

Rexrode v Poppers

2026 NY Slip Op 31569(U)

April 10, 2026

Supreme Court, New York County

Docket Number: Index No. 805131/2024

Judge: Kathy J. King

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHY J. KING PART 06

Justice

JASON REXRODE, Plaintiff, INDEX NO. 805131/2024, MOTION DATE 12/05/2025, MOTION SEQ. NO. 002

- v -

DAVID M. POPPERS M.D., NYU LANGONE HEALTH SYSTEM, and NYU LANGONE HOSPITAL,

DECISION + ORDER ON MOTION

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 51, 52, 53, 54

were read on this motion to/for DISCOVERY

Upon the foregoing documents, Plaintiff moves for an Order pursuant to CPLR 3124 compelling Defendant David M. Poppers, M.D. ("Dr. Poppers"): (1) to produce materials he has used to make presentations concerning the use of pill cams and video capsule endoscopy materials ("VCE materials") and (2) to appear for further examination before trial to answer relevant areas of inquiry that were improperly foreclosed by Defense at the August 25, 2025 deposition.

Defendants oppose Plaintiff's motion.

BACKGROUND

This medical malpractice action arises out of Defendant Dr. Popper's alleged negligent failure to administer a patency capsule prior as part of the video examination of Plaintiff's gastric tract. The essence of Plaintiff's claim is that despite Plaintiff's known history of small bowel obstruction and existing colonic strictures, Dr. Poppers did not employ a patency capsule before ordering the pill cam. As a result, Plaintiff alleges that the pill cam remained in Plaintiff's small

bowel and eroded the wall of the bowel several months later, necessitating numerous surgeries and causing Plaintiff's inability to eat solid food and other still-ongoing complications.

On August 26, Plaintiff's counsel requested by email that Defendants produce Dr. Poppers' VCE materials. In response, on October 29, 2025, defense counsel indicated that Defendant was not in possession of any presentation materials concerning the use of pill cams at any professional conference pre-dating the dates of alleged negligence.

Plaintiff now moves to compel discovery.

DISCUSSION

THE VCE MATERIALS

In support of the motion, Plaintiff submits that materials authored or used by Dr. Poppers concerning Video Capsule Endoscopy (VCE) are material and necessary for the prosecution of this action. During his deposition, Dr. Poppers testified to having given numerous presentations concerning the use of "pill cams" and acknowledged being in possession of related materials. Plaintiff asserts that despite a formal request for these records, Dr. Poppers has failed to produce them to date.

In opposition, Defendants contend that a search was conducted, and the only located materials post-date the underlying incident. Defendants argue these materials are not discoverable because evidence of subsequent remedial measures or post-incident procedures is inadmissible as a matter of law.

Pursuant to CPLR 3101(a), there shall be "full disclosure of all matter material and necessary in the prosecution or defense of an action." The words "material and necessary" are to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial. However, where a party's search for requested documents

is unsuccessful, a mere statement by counsel is insufficient. To satisfy their discovery obligations, Defendants must provide a Jackson Affidavit—a sworn statement from a person with personal knowledge of the search. This affidavit must detail: the specific locations searched; the manner in which the search was conducted; and confirmation that the search was diligent and unsuccessful (*see Jackson v City of New York*, 185 AD2d 768 [1st Dept 1992]).

Here, while the Court finds that the teaching materials are discoverable regardless of their date, to the extent that Defendants claim certain materials (specifically those pre-dating the incident) do not exist or cannot be found, a formal Jackson affidavit is required to explain the efforts made to locate them.

Accordingly, Plaintiff's branch of the motion is granted. Defendants are directed to produce all responsive materials or, alternatively, provide a *Jackson* affidavit detailing the search for the missing records within thirty (30) days of this order.

