

**Pormigiano v St Luke's-Roosevelt Hosp. Ctr.
Found., Inc**

2018 NY Slip Op 32367(U)

September 19, 2018

Supreme Court, New York County

Docket Number: 805366/13

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 11

X INDEX NO. 805366/13

JOHN PORMIGIANO and CHRISTINA PORMIGIANO,

Plaintiffs

-against-

ST LUKE’S-ROOSEVELT HOSPITAL CENTER FOUNDATION, INC,
SANFORD LITWIN, M.D. and HUGH SHARP, C.R.N.A.,

Defendants.

X

JOAN A. MADDEN, J.:

In this medical malpractice action, plaintiffs move, by order to show cause, for an order precluding defendants’ surgical expert from testifying at trial on the grounds that such testimony would be cumulative, irrelevant and prejudicial (motion seq. no. 003). Defendants Sanford Littwin, M.D. (“Dr. Littwin”) and Hugh Sharp C.R.N.A. (“Mr. Sharp”)(together the “Littwin defendants”) oppose the motion, and St Luke’s-Roosevelt Hospital Center Foundation, Inc (St Luke’s) separately opposes the motion.

The Littwin defendants separately move for an order precluding plaintiffs from offering any evidence or testimony at trial regarding St. Luke's anesthesiology policies and procedures that went into effect in July 2012 (motion seq. no. 004). Plaintiffs oppose the motion.

St. Luke’s separately move for an order pursuant to CPLR 2304, quashing the subpoenas to testify at trial served by plaintiffs upon nonparty witnesses, Jonathan Lesser, M.D. and Meg Rosenblatt, M.D., and/or to preclude certain of their testimony (motion seq no. 005).¹ Plaintiffs oppose the motion.

¹Motion sequence nos. 003, 004, and 005 are consolidated for disposition.

This is a medical malpractice action arising out of the positioning of plaintiff John Pormigiano (“plaintiff” or “Mr. Pormigiano”) during at 10 hour surgical procedure performed at at St Luke’s on August 5, 2011, for reversal of a colostomy and repair of a large ventral hernia. Dr. Littwin was the anesthesiologist, and was assisted by Mr. Sharp, the nurse anesthetist. The surgery was performed by three surgeons, Dr. Grace Kim (general surgery), Dr. William Samson (plastic surgery), and Dr. Nipa Gandhi (colorectal surgery).

During the surgery, plaintiff was placed in the supine/modified lithotomy position, with his arms abducted and strapped for the entirety of the procedure. Plaintiffs assert that Dr. Littwin and Mr. Sharp were responsible for the positioning and monitoring of plaintiff’s upper extremities, while the surgeons were responsible for the positioning and monitoring of plaintiff’s lower extremities. Plaintiffs allege that due to defendants’ negligence, Mr. Pormigiano suffered permanent injuries to his upper extremities, including to his brachial plexus nerve roots and to his median nerves, and that he developed severe bilateral carpal tunnel syndrome, which required surgery.

Plaintiffs have exchanged expert disclosures with respect to their experts in the fields of neurology and anesthesiology and indicate that these experts will testify, *inter alia*, as to departures by the anesthesiology team regarding the positioning of Mr. Pormigiano’s arms during the surgery, and that such positioning was responsible for his injuries.²

²Specifically, plaintiffs allege that the Littwin defendants were negligent in failing to formulate and implement a proper positioning plan of care; in failing to properly position the plaintiff’s arms so as to avoid over abduction and/or undue stretch of the brachial plexus; in failing to properly monitor and evaluate the position of plaintiff’s arms intraoperatively; in failing to properly apply and/or utilize the wrist/forearm straps so as to avoid undue and/or protracted pressure on the median nerve; in failing to properly monitor and evaluate the position of the wrist/forearm straps and/or the position of plaintiff’s wrists intraoperatively; and in failing

The Littwin defendants have served expert disclosures regarding experts in the fields of anesthesiology, surgery and neurology. The disclosures indicate that each of the experts will testify, *inter alia*, as to the positioning and monitoring plaintiff's arms during surgery, the role of surgical staff in determining the appropriate surgical position, and that the positioning of plaintiff was the result of the joint decision making between the anesthesiologist and the surgical team.

St Luke's has served expert disclosures for the fields of surgery and neurology. Both expert disclosures indicate the experts will testify, *inter alia*, as to the positioning of plaintiff and the monitoring of plaintiff's position during surgery.

