

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

PRESENT: Honorable Joan B. Carey
Justice

PART 40 D

JOHNSON DEVADAS and SARAMMA
DEVADAS,

Plaintiffs,

Index No.: 107637/07

MOTION DATE _____

-v-

MOTION SEQ. NO. 03

MOTION CAL. NO. _____

KEVIN NIKSARLI, M.D., MANHATTAN
LASIK CENTER, PLLC and NEWSIGHT
LASER CENTER, PLLC,

Defendants.

The following papers, 1- 14, were read on this motion by plaintiffs for a protective order, pursuant to CPLR §3101(d) and CPLR §3103(a), shielding the qualifications of plaintiffs' medical expert from further disclosure.

Notice Of Motion - Affidavits - Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits _____

Papers Numbered
1-10
11-12
13-14

FILED

DEC 10 2008

COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Plaintiffs, Johnson and Saramma Devadas, commenced the instant medical malpractice action against defendants, Kevin Niksarli, M.D., Manhattan LASIK Center, PLLC and Newsight Laser Center, PLLC. Plaintiffs allege *inter alia*, that defendants were negligent in performing LASIK eye surgery on Johnson Devadas when such procedure was contraindicated. Plaintiffs further allege that as a result of defendants' negligence, Johnson Devadas has sustained injury, including a decrease in visual acuity and visual quality, irregular corneal astigmatism secondary to corneal ectasia, and the need for post-operative care and treatment. Discovery has been completed, a note of issue/certificate of readiness has been filed, and this action is now ready for trial.

In advance of the trial of this action, plaintiffs served defendant with an expert witness disclosure, pursuant to CPLR § 3101(d), relating to plaintiffs' expert ophthalmologist who is

expected to testify at trial. With respect to the qualifications of this expert, the plaintiffs' expert disclosure sets forth that:

"[p]laintiffs' expert ophthalmologist is a fellow of the American Academy of Ophthalmology. The expert is a member of the American Society of Cataract and Refractive Surgery. The expert is well-credentialed in ophthalmology, is affiliated with and has teaching responsibilities at one or more major metropolitan hospitals, has lectured and written on the subject of refractive surgery, and has extensive experience with LASIK surgery. The expert is a physician licensed to practice ophthalmology, and has post-doctoral fellowship training in cornea-external disease."

Defendants have rejected the plaintiffs' expert disclosure, contending that it does not sufficiently set forth their expert's qualifications. Defendants seek more detailed information with respect to the qualifications of plaintiffs' expert, such as where the expert attended undergraduate school, graduate school, and medical school, as well as the dates of graduation from these institutions; where and when the expert attended internships, residency and/or fellowship programs; whether the expert is board certified in any areas of medicine; the states the expert is licensed to practice medicine in; and the hospitals plaintiffs' expert is affiliated with. Plaintiffs presently move for a protective order, pursuant to CPLR § 3101(d) and CPLR § 3103(a), shielding the qualifications of plaintiffs' medical expert from further disclosure.

CPLR § 3101(d) sets forth in pertinent part that:

"[u]pon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which the expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, *the qualifications of each expert witness* and a summary of the grounds for each expert's opinion. . . . In an action for medical, dental or podiatric malpractice, a party, in responding to a request, may omit the names of medical, dental or podiatric experts but shall be required to disclose all other information concerning such experts otherwise required by this paragraph."

See CPLR § 3101(d)(1)(i) (emphasis added). CPLR § 3101(d)(1)(i) expressly permits the omission of the names of medical, dental or podiatric experts "to avoid peer pressure, sometimes brought to discourage the expert from testifying against a fellow professional in the medical categories." Siegel, N.Y. Prac. § 348A (4th ed. 2005). However, where a party seeks to omit more than the name of an expert, it must seek a protective order from the court, pursuant to CPLR § 3103(a), "denying, limiting, conditioning or regulating the use of [the expert witness disclosure] . . . to prevent unreasonable annoyance, expense embarrassment, disadvantage, or other prejudice to any person or the courts."