CONTINUED DEPOSITION OF DR. POPPERS

The Uniform Rules for the Conduct at Depositions (22 NYCRR § 221.2) significantly restrict an attorney's authority to direct a deponent not to answer. Under this rule, a deponent must answer all questions except to preserve a privilege or right of confidentiality; to enforce a court-ordered limitation; or when the question is "plainly improper" and would cause "significant prejudice." Moreover, it is well settled that the scope of disclosure at a deposition is broader than at trial. Objections—other than as to form—are preserved for trial, and questioning should be permitted "freely" unless the inquiry is palpably irrelevant or violates a recognized privilege (*Hildebrandt v Stephan*, 42 Misc 3d 719 [Sup Ct 2013]; *Johnson v NYC Health & Hosps. Corp.*, 49 AD2d 234 [2d Dept 1975]).

I. QUESTIONS REGARDING MEDICAL LITERATURE (THE AGA GUIDELINES)

Defense counsel directed Dr. Poppers not to answer questions regarding American Gastroenterological Association (AGA) guideline statements, arguing that the witness had not first acknowledged the materials as “authoritative.”

In opposition, Defendants rely on *Ithier v Solomon* (59 AD2d 935 [2d Dept 1977]). However, the Court finds *Ithier* is not controlling here. As Plaintiff correctly notes, *Ithier* predates the 2006 adoption of Part 221 of the Uniform Rules, which was specifically enacted to curb the practice of blocking testimony through speaking objections. Furthermore, the ability to test a physician’s knowledge and awareness of clinical guidelines is “material and necessary” to the prosecution of a malpractice action. A plaintiff is not required to establish authoritativeness during a discovery deposition as a prerequisite to asking if a physician is aware of—or agrees with—standard industry guidelines (*see Hildebrandt, supra*).

II. QUESTIONS REGARDING FACTUAL KNOWLEDGE AND RETROSPECTIVE REVIEW

The Court finds that defense counsel improperly blocked answers to the following:

- “How and when did you learn that the pill cam had eroded Jason’s small bowel?”
- “Have you ever regretted not using a patency capsule?”
- “What does the phrase standard of care mean to you?”

These questions do not fall within the narrow exceptions of 22 NYCRR § 221.2. They seek to elicit the witness’s factual knowledge of the patient’s outcome, his clinical judgment, and his understanding of the medical standards governing his practice. To the extent Defendants believe these questions seek legal conclusions or are “argumentative,” such objections are preserved for the trial court; they do not justify a mid-deposition instruction to remain silent.

III. BOARD CERTIFICATION AND EDUCATION MATERIALS

The Court notes that while objections were raised regarding Dr. Poppers' board certification lapse and his educational materials, the witness did, in fact, answer these questions "over objection." Because the testimony was provided, there is no basis to resume the deposition on these specific points.

Accordingly, Plaintiff's motion to resume the deposition of Dr. Poppers is granted as to the questions concerning medical literature, the AGA guidelines, and the physician's retrospective knowledge and understanding of the standard of care.

Based on the foregoing, it is hereby

ORDERED that the branch of Plaintiff's motion seeking the production of teaching and presentation materials authored or used by Dr. Poppers concerning video capsule endoscopy (VCE) is granted; and it is further

ORDERED that, within thirty (30) days of service of a copy of this Order with notice of entry, Defendants shall produce all such materials; and it is further

ORDERED that, in the event Defendants maintain that no such materials pre-dating the incident exist, Defendants shall, within thirty (30) days of service of this Order, provide a Jackson Affidavit from a person with personal knowledge of the search, detailing the specific locations searched, the manner of the search, and the results thereof; and it is further

ORDERED that the branch of Plaintiff's motion seeking to resume the deposition of Dr. Poppers is granted to the following extent:

1. The resumed deposition shall be limited to three and a half (3.5) hours in duration; and

2. The scope of questioning shall be restricted to the subject areas where the witness was previously instructed not to answer, specifically: (i) the witness's knowledge of and agreement with AGA guidelines and medical literature; (ii) the witness's factual knowledge of the patient's injury; and (iii) the witness's understanding of the applicable standard of care, and those questions that flow from his responses; and it is further

ORDERED that the resumed deposition of Dr. Poppers shall be held within sixty (60) days of the date of this Order, at a date, time, and place mutually agreed upon by the parties; and it is further

ORDERED that all other branches of Plaintiff's motion are hereby denied.

This constitutes the Decision and Order of the Court.

4/10/2026
DATE

Kathy J. King
KATHY J. KING, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE