Ericsen v Benton
2017 NY Slip Op 32926(U)
June 21, 2017
Supreme Court, Albany County
Docket Number: 2235-11
Judge: Kimberly A. O'Connor
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

DAVID ERICSEN as the Administrator of the Estate of LEONA A. ERICSEN (Deceased), and ANTHONY ERICSEN,

Plaintiffs,

-against-

ROBERT E. BENTON, M.D.; CAPITAL CARDIOLOGY ASSOCIATES, P.C.; JOSEPH FAROOQ, M.D.; PULMONARY & CRITICAL CARE SERVICES, P.C.; PULMONARY AND CRITICAL CARE SERVICES, P.C.; JAMES P. ARAM, M.D.; BRUNSWICK FAMILY MEDICAL PRACTICE, PLLC; JOHN J. O'BRYAN, M.D.; TROY FAMILY PHYSICIANS, P.C.; and SAMARITAN HOSPITAL OF TROY, NEW YORK,

Defendants.

DECISION AND ORDER/JUDGMENT
Index No. 2235-11
RJI No. 01-11-105099

(Supreme Court, Albany County, All Purpose Term)

(Justice Kimberly A. O'Connor, Presiding)

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O'CONNOR, J.:

Plaintiff David Ericsen commenced this negligence action in March 2011 as the administrator of his mother's estate, together with his father, Anthony Ericsen (hereinafter collective referred to as "plaintiffs"), alleging medical malpractice, lack of informed consent and wrongful death against defendants Robert E. Benton, M.D. (hereinafter "Dr. Benton"); Capital Cardiology Associates, P.C.; Joseph Farooq, M.D. (hereinafter "Dr. Farooq"); Pulmonary & Critical Care Services, P.C.; Darshan S. Arora, M.D. (hereinafter "Dr. Arora"); Northeast Nephrology Associates, P.C.; Yusuf N. Silk, M.D. (hereinafter "Dr. Silk"); Capital District Surgical Associates, PLLC; James P. Aram, M.D. (hereinafter "Dr. Aram"); Brunswick Family Medical Practice, PLLC; John J. O'Bryan, M.D. (hereinafter "Dr. O'Bryan"); Troy Family Physicians, P.C.; and Samaritan Hospital of Troy, New York.[1] Following joinder of issue and discovery, several defendants filed motions based on plaintiffs' alleged discovery violations. By Decision and Order, dated January 2016, the Court addressed the propriety of plaintiffs' expert disclosure. Several defendants also filed summary judgment motions. In a Decision and Order, dated June 20, 2016, this Court dismissed the claims against the following defendants: Dr. Arora, Northeast Nephrology Associates, P.C., Dr. Silk, and Capital District Surgical Associates, as well as certain claims against the remaining defendants. Defendant Dr. Benton, now moves to have his prior testimony in an unrelated trial precluded.

BACKGROUND

This action involves certain medical care and treatment rendered to Leona A. Ericsen (hereinafter "decedent") from March 16, 2009 until April 27, 2009, the date of her death. It is

[1] Plaintiffs served a supplemental summons and amended complaint in July 2011.

undisputed that decedent was morbidly obese and had a past history of, among other things, atrial fibrillation and congestive heart failure. From October 2006 to February 2009, decedent was enrolled in a clinical trial by Dr. Benton, her cardiologist, to test an experimental blood thinning medication called Dabigatran, which was later FDA approved under the name Pradaxa. When the clinical trial ended, decedent elected to continue taking Dabigatran as part of a new study.

A. Decedent's First Hospitalization

On March 16, 2009, decedent fell in her driveway and was admitted to Samaritan Hospital with shortness of breath and congestive heart failure. Upon examination, it was noted that decedent was retaining a significant amount of fluid as she had discontinued taking her diuretic medication, Lasix. As a result, decedent was treated with an initial bolus of Lasix and then a Lasix drip. She was admitted to the progressive care unit for further evaluation of her congestive heart failure. Although decedent's blood urea nitrogen (BUN) and creatinine levels remained elevated throughout the hospitalization, in Dr. Benton's view, the intravenous diuretics led to an "intended and expected volume depletion that had a short term effect on [decedent's] kidney function".

