

Piacente v Bernstein
2013 NY Slip Op 31964(U)
August 20, 2013
Supreme Court, Albany County
Docket Number: 18022-10
Judge: Joseph C. Teresi
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

JOHN THOMAS PIACENTE,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 1802-10
RJI NO. 01-10-099919

MICHAEL P. BERNSTEIN; ERIC S. ROCCARIO;
MIKHAIL KIRNUS; KATHLEEN OZSVATH; JOHN
TAGGERT; CAPITAL REGION CARDIOLOGY ASSOCIATES,
P.C.; PRIME CARE PHYSICIANS, P.L.L.C.; THE VASCULAR
GROUP, P.L.L.C. and ST. PETER'S HOSPITAL;

Defendants.

Supreme Court Albany County All Purpose Term, August 19, 2013
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

In this medical malpractice action Defendants¹ move, in limine, for an order prohibiting Plaintiff from introducing at trial Roccario's February 22, 2008 Non-Disciplinary Order of Conditions (hereinafter "Order"). Plaintiff opposes the motion. On this record, Defendants demonstrated their entitlement to the limitation they seek.

As is applicable here, it is axiomatic that "evidence is relevant [and therefore admissible] if it tends to prove the existence or non-existence of a material fact." (People v Primo, 96 NY2d 351 [2001]). However, relevant evidence is precluded where "its probative value [is] substantially outweighed by the danger that it [would] unfairly prejudice the other side or mislead the jury." (State v Exxon Corp., 7 AD3d 926, 928 [3d Dept 2004] quoting People v Scarola, 71 NY2d 769 [1988]). Moreover, as a general rule, "it is improper to prove that a person did an act on a particular occasion by showing that he did a similar act on a different, unrelated occasion." (Matter of Brandon's Estate, 55 NY2d 206, 210-11 [1982]).

The Order was generated by the New York State, Department of Health, State Board for Professional Medical Conduct (hereinafter "the Board") after an investigation into issues that remain unidentified. Although the Order's Exhibit "A" purportedly identified the issues investigated, such exhibit was not submitted on this motion. The Order itself identifies no other factual predicate for its issuance. Instead, it sets forth numerous conditions on Roccario's practice of medicine. One of which allowed Roccario to practice medicine "only when monitored by a licensed physician, board certified in an appropriate speciality ('practice

¹ Kathleen Ozsvath, The Vascular Group, PLLC, Eric Roccario, and Prime Care Physicians, PLLC will all collectively be referred to as Defendants herein. Eric Roccario will hereinafter be referred to individually as "Roccario."

monitor’).” The designated practice monitor was then required to “visit [Roccario’s] medical practice at every location where peripheral vascular procedures are performed... [to determine if Roccario was conducting his medical practice within] generally accepted standards of professional medical care.” The Order was to “remain in effect for three years from [its] effective date.”

Approximately eight months after the Order’s issuance, Plaintiff alleges she was injured, in part, by Roccario’s negligent treatment. If Roccario’s treatment of Plaintiff constituted peripheral vascular procedures, which Roccario explicitly denies, his treatment of Plaintiff could fall within the Order’s reach. Plaintiff identified, however, no nexus between the Order’s conditions and Roccario’s actual medical treatment of her. Nor does she make any allegation that the practice monitor was involved in her care or examined Roccario’s documentation of her treatment. She similarly failed to detail the underlying issues the Board investigated, or demonstrate any parallels between the Board’s investigation’s findings and her own malpractice allegations. Moreover, because the Order was issued well before Roccario treated Plaintiff, such treatment cannot be the basis for the Order’s issuance.

Due to this lack of proof Plaintiff failed to sufficiently justify her introduction of the Order at trial. Plaintiff rationalizes her desire to use the Order to establish “the proper standard of medical care applicable to [Roccario] at the time of his treatment of plaintiff.” Such justification, however, is wholly unavailing. Without proof of a connection between the Order and Roccario’s treatment of Plaintiff, the Order is of no relevance to the standard of care actually applicable or applied. Similarly, with no nexus established, the Order is only marginally relevant

to Roccario's credibility.² Moreover, Plaintiff's "alternative motive" and "bias" justifications are premised entirely on speculation.

Contrary to Plaintiff's contention, the Order is unduly prejudicial. Even though the Order does not detail any prior medical malpractice incidents, its introduction at trial would undoubtedly lead the jury to speculate about the reasons it was issued. This speculation, based on a lack of information, could easily lead the jury to believe Roccario had committed some type of medical malpractice in the past. The jury's analysis of Roccario's treatment of Plaintiff would then be tainted by an unrelated and unproven prior incident. Such analysis cannot be condoned or "impliedly encouraged." (Maraziti ex rel. Maraziti v Weber, 185 Misc 2d 624, 626 [Sup Ct, Dutchess Co 2000]).

Because of the Order's minimal relevance and the undue prejudice it would cause, Defendants' motion is granted to the extent that Plaintiff is precluded from introducing the Order as part of his direct case.

To the extent Plaintiff seeks to use the Order for purposes of "impeachment" or to "accurately demonstrat[e]... [Roccario's] qualifications," such determination is premature. Because of the unduly prejudicial nature of the Order, Plaintiff may be allowed to introduce it at trial in the event Roccario opens the door to its introduction. (People v Massie, 2 NY3d 179 [2004])[this 'door-opening' issue will be considered at trial "by considering whether, and to what extent, the evidence or argument said to open the door is incomplete and misleading, and what if any otherwise inadmissible evidence is reasonably necessary to correct the misleading

² The lack of connection distinguishes this action from the determination made in Baragano v. Vaynshelbaum (Sup Ct, NY County, June 16, 2005, Bransten, J. Index No. 110768/03) and relied upon by Plaintiff.

impression.”]; CPLR §4514).

This Decision and Order is being returned to the attorneys for Roccario. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
August 20, 2013



Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated August 7, 2013; Affidavit of Kelly Monroe, dated August 7, 2013, with attached exhibits A-C.
2. Notice of Motion, dated August 13, 2013; Affirmation of Andrea Demers, dated August 13, 2013
3. Affirmation of Joseph Awad, dated August 15, 2013.
4. Affidavit of Kelly Monroe, dated August 15, 2013.