IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIANNA PAIGE VINCENT, ppa HEATHER VINCENT, and HEATHER VINCENT, Ind.	:	3:04 CV 491 (JBA)[1]
v.	:	
HOWARD MORTMAN, M.D., and SHARON OB/GYN ASSOCIATES	:	MARCH 17, 2006

RULING ON DEFENDANTS' MOTION FOR PROTECTIVE ORDER

This lawsuit is proceeding against defendants Dr. Howard Mortman, Sharon OB/GYN Associates, and Physicians for Women's Health, LLC. The Second Amended Complaint, filed June 7, 2005, alleges negligence (Count Three) and negligent infliction of emotional distress (Count Four)(Dkt. #72). United States District Judge Janet Bond Arterton referred this lawsuit to this United States Magistrate Judge for discovery purposes on January 5, 2005. (Dkt. #50). Under the current scheduling order, discovery is to be completed by July 13, 2006. (Dkt. #117, ¶ 1).

On February 23, 2006, defendants Dr. Mortman and Sharon OB/GYN Associates filed the pending Motion for Protective Order and brief in support (Dkt. #128),[2] as to which plaintiffs filed a brief in opposition five days later and Request for Leave to Reopen Deposition under Fed. R. Civ. P. 30(a)(2)(B) (Dkt. #130).[3] The sole issue raised in the pending motion is whether plaintiffs may depose defendant Dr. Mortman for a second time,

[1]This lawsuit has been consolidated with Vincent v. Physicians of Women's Health, LLC, 3:06 CV 249 (JBA). (See Dkts. ##135, 139-41).

[2]The following exhibits were attached: excerpts from the deposition transcript of Susan Shannon, taken on May 27, 2005 (Exh. A); copy of Revised Re-Notice of Deposition of Dr. Mortman, dated February 14, 2006 (Exh. B); and copies of case law.

[3]The following two exhibits were attached: excerpts from the deposition transcript of Nurse Carolyn Salinas (Exh. A); and copy of medical records (Exh. B).

after having already deposed him for nearly eight hours on July 25, 2005. (Dkt. #128, Brief at 4).

As both sides recognize, this matter is governed by FED. R. CIV. P. 30(a)(2)(B), which requires "leave of the court, . . . granted to the extent consistent with the principles stated in Rule 26(b)(2)," where "the person to be examined already has been deposed in the case," unless the parties stipulate otherwise.[4]

Plaintiffs argue that a limited second deposition of defendant Dr. Mortman is necessary because of a critical factual dispute regarding whether Dr. Mortman ordered a "stat" C-Section in a telephone conversation he had with Nurse Carolyn Salinas on March 15, 2003, at 6:51 a.m. (Dkt. #130, at 1-2). In his medical records and at his deposition on July 25, 2005, Dr. Mortman represented that he had given such an order (id. & Exh. B). However, at her deposition, taken some five months later, Nurse Salinas testified Dr. Mortman had given no such order. (Id. at 1-2 & Exh. A). As a result, plaintiffs argue that they never questioned Dr. Mortman regarding the standards applicable to giving the "stat" order because they had assumed, based on his medical records and his testimony, that he given such an order. (Id. at 2). Thus, plaintiffs want to question defendant Dr. Mortman on this limited issue.

Under Rule 30(a)(2)(B), courts "frequently permit a deposition to be reopened where the witness was inhibited from providing full information at the first deposition" or "where new information comes to light triggering questions that the discovering party would not have thought to ask at the first deposition." Keck v. Union Bank of Switzerland, 1997 WL 411931,

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[4]Plaintiffs did not seek such leave prior to their Revised Re-Notice of Deposition on February 14, 2006 (Dkt. #128, Exh. B), but only in their filing five days after defendants' motion. While federal judges in the Southern District of New York appear to disallow retroactive applications under Rule 30(a)(2)(B), see Innomed Labs, LLC v. Alza Corp., 211 F.R.D. 237, 239-40 (S.D.N.Y. 2002)(citations omitted), this Magistrate Judge nonetheless will permit plaintiffs' request, nunc pro tunc, given the largely unnecessary motion practice in this action. (See, e.g., Dkts. ##55, 64, 80, 86, 98, 107, 122, 131-34, 136, 138, 142-43, 145-47).

at *1 (S.D.N.Y. July 22, 1997)(multiple citations omitted). See also Seth Co., Inc. v. United States, 2003 WL 1874738, at *2-3 (D. Conn. Mar. 3, 2003)(permitting second deposition of corporate plaintiff's associates where defense counsel "has identified specific areas of inquiry [defendant] did not cover or . . . did not cover in sufficient depth" based on newly developed facts). Given Nurse Salinas' testimony at her December 2005 deposition, this case is one in which "new information comes to light triggering questions that [plaintiffs] would not have thought to ask at the first deposition" of defendant Dr. Mortman. Keck, 1997 WL 411931, at *1.

Plaintiffs additionally wish to question Dr. Mortman about a subsequent C-Section protocol about which Dr. Mortman testified at his deposition, but this protocol was not produced until former defendant Sharon Hospital was ordered to do so, in a discovery ruling, filed January 30, 2006. (Dkt. #130, at 2; see also Dkt. #122). Plaintiffs may question defendant Dr. Mortman about this new protocol, only to the extent that having the new protocol before him varies his prior testimony regarding such protocol.

Accordingly, defendants' Motion for Protective Order (Dkt. #128) is denied in large part and plaintiffs' Request for Leave to Reopen Deposition (Dkt. #130) is granted in limited part, such that plaintiffs may redepose defendant Dr. Mortman only with respect to: (i) the standards applicable to giving the "stat" order; and (ii) whether having the new protocol before him varies his prior testimony regarding such protocol, and if so, in what respects.

This is not a Recommended Ruling but a Ruling on discovery, the standard of review of which is specified in 28 U.S.C. § 636; FED. R. CIV. P. 6(a), 6(e) & 72; and Rule 2 of the Local Rules for United States Magistrate Judges. As such, it is an order of the Court unless reversed or modified by the District Judge upon timely made objection.

See 28 U.S.C. § 636(b)**(written objections to ruling must be filed within ten days after service of same);** FED. R. CIV. P. 6(a), 6(e) & 72; Rule 2 of the Local Rules for United

States Magistrate Judges, United States District Court for the District of Connecticut; Small v. Secretary, H&HS, 892 F.2d. 15, 16 (2d Cir. 1989)**(failure to file timely objection to Magistrate Judge's recommended ruling may preclude further appeal to Second Circuit).**

Dated in New Haven, Connecticut, this 17th day of March, 2006.

/s/
Joan Glazer Margolis
United States Magistrate Judge