Quinn v. St. Peter's Hospital

9 Misc.3d 1102(A) (2005) | Cited 0 times | New York Supreme Court | August 17, 2005

Plaintiffs move for an order granting further expert witness disclosure and to preclude the testimony of defendants' expert in this medical malpractice action.

Defendants have agreed to provide much of the information sought by plaintiffs but object to providing the expert's years of graduation and internship as well as information regarding publications by the expert because such information would likely reveal the identity of the expert in contravention of CPLR 3101 § [d][1][i].

Defendants are directed to provide the disclosure which has not been explicitly objected to in the motion papers.

The Third Department (Morris v Clements, 228 AD2d 990, 991) has held that:

"[A] party responding to a request for information about expert witnesses in the context of a medical malpractice action, 'may omit the names of medical ... experts but shall be required to disclose all other information concerning such experts', including his or her professional qualifications. With the exception of their names, virtually all information regarding expert witnesses and their anticipated testimony is discoverable under CPLR 3101 (d)(1)(I), unless 'the request is so detailed that disclosure would have the net effect of disclosing the experts' identities' [citing Pizzi v Muccia, 127 AD2d 338, 340; Jasopersaud v Tao Gyoun Rho, 169 AD2d 184, 188]. To avoid an order directing such disclosure, a party must move for a protective order and to succeed thereon, the movant must shoulder the burden of demonstrating that the information sought is immune from disclosure."

Trial courts have struggled with the increasing practical difficulty of protecting the identity of expert medical witness while allowing full pretrial disclosure. The court in Thomas v Alleyne (302 AD2d 36, 43) aptly describes the issue:

"[I]n light of the expansion of computer technology, it has become markedly easier for attorneys, or their employees, to perform various research functions that, at the time of the enactment of CPLR 3101 (d)(1)(i) in 1985 (L 1985, ch 294, § 4) would have required significantly more time and effort. While it was undoubtedly possible, even then, for anyone willing to expend the necessary time and

resourceful enough to locate the necessary directories, to determine the identity of an unknown physician based on a limited quantity of information known about such physician's background, that task is now vastly simplified as the result of computer technology. The plaintiff argues that the law should recognize this technological change by further limiting defendants' right to the disclosure of background information relating to a medical malpractice plaintiff's expert's qualifications. We believe, instead, that this technological change points to the futility of attempting to conceal the identity of expert witnesses in medical malpractice cases, or in any other kind of case for that matter.

Virtually every jurisdiction in the United States except New York, conforming to the Federal Rules of Civil Procedure in this respect, allows the discovery of the names of adverse expert witnesses in medical malpractice cases through depositions or interrogatories; many states go so far as to permit depositions of such experts .... New York's rule, which, contrary to the federal rules, permits parties in medical malpractice cases temporarily to conceal the identity of their expert witnesses, is contrary to the salutary policy of encouraging full pretrial disclosure so as to advance the fundamental purpose of litigation, which is to ascertain the truth...."

This court finds that the Thomas decision (id.) best exemplifies the appropriate balance between required disclosure and protection of the expert's identity.

The Thomas court held (302 AD2d at 38) that "in medical malpractice actions the [parties] are presumptively entitled to a statement of the ... expert's qualifications in 'reasonable detail' (CPLR 3101 [d][1][i]), as the statute commands, and that [a party] in such cases may avoid compliance with this obligation only upon production of proof sufficient to sustain findings (a) that there is a reasonable probability that such compliance would lead to the disclosure of the actual identity of their expert or experts, and (b) that there is a reasonable probability that such disclosure would cause such expert or experts to be subjected to 'unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice' (CPLR 3103[a])."

With respect to the demand for the expert's years of graduation and internship, the court finds that defendants have failed to sufficiently show that there is a reasonable probability that the requested disclosure would lead to discovery of the expert's identification.

The publication information will likely lead to the identity of the expert but defendants have neither moved for a protective order nor shown that disclosure of the expert's identity would lead to "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice."

Defendants have failed to overcome the presumption that the expert's qualifications must be disclosed in reasonable detail.

In view of the court's "broad discretion to supervise discovery" (Dolback v Reeves, 265 AD2d 625, 626) and, in particular, its "broad discretion in addressing expert disclosure issues" (Gross v Sandow, 5

AD3d 901, lv dismissed in part and denied in part 3 NY3d 735), the plaintiffs' motion for further expert disclosure is granted.

The motion to preclude the expert's testimony on the basis of his or her qualifications and on the basis of "bolstering" or "duplication" is denied without prejudice to renewal at trial.

All papers, including this decision and order, are being returned to plaintiffs' counsel. The signing of this decision and order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that section relating to filing, entry and notice of entry.

This memorandum shall constitute both the decision and the order of the court.

IT IS SO ORDERED.

PAPERS CONSIDERED:

Notice of motion;

Affidavit of Krzykowski;

Affidavit of McFarland;

Reply affidavit of Mills.