On March 22, 2009, Dr. Benton and Dr. Aram agreed to discharge decedent from the hospital. Dr. Aram ordered that decedent continue all of the medications she was on at the time of admission and prescribed Bactrim to treat a weeping rash on her extremities. Dr. Aram also arranged for decedent to be monitored at home by the Eddy Visiting Nurses. Finally, Dr. Benton instructed decedent, who had historically been a compliant patient, to return to his office one week from discharge for an examination and blood work. Decedent, however, failed to maintain her appointment with Dr. Benton.

B. Decedent's Second Hospitalization

On April 26, 2009, decedent presented to Samaritan Hospital's emergency room with rectal bleeding. Decedent's family reported that she had not been eating or drinking well, but was still taking all of her prescribed medications. Dr. O'Bryan's initial assessment of decedent included, among other things, a gastrointestinal bleed, renal failure, coagulopathy secondary to anticoagulant use, hypotension, and anemia. As such, decedent was given intravenous hydration and packed red blood cells along with fresh frozen plasma. Decedent was then admitted to the intensive care unit and consultations were placed with a hematologist, nephrologist, gastroenterologist, cardiologist and critical care physician. Following their respective examinations, Dr. Farooq, a critical care specialist, and Dr. Arora, a nephrologist, determined that decedent was suffering from acute renal failure due to dehydration and the use of Dabigatran. Decedent's family expressed their desire to pursue aggressive treatment and a plan to dialyze the Dabigatran from decedent's system was developed.

Thereafter, Dr. Silk, a surgeon, was called to place a triple lumen catheter in decedent's neck in preparation for dialysis. Although the operative report indicated that the catheter's guidewire had been removed, the post-procedure x-ray revealed that a piece of the guidewire had, in fact, sheared off in the catheter. Nevertheless, Dr. Silk informed the nursing staff that they could still use the catheter for dialysis because the two outer ports were unobstructed. Dialysis was subsequently commenced by an acute dialysis nurse, Laurie Rafferty, LPN. Approximately 20 minutes into the treatment, the dialysis machine clotted. After a second failed attempt with a new machine, Rafferty advised Dr. Arora that she was unable to perform dialysis.

Later that evening, nursing staff discussed a do not resuscitate order (DNR) with decedent's family. Dr. O'Bryan determined that decedent lacked the capacity to consent and, over the

telephone, approved the DNR to be signed by a surrogate. The DNR was ultimately obtained from decedent's son, plaintiff David Ericsen, after which comfort measures were implemented. Decedent subsequently experienced multiple organ system failure and died on April 27, 2009.

C. Dr. Benton's Previous Trial Testimony

On March 22, 2011, Dr. Benton was called as a treating physician/expert witness by the defendant Dr. Jacqueline Weaver in a medical malpractice case entitled *Galvin v. Weaver, et.al.*, in Rensselaer County Supreme Court. On cross-examination by plaintiff's counsel, Denis Hurley, Esq., of Conway & Kirby, PLLC, the same firm that represents the plaintiffs in the instant action pending before this Court, Dr. Benton was questioned about his treatment of the decedent, Leona Ericsen, and the Department of Health's investigation of the same. On redirect examination, Dr. Weaver's attorney followed up regarding the clinical trial Ms. Ericsen was involved in, and Dr. Benton testified at length about his treatment of Ms. Ericsen, and the investigation by the Department of Health. On recross examination, Mr. Hurley again questioned Dr. Benton about the Department of Health investigation. On March 30, 2011, the law firm of Conway & Kirby, PLLC commenced the instant lawsuit on behalf of Ms. Ericsen.

ANALYSIS

The parties extensively briefed this issue in several separate submissions that addressed different aspects of the question of the admissibility of this prior testimony by Dr. Benton. Initially, the Court finds defendant's contention that the testimony must be precluded on hearsay grounds to be without merit. The Court agrees with plaintiffs that the prior testimony or statement of a party is a specific exception to the hearsay rule, and, as such, cannot serve as a basis for preclusion in this situation. As a corollary to the parties' arguments regarding hearsay, the Court notes that the

plaintiffs and Dr. Benton agree that if Dr. Benton testifies at the trial of this matter, any portion of the prior trial testimony in the *Galvin* case may be used to impeach his testimony.

