

, et al.

Plaintiffs,

v.

Defendant.

* IN THE
* CIRCUIT COURT
* FOR
* ANNE ARUNDEL COUNTY
* Case No.:

* * * * * * * * * * *

DEFENDANT'S MOTION TO COMPEL THE DEPOSITION OF
M.D., OBJECTION TO SUBPOENA AND REQUEST FOR PROTECTIVE ORDER
FOR THE DEPOSITION OF _____, WOCN,
AND RULE 2-431 CERTIFICATE

Defendant, _____ (_____), by its attorneys,
_____ and _____, and pursuant to Maryland
Annotated Code, Courts and Judicial Proceedings Article, § 3-2A-04(b)(iii) and Maryland Rules
2-401 and 2-431 respectfully requests that this Court enter an Order permitting Defendant to
conduct the deposition of _____, M.D., for the limited purpose of obtaining discovery on
the opinions contained in his Certificate of Merit and Report.

Defendant also objects to the Plaintiffs' subpoena for deposition of fact witness (and
employee of _____), _____, WOCN, and requests that this Court issue a protective
order pursuant to Maryland Rules 2-403 and 2-510.

As grounds in support of this Motion, the Defendant states as follows:

- This is a complicated medical malpractice case arising out of the care and treatment
provided to _____, age _____, at _____ . On November 20, 2008 Ms. _____ was admitted
to _____ for treatment relating to compression fractures in her thoracic spine. She suffered from
numerous co-morbidities including Type 2 diabetes, end-stage renal failure on dialysis,

cardiomyopathy, coronary artery disease, morbid obesity and anemia. Unfortunately, Ms. _____ course at _____ was complicated due to her multiple medical issues and she passed away on January 27, 2009.

2. During her admission to _____, Ms. _____ developed a sacral decubitus ulcer. Plaintiffs allege that the sacral decubitus ulcer developed and worsened as a result of negligent care and treatment by health care providers at _____, and eventually caused Ms. _____ death.

3. Pursuant to MD. CODE ANN., CTS & JUD. PROC., § 3-2A-04(b), Plaintiffs filed a Certificate of Merit and Report of _____, M.D., regarding _____ in the Health Care Alternative Dispute Resolution Office on June 23, 2011. In his Certificate and Report, Dr. _____ alleges that:

_____, by and through its employees, that include but are not limited to _____ and _____ breached the applicable standard of medical care for the treatment of _____ and this breach as a proximate cause of a physical injury to _____, and which resulted in her death.

See Exhibit 1, Certificate of Merit and Report, ¶ 8. Ms. _____ and Ms. _____ are the only health care providers identified by Plaintiffs as having breached the standard of care.

4. Defense counsel first requested the Certificate deposition of Dr. _____ on December 27, 2011, at the Court's Scheduling Conference, and followed up with numerous verbal and written requests. See Exhibit 2, Correspondence with Plaintiffs' counsel. This request was not honored until very recently, when Plaintiffs' counsel agreed to schedule Dr. _____'s Certificate deposition for May 14, 2012. See Exhibit 3, Notice to take Deposition Duces Tecum.

5. Plaintiffs' counsel has, however, since noted and subpoenaed the deposition of _____, WOCN, for April 12, 2012. Ms. _____ not a named Defendant. She is not

identified in Dr. _____'s Certificate and Report as having breached the standard of care in any way. Ms. _____ is a fact witness only.

6. The purpose of this Motion is twofold. Defendant requests that this Court recognize the right of the Defendant to depose Dr. _____ with respect to his Certificate and Report, which are vague and identify only two health care providers at _____, each of whose involvement in _____' care was minimal and seemingly unrelated to the allegations of negligence set forth by Plaintiffs. Second, Defendant requests that, in conjunction with its right to depose Dr. _____, the Court order that the Certificate deposition of Dr. _____ should occur prior to the deposition of Nurse _____.

7. To allow Plaintiffs to proceed by deposing an unnamed fact witness prior to the deposition of their certifying expert – which was requested months ago – is tantamount to permitting Plaintiffs to engage in a fishing expedition.

MOTION TO COMPEL DEPOSITION OF _____

8. Section 3-2A-04(b)(3)(ii) of the Courts and Judicial Proceedings Article plainly states that “[d]iscovery is available as to the basis of the certificate.” Moreover, Maryland Rule 2-401(a) provides that parties may obtain “discovery” by conducting depositions upon oral examination or written questions. Read together, these provisions permit the Defendant to conduct the deposition of Dr. _____ for the limited purpose of obtaining the basis for his opinions contained in the Certificate of Merit.

9. In addition, it is well settled under Maryland law that any party may conduct the deposition of a witness “for the purpose of discovery or for use as evidence in the action or for both purposes.” Md. R. 2-411.

10. By conversation on December 27, 2011, and letters dated January 5, February 24,

and March 12, 2012, counsel for Defendant made clear that we wished to depose Dr.

