Palacino v Brogno
2013 NY Slip Op 33890(U)
October 22, 2013
Supreme Court, Orange County
Docket Number: 2907/2012
Judge: Catherine M. Bartlett
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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

ORIGINAL

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT : STATE OF NEW YORK
COUNTY OF ORANGE

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EMANUEL PALACINO, as Administrator of the Goods, Chattels and Credits which were of ETHEL PALACINO, Deceased and EMANUEL PALACINO, Individually,

Plaintiffs,

-against-

DAVID A. BROGNO, M.D., ALFRED BECKER, M.D., ALBERT H. ZUCKER, M.D., RICHARD L. ROTH, M.D. SEYMOUR H. LUTWAK, M.D., HUDSON HEART ASSOCIATES, PC and GOOD SAMARITAN HOSPITAL,

Defendants.

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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,

Index No. 2907/2012
Motion Date: October 17, 2013

The following papers numbered 1 to 5 were read on plaintiffs' motion to compel discovery pursuant to CPLR §3124, to wit, a further deposition of the defendant Richard L. Roth, M.D. to answer certain questions objected to by Dr. Roth's counsel:

Notice of Motion-Affirmation in Support- Exhibits 1-3

Affirmation in Opposition-Exhibits. 4-5

Upon the foregoing papers, it is ORDERED that the motion is disposed of as follows:

This is a case grounded in medical malpractice which was alleged to have occurred from May 19-27, 2010 while plaintiff's decedent was confined to defendant Good Samaritan Hospital. Plaintiff's decedent was a patient of defendant Brogno of defendant Hudson Heart Associates,

PC, but was admitted to the hospital on defendant Zucker's service.[1] During her hospitalization, Dr. Zucker called a cardiac consultation which was covered by defendant Lutwak, who was also not a member of defendant Hudson Heart Associates, PC. Plaintiff's decedent eventually became a patient of Hudson Heart Associates, PC and a consultation request of said defendant was made. On May, 19, 2010, the day of plaintiff's decedent's admission, defendant Roth was also called for a consultation with plaintiff's decedent and after examination, ordered a transthoracic echocardiogram (TTE) which is designed to externally examine the heart's function without the need for an internally invasive test. After placing the order for the TTE on May 19, 2010, defendant Roth had no further contact with plaintiff's decedent and rendered no further care.

On May 20, 2010, defendant Brogno consulted with the patient and the TTE which had previously been ordered by Dr. Roth had not yet been completed, but was done later on May 20, 2010. After the TTE was performed, it was interpreted by a non-party physician, Dr. Schair, who again is not a member of Hudson Heart Associates, PC. At Dr. Roth's deposition, he was asked two questions to which defendants' counsel objected and refused to permit Dr. Roth to answer. First, Dr. Roth was asked whether he disagreed with any of Dr. Schair's conclusions contained in his report which test, interpretation and report was not performed nor available at the time of Dr. Roth's treatment of plaintiff's decedent.

Shortly thereafter, Dr. Roth was asked why he did not order a transesophageal echocardiogram, or TEE, of plaintiff's decedent to which he answered that such a test was more invasive involving the insertion of a tube down a patient's esophagus and examination of the patient's heart. Dr. Roth explained that the TEE was not ordered due to its more invasive

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[1]Dr. Zucker is not a member of defendant Hudson Heart Associates, PC

character over the TTE. Plaintiff's counsel inquired of Dr. Roth whether after reading Dr. Schair's report, he would have preferred a TEE over a TTE at the time of his evaluation to which defendant's counsel objected. Thereafter, plaintiff's counsel asked Dr. Roth whether he had an opinion to a reasonable degree of medical certainty whether plaintiff's decedent required a TEE after the May 20, 2010 TTE was performed, despite the fact that Dr. Roth had never seen the patient after the May 19, 2010 consultation. Defendants' counsel refused to permit Dr. Roth to answer such a question. Plaintiffs now seek to compel answers to both of those questions, citing the rules of discovery and the conduct of attorneys at depositions.