After the defendants served their expert disclosures, plaintiffs withdrew their claims against the surgeons who participated in the surgery, and thus their claims do not allege any departures related to the surgical standard of care, or to the surgeon's positioning and/or monitoring of plaintiff's lower extremities during surgery. Accordingly, plaintiffs requested that the defendants withdraw their surgical expert disclosures, which request was denied by defendants.

Plaintiffs' Motion to Preclude the Testimony of Defendants' Surgical Experts

Plaintiffs now move to preclude the testimony of the defendants' surgical experts at trial, arguing that now that their claims against the surgeons have been withdrawn that the defendants' surgical experts should be precluded from testifying a trial as such testimony would be irrelevant, prejudicial, as well as cumulative of that of the defendants' expert in anesthesiology.

Plaintiffs' argument has merit. While plaintiffs allege departures by the anesthesiology

to take proper precautions to prevent plaintiff from developing positional-related perioperative peripheral neuropathies.

team, there are no longer any claims or cross claims against the surgeons, including with respect to any departures related to the surgeon's positioning of plaintiff's lower extremities during the surgery. Moreover, there is no dispute that the anesthesiology team participated in the positioning of the plaintiff. Next, as noted above, the Littwin defendants' expert disclosure indicates that their anesthesiology and neurology expert will testify as to the anesthesiologists positioning of plaintiff during surgery, the joint decision making of the surgical team on plaintiff's positioning during surgery, and the impact of the positioning on plaintiff's alleged injuries. St Luke's expert in the field of neurology will also testify in his regard. Thus, to the extent the defendants' surgical experts' anticipated testimony relates to standard of care for positioning of plaintiff by anesthesiologist team and the role of the surgical team in connection with such positioning, including its joint decision making with the anesthesiology team, such testimony would be cumulative of the testimony of defendants' expert in anesthesiology (and neurology). See Abbott v. New Rochelle Hosp. Center, 141 AD2d 589 (2d Dept), appeal denied 72 NY2d 808 (1988) (holding that the trial court properly limited the testimony of plaintiffs' third expert where would be "largely repetitive"). Furthermore, as plaintiffs have withdrawn their claims against the surgeons, any testimony from defendants' surgical experts relating to the surgical standard of care, would be irrelevant and immaterial. Accordingly, plaintiffs' motion to preclude defendants' surgical experts is granted.

Littwin Defendants' Motion to Preclude Evidence or Testimony Regarding Protocols

The court will next address the Littwin defendants' motion for an order precluding the plaintiffs from offering any evidence or testimony at trial regarding St. Luke's Anesthesiology Safety Regulations (hereinafter "anesthesiology protocols" or "protocols") which went into effect

in July 2012. This motion is based on the argument that as the 2012 protocols post-date plaintiff's August 2011 surgery, these anesthesiology protocols are inapplicable.

In opposition, plaintiffs assert that in response to their demand for specific policies from the Department of Anesthesiology and Department of Surgery in effect in 2011, St Luke's provided the anesthesiology protocols effective in 2012, and that the protocols are "highly relevant" to defendants' alleged malpractice. Specifically, plaintiffs point to paragraphs "H" and "I" on page 3 of the protocols. Paragraph "H" reads as follows: "If it is necessary for an arm to be abducted, this shall not be greater than 80 degrees." Paragraph "I" reads as follows: "Particular attention will be given to protection of the brachial plexus, ulnar, radial and lateral popliteal nerves."

Plaintiffs also rely on Dr. Littwin's deposition testimony that he believed the protocols were in effect at the time of plaintiff's August 2011 surgery. They also note that Mr. Sharp testified that he believed the standards in Paragraph H and Paragraph I of the protocols were in effect at the time of plaintiff's surgery. Defendants, however, note that Dr. Littwin testified that he did not know if the protocols were in effect in August 2011, and that Mr. Sharp testified that he could not definitively say whether the protocols had been changed or revised after plaintiff's surgery. During Dr. Littwin's deposition, Dr. Littwin's counsel noted on the record the protocols "seem to have been revised in July 2012" (Littwin EBT at 129). St. Luke's counsel responded that "we have furnished whatever documents we have been advised existed" (Id at 131).

