

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER
0101191/2003

PART A Part 16

SCHIFFER, MARK
VS
SPEAKER, MARK G., M.D.

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

SEQ 4

DISMISS ACTION

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE
WITH ACCORDING MEMORANDUM
DECISION IN MOTION SEQUENCE 003.

FILED

DEC 16 2004

NEW YORK
COUNTY CLERK'S OFFICE

Dated: DEC 10 2004

Alice Schlesinger
ALICE SCHLESINGER J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER
Justice

PART A Part 16

OT01191/2003

SCHIFFER, MARK
VS
SPEAKER, MARK G., M.D.

EX NO. _____

TION DATE _____

SEQ 3

TION SEQ. NO. _____

COMPEL DISCLOSURE

TION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

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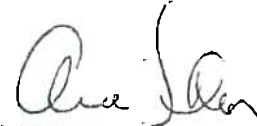
**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION.**

FILED

DEC 16 2004

NEW YORK
COUNTY CLERK'S OFFICE

Dated: DEC 10 2004



ALICE SCHLESINGER S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 16

-----X
MARK SCHIFFER,

Plaintiff,

-against-

Index No. 101191/03
Motion Seq. Nos. 003 & 004

MARK G. SPEAKER, M.D., LASER AND CORNEAL
SURGERY ASSOCIATES, P.C., TLC LASER EYE
CENTER, REGINA ZYSZKOWSKI and DRS. FARKAS,
KASSALOW, RESNICK and ASSOCIATES, P.C.,

Defendants.

-----X
SCHLESINGER, J.:

On September 29, 2000 Mark Schiffer met for the first time with an optometrist, Dr. Regina Zyszkowski, to determine whether he was a suitable candidate for LASIK surgery. He wore glasses at the time. Dr. Zyszkowski was an employee of Farkas, Kassalow, Resnick and Associates. She performed various tests on Mr. Schiffer's eyes, including a keratometry, a topography and a slit lamp exam. Because Dr. Zyszkowski noticed an irregularity in Mr. Schiffer's retina, she referred him to a retina specialist, Dr. Kenneth Carnevale. On or about October 3, 2000 she heard back from Dr. Carnevale that the planned LASIK surgery was not contraindicated. She then referred her patient to TLC Laser Eye Center and set up an appointment for the procedure for October 6. She testified at her deposition that she specifically wished the surgery to be done by Dr. Mark Speaker, but there is no evidence that that information was communicated to Mr. Schiffer.

On the 6th, Mr. Schiffer appeared at TLC's offices (his first visit there) where he met with Dr. Speaker. He then underwent various tests by the doctor, signed a multi-page consent form and submitted that day to bilateral LASIK surgery by Dr. Speaker.

Dr. Speaker is both the sole shareholder of his P.C., Laser and Corneal Surgery Associates, and Medical Director of TLC. In the latter capacity, for which he is paid \$25,000 per year, his duties include administrative functions as well as those involved in the care and treatment of patients.

After the surgery was performed, seemingly without complications, Mr. Schiffer made seven post-operative visits to Dr. Zyszkowski. On the final visit, on May 16, 2001, she noted some far-sightedness with astigmatism and discussed with him the possibility of a second "enhancement" surgery. Dr. Zyszkowski however first requested additional testing, specifically pachymetry and topography from Dr. William Tullo, an optometrist and Clinical Director of TLC, as well as Dr. Zyszkowski's former professor.

Mr. Schiffer returned to TLC on June 5, 2001 and on that day was examined first by Dr. Tullo and then by Dr. Speaker. Both agreed that Mr. Schiffer had a thinning of the cornea, a condition known as ectasia, which made additional surgery unsound. The enhancement procedure was cancelled. Mr. Schiffer went on his way and never returned.

However, Mr. Schiffer has now been diagnosed with Keratoconics, a degenerative condition of the cornea. He has sued all of the above-mentioned health care providers for injuries he has suffered allegedly from the October 6th LASIK surgery. This surgery, he claims, should never have been performed because of the Keratoconus, a condition he says was present before the surgery or could have been anticipated. He now suffers from impaired vision, particularly in his left eye where his vision is blurred and distorted. He has been advised that the only possible treatment would be corneal transplants.