However, that does not end the inquiry. This prior trial testimony and its admissibility in the trial in which Ms. Ericsen's estate and spouse are the plaintiffs presents a complicated issue for the Court to determine. There are a few different aspects that need to be decided. Generally, "New York follows the common-law rule that the admissibility of evidence is not affected by the means through which it is obtained. Hence absent some constitutional, statutory, or decisional authority mandating the suppression of otherwise valid evidence . . . , such evidence will be admissible even if procured by unethical or unlawful means (citations omitted)" (*Stagg v. New York City Health & Hosps. Corp.*, 162 A.D.2d 595, 596 [2d Dep't 1990]).

In *Stagg*, an investigator posed as a buyer who was interested in buying the plaintiff's pickup truck, and spoke to the plaintiff on a few occasions and observed him physically. The investigator then testified about the plaintiff's statements and condition that belied the plaintiff's claim in the lawsuit that he was unable to work. The *Stagg* Court found that the investigator could not be held to the requirements of the Code of Professional Responsibility by which a lawyer is bound (*Stagg v. New York City Health & Hosps. Corp.*, 162 A.D.2d at 596). The Court further held that the plaintiff's contention that the defendant's lawyer had violated the Code of Professional Responsibility based upon the actions of the investigator was without merit (*id.*). The Court ultimately held that "[i]nasmuch as there is no independent constitutional, statutory or overriding policy basis requiring a departure from the common-law rule in this case, we would discern no error in the admission of the challenged testimony even if an ethical violation were established (citation omitted)." (*id.*).

In the case at bar, Dr. Benton contends that CPLR § 3103 would provide the permissible statutory authority for the Court to evaluate this issue and take whatever action it deems appropriate. Plaintiffs argue that CPLR § 3103 does not apply because the testimony was not obtained during the discovery phase of the instant matter. The Court is inclined to agree with the defendant, and finds it the authority to evaluate this issue and take appropriate action for two reasons. First, the actions of Mr. Hurley in utilizing information he could only have gained from his knowledge of Ms. Ericsen's case, as her attorney who was about to sue Dr. Benton and the other defendants, appears to implicate certain fundamental principles relating to the behaviors and actions of an attorney. It is unclear whether it was permissible for him to utilize the information he gained from representation of Ms. Ericsen in the prosecution of an unrelated matter. In addition, the plaintiff does not dispute that the law firm of Conway & Kirby, PLLC had already been retained to represent Ms. Ericsen's estate and spouse to bring this case on their behalf, and was poised to file the lawsuit just eight (8) days after Dr. Benton testified in the *Galvin* case. As a result, the stage was set for this lawsuit to commence, and plaintiffs cannot now argue that Dr. Benton was not considered an individual with adverse interests to that of the plaintiffs regarding the allegations of malpractice with respect to his care and treatment of Ms. Ericsen.

A review of the testimony on cross-examination reveals that Mr. Hurley's questions regarding Ms. Ericsen were intended, and, in fact, were designed, to elicit answers from Dr. Benton that would establish the facts surrounding his treatment of her and the cause of her death, as well as the fact that the Department of Health conducted an investigation of that treatment and Ms. Ericsen's death. While it can be argued that as a tactic for cross-examination, this testimony could be weighed by the trier of fact in determining the credibility of the witness and assist the trier of fact in weighing

his testimony in that case overall, it is also clearly a means for obtaining relevant information for the lawsuit that was on the eve of commencement. Further, although this pre-action discovery was not done pursuant to Court order and is certainly not traditional or conventional pre-action discovery, plaintiff's counsel availed himself of the opportunity to engage in such an exchange when the fortuitous circumstance arose in which he found himself questioning Dr. Benton in another case. This confluence of events created this opportunity for plaintiff's counsel to gather information regarding this lawsuit. Had this information been obtained under different circumstances, the Court's analysis here would certainly be different.

