

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT

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BRIANNA PAIGE VINCENT, ppa HEATHER VINCENT, and HEATHER VINCENT, Ind. : 3:04 CV 491 (JBA)<sup>1</sup>  
v. :  
HOWARD MORTMAN, M.D., and SHARON OB/GYN ASSOCIATES : MAY 3, 2006  
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RULING ON PENDING DISCOVERY MOTIONS

\_\_\_\_\_ 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). Familiarity is presumed with the multiple previous discovery rulings issued by this Magistrate Judge. (See Dkts. #55, 64, 80, 86, 98, 107, 122, 148, 158 & 159). Under the current scheduling order, all non-expert discovery is to be completed by July 13, 2006 and all expert discovery is to be completed by October 24, 2006. (Dkt. #187, at 3 ¶ 8).

Three discovery motions are addressed in this ruling. On March 6, 2006, defendants filed their Motion to Compel, affidavit, and brief in support (Dkt. #142),<sup>2</sup> along with another

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<sup>1</sup>This lawsuit has been consolidated with Vincent v. Physicians of Women’s Health, LLC, 3:06 CV 249 (JBA). (See Dkts. ##135, 139-41; Dkt. #187, at 1 ¶ 4 (first one)).

<sup>2</sup>The following seven exhibits were attached: copy of defendants’ Interrogatories and Requests for Production, dated May 29, 2004 (Exh. A); copy of plaintiffs’ Answers, dated September 13, 2004 (Exh. B); copy of correspondence between counsel, dated July 19, 2005 (Exh. C); copy of correspondence between counsel, dated October 27, 2005, with blank Request for Copy of Tax Return and Authorization for Use or Disclosure of Protected Health Information attached (Exh. D); copy of medical records from Vassar Brothers Medical Center (Exh. E); and copies of

Motion to Compel, affidavit, and brief in support (Dkt. #143).<sup>3</sup> Plaintiffs filed their brief in opposition to both motions three weeks later. (Dkt. #164).<sup>4</sup> On March 30, 2006, plaintiffs filed their Motion to Determine the Sufficiency of the Mortman Defendants' Objections to Five Requests to Admit, and brief and affidavit in support. (Dkt. #167).<sup>5</sup> On April 24, 2006, defendants filed their brief in opposition. (Dkt. #186).<sup>6</sup> Two days later, plaintiffs filed their reply brief. (Dkt. #189).<sup>7</sup>

## I. DISCUSSION

### A. DEFENDANTS' MOTIONS TO COMPEL (Dkts. ##142 & 143)

In their first motion (Dkt. #142), defendants identify medical records they contend

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medical records from New Milford Hospital Emergency Department (Exhs. F-G).

<sup>3</sup>The following two exhibits were attached: copy of defendants' Supplemental Interrogatories and Requests for Production, dated July 18, 2005 (Exh. A); and copy of correspondence between counsel, dated February 14, 2006 (Exh. B).

<sup>4</sup>Attached are copies of five letters from plaintiffs' counsel, dated August 26, 2005, to medical providers.

<sup>5</sup>Attached as Exh. A was a copy of plaintiffs' Requests to Admit Directed to Defendants Dr. Mortman and Sharon Ob/Gyn, dated March 3, 2006, with a copy of Sharon Hospital medical records.

<sup>6</sup>The following fourteen exhibits were attached: another copy of plaintiffs' Requests to Admit to Defendants Dr. Mortman and Sharon OB/GYN, dated March 3, 2006, with medical records attached; copy of defendants' brief in support of Objection to plaintiffs' Request to Admit, dated March 17, 2006; copy of parties' Planning Report, filed May 13, 2004 (Exh. A); copy of Scheduling Order, with attached court orders, filed June 28, 2004 (Exh. B); copy of plaintiffs' First Motion for Extension of Time of the Scheduling Order, filed January 24, 2005 (Exh. C), copy of Judge Arterton's Endorsement Order, filed January 31, 2005, and excerpt from CM/ECF docket sheet (Exh. D); copy of Agreed Motion for Extension of the Scheduling Order, filed April 7, 2005 (Exh. E); copy of Judge Arterton's Endorsement Order, filed April 12, 2005, with excerpts from CM/ECF docket sheet (Exh. F); copy of Second Supplemental Scheduling Order, filed June 1, 2005 (Exh. G); copy of Essent Defendants' Motion for Enlargement of Time, filed January 4, 2006 (Exh. H); copy of Third Supplemental Scheduling Order, filed January 9, 2006 (Exh. I), copy of excerpt from CM/ECF docket sheet (Exh. J); another copy of plaintiffs' Requests to Admit Directed to Defendants Dr. Mortman and Sharon OB/GYN, with medical records attached, dated March 3, 2006 (Exh. K); and excerpts from the deposition transcripts of Nurse Salinas and defendant Dr. Mortman (Exh. L).

<sup>7</sup>The briefing is not yet complete on the two remaining pending motions, defendants' Motions for Reconsideration (Dkts. ##169 & 173).

were not provided by plaintiffs, including reports from plaintiffs' Sharon Hospital Neonatal admission, Vassar Brothers Medical Center, Westchester Medical Center, Dr. David Krohn of the Regional Medical Genetics Center, Dutchess County Health Department Nursing Visits, Family Practice Center of New Paltz, Dr. Joseph Higgins, Children's Medical Center, New York Medical College, NYMC Sections of Pediatric Gastroenterology and Pediatric Surgery, NYMC Children's Rehabilitation Center, REHAB Programs/Dutchess County Early Intervention Program, Central New York Eye Center and Dr. Hugh L. Sauer, and billing records therefor, as well as the preschool records of plaintiff Brianna Vincent (at 7-14 & Exhs. A-G). In their brief in opposition, plaintiffs contend that they have produced all medical records in their possession, have supplemented the records, will supplement them shortly, have provided HIPPA authorizations, or the medical providers have no records. (Dkt. #164, at 1-3 & Exh. A). Therefore, defendants' Motion to Compel (Dkt. #142) is denied without prejudice as moot.

In their second motion (Dkt. #143), defendants seek production of medical records from the White Plains Abortion Clinic, Hudson River Community Health, and Dr. Antonio Orlito Trias (at 3-4 & Exhs. A-B). In their brief in opposition, plaintiffs argue that the medical records of plaintiff Heather Vincent subsequent to the incident at issue are irrelevant, but they are willing to provide Dr. Vogel's medical records, but not any abortion records. (Dkt. #164, at 3-4). Plaintiffs are correct that under these circumstances, any subsequent abortion by plaintiff Heather Vincent is irrelevant. See, e.g., Garcia v. Providence Med. Center, 806 P.2d 766, 769-71 (Wash. Ct. App.), review denied, 816 P.2d 1223 (Wash. 1991). However, it is not clear from the present record whether the medical records of Hudson River Community Health and Dr. Trias are abortion-related. To the extent that the medical records of these two providers are not abortion-related, copies thereof shall be forwarded to the

Magistrate Judge's Chambers, **on or before May 24, 2006**, for an in camera review. Thus, defendants' Motion to Compel (Dkt. #143) is denied with respect to any abortion records and is granted in part to the extent the Magistrate Judge will conduct an in camera review of any non-abortion records.

B. PLAINTIFFS' MOTION TO DETERMINE SUFFICIENCY OF OBJECTIONS (Dkt. #167)

This motion pertains to five Requests to Admit, four of which regard the standard of care applicable to defendant Dr. Mortman on March 15, 2003. (Dkt. #167, at 3-4 & Exh. A). In their brief in opposition, defendants argue that the standard of care is "at the very center of this case," and is not, as plaintiffs argue, an opinion of fact or an application of law to fact. (Dkt. #186, at 3; see also attached Memorandum of Law, dated March 17, 2006). While Requests to Admit "may relate to the application of law to fact," they "should not be confused with pure requests for opinions of law," such as "legal conclusions," "which are not contemplated by the rule." 7 MOORE'S FED. PRAC. ¶ 36.10[8] (3d ed. 2006)(multiple citations omitted). The examples cited in MOORE'S include requests for determining whether a patent is invalid and whether a product or process infringes a patent. Id. at n.20.<sup>8</sup> Requests Nos. 1-2 and 4-5 all regard the standard of care applicable in ordering a nurse to prepare for a "stat" C-Section, for any failure to order such a "stat" C-Section, to prepare an erroneous procedure note, and to lie about any orders he gave to a nurse. As such, these four Requests to Admit need not be answered until after the completion of expert discovery on October 24, 2006. (See Dkt. #187, at 3 ¶ 8). However, Request No. 3 merely asks

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<sup>8</sup>Plaintiffs have cited Frost v. U.S., 2005 WL 1266915, at \*2-3 (S.D. Ill. May 5, 2005), a FTCA obstetrical malpractice lawsuit, which seems to suggest that Requests to Admit regarding a doctor's duties to provide reasonable medical care are appropriate under Rule 36(a). However, the opinion largely emphasized the Government's failure to make inquiry of the doctor allegedly at fault or of another obstetrician, and not the propriety of such requests under Rule 36(a).

defendants to admit that defendant Dr. Mortman's procedure note reflects that he gave an order to Nurse Salinas to prepare for a "stat" C-Section on March 15, 2003, at approximately 6:51 a.m. This request does not seek an opinion of law or legal conclusion, and as such, should be answered, **on or before May 24, 2006.**

Accordingly, plaintiffs' Motion to Determine the Sufficiency of the Mortman Defendants' Objections to Five Request to Admit (Dk. #167) is granted as to Request No. 3, which is to be answered by May 24, 2006, and is granted with respect to Requests Nos. 1-2 and 4-5, which are to be answered by October 24, 2006.

## II. CONCLUSION

Accordingly, defendants' Motion to Compel (Dkt. #142) is denied without prejudice as moot; defendants' Motion to Compel (Dkt. #143) is granted in part and denied in part to the extent set forth in Section I.A. supra; and plaintiffs' Motion to Determine the Sufficiency of the Mortman Defendants' Objections to Five Request to Admit (Dk. #167) is granted to the extent set forth in Section I.B. supra.

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 72.2 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 72.2 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 3rd day of May, 2006.

\_\_\_\_\_/s/\_\_\_\_\_  
Joan Glazer Margolis  
United States Magistrate Judge