I have before me two substantive motions and one procedural one. First, defendant TLC is moving for summary judgment dismissing the two causes of action that make up the

complaint, the first that sounds in negligence or medical malpractice, and the second which alleges a lack of informed consent. The only other defendant that takes a position on TLC's motion is Mark Speaker and his P.C., Laser & Corneal Surgery Associates. They partially oppose the motion, specifically that part of it which seeks to dismiss the aspect of the claim that asserts a theory of vicarious liability against them vis-a-vis the actions of Dr. Speaker. However, those defendants join in TLC's motion to dismiss the lack of informed consent claim via their own cross-motion. Not surprisingly, the plaintiff vigorously opposes both motions.

On the procedural front, TLC is moving pursuant to CPLR §3124 for an order directing plaintiff to provide further identifying information for its expert witness pursuant to CPLR § 3101(d)(1)(i), or alternatively to preclude the plaintiff from offering the witness at trial. Dr. Speaker and his P.C. again join in this motion. Here, plaintiff not only opposes but cross-moves for a protective order, pursuant to CPLR §3101(d) and 3103(a), shielding the qualifications of his medical expert from further disclosure and also requiring defendants to enter into a confidentiality agreement vis-a-vis his tax returns and those of his employer, which this Court had previously ordered disclosed.

The Summary Judgment Motions

It is TLC's contention in support of its summary judgment motion that Dr. Speaker, though having a relationship with them and performing surgery at their facility, was an independent contractor, thereby relieving TLC of any responsibility. They point out that Dr. Zyskowski is not their employee either. Finally, they argue that TLC had nothing to do with Mr. Schiffer before his October 6 surgery and nothing to do with the decision to go ahead with that surgery.

As to the lack of informed consent claim, both defendants point to the multi-page consent form Mr. Schiffer signed, at Dr. Speaker's request, before the surgery on October 6 and urge that such form clearly lays out all of the risks associated with the procedure and even gives the patient the opportunity to ask questions. In fact, they point out that on page 2 of the consent form (a page the plaintiff initialed as he did all pages), Section 3, concerning LASIK indications and contraindications, it states "candidates must be free of certain eye diseases including Keratoconus, glaucoma, cataracts and certain retinal optic nerve diseases." Therefore, defendants say that as a matter of law, it must be found that Mr. Schiffer had been adequately informed of the reasonably foreseeable risks of the surgery.

Plaintiff's opposition consists of a physician's affirmation (redacted to retain his anonymity as will be discussed more fully later), certain exhibits concerning Dr. Speaker's relationship to TLC, and a memorandum of law. Their doctor, an ophthalmologist who performs these procedures, gives his opinion that Mr. Schiffer presented to the defendants, prior to the LASIK surgery, with form frusta Keratoconus, a condition that made the surgery contraindicated. Further, he points to testimony given by Dr. Speaker to the effect that Mr. Schiffer presented on October 6 with an anomalous inferior steepening of the cornea of his left eye. This, according to the expert, increased plaintiff's risks and made the LASIK surgery unwise. However, the patient was never given this information.

Counsel for Mr. Schiffer points out the following vis-a-vis TLC and their relationship with the other defendants. First of all, the fee of \$5500 paid by the plaintiff was divided in the following way: \$1100 to the Farkas Group, \$1100 to Dr. Speaker, and the remaining \$3300 to TLC. Further, Dr. Speaker was a Corporate Director in TLC's Delaware affiliate

and received stock in TLC, a publicly traded corporation. Also, he did all of his LASIK surgery at their facility and relies on them for his pre-op data.

Finally, in Reply, TLC points out that Dr. Speaker's agreement vis-a-vis his Medical Directorship excludes seeing patients or practicing medicine. Therefore, they maintain they are not responsible for his activities when he does this work. Their agreement even contains a clause to that effect, they argue.

TLC's motion is denied vis-a-vis both causes of action, as is Dr. Speaker's motion vis-a-vis the second cause of action relating to informed consent. First of all, agreements between parties are "not determinative of the relation [vis-a-vis third parties] in the event that the actual titles indicate otherwise." *Mduba v. Benedictine Hospital*, 52 AD2d 450, 452 (Third Dept, 1976), quoting *Matter of Fidel Assn. of NY*, 259 App. Div. 486, 487 (Third Dept, 1940), *aff'd* 287 NY 626. Second, issues as to whether a medical practitioner is truly an independent contractor as opposed to an employee are traditionally issues of fact best left to be decided at trial. *Campanelli v. Flushing Ultrasound*, 287 AD2d 428 (Second Dept, 2001), *lv. dismissed* 98 NY2d 692 (2002); *Felice v. St. Agnes Hospital*, 65 AD2d 388 (Second Dept, 1978).