This Court is not the forum in which determinations regarding potential violations of the ethics rules are made. However, the underlying actions of the attorney must be reviewed in the context of this application. The Court agrees with the defendant that this is a circumstance in which the attorney for Ms. Ericsen's estate and spouse was dealing with an individual whom he was about to sue, and who did not have an attorney. It certainly cannot be argued that Dr. Benton had an attorney-client relationship with Dr. Weaver's attorney since he was a witness in that matter. No information was provided ahead of time to Dr. Benton, Dr. Weaver's attorney, or the Court, in the *Galvin* case by plaintiff's counsel to inform them regarding the line of questioning he was prepared to undertake in his cross-examination of Dr. Benton, and his attorney-client relationship with Ms. Ericsen. Since Dr. Benton had no idea that Mr. Hurley represented Ms. Ericsen's estate and spouse, it can only be concluded that Mr. Hurley appeared to be a disinterested person who was questioning Dr. Benton solely on behalf of Ms. Galvin. Had Mr. Hurley informed the Court of this situation, and given the Court an opportunity to take appropriate action, this situation could have been avoided.

It is apparent from the record that Mr. Hurley's actions served as a means of discovering

information to Ms. Ericsen's estate and spouse's advantage in their impending lawsuit without a defendant in that lawsuit being made aware of the situation. The gravamen of the issue in this situation is the failure of the attorney to reveal his representation of Ms. Ericsen and the impending lawsuit. Based upon the timing of the questioning by Mr. Hurley and the almost immediate filing of the lawsuit, this Court has determined that the actions by Mr. Hurley can be considered in the nature of discovery and are subject to analysis pursuant to CPLR § 3103(c).

That section of the CPLR provides that "[i]f any disclosure under . . . [Article 31] has been improperly or irregularly obtained so that a substantial right of a party is prejudiced, the court, on motion, may make an appropriate order, including an order that the information be suppressed." This Court finds, based upon the analysis above, that the testimony of Dr. Benton in the *Galvin* trial has been "improperly or irregularly obtained," and, as such, the defendant's motion to preclude must be granted. The Court further finds that even if it were determined that CPLR § 3103 does not apply in this circumstance, these facts present an "overriding policy basis requiring a departure from the common-law rule," as noted as a possible exception by the *Stagg* Court (*Stagg v. New York City Health & Hosps. Corp.*, 162 A.D.2d at 596).

This situation is akin to the circumstances in the case of *Obser v. Adelson,* 96 N.Y.S.2d 817 [Sup.Ct., New York County 1949], aff'd, 276 A.D. 999 [1st Dep't 1950]), which involved the actions of an employee of the defendant's firm taking a statement of the mother of the infant plaintiff without notifying her or her attorney. This representative of the defendant spoke to the mother of the infant plaintiff while she was already represented without notifying plaintiff's counsel. In the *Obser* case, the trial Court noted ". . . [t]he [ethics]rule was not intended to operate only after the commencement of an action to enforce a claim, but by its language clearly indicates that it applies

to a pending claim, regardless of whether an action has been commenced or not." (*Obser v. Adelson*, 96 N.Y.S.2d 817, 819. The Court in *Obser* granted the motion to suppress the improperly obtained statement. The determination in the *Obser* case is instructive here because the complained of behavior in this matter also took place just prior to the commencement of the action, and the nature of such behavior warrants the Court taking action in this matter, as the Court did in *Obser*.

The ethics rules governing attorney behavior, in the various forms they have taken over the years, have always included provisions about attorneys interacting with parties and individuals with adverse interests, whether those individuals were represented or unrepresented. The rules have required attorneys to act in a manner that is consistent with their obligations to their clients. They also require attorneys to act in a manner which respects the rights of the individuals with adverse interests.

Many of the cases cited by both sides that analyze this type of issue tend to have one fact present that is different than the facts of this situation: the questionable actions were often taken by an investigator or other third party, and were attempted to be attributed to the attorney. Those cases simply do not line up with the situation here. In the case at bar, the Court has concerns about the manner in which the testimony was obtained from Dr. Benton by Mr. Hurley. Based upon a review of the law in this area, other than the Nassau County Bar Association and the New York State Bar Association Ethics opinions cited by the defendant, it does not appear as though there are any published court decisions that are directly on point with the issues raised. This appears to be a case of first impression for the courts. While the Ethics opinions of the bar associations provide some useful guidance in analyzing the ethics implications of such behaviors by an attorney, those opinions are limited to being advisory in nature, and make clear that those committees do not make

determinations of law, including admissibility questions. As such, the Court is left to determine the issues in this specific case based upon the limited body of case law that provides some guidance on these issues, but does not provide a direct answer to the questions posed.