See **Exhibit 2**.

11. By letter dated March 7 and March 16, 2012, Plaintiffs' counsel refused to recognize Defendant's right to depose Dr. on the basis of the opinions contained in his Certificate and Report prior to the deposition of fact witnesses. See **Exhibit 4**, Correspondence from Plaintiffs' counsel. Rather, Plaintiffs' counsel stated that he "need[s] to move forward with the deposition of the fact witnesses, then we can schedule the deposition of the experts." *Id.*

12. In considering an issue of statutory construction, the "cardinal rule . . . is to ascertain and effectuate the intent of the Legislature." *Stoddard v. State of Md.*, 395 Md. 653, 661, 911, A.2d 1245, 1249 (2006) (internal citations omitted). The analysis begins by examining the plain language of the statute based on the underlying premise that "the Legislature is presumed to have meant what it said and said what it meant." *Id.* at 661 (quoting *Witte v. Azarian*, 369 Md. 518, 525, 801 A.2d 160, 165 (2002)).

13. By its terms, § 3-2A-04(b)(3)(ii) clearly affords Defendant the right to conduct discovery "on the basis of the Certificate" (emphasis added). To assume otherwise, as Plaintiffs contend, is inconsistent with the plain language of the statute. Moreover, such position renders this provision of the statute both meaningless and unnecessary.

14. Recently, in another medical malpractice case in the Circuit Court for Baltimore County, Judge John F. Fader granted the defendant's motion to compel the deposition of the plaintiff's certifying expert on the very grounds set forth in this motion. See **Exhibit 5**, Order (*Burns v. Pharoan*, Case No. 10-4724). In *Burns*, Judge Fader ordered that the plaintiff's certifying expert be produced for deposition on the basis of his Certificate and Report, and then be produced a second time for a discovery deposition if the expert were to be offered at trial. *Id.*

15. Similar motions have also been granted in Prince George's County by Judges Thomas Smith and Leo E. Green. See **Exhibit 6**, Orders (Morris v. Orellano, Case No. CAL10-01559) and (Medley v. Doctors Hospital, Inc., Case No. 08-14184).

16. Based on the analysis set forth above, Defendant should be permitted to conduct the deposition of Dr. [redacted] to identify the basis for the preliminary opinions addressed in his Certificate and Report. Indeed, at this early stage of litigation, it is critical that Defendant be able to precisely identify each allegation of negligence, so that defense counsel can adequately prepare its defense and obtain expert support. In addition, Defendant should not be foreclosed from deposing Dr. [redacted] on the basis of any opinions he intends to offer at trial, should Plaintiffs later designate him as an expert witness.

MOTION FOR PROTECTIVE ORDER

17. Defendant further requests that this Court issue a protective order pursuant to Maryland Rules 2-403 and 2-510, with respect to the deposition of [redacted], WOCN. Plaintiffs have issued a subpoena and notice to take Nurse [redacted]'s deposition on April 12, 2012. See **Exhibit 7**, Subpoena and Notice. Maryland Rule 2-403 provides, in pertinent part:

For good cause shown, the court may enter any order that justice requires to protect a party or person for annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (2) that the discovery not be had until other designated discovery has been completed...

See Md. R. 2-403(a)(2).

18. Ms. [redacted] is not a defendant, nor has she been identified in Dr. [redacted]'s Certificate or Report as having breached the standard of care. Carroll v. Konits, 400 Md. 167, 196, 929 A.2d 19 (2007) ("Maryland law requires that the certificate mention explicitly the name of the licensed professional who allegedly breached the standard of care.") (emphasis added).

She is simply a fact witness who cared for _____ during a portion of her admission to _____

19. There is no reason Plaintiffs should be permitted to take the deposition of Nurse _____ prior to Defendant taking the deposition of Dr. _____. Dr. _____ is the certifying expert – Defendant has the right to take his initial deposition to determine what the basis for his Certificate and Report are. This statute will be rendered useless if Plaintiffs are permitted to depose fact witnesses – seemingly at random – prior to this Certificate deposition taking place. Moreover, Defendant began requesting Dr. _____'s deposition in December, 2011 – months before Plaintiffs requested the deposition of Nurse _____.

20. Defendant is not refusing Plaintiffs the opportunity to depose Nurse _____ . Rather, Defendant simply requests that this Court issue a protective order stating that Nurse _____'s deposition not be taken until after Dr. _____ is deposed on his Certificate and Report.

21. A certificate documenting Defendant's good faith attempt to resolve these discovery disputes, in accordance with Maryland Rule 2-431, is attached hereto.

WHEREFORE, for the above-stated reasons, Defendant _____

_____, respectfully requests that this Court grant its Motion to Compel the Deposition of _____, and further requests that a protective order be issued with respect to the deposition of _____, WOCN.