On May 8, 2018, in preparation for trial, plaintiffs served St Luke's with a subpoena duces tecum for certified copies of the hospital policies and protocols that were disclosed during the course of discovery, including the subject protocols. On June 28, 2018, in response to the

subpoena, counsel for St. Luke's advised that the anesthesiology protocols that were in effect at the time of the malpractice "were not found." More specifically, counsel advised as follows: (1) that the anesthesia safety regulations (i.e. the protocols) previously disclosed came into effect as of July 2012; (2) that a prior policy which came into effect as of December 2005, and which was applicable at the time of the malpractice, "was not found;" and (3) that an earlier policy dated September 12, 2000 still exists. In an effort to comply with the subpoena, counsel for St. Luke's provided a certified copy of both the July 2012 protocols, and the September 12, 2000 protocols.³ Plaintiffs point out that the "Patient Safety" section of the September 12, 2000 protocols is identical to that of the July 2012 protocols. This includes Paragraph "H" ("If it is necessary for an arm to be abducted, this shall not be greater than 80 degrees."), as well as Paragraph "I" ("Particular attention will be given to protection of the brachial plexus, ulnar, radial and lateral popliteal nerves.").⁴

Plaintiffs argues that under these circumstances, an inference can be drawn that the relevant paragraphs in the protocols regarding the placement of the patient were in effect at the time of the surgery.

In consideration of plaintiffs' arguments, and as the admissibility of the protocols is an evidentiary issue for resolution by the trial court, including whether any limiting instructions

³The September 12, 2000 policy became effective in September 1997, and was "reviewed," not "revised," on September 12, 2000. (Exhibit "K").

⁴Plaintiffs assert that because relevant "Patient Safety" section of the protocols from September 1997 were reviewed and not revised in September 2000, that the "Patient Safety" section was in effect as far back as fourteen years before the subject malpractice (September 1997), remained in effect eleven years before the malpractice (September 2000), and was still in effect one year after the malpractice (July 2012).

and/or a missing document charge are appropriately given, the Littwin defendants' motion to preclude the admission of the protocols at trial is denied without prejudice to renewal before the trial court.

St Luke's Motion to Quash Trial Subpoenas

St Luke's moves to quash the subpoenas to testify at trial served upon non-party witnesses Jonathan Lesser, M.D. and Meg Rosenblatt, M.D., which seeks their testimony as to the anesthesiology protocols in effect at the time of plaintiff's surgery and/or to preclude certain testimony. St Luke's argues that neither Dr. Lesser nor Dr. Rosenblatt have any pertinent knowledge as to the applicability of the protocols in effect at the time of plaintiff's surgery, nor were they involved in the care and treatment of Mr. Pormigiano or have contract with plaintiffs.

In support of its motion, St Luke's submits the affirmations of Dr. Lesser and Dr. Rosenblatt. Dr. Lesser, an Attending Physician in the Department of Anesthesiology at St Luke's since 1992, affirms that he was never involved in the care and treatment of Mr. Pormigiano at St Luke's and never had any contact with plaintiffs and never discussed the care and treatment of Mr. Pormigiano at St Luke's with any of the defendants in this action or any other staff members.

Dr. Lesser also affirms that he first became aware of this action in or about June 2018, when he was contacted by Risk Management at St Luke's with a request to certify guidelines from the Department of Anesthesiology (i.e. the protocols) for purposes of trial, and that he was asked to certify guidelines which came into effect in September 2000 on the subject of Anesthesia Safety Regulations from the Department of Anesthesiology, and that he "certified the

September 2000 guideline on the subject of Anesthesia Safety Regulations and others.⁵” Dr. Lesser further states that he is aware that Department of Anesthesiology makes guidelines in the regular course of business, and he certified the September 2000 guidelines on the subject of Anesthesia Safety Regulations, and others, because he was on staff at St Luke’s at the time the September 2000 regulation came into effect. However, he states that he was not involved, and has never been involved in establishing, compiling, drafting or editing the regulations that came into effect in September 2000, or any treatment guidelines in the Department, and that he has no knowledge of the applicability of the guideline in effect in August 5, 2011 to plaintiff’s treatment.

Dr. Rosenblatt states that she is a Professor of Anesthesiology, and that since November 2014, she has been the Site Chair of the Department of Anesthesiology at Mount Sinai St. Luke’s and Mount Sinai West, the successor entities to St Luke’s Roosevelt Hospital Center which merged with Mount Sinai Hospital. Dr. Rosenblatt affirms that she was never involved in the care and treatment of Mr. Pormigiano at St Luke’s and had no contact with plaintiffs and never discussed the care and treatment of Mr. Pormigiano at St Luke’s with any of the defendants in this action or any other staff members. She states that she was not involved, and has never been involved in establishing, compiling, drafting or editing any guidelines for St Luke’s. She also affirms that she has no knowledge of the of the applicability of the guideline on Anesthesia Safety Regulations in effect on in August 2011, or any prior or subsequent versions of these guidelines, and that she was not aware of this action until she was informed by the Risk Management Office of a subpoena for her testimony at the trial of this action.