It is also worth noting that this Court gave all defendants an opportunity to be heard on these issues at the oral argument of this motion. Other than Dr. Benton's counsel, only Dr. Aram's attorney presented a detailed argument regarding the potential impacts the introduction of such testimony may have on the other defendants. Dr. Aram's attorney argued that because Mr. Hurley did not advise Dr. Benton about his role as Ms. Ericsen's attorney, or indicate prior to questioning him what the nature of this line of questioning would be, the testimony was improperly obtained and prejudice exists to Dr. Benton and, by extension, to Dr. Aram. Counsel contends that there is prejudice to Dr. Aram because he and Dr. Benton made decisions together regarding Ms. Ericsen. Dr. Aram was not present at the *Galvin* trial, and certainly had no opportunity to address the questioning by Mr. Hurley or have input in any way about the propriety of that occurrence. This puts Dr. Aram in the position of having Dr. Benton's testimony, which contains admissions about "mistakes" made in the care and treatment of Ms. Ericsen, placed in front of the jury when that testimony was taken under circumstances in which Dr. Aram had no ability to deal with the testimony.

Although not necessary to the overall analysis for Dr. Benton's motion based upon the foregoing analysis, it is imperative that the Court discuss some of the alternative arguments raised by Dr. Benton's motion in the context of Dr. Aram's objection to the testimony being admitted. Dr. Benton asserted that the admission of certain portions of his prior testimony would be problematic based upon this Court's earlier ruling that the opinions and conclusions contained in the Department

of Health report were not admissible. There are portions of Dr. Benton's testimony that discuss the result of the Department's report, which clearly violates this Court's ruling. Since this Court is suppressing the entirety of the testimony based upon Dr. Benton's motion, this point is not critical regarding the overall admissibility of the testimony as noted in the above analysis. However, Dr. Aram raised the point that if the Court allows in the prior testimony of Dr. Benton, these previously excluded opinions, in a broad sense, would be permitted to be put before the jury, and the specific findings that are in Dr. Aram's favor, such as the finding that the discharge of Ms. Ericsen from the hospital was proper, would not come before the jury. This presents an inequitable situation that prejudices the defendants.

The plaintiff contends that a curative instruction would address the issues raised by Dr. Aram. However, this Court is not convinced. To allow the jury to consider fully the prior testimony of Dr. Benton when considering Dr. Benton's liability, but not allow that testimony to be considered when determining Dr. Aram's liability when the two doctors made decisions together presents significant problems for the trier of fact that does not appear to be curable by an instruction.

CONCLUSION

For all of these reasons, the Court grants Dr. Benton's motion. Any remaining arguments raised by the parties, and not specifically addressed herein have been examined and found to be without merit, and need not be reached in light of the foregoing determination.

Accordingly, it is hereby

ORDERED, that defendant Dr. Benton's motion to preclude plaintiffs from offering his prior testimony in the *Galvin* case is granted, except that under appropriate circumstances, such testimony may be utilized to impeach Dr. Benton at trial.

This memorandum constitutes the Decision and Order of the Court. The original Decision and Order is being forwarded to the attorneys for Dr. Benton. A copy of this Decision and Order together with all supporting papers on the motion is being forwarded to the Office of the Albany County Clerk for filing. The signing of this Decision and Order and delivery of a copy of the same to the County Clerk shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule relating to filing, entry, and notice of entry of the original Decision and Order.

SO ORDERED.

ENTER.

Dated: June 21, 2017
Albany, New York

Kimberly A. O'Connor

HON. KIMBERLY A. O'CONNOR
Acting Supreme Court Justice

JM 6-27-17

Papers Considered:

1. Motion in Limine Seeking to Preclude Use of Dr. Benton's Prior Trial Testimony, dated April 27, 2017; with Exhibits A - B annexed;
2. Plaintiff's Opposition to Defendant Benton's Motion in Limine to Preclude Prior Testimony, dated May 1, 2017;
3. Motion in Limine Seeking to Preclude Use of Dr. Benton's Prior Trial Testimony, dated May 4, 2017; with exhibit annexed;
4. Plaintiff's Further Opposition to Defendant Benton's Motion in Limine to Preclude Prior Testimony, dated May 3, 2017; *and*
5. Plaintiff's Second Further Opposition to Defendant Benton's Motion in Limine to Preclude Prior Testimony, dated May 5, 2017.