CPLR §3101(a) states in pertinent part: "There shall be full disclosure of all mater material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by: (1) a party, or the officer, director, member, agent or employee of a party; . . ." In interpreting this statute, the Court of Appeals stated unequivocally in *Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406-407 (1968), that:

> the words "material and necessary", are, in our view, 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. CPLR 3101 (subd.(a)) should be construed, as the leading text on practice puts it, to permit discovery of testimony "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)". *See, Hoenig v Westphal*, 52 NY2d 605, 608 (1981).

Moreover, the *Allen* Court held that " 'The purpose of disclosure procedures . . . is to advance the function of a trial to ascertain truth and to accelerate the disposition of suits' and, . . . '(i)f there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross-examination, it should be considered 'evidence material * * * in the

prosecution or defense' [citation omitted]." *Allen*, 21 NY2d at 407.

As stated in *American Reliance Insurance Co. v. National General Insurance Co.*, 174 A.D.2d 591, 571 N.Y.S.2d 493 (2nd Dept. 1991), " . . . the proper procedure to be followed in order to compel a further deposition of a witness is to indicate to the court precisely which questions were not answered, that the witness's refusal to answer was improper, and that a further deposition is the appropriate remedy." Plaintiffs have followed that mandate which leads the Court to analyze and determine the propriety of plaintiff's request.

In *Freedco Products, Inc. v New York Telephone Co.*, 47 AD2d 654, 655 (2nd Dept. 1975), the Court held that " . . . in an examination before trial unless a question is clearly violative of the witness's constitutional rights, or of some privilege recognized in law or is palpably irrelevant, questions should be freely permitted ans answered, since all objections other than as to form are preserved for the trial and may be raised at that time." *See, Watson v State*, 53 AD2d 798, 799 (3rd Dept. 1976).

In *Ferraro v New York Telephone Co.*, 94 AD2d 784, 785 (2nd Dept. 1983), the Court held that the defendant attempted to obscure the discovery of facts and obstruct and frustrate the discovery process not only by providing employees with no knowledge of the facts but also by instructing one of its employees not to answer certain questions "despite the fact that his objections did not relate to the form of the questions (see, *Spatz v. Wide World Travel Serv.*, 70 A.D.2d 835, 418 N.Y.S.2d 19), and the questions were neither palpably irrelevant nor violative of some legal privilege or constitutional right [cit. om.]." The Court in *Spatz v World Travel Service, Inc.*, 70 AD2d 835, 836 (1st Dept. 1979) went even further to declare that "counsel is without authority to direct a witness to refuse to answer questions at an examination before trial."

As articulated in *Murphy v New York Central Railroad Co.*, 16 Misc2d 249, 251 (Sup. Ct. Erie Co. 1959), "Considerable latitude should be given in examining before trial an adverse party or its employee for it is in the nature of a cross-examination to elicit the truth and shorten the trial . . . Where a question call for matter clearly relevant it should be answered; only objections for incompetency, inadmissibility and immateriality must be reserved for the trial itself, where the defendants' rights shall be preserved [cit. om.]." Moreover, the Court held that since the parties stipulated that all objections except as to form are reserved for the time of trial, it is for the trial court to make the determinations of the admissibility of the statements and the witness was required to answer the questions posed. *See, Id.* at 252.

N.Y.Ct.Rules, § 221.2 states:

> A deponent shall answer all questions at a deposition, except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court, or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney shall not direct a deponent not to answer except as provided in CPLR Rule 3115 or this subdivision. Any refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefor. If the deponent does not answer a question, the examining party shall have the right to complete the remainder of the deposition.

Judge Mark Dillon, in an article entitled, noted only five exceptions to prohibiting inquiry into discovery materials or topics during a deposition, none of which are applicable to the instant case. Judge Dillon stated:

> There are only five general categories under which a witness need not answer questions posed during deposition, notwithstanding CPLR Rule 3115 and any acceptance between counsel of the usual stipulations. These five exceptions are as follows:

1. The Palpably Improper Question. A witness need not answer deposition questions that are so improper that to answer them would cause substantial prejudice or which are palpably or grossly irrelevant or burdensome. See, Ferraro v. New York Telephone Co., 94 A.D.2d 784, 785 (2nd Dept. 1983); Watson v. State of New York, 53 A.D.2d 798, 799 (3rd Dept. 1976). Given the liberal nature of discovery, the burden is high to establish that a deposition question is palpably irrelevant or grossly improper or burdensome. E.g., Andersen v. Cornell University, 225 A.D.2d 946 (3rd Dept. 1996)(plaintiff seeking damages from alleged rape at defendant campus not required to detail her prior sexual practices). What questions are so improper as to justify the refusal to answer depend naturally upon the nature, subject matter and circumstances of each case. The textbook objectionable question of "Why do you beat your wife?" is improper for multiple reasons in an automobile negligence action, while the same inquiry may be highly relevant and discoverable in a matrimonial action based upon the alleged cruel and inhuman treatment of the deponent husband.

2. A Defendant-Physician's Opinion of Co-Defendant's Alleged Medical Malpractice. In medical malpractice actions brought against more than one physician, a defendant physician cannot be asked questions at deposition about the professional quality of the services rendered by a co-defendant physician, if the question bears solely upon the alleged malpractice of the co-defendant and not on the practice of the witness. Carvahlo v. New Rochelle Hospital, 53 A.D.2d 635 (2nd Dept. 1976). Where the question refers to the treatment rendered by the witness, the witness must answer the question during examination before trial even if the answer might refer to services rendered by a co-defendant. Carvahlo, at 635.

In Lloyd v. Cohen, Aug. 10, 1995 N.Y.L.J. 26, col. 3, Justice Nicholas Colabella of the Supreme Court, Westchester County, reviewed post-Carvahlo case law and correctly noted that Carvahlo has been consistently interpreted in a restrictive fashion. See, Harley v. Catholic Medical Center of Brooklyn, 57 A.D.2d 827 (2nd Dept. 1977); Glass v. Rochester General Hospital, 74 A.D.2d 732, 733 (4th Dept. 1980); Gilly v. City of New York, 69 N.Y.2d 509 (1987). See also, McGuire v. Zarlengo, 250 A.D.2d 823 (2nd Dept. 1998); Forgays v. Merola, 222 A.D.2d 1088 (4th Dept. 1995). Under post-Carvahlo decisional authorities, the defendant physician need not answer a "pure" Carvahlo question addressed to the quality of a co-defendant's diagnosis or treatment of the patient plaintiff, but is required to answer questions pertaining to the actions or omissions of the witness that may secondarily implicate co-defendant physicians.

3. The Right Against Criminal Self-Incrimination. A party has the right to invoke the Fifth Amendment privilege against self-incrimination during all phases of

discovery, including during examinations before trial. State of New York v. Carey Resources, Inc., 97 A.D.2d 508 (2nd. Dept. 1983); Selvaggio v. Brookdale Hospital Medical Center, July 24, 1990 N.Y.L.J. 20, col. 2 (Sup. Ct. Kings Co. 1990); See also, Agapov v. Agapov., Aug. 29, 2000 N.Y.L.J. 23, col. 2 (Sup. Ct. N.Y. Co. 2000).

Indeed, the federally-protected guarantee against self-incrimination has been statutorily extended to civil actions in New York by application of CPLR Section 4501. The privilege cannot be asserted if the deposition witness has already received a grant of immunity from criminal prosecution, as the reason for the privilege then no longer exists. Richardson on Evidence, 10th Ed., Section 531, p. 525. The privilege is personal to the witness and therefore cannot be invoked on behalf of a corporation. United States v. White, 322 U.S. 694 (1944).