Finally, pursuant to the theory of ostensible agency, wherein a patient such as the plaintiff here comes to a facility for services and is provided those services by a doctor at the facility and has no reason to suspect or believe the doctor is not working for the facility, rather than simply at it, that facility can be held responsible for the conduct of the doctor. *Hyllon v. Flushing Hospital and Medical Center*, 218 AD2d 604 (First Dept, 1995), *lv. den.* 87 NY2d 807 (1996); *Soltis v. State of New York*, 172 AD2d 919 (Third Dept, 1991).

As to the informed consent issue, the expert opines that all the risks specifically affecting Mr. Schiffer, including the steepening of the cornea of his left eye, should have been told to him and were not. This opinion, at the least, creates an issue of fact, despite the signed consent form, that he may not have been given all the necessary information. *Eppel v. Fredericks*, 203 AD2d 152 (First Dept, 1994).

The Issue of Expert Disclosure

The second motion and cross-motion, concerning how much expert disclosure the plaintiff must provide, is an interesting one here. Section 3101(d)(1)(l) mandates disclosure of identifying information about a proffered expert, though in medical malpractice cases the name of that expert does not have to be revealed. However, with new advances in computer technology, it has become relatively simple for the expert's name to be discovered when enough information is provided. That information includes the expert's board certifications and when they were obtained, the jurisdictions where she is licensed, the medical school attended and the dates of attendance, the institutions where residencies and fellowships were served with their dates, and whether the expert has published books and articles and, if so, the details. It is probable that with the disclosure of only some of these details, particularly with their relevant dates, the identity of the expert would be revealed.

Because of this relative ease of identification, courts throughout the State have attempted to fashion some remedy which would balance the dictates of the statute, which aims for better trial preparation and lack of surprise, with the protection of the actual identity of the expert, which serves the perceived goal, of plaintiffs in particular, of being able to retain such witnesses without fear of disapproval from the medical community in which they practice.

In *Jasopersaud v. Tao*, 169 AD2d 184, the Second Department in 1991 attempted to do this. In that case, the plaintiff was directed to disclose the expert's board certifications, the jurisdictions where she was licensed, the medical school attended, the area of expertise, and the institutions where the expert did post graduate work. However, the dates of these events could be withheld, as well as the institutions where the expert was presently affiliated, as the court concluded that the additional information "could effectively lead to disclosure of the expert's identity." 169 AD2d at 188. The issue of identifying publications never came up as the defendants had never demanded them.

The Fourth Department in early 2002 in *Thompson v. Swiantek*, 291 AD2d 884, however, went even further in protecting the expert's identification. There the court said the plaintiff only had to disclose the specialty and board certification(s) and the jurisdiction(s) where the expert was licensed.

Later that year, a kind of sea change occurred in Brooklyn and its environs when the Second Department decided to review and revise its holding in *Jasopersaud* (ironically at the invitation of the plaintiff). In a well reasoned opinion, *Thomas v. Alleyne*, 302 AD2d 36, the court rejected the balancing approach adopted by it eleven years earlier in *Jasopersaud*, pointing out that it was impractical, ultimately futile if any meaningful disclosure was to occur, out of step with virtually every other jurisdiction in the United States, and inconsistent with the literal interpretation of the statute which requires in "reasonable detail" disclosure of the qualifications of all experts, medical or otherwise.

Thus, the *Thomas* court directed that full disclosure would occur except in those cases, pursuant to CPLR §3103(a), where the plaintiff seeks a protective order "denying, limiting ... or regulating the use of any disclosure device ... to prevent unreasonable

annoyance, expense, embarrassment, disadvantage or other prejudice to any person or the courts." 303 AD2d at 46. In the "interest of justice," the court then remanded the case to the trial court to give plaintiff an opportunity to renew her objections and show that the expert in question had an "objectively reasonable belief that, if his or her identity were revealed prior to trial, then he or she would be subject to threats or pressure from other physicians, from representatives of a malpractice insurance carrier, or from any other source." 302 AD2d at 47.

