convictions of conspiracy to commit wire fraud, in violation of 18 USC § 1349, and making false statements in connection with enforcement of the federal Clean Air Act, in violation of 42 USC § 7413(c)(2)(A) and 18 USC § 2, is granted; and it is further,

ORDERED that the motion of the defendant Scott Graham, M.D. (MOT SEQ 003), to compel the plaintiff Andre Bernard to submit to a continued deposition for the purpose of answering questions concerning the facts underlying his convictions of conspiracy to commit wire fraud, in violation of 18 USC § 1349, and making false statements in connection with enforcement of the federal Clean Air Act, in violation of 42 USC § 7413(c)(2)(A) and 18 USC § 2, is granted; and it is further,

ORDERED that the motion of the defendant New York Presbyterian-Lawrence (MOT SEQ 004), to compel the plaintiff Andre Bernard to submit to a continued deposition for the purpose of answering questions concerning the facts underlying his convictions of conspiracy to commit wire fraud, in violation of 18 USC § 1349, and making false statements in connection with enforcement of the federal Clean Air Act, in violation of 42 USC § 7413(c)(2)(A) and 18 USC § 2, is granted; and it is further,

ORDERED that, on the court’s own motion, on or before January 30, 2026, the plaintiff Andre Bernard is directed to appear for a continued deposition, limited to questions concerning the facts underlying his pleas of guilty to conspiracy to commit wire fraud, in violation of 18 USC § 1349, and making false statements in connection with enforcement of the federal Clean Air Act, in violation of 42 USC § 7413(c)(2)(A) and 18 USC § 2, and he shall fully respond to those questions.

This constitutes the Decision and Order of the court.

12/16/2025
DATE

JOHN J. KELLEY, J.S.C.

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| MOTION 002: | <input type="checkbox"/> | CASE DISPOSED | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION | |
| APPLICATION: | <input checked="" type="checkbox"/> | GRANTED | <input type="checkbox"/> DENIED | <input type="checkbox"/> | <input type="checkbox"/> OTHER |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | SETTLE ORDER | | <input type="checkbox"/> | <input type="checkbox"/> REFERENCE |
| MOTION 003: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| APPLICATION: | <input type="checkbox"/> | CASE DISPOSED | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION | <input type="checkbox"/> OTHER |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | GRANTED | <input type="checkbox"/> DENIED | <input type="checkbox"/> | <input type="checkbox"/> |
| MOTION 004: | <input type="checkbox"/> | SETTLE ORDER | | <input type="checkbox"/> | <input type="checkbox"/> REFERENCE |
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