A protective order limiting the disclosure of the qualifications of a plaintiffs' medical expert from further disclosure requires proof sufficient to sustain findings that (a) there is a reasonable probability that compliance with CPLR § 3101(d) would lead to the disclosure of the actual identity of plaintiffs' expert, and (b) there is a reasonable probability that such disclosure would cause such

expert to be subjected to unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice. See *Thomas v. Alleyne*, 302 AD2d 36 [2d Dept. 2002]; *Schiffer v. Speaker*, 2004 WL 3115145 (December 10, 2004, N.Y. Sup., Schlesinger J.) The first prong, *i.e.*, whether there exists a reasonable probability that the actual identity of plaintiffs' expert would be disclosed, is easily satisfied. As the Appellate Division, Second Department, noted in *Thomas*, with the current state of computer technology, the disclosure of certain details relating to an expert's qualifications, such as board certifications and when they were obtained, jurisdictions where the expert is licensed, medical schools attended and dates of attendance, as well as information regarding the expert's residencies, fellowships and published works, will probably result in the identity of the expert being revealed. See also *Schiffer v. Speaker, supra*. In the instant action, if the information plaintiffs seek to omit is provided to defendants, it is highly probable the expert's identity will be revealed.

The second prong, *i.e.*, whether there is a reasonable probability that such disclosure would cause such expert to be subjected to unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice, requires "a factual showing that there exists a concrete risk, under the special circumstances of a particular case, that a prospective expert medical witness would be subjected to intimidation or threats if his name were revealed before trial." *Thomas v. Alleyne, supra*. If "the expert in question has 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," the court may issue a protective order. *Id.*

In support of this motion, plaintiffs rely upon the affidavit of their expert, wherein he or she states that "in the likely event that my identity were disclosed or discovered by defendants, I believe that there exists a reasonable probability that I would be subjected to unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice." The expert sets forth that he seeks to avoid the annoyance of defendants attempting to dissuade him from testifying and also fears that if his identity is revealed he may suffer economic loss as a result of his medical practice being targeted by defendants. Additionally, plaintiffs' expert seeks "to avoid affording defendants the opportunity to dredge into my personal and professional affairs in an effort to discredit or embarrass me." Plaintiffs' expert expressly states in his affidavit that "the culture in the LASIK industry is particularly suitable to such retaliation" and that he or she has "personally borne the brunt of antagonistic comments from colleagues for representing patients in LASIK malpractice claims."

In addition to the aforementioned affidavit, plaintiffs have submitted an article appearing in *Ophthalmology News*, as well as portions of internet websites, which relate to efforts made by refractive surgeons to harass and retaliate against plaintiff's experts in LASIK cases, and against a dissatisfied patient who spoke out against LASIK. Plaintiffs have also submitted a complaint in a slander action that was recently commenced by a LASIK provider against a plaintiff's expert who testified against them in a LASIK case. According to the affidavit of plaintiffs' expert submitted in support of the instant motion, the retaliation against these individuals is not isolated, and seeks to avoid further disclosing his or her qualifications to avoid such retaliation for providing expert testimony in the instant action. When viewed collectively, the evidence submitted by plaintiffs demonstrates a concrete risk that the expert ophthalmologist would be subjected to annoyance, expense, embarrassment, and disadvantage, if identified before trial. The culture of the LASIK

Industry, as discussed in plaintiffs' various submissions, coupled with the fact that plaintiffs' expert has already "personally born the brunt of antagonistic comments from colleagues for representing patients in LASIK malpractice claims," leads the Court to find that a protective order is warranted.

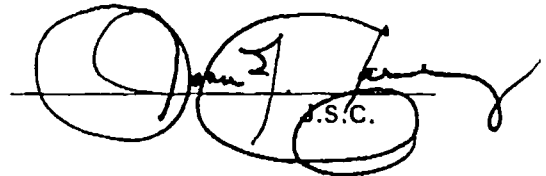
Notwithstanding the foregoing, the Court appreciates the defendants' right to properly prepare a cross-examination of plaintiffs' expert. Therefore, plaintiffs will be directed to supplement their CPLR §3101(d) expert witness disclosure to adequately disclose the qualifications of their expert at the conclusion of jury selection. Opening statements and witness testimony will begin two (2) days following the completion of jury selection, providing defendants with a full day to prepare for such cross-examination prior to the commencement of the trial.

Based on the foregoing, it is hereby

ORDERED that plaintiffs' motion for a protective order, pursuant to CPLR §3101(d) and CPLR §3103(a), shielding the qualifications of plaintiffs' medical expert from further disclosure, is granted; and it is further

ORDERED that counsel for all parties are to appear before the court on January 9, 2009, at 9:30am, at 100 Centre Street, room 1306, Part 40D, for a settlement conference.

Dated: 12/8/2008



Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

FILED
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