That is precisely what Dr. Schiffer is attempting to do here. In that regard, his counsel has presented a redacted affirmation from his expert, the same person who authored the opinions given in both the expert disclosure report and the papers offered in opposition to TLC's motion and Mr. Speaker's cross-motion for summary judgment. In it, he/she states the following: 1) because the fraternity (sorority) of well-credentialed ophthalmologists who perform refractive and LASIK surgery is discrete and most practitioners are known to each other, the expert believes his/her identity would be revealed if additional information is provided; 2) he/she believes that if his/her identity became known it would result in unreasonable annoyance, expense, embarrassment and the like; 3) this belief is based on his/her expectation that friends and/or colleagues would try to dissuade him/her from testifying, something he/she does not wish to experience. Also he/she, as a competitor to TLC and Dr. Speaker, is fearful of the economic consequences he/she would suffer if targeted by them. In this regard he/she points out that TLC is a publicly traded company with huge resources and that Dr. Speaker is "a prolific LASIK surgeon, and one of TLC's stars in the New York area."

Further, counsel has included an article from Ophthalmology News written by its contributing editor Marilyn Haddrill, which describes the recantation of an expert witness, Dr. Jeffery Machat, after a \$4 million award had been returned in favor of a plaintiff on whose behalf he had testified. The case, tried in Tucson, Arizona, *Post v. United Physicians, Inc.*, involved LASIK surgery. According to Dr. Machat (TLC's founder), he came forward after he "discovered his error when he attended an American Society of Cataract and Refractive Surgery conference in June, where he talked to colleagues and Visx company officials." Dr. Machat admitted on cross-examination at the hearing for a new trial that many of his colleagues as well as corporate members were very upset with him because they believed he was irresponsible in giving the trial testimony. He acknowledged further that at the conference he had been "cursed", "verbally assaulted" and asked to resign from the Society's advisory board.

Counsel also included articles printed from the web, which suggest via letters and e-mails that experts who have testified for plaintiffs in LASIK cases have been subjected to anger and abuse, such as being called "whores" and "prostitutes."

Finally, counsel states that he has approached other ophthalmologists, some even from outside of the Metropolitan area, three of whom had declined to testify, even though they had found merit to the claim, because the defendants included TLC and Mark Speaker.

Defendants are not impressed with the above. In two paragraphs, counsel for TLC takes issue with the conclusions plaintiff draws from the article in Ophthalmology News and characterizes the website offerings as one-sided, prejudicial and lacking in verification. Plaintiff is accused of having failed to provide documentation from an independent and unbiased source. However, neither of the defendants provided such documentation. Nor

does their counsel comment on the fears expressed by the expert here or the problems counsel has encountered in attempting to retain other experts.

At oral argument, I gave counsel an opportunity for a hearing on this issue, which was declined. I believe plaintiff has presented a sufficient showing of fear and retaliation anticipated by his expert if further information is given over, enough to have sustained his burden entitling him to a protective order. Therefore, I am granting plaintiff's cross-motion for a protective order and denying defendants' motion to compel further disclosure and holding that the doctor will not have to provide information beyond that already given in plaintiff's April 27, 2004 Expert Witness Disclosure, which states:

The expert (doctor) is well-credentialed in ophthalmology, is affiliated with and has teaching responsibilities at one or more hospitals in the metropolitan New York area, has lectured and written on the subject of refractive surgery, and has extensive experience with laser surgery.

However, defendants must have an opportunity to properly prepare a cross-examination of this expert. Therefore, while a protective order is being granted until the time of trial testimony, plaintiff will have to make arrangements for this expert to return to court on a second day (plaintiff to abide the cost) so that defendants will have an opportunity, at the least, to properly research the expert and his/her writings.

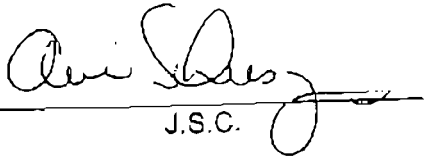
Finally, on the issue of the confidentiality of the plaintiff's income tax information, information I have earlier directed be turned over to defendants, the defendants shall enter into the confidentiality agreement the plaintiff requests, with the additions urged by counsel for Dr. Speaker with regard to items 2c and 6 included.

Counsel for all parties shall appear before this Court in Room 222 on Wednesday,
January 12, 2005 at 9:45 a.m. for a pre-trial conference.

This decision constitutes the order of the Court.

Dated: December 10, 2004

DEC 10 2004


J.S.C.

ALICE SCHLESINGER

FILED
DEC 16 2004
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