In instances when a witness at deposition refuses to answer questions by invoking the Fifth Amendment privilege against self-incrimination, the trier of fact may later draw a discretionary negative inference from the witness's refusal to answer. PJI 1:76; Marine Midland Bank v. John E. Russo Produce Co., 50 N.Y.2d 31, 42-43 (1980); DeBonis v. Corbisiero, 155 A.D.2d 299 (1st Dept. 1989), app. den., 75 N.Y.2d 709 (1990), cert. den., 496 U.S. 938 (1990); Carey v. Foster, 164 A.D.2d 930 (2nd Dept. 1990); Agapov, supra. Accordingly, a deposition witness should carefully weigh and evaluate the costs and benefits of invoking the Fifth Amendment privilege against the potential negative inference that may be drawn from it at trial.

4. Constitutionally and Statutorily Recognized Privileged Communications. Other recognized privileges permit deposition witnesses to refuse to answer questions, where a privilege is implicated and not otherwise waived. These privileges include the attorney-client privilege (CPLR Section 4503(a)), though fee arrangements, if otherwise relevant, are not privileged where a claimant in an action seeks to recover legal fees. Matter of Priest v. Hennessy, 51 N.Y.2d 62, 69 (1980); Cutrone v. Gaccione, 210 A.D.2d 289, 291 (2nd Dept. 1994); Oppenheimer v. Oscar Shoes, Inc., 111 A.D.2d 28, 29 (1st Dept. 1985); Rumrill v. Hoyt, Inc. v. Perri, 97 A.D.2d 951 (4th Dept. 1983).

The attorney-client privilege may only be properly asserted if all elements of the privilege are satisfied, including the client's reasonable expectation of privacy and, typically, the absence of a third party when the communication was uttered. See, Matter of Priest v. Hennessy, supra, at 69; Baumann v. Steingester, 213 N.Y. 328, 332-33 (1915).

Matters protected by spousal privilege are beyond the scope of proper inquiry

(CPLR Section 4502(b)), though ordinary business dealings between spouses are not considered confidential and are discoverable. Pokoik v. Gittens, June 25, 1990N.Y.L.J. 25, col. 2 (Sup. Ct. N.Y. Co. 1990).

The physician-patient and psychologist-patient privileges (CPLR Sections 4504 and 4507) are waived where treatment history is material to a party's claims or defenses (E.g., Prink, supra, at 314), though discovery of a family member's medical history is not permissible absent waiver of the privilege by the family member or other special showing of relevance. See, Moore and Gaier, "Discovery Regarding a Plaintiff's Family Members, Jan. 2, 2001 N.Y.L.J. 3, col. 1. Additional privileges, relevant at deposition and otherwise, include the penitent-clergy privilege (CPLR Section 4505), social worker privilege (CPLR Section 4508) and rape crisis counselor privilege (CPLR Section 4510).

Though not codified by statute, courts have recognized as privileged certain communications intended as confidential between union members and union officials regarding issues that later become the subject matter of litigation, and such confidentiality, where applicable, insulates a witness from having to answer questions at deposition as with any statutory privilege. Matter of City of Newburgh v. Newman, 70 A.D.2d 362, 366 (3rd Dept. 1979); Matter of Seelig v. Shepard, 152 Misc.2d 699, 702 (Sup. Ct. N.Y. Co. 1991). Compare, Children's Village v. Greenburgh Eleven Teachers' Union Federation of Teachers, Local 1532, 232 A.D.2d 356 (2nd Dept. 1996).

5. Questions Regarding Custody in Matrimonial Actions. Courts are reluctant to permit examinations before trial of spouses on issues of custody in matrimonial actions. Hunter v. Hunte r, 10 A.D.2d 291, 294 (1st Dept. 1960); P., Plaintiff v. P., Defendant, 93 Misc.2d 704, 706 (Sup. Ct. N.Y. Co. 1978). This reluctance arises out of concern that deposition questions relating to custody might lessen the chances of marital reconciliation. Also, no matter the outcome of the matrimonial proceeding, parties will still be bound to each other as parents for life, and it is feared that custody questions at deposition might render parties' future relationship more difficult. P., Plaintiff, supra, at 706.

