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

PRESENT: EILEEN BRANSTEN PART 6
Justice

BARAGANO,
Plaintiff,

- v -

VAYNSHELBAUM,
Defendants

INDEX NO. 110768/03
MOTION DATE 3/15/05
MOTION SEQ. NO. 01
MOTION CAL. NO. 14

The following papers, numbered 1 to 3 were read on this motion to preclude.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☑ No

FILED
JUL 27 2005
NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, It is ordered that this motion

IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 6-16-05

EILEEN BRANSTEN, *J.S.C.*

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART SIX

----------X

MARLENE BARAGANO,

Plaintiff,

-against-

Index No.: 110768/03
Motion Date: 3/15/05
Motion Seq. No.: 01
Motion Cal. No. 14

YEFIM VAYNSHELBAUM and PARK AVENUE MEDICAL IMAGING AND MAMMOGRAPHY, P.C.,

Defendants.

----------X

PRESENT: EILEEN BRANSTEN, J.

Defendants Yefim Vaynshelbaum ("Dr. Vaynshelbaum") and Park Avenue Medical Imaging and Mammography, P.C. (collectively "Defendants") move for an Order precluding plaintiff Marlene Baragano ("Ms. Baragano") from "proffering or attempting to admit any evidence, or making any verbal references during the trial of this action, regarding any 'statements' and/or 'findings,' and/or 'directives,' and/or 'decrees' made by the New York State Department of Health, the Office of Professional Medical Conduct and the U.S. Food and Drug Administration, pertaining to medical treatment purportedly administered by [Defendants] to individuals who are not parties to this action during a period of time beginning after the cessation of [Ms. Baragano's] treatment" with Defendants. Order to Show Cause, at ¶ 1. Their motion is denied.

Background

On January 8, 2001, Ms. Baragano underwent a routine mammogram at Park Avenue Medical Imaging and Mammography, P.C. Affirmation in Opposition ("Opp. Aff."), at 2.

Dr. Vaynshelbaum interpreted Ms. Baragano's films and allegedly did not order any further diagnostic tests. *Id.*

In September 2002, Ms. Baragano underwent another mammogram, this time at a different facility. Opp. Aff., at 2. The findings in the right breast were suspicious and a core biopsy confirmed cancer. *Id.* A partial mastectomy and a re-excision were subsequently performed and confirmed that the cancer had metastasized to Ms. Baragano's lymph nodes. *Id.*, at 2-3.

In June 2003, Ms. Baragano commenced this action against Defendants, alleging that Dr. Vaynshelbaum "incorrectly interpreted [her January 8, 2001] mammogram films and failed to perform any further diagnostic tests which were clearly warranted due to the asymmetry of Ms. Baragano's breasts on the mammogram films." Opp. Aff., at 2.

During the course of the litigation, Ms. Baragano learned that the New York State Department of Health ("DOH") undertook a quality assurance review of mammogram films that Dr. Vaynshelbaum had interpreted. *Id.*, at 3. A press release issued by the Commissioner of DOH and available on the Internet states that on November 5, 2003, DOH announced that "women who had their most recent mammogram at Park Avenue Medical Imaging and Mammography, PC * * * should immediately be rescreened." Opp. Aff., Ex. A. Rescreening was deemed necessary because:

> "Three independent reviews by [DOH, the U.S. Food and Drug Administration ("FDA") and the Centers for Medicare and Medicaid Services ("CMS")] have recently been conducted at this facility. The first review, initiated by the [DOH] Cancer Services Program, included the women in the NYS Healthy Women's Partnerships who were screened at Park Avenue Medical Imaging, P.C.
>
> - "A review of a random sample of patients' films undertaken by a medical consultant to [DOH] found that in 74% of cases there was a risk for missed cancer either because the appropriate diagnostic tests for abnormal findings were not ordered, or because the technical quality of the films was poor.
>
> - "At the request of the FDA, the American College of Radiology ("ACR") conducted an additional mammography review. The ACR found areas of concern in both the technical quality of the films and with the interpretations by the doctor.
>
> - "CMS initiated its own review and found quality of care concerns in 53% of cases and the need for rescreening in 17.5% of the sample it reviewed."

Id. The press release further disclosed that on October 2, 2003, the FDA directed Park Avenue Medical Imaging and Mammography, P.C. to notify "at-risk patients seen between August 12, 2001 and July 25, 2003 and their physicians of the potential health risk because the mammograms performed at the facility during the review period were 'so inconsistent with established quality standards as to pose a significant risk to individual or public health.'" *Id.* It is unclear whether Ms. Baragano received any notification because she was treated in January 2001, just eight months earlier than those who were seen during the review period.