⁵While Dr. Lesser does not specify what other guidelines he certified, it appears from the record that he also certified the July 2012 guidelines/protocols.

In opposition, plaintiffs argue that under the circumstances here, including that the protocols, and in particular the Patient Safety Section, are directly relevant to whether defendants were negligent in positioning plaintiff during surgery, and that St Luke's now asserts that the protocols it produced are not applicable to the August 2011 surgery, it is entitled to question a witness from St. Luke's with knowledge of the Department of Anesthesia's policies. Specifically, they argue such witness would give relevant testimony

on various topics including but not limited to, the promulgation, revision, review and maintenance of the Department's policies ;the existence or lack thereof of the regulations that were in effect in August 2011; the reasons for the failure to maintain the regulations; the time period in which the regulations last existed; the identity of the individuals who authored and/or signed off on the 1997, 2000 and 2012 policies; the differences between the policies; the details as to the search conducted for the policies in effect in August 2011; the likelihood that the language of the "missing" regulations is different than that of the 1997, 2000 and 2012 regulations, et "given the central importance of the anesthesiology protocols and in particular the patient safety section of such protocols, and St Luke's objection to the protocols that it produced in discovery on the grounds that they are inapplicable to the August 2011 surgery and St Luke's failure to locate the protocols in effect in August 2011, he likelihood that the language of the "missing" regulations is different than that of the 1997, 2000 and 2012 regulations....

As for Dr. Lesser, plaintiffs argue that he can provide relevant testimony on this topic as he certified the 2000 and 2012 policies for trial and has been an attending anesthesiologist since 1992. With regard to Dr. Rosenblatt, plaintiffs argue that as Chair of Anesthesiology she can also provide relevant testimony. Plaintiffs also assert that St Luke's did not move to quash the subpoena for a "witness with knowledge" of the anesthesia safety regulations that were in effect before, after and on the date of malpractice, and defendant should be directed to comply with

said subpoena by producing such a witness at trial.

In reply, St Luke's asserts that "due to oversight" their motion to quash did not include language to also preclude plaintiffs' subpoena for a person with knowledge of St Luke's Anesthesiology regulations.

"An application to quash a subpoena should be granted only where the futility of the process to uncover anything legitimate is inevitable or obvious, or where the information sought is utterly irrelevant to any proper inquiry." Anheuser-Busch, Inc., v. Abrams, 71 NY2d 327, 331, 332 (1988)(internal citations and quotations omitted); see also Kapon v. Koch, 23 NY3d 32, 38-39 (2014). Moreover, while a trial subpoena is subject to challenge for being overly broad or attempting to obtain discovery (Bour v. Blecker LLC, 104 AD3d 454 (1st Dept 2013)), such challenges are not at issue here.

Instead, St Luke's argues that the individuals that are subject to the subpoenas do not have knowledge of any relevant information. With respect to Dr. Rosenblatt, based on her affidavit, St. Luke's has met its burden of demonstrating that her testimony would be futile as she has no knowledge of the anesthesiology protocols at issue. As for Dr. Lesser, St Luke's has not demonstrated that his testimony would be futile and/or "utterly irrelevant" since he certified the protocols for trial and has been an Attending Physician in the Department of Anesthesiology at St Luke's since 1992. In addition, St Luke's has not shown that the trial subpoena for a person with knowledge of St Luke's anesthesiology regulations should be quashed since such testimony regarding the protocols would be potentially relevant to the issues relating to defendants' alleged malpractice.

Conclusion

In view of the above, it is

ORDERED that plaintiffs' motion for an order precluding defendants' surgical expert from testifying at trial (motion seq. no. 003) is granted; and it is further

ORDERED that the Littwin defendants' motion to preclude plaintiffs from offering any evidence or testimony at trial regarding St. Luke's anesthesiology policies and procedures that went into effect in July 2012 (motion seq. no. 004), is denied without prejudice to renewal before the trial court; and it is further .

ORDERED that St. Luke's motion to quash three subpoenas served by plaintiffs for trial testimony (motion seq no. 005) is granted only to the extent of quashing the subpoena served on Meg Rosenblatt, M.D., and is otherwise denied.

DATED: September 19, 2018



J.S.C.

HON. JOAN A. MADDEN
J.S.C.