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| <b>Brown v Peretz</b>                                                                                                                                                                                                          |
| 2025 NY Slip Op 35496(U)                                                                                                                                                                                                       |
| January 22, 2025                                                                                                                                                                                                               |
| Supreme Court, Westchester County                                                                                                                                                                                              |
| Docket Number: Index No. 56536/2021                                                                                                                                                                                            |
| Judge: Lewis J. Lubell                                                                                                                                                                                                         |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER - MDPM PART

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.

P R E S E N T:

**HON. LEWIS J. LUBELL**  
**JUSTICE OF THE SUPREME COURT**

-----X  
GARY BROWN,

Plaintiff,

-against-

ANDREW M. PERETZ, M.D., STEPHEN E. KOCH, M.D.,  
SOMERS ORTHOPAEDIC SURGERY AND SPORTS  
MEDICINE GROUP, P.L.L.C., STEPHEN E. KOCH, M.D.,  
P.C., HUDSON VALLEY RADIOLOGISTS, P.C., and  
PUTNAM HOSPITAL CENTER,

Defendants.  
-----X

LUBELL, J.

**DECISION & ORDER**

Index No. 56536/2021

Seq. No. 1

The following papers were considered on this motion by plaintiff for, inter alia, an order pursuant to CPLR 3124, compelling defendants Andrew M. Peretz, M.D. and Stephen E. Koch, M.D., to appear for further depositions to answer questions that their attorneys directed them not to answer as well as other questions that flow therefrom, and for such other and further relief as this court deems just and proper.

Notice of Motion

Affirmation in Support of Adam J. Glatt, Esq.

Exhibits A through H

Affirmation in Opposition of Micah I. Friedberg, Esq.

Reply Affirmation of Anthony Pirrotti, Jr., Esq.

NYSCEF File

Upon the foregoing papers, this motion is determined as follows:

This action was commenced on or about May 12, 2021, when the plaintiff filed his summons and complaint seeking to recover damages against the defendants as a result of allegations of medical malpractice. The plaintiff claims that on February 13, 2019, he underwent lumbar spinal surgery at defendant Putnam Hospital Center ("Putnam Hospital") performed by defendant Andrew M. Peretz, M.D. ("defendant Peretz" or "Dr. Peretz"). Defendant Peretz had previously performed lower back surgery on the plaintiff in May 2013 that, according to the plaintiff, had caused a right foot drop which had resolved itself at the time of the second surgery. According to the plaintiff, a disc fragment/osteophyte from Dr. Peretz's February 2019 surgery impinged on his L5 nerve root causing a foot drop. Plaintiff alleges that he woke up the morning of February 15, 2019, with a right foot drop, numbness and pain. He was treated in the Emergency Department at Putnam Hospital and was diagnosed with right foot drop. Defendant Stephen

E. Koch, M.D. (“defendant Koch” or “Dr. Koch”) was the radiologist who performed an MRI on the plaintiff on February 15, 2019. Defendant Peretz diagnosed plaintiff with peroneal nerve palsy at that time. Thereafter, plaintiff allegedly sought a second opinion from the Hospital for Special Surgery (“HSS”) and an MRI was performed on June 19, 2020 (“HSS MRI”). Issue was joined on or about June 8, 2021, when defendants Dr. Koch, Stephen E. Koch, M.D., P.C., and Hudson Valley Radiologists, P.C., served and filed their verified answer. Defendants Dr. Peretz and Somers Orthopaedic Surgery and Sports Medicine Group, P.L.L.C. served and filed their verified answer on June 16, 2021.

As is relevant here, during discovery, at Dr. Peretz’s deposition, his counsel objected and directed his client not to answer any questioning regarding the HSS MRI. The following colloquy transpired at Dr. Peretz’ deposition:

Q. With regard to the HSS imaging, have you reviewed the HSS imaging?

A. No.

Q. All right. I’m going to show it to you.

\* \* \* \*

[Witness] you have the sagittal on the side.