Ms. Baragano further establishes--by submitting a copy of a Consent Agreement and Order issued by the New York State Board for Professional Medical Conduct ("Misconduct Order")--that Dr. Vaynshelbaum's license to practice medicine in the state of New York has been "limited so as to preclude [him] from performing breast cancer detection evaluations." Opp. Aff., Ex. 2, Misconduct Order at 2.

Defendants now seek a broad Order essentially precluding admission of any evidence related to findings by DOH, the Office of Professional Medical Conduct ("OPMC") or the FDA. Defendants' Order to Show Cause. In support of their application, Defendants attach materials from the Commissioner of DOH that have been posted on the Internet. Other than the Misconduct Order (which Ms. Baragano includes with her opposition papers), the Court has not been provided with any actual official administrative reports or findings.

Acknowledging that DOH reports, Statements of Deficiencies and OPMC findings are generally admissible at trial, *see*, Affirmation (in Support of Preclusion) ("Supp. Aff."), at ¶ 5(a), Defendants assert (apparently based on the Internet DOH materials) that the governmental findings here relate solely to a time period post-dating Ms. Baragano's treatment and that they have no relationship to this case. "As such," Defendants urge, "any evidence regarding such findings is not probative of any issues involved in this lawsuit and would unduly prejudice the Defendants if admitted during trial." Affirmation [in Support of Motion] ("Supp. Aff."), at ¶ 4.

Specifically, Defendants point out that DOH only recommended that "patients who had their most recent mammogram" at Park Avenue Medical Imaging and Mammography, P.C. be rescreened. Ms. Baragano's most recent mammogram was *not* performed at the facility; therefore, Defendants submit that she does not fall into the class of women addressed. Defendants further point out that the FDA's determination that they notify patients of a potential health risk applies only to women seen between August 2001 and July 2003. Defendants again set forth that Ms. Baragano does not fall into this category as her mammogram was interpreted months earlier, in January 2001. Supp. Aff., at ¶ 5. In sum, Defendants vehemently oppose introduction of any of these administrative findings because they involve "subsequent acts unrelated to the treatment of Ms. Baragano." *Id.*, at ¶ 16.

Ms. Baragano counters that the administrative findings as to Dr. Vaynshelbaum are relevant and "highly probative to show that [he] lacked the skills, knowledge and ability to interpret Ms. Baragano's mammograms." Opp. Aff., at 6. She seeks to introduce the findings "as actual proof that he was unqualified to properly interpret Ms. Baragano's mammographic studies in January of 2001." *Id.* In support of her position, Ms. Baragano attaches a copy of the Misconduct Order and DOH press releases. She argues that findings by DOH and OPMC are admissible pursuant to Public Health Law § 10(2) and New York case law. Opp. Aff., at 4.

Ms. Baragano further points out that allowing Dr. Vaynshelbaum to testify regarding his qualifications without allowing the jury to hear about the finding of professional misconduct and limitations on his practice of medicine would perpetrate a fraud on the legal system. Opp. Aff., at 8. Ms. Baragano urges that once a witness offers expert testimony, the opposing party must have the opportunity to impeach the expert's qualifications and credentials, which will undoubtedly affect the weight of the evidence. Opp. Aff., at 9. Indeed, Ms. Baragano points out, an expert in a medical malpractice case may be cross-examined regarding suspensions from the practice of medicine

Defendants respond that administrative reports and findings should only be admitted into evidence if they relate directly to the incidents underlying the suits. Defendants further assert that while it is true that an expert witness can be impeached at trial by an attack on qualifications, the rule must be different when dealing with a defendant because the evidence is more prejudicial in that context.

Analysis

New York law firmly establishes that evidence "is relevant if it has any tendency in reason to prove the existence of any material fact * * *. [It is relevant, moreover, if] it makes determination of the action more probable or less probable than it would be without the evidence. * * * Not all relevant evidence is admissible as of right, however. Even where technically relevant evidence is admissible, it may still be excluded by the trial court in the

exercise of its discretion if its probative value is substantially outweighed by the danger that it will unfairly prejudice the other side or mislead the jury." *See, People v. Scarola*, 71 N.Y.2d 769 (1988); Richardson, Evidence § 4-101 (Prince 11th ed.).

Trial courts have broad discretion in ruling on the admission of evidence. *See, e.g., Messinger v. The Mount Sinai Medical Ctr.*,15 A.D.3d 189 (1st Dep't 2005).

Defendants' arguments--that any and all administrative findings by DOH, OPMC and the FDA are entirely irrelevant and should automatically be excluded because they do not particularly relate to Ms. Baragano or the exact time period in which she was treated by them--are misplaced.

New York courts have authorized admission into evidence of OPMC and other administrative findings provided, among other things, that the information is relevant to the issues being litigated. In *Bogdan v. Peekskill Community Hosp.*, 168 Misc. 2d 856 (Sup. Ct. Westchester Cty. 1996), for example, the court analyzed whether OPMC and other administrative findings were admissible in a breach-of-contract action brought by Dr. Bogdan who was suspended by defendant hospital. The OPMC reports involved investigations of misconduct in cases that culminated in Dr. Bogdan's suspension. After thoroughly analyzing whether an OPMC order should be admitted into evidence through the public document exception to the hearsay rule, *see*, CPLR 4520, the court concluded that a redacted report was admissible. *Id.*, at 861. The court further allowed into evidence a

redacted OPMC report pertaining to another doctor at the hospital because it was relevant to whether the hospital suspended Dr. Bogdan in good faith.

Relevance, however, is not the sole consideration. Courts must also weigh the probative value of evidence against the potential prejudice that would inure if it were admitted. In cases in which administrative findings have been made as a result of an investigation into the very conduct that is the subject of a malpractice lawsuit, New York courts have held that the findings are admissible because of their significant probative value. *See, Cramer v. Benedictine Hosp.*, 190 Misc. 2d 191 (Sup. Ct. Ulster Cty. 2002) (redacted copy of DOH report prepared after investigation of incident underlying plaintiff's medical malpractice lawsuit admitted into evidence), *aff'd* 301 A.D.2d 924 (3d Dep't 2003); *cf.*, *Smith v. Delago*, 2 A.D.3d 1259 (3d Dep't 2003) (plaintiff entitled to production of DOH Statement of Deficiencies prepared after investigation of the care that he received).

When administrative findings do not directly relate to allegations in the suit, but rather, pertain to a particular incident that does not involve the plaintiff, courts have often refused to allow their introduction into evidence because the potential for prejudice is too great. Underlying the reluctance of courts to admit such findings is the well known evidentiary principle that, generally, it is improper to prove that a person acted in a certain manner on a particular occasion by showing that the actor acted in a similar manner on a

different, unrelated occasion. *Matter of Estate of Brandon*, 55 N.Y.2d 206 (1982); *Rosso v. Beer Garden, Inc.*, 12 A.D.3d 152 (1st Dep't 2004).

Maraziti v. Weber, 185 Misc. 2d 624 (Sup. Ct. Dutchess Cty. 2000) (Marlow, J.), for example, involved allegations of negligent obstetrical care and mismanagement of labor resulting in significant brain damage to Michael Maraziti. Plaintiff moved to introduce into evidence OPMC's findings of prior negligent acts of defendants, specifically, the reports of hearings that resulted in the revocation of a defendant's medical license and the restriction of obstetrical practice as to other defendants. Plaintiff argued that the information would "give evidence as to defendants' 'wrongful conduct' and 'impeach their credibility.'" *Id.*, at 625.

The court concluded that:

> "while OPMC's findings concerning plaintiff's case are clearly relevant, information from reports of OPMC unrelated to the instant case would be of marginal relevance at best, but would be likely to unduly prejudice the jury. The jury should not be provided the opportunity, or be impliedly encouraged, to assume that the facts underlying one incident would necessarily govern a finding about a subsequent incident, solely because the two events are substantively similar."

Id., at 626. The court determined that although legitimate public policy would be furthered by exposing harmful medical practices, allowing plaintiff to introduce proof of all OPMC reports dealing with defendants would be "unwise and most unfair." Defendants would

have to justify and explain prior conduct unrelated to plaintiff, resulting in a distracting series of mini-trials and negatively impacting the jury's objectivity.

Here, there can be little doubt that the administrative findings are relevant to Ms. Baragano's action. The quality of defendants' mammography in January 2001 is at the very heart of this case. If DOH, OPMC or the FDA issued determinations regarding the substandard quality of defendants' August 2001 mammography (and the Court has yet to see any of these official administrative reports or findings), those conclusions would make it probable that the quality of mammography was poor just a few months earlier when Ms. Baragano was treated.

Additionally, courts have discretion to permit a party to ask its opponent's medical expert about suspensions from the practice of medicine. *See, Alonso v. Powers*, 220 A.D.2d 311 (1st Dep't 1995). Application of a different rule when a party qualifies as an expert would paint an inaccurate picture for the jury and could result in a tremendous injustice.

If Dr. Vaynshelbaum testifies at trial and his qualifications are elicited, the failure to inform the jury that he is no longer authorized to perform breast cancer detection evaluations would be misleading and give the jury an incomplete, skewed impression of the facts. Informing the jury of Dr. Vaynshelbaum's status as a licensed physician without also making it aware of his inability to perform breast cancer evaluations, would increase the likelihood that the jury would give more credence to his testimony than it would if aware that he is no

longer permitted to screen for breast cancer anymore. As such, it would deprive the jury of the opportunity to fairly weigh any evidence presented by Dr. Vaynshelbaum.

A conclusion that these administrative findings are altogether irrelevant defies common sense. The findings are highly probative of the quality of Defendants' mammography at the relevant time because they allegedly concern the general quality of services that Defendants rendered a mere few months after Ms. Baragano's treatment. The restriction on Dr. Vaynshelbaum's practice of medicine, moreover, is unquestionably relevant to his qualifications and is therefore very valuable in assessing the credibility of his testimony.

The high probative value of the administrative findings heavily militates in favor of their admissibility. Introducing the evidence to the jury would not be unfairly prejudicial or misleading. To the contrary, the evidence would provide a more complete and accurate portrayal of the facts. This is not a case where plaintiff's objective is to propound examples of prior bad acts, hoping that the jury infers that there was like behavior here. This is a case where plaintiff simply seeks to paint a complete portrait of Defendants' qualifications and not allow the trial to be based on a series of half truths. Additionally, the findings are not based on one isolated incident and their admission into evidence would not require inquiry into individual cases or result in a distracting series of mini-trials.

Case law supports admission of the administrative findings and orders. *Waller v. Hayden*, 885 P.2d 1305 (Mont. 1994), a Montana medical malpractice case, illustrates the trial court's broad discretion to admit evidence of administrative findings. Ms. Waller alleged that Dr. Hayden negligently removed her ovaries after diagnosing her with endometriosis. Dr Hayden moved *in limine* to preclude her from referring to prior disciplinary proceedings, which were based on the performance of two allegedly unnecessary cesarian-sections and resulted in a temporary requirement that he "obtain consultation prior to performing any further cesarean sections, and [that he] obtain additional post-graduate education." *Id.*, at 1307.

The trial judge precluded the evidence "except to the extent that Hayden 'opened the door' to admission [of the evidence], or to the extent that it was necessary for impeachment purposes." *Id.*. On reconsideration, the trial court emphasized that "unless defendant testified and tried to embellish on his qualifications, the [evidence] was irrelevant to the issues," reasoning that "Hayden's qualifications for diagnosis of endometriosis had nothing to do with his judgment related to cesarean section procedures performed ten years earlier." *Id.* (emphasis added).

The Montana Supreme Court analyzed the case using a standard for admissibility almost identical to that applicable in New York and addressed "whether [the] proffered evidence makes a fact in issue more or less likely." *Id.*, at 1309. The court determined that

the trial court's decision must be affirmed because there was no manifest abuse of discretion. *Id.*, at 1310. The court stated that:

> "The events which led to the * * * disciplinary proceedings occurred eight to ten years prior to the acts complained of by plaintiff; those complaints related to Hayden's judgment about when to perform cesarean sections and his relationships with other staff members; and his federal lawsuit [against the hospital responsible for initiating the proceedings] simply resolved whether his accusers had done anything wrong--not whether he was qualified professionally. It is within the range of a district court's discretion to conclude that there was nothing in the [evidence related to the disciplinary proceedings] which made it more or less likely that Hayden was negligent when he treated Waller in 1989 [the disciplinary evidence related to Dr. Hayden's practice of medicine between at the earliest 1973 and at the latest 1982]."

Id. (emphasis added). The court further established that even if the remote disciplinary evidence was relevant, it was still within the court's discretion to exclude it "based on the conclusion that it was more prejudicial than probative." *Id.*

In this case, the administrative findings are not at all remote in relation to the alleged malpractice. Instead of the passage of eight to 10 years, as was the case in *Waller*, here, the findings relate to a period a mere eight months after the alleged malpractice. Furthermore, the high probative value of the findings in this case, which centers on Defendants' performance and interpretation of mammograms, cannot be ignored.

The cases that Defendants cite in support of their motion to preclude are readily distinguishable. In those cases, information that a party sought to introduce was not relevant

to the issues in the pending litigation. Although the proponent of the evidence argued that the matters related to credibility, the courts concluded that the lines of inquiry "could have had no purpose other than to prejudicially influence the jurors." *See, e.g.*, *White v. Molinari*, 160 A.D.2d 302 (1st Dep't 1990); *see also*, *Rosso v. Beer Garden, Inc.*, 12 A.D.3d 152 (1st Dep't 2004).

In *White v. Molinari*, 160 A.D.2d 302, for example, plaintiff sought recovery for injuries sustained in a car accident. The trial court allowed plaintiff to introduce into evidence that defendant's license had been suspended due to his failure to have his vehicle inspected. The trial court further authorized admission of evidence establishing that defendant received a citation for disorderly conduct after arguing with a police officer who responded to the accident-scene and that defendant failed to appear in court to answer that charge. The Appellate Division determined that "the license suspension was clearly irrelevant to the issues of negligence and proximate cause, and * * * the defendant's conduct after the accident was, similarly a collateral and irrelevant issue. Despite plaintiff's contention that they bore on the issue of his credibility, these improper lines of inquiry could have no purpose other than to prejudicially influence the jurors on the issue of [defendant's] percentage of fault." *Id.*, at 303.

Similarly, in *Roe v. Doe*, 160 Misc. 2d 1074, plaintiffs alleged that Dr. Doe committed malpractice in negligently providing postpartum care to Mrs. Roe. The Roes

sought to admit evidence that Dr. Doe was convicted of a misdemeanor for unauthorized placement of a child for adoption and that he was professionally disciplined--his license to practice medicine was suspended for six months--as a result of the incident The court permitted inquiry regarding the conviction and its underlying facts because such information impacts the weight of the doctor's testimony. *Id.*, at 1076 (citing CPLR 4513). The judge concluded, however, that the disciplinary proceedings were not admissible because they were cumulative of the convictions. *Id.*, at 1076.

The *Roe* court further determined that plaintiffs could not introduce the professional discipline to have the jury infer that Dr. Doe lacked competence and was therefore more likely to have committed malpractice with respect to the postpartum care, explaining that such "effort is outside the rationale of the rule that permits evidence about a prior 'bad act' for impeachment, and * * * runs afoul of the general rule that negligence cannot be established by a claimed prior unrelated act of negligence." *Id.*, at 1077.

These cases are inapposite. In *White*, evidence of defendant's suspended license and post-accident misconduct bore absolutely no relationship to his driving. Likewise, in *Roe*, evidence of impropriety in connection with an adoption bore absolutely no relationship to defendant's provision of post-partum care. These DOH, OPMC and FDA findings, by contrast, directly relate to what is at issue in this case, namely, the quality of Defendants'

mammography. The evidence is not simply being introduced for impeachment. Nor is it cumulative of any other information.

Defendants' reliance on *Glusakas v. John E. Hutchinson, III, M.D., P.C.*, 148 A.D.2d 203, is equally misplaced. There, the Appellate Division simply held that a the videotape of a surgery defendant had prepared to demonstrate applicable procedures was inadmissible because it bore no relationship to the case at hand. The Appellate Division explained that the videotape was created six years after the alleged malpractice and showed surgery on a patient "whose physical condition differed in a number of significant respects" from that of the decedent. The Appellate Division further stated that the videotaped surgery was apparently performed with more attention than a typical like surgery and concluded that evidence of conduct under similar circumstances is inadmissible to raise an inference that the same amount of caution was used on the occasion at issue. *Id.*, at 206. *See also*, *Acevedo v. New York City Health and Hosps. Corp.*, 251 A.D.2d 21, 22 (1st Dep't 1998). In this case, the Court is not concerned with any demonstrative evidence specially created for the trial.

In conclusion, Defendants' motion to preclude, which rests on analysis of the relevance of the administrative findings and whether their probative value is outweighed by any potential prejudice, is denied. This Court has had no occasion to address whether any findings or reports that are ultimately offered into evidence are hearsay and has not analyzed

exactly what redactions, if any, would be warranted. Additionally, the Court does not decide whether any administrative findings will be admitted if Dr. Vaynshelbaum does not testify or is called as a witness by plaintiff. Those determinations must be made by the trial judge after closely examining the actual reports and based on the testimony at the time of the trial. All that the Court has decided here is that, on this record, there is absolutely no basis for broadly precluding Ms. Baragano from offering any and all evidence of administrative findings concerning Defendants' mammography.

Accordingly, it is

ORDERED that Defendants' motion to preclude is denied. It is further

ORDERED that the parties are to appear prepared for trial on September 12, 2005.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
June 16, 2005

ENTER:

Hon. Eileen Bransten