Since discovery is liberally construed, and since CPLR Rule 3115 and the "usual stipulations" constitute a waiver until trial of almost all objections that might otherwise be interposed at deposition , counsels should tread carefully in ever advising a client not to answer questions posed at the examination table. All questions should be answered unless the attorney and client are on firm footing that one of the foregoing exceptions apply.

Dillon, 10/22/2001 NYLJ 1, (col. 1).

Defendants assert that Dr. Roth should not be forced to answer these questions and cite several Second Department cases in support of their assertion, essentially concluding that one physician cannot be forced to render expert testimony against another physician if those questions bear solely on the negligence of the co-defendant physician and not on the practice of the witness himself. The primary decision relied upon by defendants is *Carvalho v New Rochelle Hospital*, 53 AD2d 635 [2nd Dept.1976].

The genesis of the *Carvalho* decision is the New York Court of Appeals decision in *McDermott v Manhattan Eye, Ear and Throat Hospital*, 15 NY2d 20 [1964], which held that "a party in a civil suit may be called as a witness by his adversary and, as a general proposition, questioned as to matters relevant to the issues in dispute." *Id.* at 26. The Court of Appeals went on to hold that "any living witness who could throw light upon a fact in issue should be heard to state what he knows, subject always to such observations as to his means of knowledge." *Id.* at 26. The court also stated that "[w]e cannot agree with the suggestion that it is somehow neither sporting nor consistent with the adversary system to allow a party to prove his case through his opponent's own testimony." *Id.* at 28.

The Court of Appeals concluded:

> In short, then, a plaintiff in a malpractice action is entitled to call the defendant doctor to the stand and question him both as to his factual knowledge of the case (that is, as to his examination, diagnosis, treatment and the like) and, if he be so qualified, as an expert for the purpose of establishing the generally accepted medical practice in the community. While it may be the height of optimism to expect that such a plaintiff will gain anything by being able to call and question (as an expert) the very doctor he is suing, the decision whether or not to do so is one which rests with the plaintiff alone.

McDermott, 15 NYS2d at 29.

In *Johnson v NYCHHC,* 49 AD2d 234 [2nd Dept.1975] the Court held that the *McDermott* rule applied to depositions of expert defendants. What the defendants refer to in *Carvalho, supra,* at 635 is as follows:

> In an action for malpractice brought against more than one physician, one defendant physician may not be examined before trial about the professional quality of the services rendered by a codefendant physician if the questions bear *solely* on the alleged negligence of the codefendant and not the practice of the witness (emphasis added; *citing McDermott*).

The holding in *Carvalho* is that a co-defendant may be deposed to give expert opinions about the services of a co-defendant. Where, however, the opinion sought refers to the treatment rendered by the witness, the fact that it may also refer to the services of a codefendant does not excuse the defendant witness from deposing as an expert.

The *Carvalho* decision, unlike *McDermott,* deals with an examination before trial, not with a trial. It is clear that the Second Department's rule in 1976 is aimed at not allowing a plaintiff to obtain free expert opinions from the defendants as was cautioned in *McDermott* at page 30 note 5. *Carvalho* is a policy decision discouraging plaintiffs from suing a physician for the purposes of obtaining multiple free expert opinions during discovery even when there is no merit to the case against that doctor.

Additionally, the Second Department clarified its position in *Carvalho* in 1977 in *Harley v Catholic Medical Center of Brooklyn*, 57 AD2d 827, 828 [2nd Dept.1977], another case dealing with questions during an examination before trial. In *Harley,* at 828, the Court reiterated its holding in *Carvalho* that where "the opinion sought refers to the treatment rendered by the

witness, the fact that it may also refer to the services of a codefendant does not excuse the defendant witness from deposing as an expert." In *Harley,* a pediatrician was asked questions regarding the effects on the infant of certain medicines given by the codefendant obstetrician during the mother's labor. This was permitted as the questions did not "bear *solely* on the alleged negligence of the codefendant physician" (*supra,* at 828).