Q. So the sagittal is in the corner.

A. I see.

Q. Right. And the sagittal then identified for you what level we’re talking about; right?

A. Correct.

Q. Do you want me to pull up that corner so you can see it?

MR. FRIEDBERG: Anthony, I’m going to object, you know, once you start asking him about the film. It’s not something he ever reviewed. It’s not a test that he ordered. It’s from a year and a half after his surgery. So I’m not going to allow him to answer questions on the grounds it’s palpably improper and prejudicial.

MR. PIRROTTI: Right. There’s only one problem with that statement, and it’s the seminal case of McDermott versus New York Eye and Ear which allows me to ask these exact questions of your client. If he can’t answer them, then he can’t answer them. But I’m allowed to ask, and he must tell me – give me responses. If he doesn’t know, his answer I don’t know, that’s fine by me.

MR. FRIEDBERG: I don’t have McDermott versus Eye and Ear with me. You know, if you want to take a pause, I’ll go look it up and read it, otherwise I’m going to object and –

MR PIRROTTI: Sure. I’ll give you McDermott. I’ll give you the citation to it.

\* \* \* \*

MR. PIRROTTI: Pursuant to an off-the-record discussion between myself and Mr. Friedberg, it is now 3:20, he’s taken the opportunity to take a look at the case law. We are at opposite ends of the legal points of view on this. He will direct his client not to answer the question, and I will then get a ruling or make a motion, whatever the court wants me to do, in order to get answers to questions that I’m entitled to

and he's going to oppose. Fair, Micah?

MR. FRIEDBERG: That's fair. Thank you (Peretz tr at 563-568 [NYSCEF Doc. No. 48]).

Also at issue on this motion are objections made at Dr. Peretz's deposition when plaintiff's counsel referred to entries made in his progress notes dated May 7, 2019, as follows:

Q. Okay. Now, the impression here says, "Mr. Brown appears to have a peroneal nerve palsy." Let me just stop there right before the comma. You say that he appears to. You are not stating it as a fact. You're just saying it appears. So you really don't know; right?

MR. FRIEDBERG: Objection; argumentative. Please rephrase.

MR. PIRROTTI: No, that's the question. Sorry.

MR. FRIEDBERG: I won't allow him to answer in that form.

MR. PIRROTTI: You're directing him not to answer. Could you mark that for a ruling, please, Michelle.

MR. FRIEDBERG: Hold on. For the record, I will not allow him to answer it in that form. If you rephrase it.

MR. PIRROTTI: Just so you know though Micah, objections to form are reserved for trial. It is --- objection to form under the Appellate Division case law and Supreme Court case law does not allow you to direct a client not to answer. But you're going to do whatever you want to do. And I'm just going to reserve it, make a motion on it, and we'll go from there.

MR. FRIEDBERG: Okay (Peretz tr at 493-494 [NYSCEF Doc. No. 48]).

\* \* \* \*

Q. All right. Now, you chose the word in the impression "Mr. Brown appears to have a peroneal nerve neuropathy." Why didn't you say Mr. Brown has a peroneal nerve neuropathy?"

MR. FRIEDBERG: Objection.

A. I think you're just semantically trying to word this in a way. But he has a peroneal nerve injury. I'll state that as a fact today.

Q. Right. Why didn't you say it then?

A. When we dictate, we just use certain words, you know, per se. We've been treating him for a peroneal nerve injury all along. We have evidence that it was there. Appears was a word. It doesn't mean -- it should not be taken out of context as you're attempting.

Q. I didn't choose the word appear. You did; right?

A. Mr. Brown has a neuropathy of the peroneal nerve.

Q. That's what you're saying now.

A. I know what the question is.

MR. FRIEDBERG: Just answer it (Peretz tr at 494-495 [NYSCEF Doc. No 48]).

At defendant Koch's deposition, his counsel also blocked questioning regarding the HSS MRI, as follows:

Q. I'm going to jump ahead to try to expedite everything. We're looking now at Exhibit 11, slide 37. And may I ask you, please, have you ever taken a look at the HSS images of the lumbar spine which were taken on June 19, 2020.

A. No, I have not.

Q. Okay. This is a T1-weighted study, series 13, image 7. Do you need to that blown up?

MR. COLLINS: Anthony, I'm not going to let him testify as to something he's never seen before.

MR. PIRROTTI: Okay. So that will be if I – no matter what I ask him, you're going to direct him not to answer the question?

MR. COLLINS: I will.

MR. PIRROTTI: Okay, So then not to argue, I'll just mark it for a ruling, and we'll get a ruling from the court.

MR. COLLINS: Okay (Koch tr at 157-158 [NYSCEF Doc. No. 49]).

This motion ensued. Plaintiff argues that the objections and directions not to answer were improper. Plaintiff argues that the objected to questions did not implicate any of the exceptions permitted by the court rules. According to the plaintiff, the objections improperly precluded him from exploring relevant testimony that went directly to the claims at bar—that defendant Peretz and Koch claimed that the images of post-operative MRI's take at Putnam Hospital did not "show a fragment/osteophyte," whereas the HSS MRI showed the "fragment/osteophyte in the same spot as the Post-Operative Images taken at Putnam Hospital" (Glatt Affirmation at 32 [NYSCEF Doc. No. 41]). Plaintiff argues that the fact that the HSS MRI was taken after the defendants' treatment was immaterial to this line of questioning insofar as the defendants both had experience reading MRI films. Further, the fact that defense counsel limited what their clients reviewed in preparation for the deposition did not preclude plaintiff from asking these questions.

Counsel for Dr. Peretz argues that the objection and direction not to answer was proper on the

grounds that the questions were palpably improper and prejudicial. Firstly, the HSS MRI did not bear in any way on Peretz's factual knowledge of the case. Further, Dr. Peretz was an orthopedic spine surgeon and not a radiologist. Therefore, counsel argues that he was not an expert in radiology or in interpreting MRIs. Lastly, plaintiff's attempt to question Peretz "about a single, static PDF of a single slice of a single imaging sequence of an MRI" was improper because MRIs are "dynamic, multi-imaging" studies (Friedberg Affirmation at 15 [NYSEC Doc. No. 50]). Accordingly, requiring Dr. Peretz, a non-expert in radiology, to interpret a single, static image of a dynamic study, that has no bearing on his factual knowledge nor speaks to the generally accepted medical practice in the community, would be patently improper and prejudicial.

In reply, plaintiff argues that Peretz's contention in opposition that he was not an expert in radiology and should not be required to testify outside of his area of specialty was an "unforgivable ruse" where Peretz testified that he has "seen tens and tens of thousands of MRIs" throughout his career (Pirrotti Reply Affirmation at 16-18 [NYSCEF Doc. No. 51]). Further, there was no objection at the deposition to Peretz answering question regarding other MRI images taken at Putnam Hospital. Further, plaintiff points out that this objection that the defendant should not be made to testify regarding the HSS MRI because it was outside of his expertise is being raised for the first time in opposition to this motion and was never made at the defendant's deposition.<sup>1</sup>

### Analysis

CPLR 3101(a) requires "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 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 Publishing Co.*, 21 NY2d 403 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, "a party does not have the right to uncontrolled and unfettered disclosure" (*Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408 [2d Dept 2009]; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). The trial 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 (*Auerbach v Klein*, 30 AD3d 451 [2d Dept 2006]; *Feeley v Midas Properties, Inc.*, 168 AD2d 416 [2d Dept 1990]).

Part 221 of the Uniform Rules of the Trial Courts (22 NYCRR), also known as the Uniform Rules for the Conduct of Depositions was promulgated in 2006. Part 221 was "designed to combat obstructive behavior during a deposition" (*Pedraza v New York City Transit Authority*, 2016 WL 270825, 8 (Sup Ct, NY County [2016])). Pursuant to the Uniform Rules for the Conduct of Depositions § 221.2, 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]). Additionally, the Uniform Rules for the Conduct of Depositions § 221.1(b) provides that "[s]peaking objections [are] restricted. Every objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent and, at the request of the questioning attorney, shall include a clear statement as to any defect in form or other basis of error or irregularity. Except to the extent permitted by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning."

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<sup>1</sup>Defendant Dr. Koch did not oppose this motion.

When a deponent refuses to answer a question, or an attorney instructs a deponent not to answer, such refusal or instruction “shall be accompanied by a succinct and clear statement of the basis therefor” (22 NYCRR § 221.2). Further, where a deponent does not answer a question, the deposition proceeds, and “the examining party shall have the right to complete the remainder of the deposition” (22 NYCRR § 221.2). CPLR 3115(b), (c), and (d) provide limited bases for making objections during depositions including errors which might be obviated if known promptly, disqualification of the person taking the deposition, and competency of witnesses or admissibility of testimony. However, CPLR 3115 does not provide a separate basis for refusing to answer questions or for an attorney to direct a deponent not to answer questions. Furthermore, the Uniform Rules for the Conduct of Depositions § 221.1(a) provides that 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” (22 NYCRR § 221.1[b]; *see Freidman v Fayenson*, 41 Misc. 3d 1236(A) [Sup Ct, NY County 2013], *affd sub nom. Freidman v Yakov*, 138 AD3d 554 [1st Dept 2016]). Accordingly, 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 the Uniform Rules for the Conduct of Depositions § 221.2. “[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, 706 [2d Dept 1990]).

It is against these standards that the depositions of defendants Peretz and Koch must be considered. A review of the transcripts reveals that defendants’ counsel improperly objected to and directed their clients not to answer questions regarding the HSS MRI in violation of the Uniform Rules. It is well-settled that a plaintiff in a medical malpractice action may question a defendant doctor at an examination before trial as to his factual knowledge of the case and for the purpose of establishing the generally accepted medical practice in the community (*see Johnson v New York City Health & Hosps. Corp.*, 49 AD2d 234, 236-237 [2d Dept 1975]; *see also McDermott v Manhattan Eye, Ear & Throat Hosp.*, 15 NY2d 20, 29-30 [1964]). Here, contrary to defendants’ contentions, it was neither palpably improper nor prejudicial for plaintiff’s counsel to pursue this line of questioning regarding the HSS MRI. The fact that the defendants might not have reviewed the MRI prior to their depositions was not a prohibition to plaintiff’s questioning. Further, counsel’s objections at the respective depositions on the grounds that the questioning was improper and prejudicial because the MRI was neither ordered by the defendants nor taken during the treatment at issue here were improper. Moreover, the objection as to form and direction not to answer was impermissible. None of these objections are among the enumerated exceptions provided for by the Uniform Rules for the Conduct of Depositions § 221.2 and therefore were improper.

Further, counsel’s argument raised for the first time on this motion that Dr. Peretz should not be made to testify about the HSS MRI because he was not qualified as an expert in the field of radiology is both disingenuous and irrelevant. It is well-settled that “[w]hile it is true that a medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in that field. . . the witness nonetheless should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable” (*Behar v Coren*, 21 AD3d 1045, 1046-1047 [2d Dept 2005]; *see Shectman v Wilson*, 68 AD3d 848, 849 [2d Dept 2009]). Here, Dr. Peretz testified that he had extensive experience reviewing MRIs in his role as an orthopedic surgeon and in fact testified that he has reviewed tens of thousands of MRIs throughout his career. It was therefore permissible for plaintiff to elicit testimony from Dr. Peretz regarding the HSS MRI, even if it was not performed in the course of his treatment of the plaintiff (*see Whelan v Mount St. Mary’s Hosp.*, 181 AD3d 1327 [4<sup>th</sup> Dept 2020]).

Further, Dr. Peretz also argues that any testimony regarding the HSS MRI is not relevant to his factual knowledge regarding his examination, diagnosis and treatment of the plaintiff herein. However,

contrary to defendant's contention, relevance is not one of the specific exceptions set forth in the Uniform Rules for the Conduct of Depositions § 221.2. In fact, it is well-settled that the scope of deposition examinations is broader than what is admissible at the time of trial (*see Allen v Crowell-Collier Publishing Co.*, 21 NY2d at 406; *White v Martins*, 100 AD2d 805 [1<sup>st</sup> Dept 1984]). The Uniform Rules for the Conduct of Depositions explicitly provide that a deponent must answer all questions, except to preserve a privilege, or when the question is palpably improper and would if answered cause significant prejudice (22 NYCRR 221.2). As the Uniform Rules for the Conduct of Depositions § 221.2 makes clear, it is not enough that a question is plainly improper. The Rules also require that answering the "palpably improper" question must also cause "significant prejudice" in order for counsel to direct the witness not to answer. Accordingly, counsel's direction to Peretz not to answer questions that he unilaterally deemed to be irrelevant, improper and prejudicial in contravention of the Uniform Rules, was improper and effectively interfered with plaintiff's counsel's efforts to depose the defendant.

Further, notably, defendant Koch did not oppose the plaintiff's motion insofar as it related to his deposition. Accordingly, plaintiff is also entitled to the further deposition of defendant Koch on this issue for the same reasons set forth herein.

However, as relates to the second line of questioning concerning Dr. Peretz's progress notes on May 7, 2019, regarding his knowledge of whether the plaintiff had peroneal nerve injury, while counsel improperly initially directed the defendant not to answer these questions, a review of the transcript in its entirety clearly demonstrates that he responded and provided meaningful testimony on this issue and in fact subsequently explained what he meant in his note when he wrote that the plaintiff "appears to have peroneal nerve palsy". A review of the entire deposition transcript reveals that while defense counsel initially objected, he eventually permitted and Dr. Peretz explained his entry. Further, Dr. Peretz testified extensively regarding his knowledge and diagnosis of plaintiff's peroneal nerve palsy. He testified regarding his diagnosis of the plaintiff's peroneal nerve palsy in February 2019 and described the multiple factors that were considered in making this diagnosis, including the patient's self-reported history, the absence of radicular pain, weakness of his dorsiflexion, foot numbness, and a review of an MRI that showed neurological impingement (Peretz tr at 57-58, 60-61, 74-76, 405, 414 [NYSCEF Doc. No. 48]). Further, defendant Peretz testified without objection to his February 15 and 26, 2019 notes that he "knew" and had diagnosed the plaintiff's peroneal nerve palsy (Peretz tr at 370, 377, 388, 399, 405 [NYSCEF Doc. No. 48]). Thus, while an objection as to form is not among the proper exceptions to direct a witness not to answer a question at a deposition as set forth in the Uniform Rules, taking Dr. Peretz's deposition testimony as a whole, plaintiff was able to meaningfully elicit testimony regarding the otherwise objected to question. Having elicited from Dr. Peretz extensive testimony regarding his diagnosis and knowledge of the plaintiff's peroneal nerve injury and palsy, this court is not convinced that a further deposition of Dr. Peretz on this issue is required.

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

Accordingly, it is hereby

**ORDERED** that the plaintiff's motion is granted insofar as, on or before March 7, 2025, defendants Andrew M. Peretz, M.D. and Stephen E. Koch, M.D. shall appear for their further continued depositions limited to questioning regarding the HSS MRI and all questions that flow therefrom; and it is further

**ORDERED** that, in all other respects, the plaintiff's motion is denied; and it is further

**ORDERED** that within five (5) days of the date of this decision and order, the plaintiff shall serve a copy of this decision and order on all parties with notice of entry; and it is further

**ORDERED** that proof of service of this decision and order with notice of entry shall be filed with the court within three (3) days after service has been completed; and it is further

**ORDERED** that all parties shall appear for an in-person Compliance Conference on March 13, 2025, at 9:30 AM.

The foregoing constitutes the decision and order of this Court.

**Dated: White Plains, New York**  
**January 22, 2025**



**HON. LEWIS J. LUBELL**  
**JUSTICE OF THE SUPREME COURT**