In *Segreti v Putnam Community Hosp.,* 88 AD2d 590, 592 [2nd Dept.1982] and *Braun v Ahmed*, 127 AD2d 418 [2nd Dept.1987], the Second Department cited *McDermott* for the general rule "that a plaintiff in a medical malpractice action may call as a witness the doctor against whom she brought the action and question him as a medical expert."

Additionally, in *Gilly v City of New York*, 69 NY2d 509, 511 [1987], the court in discussing *McDermott* stated:

> In *McDermott v. Manhattan Eye, Ear & Throat Hosp.*, 15 N.Y.2d 20, 255 N.Y.S.2d 65, 203 N.E.2d 469, we addressed the related issue of whether a physician-defendant could be called as an expert witness by the plaintiff in a medical malpractice case. We held that he could be, and refused to limit his testimony to "facts within his knowledge" and things he "actually saw and did." The more enlightened view, we concluded, was that plaintiff should be permitted to examine his doctor-opponent as fully and freely as other qualified witnesses, and that such testimony could include expert opinion (*id.*, at 26–29, 255 N.Y.S.2d 65, 203 N.E.2d 469). We distinguished *People ex rel. Kraushaar Bros. & Co. v. Thorpe*, 296 N.Y. 223, 72 N.E.2d 165—in which we had held that a person may not be required to give an expert opinion involuntarily—noting that the defendant-physician was not an *586 independent, disinterested witness forced to attend the trial merely because he is "accomplished in a particular science, art, or profession" who might be called upon in every case "in which any question in his department of knowledge is to be solved" (*id.*, at 29, 255 N.Y.S.2d 65, 203 N.E.2d 469). Rather, he was already connected to the case. Thus, while the "unwilling witness who is in no way connected with the action" could not be compelled to testify as an expert for the plaintiff, we held in *McDermott* that the defendant-physician—by virtue of his existing association with the case—could be (*id.*).

This rationale was used during the trial of another medical malpractice action involving a brain damaged baby in the Supreme Court, New York County, *Cruz v City of New York*, 135 Misc2d 393 [Sup.Ct. N.Y. County 1987]). In *Cruz, supra,* at 395, Justice Stanley L. Sklar held that a resident, who was not a named defendant, but was part of the obstetrical team delivering the baby, "is more likely than others to have critical factual information. His expert opinions concerning those facts may well be critical in our search for the truth—even though, as just noted, he has a motive to insulate himself from blame." (Cf., *McDermott v Manhattan Eye, Ear & Throat Hosp.,* 15 NY2d 20, 27–28, *supra.*) As *McDermott* noted, the decision to ask those questions calling for expert opinions should rest with plaintiff (15 N.Y.2d, at 30, 255 N.Y.S.2d 65, 203 N.E.2d 469).

Effective October 1, 2006, part 221 of 22 NYCRR, entitled "Uniform Rules for the Conduct Of Depositions," generally mandates that, upon the making and recording of an objection to a question at an EBT, the answer nonetheless "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[a]; *see generally* CPLR 3115[a], [d], [e]). 22 NYCRR § 221.2 limits the right of the witness to refuse to answer on the advice of counsel. It states that a "deponent shall answer all questions at a deposition, except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court, or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person" (22 NYCCR § 221.2). CPLR 3115, and indeed the whole of CPLR article 31, makes clear that the discoverability of information before trial is not tantamount to the admissibility of such information at trial (*see generally Suk Ching Chan v Otis El. Co.,* 147 A.D.2d 395, 538

N.Y.S.2d 449 [1st Dept.1989]).

This Court has serious doubts that the decision in *Carvalho* would be rendered today, in the era of 22 NYCRR part 221 (there are no appellate citations to *Carvalho* since October 2006). Beyond that, this Court has serious misgivings about the provenance (let alone the sense) of the rule set out in *Carvalho,* i.e., that the defendant-witness may not be examined before trial about the professional quality of the services rendered by a codefendant physician if the questions bear solely on the alleged negligence of the codefendant and not on the practice of the witness. That rule is not to be found in, and does not even seem to be suggested by, the decisions in *McDermott* and *Johnson,* the sole authorities cited by the Second Department in *Carvalho.* Again, *McDermott* unequivocally holds that "a plaintiff in a malpractice action is entitled to" question the defendant-doctor "both as to his factual knowledge of the case (that is, as to his examination, diagnosis, treatment and the like) and, if he be so qualified, as an expert for the purpose of establishing the generally accepted medical practice in the community" (*McDermott,* 15 NY2d at 29–30 [parenthetical material in original]), whereas *Johnson* merely holds that the *McDermott* rule applies fully to examinations before trial (*Johnson,* 49 AD2d at 236–237). Neither *McDermott* nor *Johnson* involved a defendant-physician's being asked to opine specifically on the conduct of a codefendant-physician (or a hypothetical physician) in relation to the standard of care, and thus neither decision went so far as to say that such opinion would not be a proper area of inquiry of the defendant-witness in a medical malpractice case. The "if he be so qualified" language of *McDermott* would seem to be directed by its terms to the practice of a co-defendant-physician (possibly including one practicing in a different community and area or specialty than the defendant-witness) since a defendant-witness would almost assuredly be qualified to opine as

to the standard of care in his own community and area or specialty of practice. Some authorities suggest that the real rationale for the restrictive *Carvalho* rule is to prevent a medical malpractice plaintiff from co-opting at the discovery stage one of the defendant-physicians as the plaintiff's own expert for the purpose of establishing the liability of another defendant-physician, and indeed to discourage the plaintiff from suing more doctors than necessary or appropriate in order to have at least one physician-defendant available to implicate another in the alleged malpractice However, the very articulation of that rationale for the *Carvalho* rule-not to mention any plain reading of the *McDermott* decision itself-would indicate that it is permissible for plaintiff to make his adversary his expert at the trial stage (as opposed to before trial). Moreover, any such attempt to disallow at the discovery stage what is permissible at trial runs directly counter to the express holding of *Johnson,* which is that any expansionary rule of evidence applicable at trial "obvious[ly]" and "necessarily" governs at the discovery stage as well, since the scope of discovery is, by definition, "at least as broad" as the standard of admissibility of evidence at trial (*Johnson,* 49 AD2d at 237). Finally, in rendering its decision in *McDermott,* the Court of Appeals was willing to "assume[ ] that [the] plaintiff, in naming a doctor as a defendant, ha[d] done so in good faith, on the basis of his relationship with the case and not as a device or subterfuge in order to afford the plaintiff an opportunity to call him as an expert witness" at trial (15 NY2d at 30 n. 5).

All this being said, *Carvalho* has not been expressly overruled and therefore this Court is bound by its holding. Dr. Roth never treated or dealt with the patient after May 19, 2010. Reading the *Carvalho* strictly, Dr. Roth need not answer a "pure" *Carvahlo* question addressed to the quality of a co-defendant's diagnosis or treatment of the plaintiff's decedent, but is required to

answer questions pertaining to his own actions or omissions that may secondarily implicate co-defendant physicians. Neither of the questions posed by plaintiff's counsel address Dr. Roth's specific actions or omissions since the questions pertain to time frames after Dr. Roth's contact or treatment of plaintiff's decedent. Therefore, plaintiff's motion must be denied.

The foregoing constitutes the decision and order of the court.

Dated: October 22, 2013 E N T E R
Goshen, New York

HON. CATHERINE M. BARTLETT,
A.J.S.C.
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE