

SCAN

**SHORT FORM ORDER**

**MD**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. ROY S. MAHON**  
**Justice**

**SARI RAUCH and JEFFREY RAUCH,**

**TRIAL/IAS PART 15**

**INDEX NO. 8358/03**

**Plaintiff(s),**

**MOTION SEQUENCE  
NO. 1**

**- against -**

**EMILY S. BROOKS, M.D., HENRY K. PRINCE, M.D.,  
PREMIER OB/GYN and QUEST DIAGNOSTICS  
INCORPORATED,**

**MOTION SUBMISSION  
DATE: September 7, 2004**

**Defendant(s).**

**The following papers read on this motion:**

- Notice of Motion** **X**
- Affirmation in Opposition** **X**
- Reply Memorandum** **X**
- Reply Affidavit** **X**
- Memorandum of Law** **X**

Upon the foregoing papers, the motion by the defendant, Quest Diagnostics Incorporated, for an Order of Protection, pursuant to CPLR §3103, restricting the scope of the deposition of Enrique Victoriano, an employee of Quest Diagnostics Incorporated, and denying the request of plaintiffs' attorneys for a further deposition of Enrique Victoriano to ask questions as to his opinions of a certain Pap Test slide pertaining to the plaintiff, Sari Rauch, is determined as hereinafter provided:

This medical malpractice arises out of an alleged failure to diagnose cancer by the respective defendants. The plaintiff, Sari Rauch, had a Thin Prep Pap Test that was collected on April 17, 2001 by the defendant Emily S. Brooks, MD and sent to the defendant Quest Diagnostic Incorporated. Subsequently between April 18, 2001 and April 23, 2001, a slide was prepared at the defendant Quest Diagnostics Incorporated and screened by Enrique Victoriano, a cytotechnologist employed by the defendant Quest Diagnostics Incorporated. Mr. Victoriano's impression of the slide as set forth in his report was that there were no abnormal cells and that the slide was within normal limits.

The defendant, Quest Diagnostics Incorporated, appeared for deposition by Enrique Victoriano. A review of the deposition transcript reveals that Mr. Victoriano responded to certain questions regarding

quality control and his custom and practice in reviewing slides although he had no specific recollection of the slide in issue. Mr. Victoriano identified the report that he prepared as a result of his review of the plaintiff Sari Rauch's slide.

The Court surmises that at the deposition the plaintiffs' counsel sought to have Mr. Victoriano review the slide in issue. At pgs. 92-93 of the deposition transcript of Enrique Victoriano, the respective counsel set forth:

"MR FALLARINO: Mr. McCoy and I have been discussing the fact that I want this gentleman, Enrique Victoriano, to review the slides as he did back in April of 2001 with regard to using a microscope and looking at it and then I can point out certain areas to him and ask him some questions about it.

Mr. McCoy has indicated a desire to make a protective order motion to those questions. Without listing all my questions in here, Mr. McCoy and I have agreed that that's the content, that I want to show him the slide and whatever it leads to as far as questions, he has agreed that he's not going to limit me to one or two questions, but a full examination if I am permitted to go forward.

He has said he's going to make a protective order application based upon my request to have Mr. Victoriano look at them under the concept of the conditions as they existed at that time.

MR. MCCOY: I mean, that's fair, and we agreed that we would go to the judge to talk about that and also the logistics involved, because frankly, if he denies my motion and he grants Mr. Fallarino's request, it really would be impossible to set up a conference room in the courthouse with the equipment that would be necessary to do such a deposition and a review.

So Mr. Fallarino and I agreed that in order to comply with the court's order, which provided that Mr. Victoriano be deposed today, that we go forward with the deposition, do as much as we could today and then go to the court with an application on a subsequent date so as to comply with the court's order to the fully extent possible."

The defendant, Quest Diagnostics Incorporated, in support of the instant application contends that the plaintiffs are in substance seeking an expert's opinion from Mr. Victoriano when he is not in fact qualified to render such an opinion and that the review of the slide by Mr. Victoriano at his deposition would be prejudicial to the defendant Quest Diagnostics Incorporated.

In opposition to the requested relief, the plaintiffs through counsel argue:

"Plaintiff's main allegation against this defendant is that the April, 2001 pap smear slide was misread and improperly reported. Mr. Victoriano is the person that read that slide and reported it as normal. Plaintiff is merely asking Mr. Victoriano to place this slide under the microscope and is going to inquire about its contents."

The Court observes that the plaintiffs are entitled to discovery that is material and necessary to the

facts in issue (see, **Allen v Crowell-Collier Publishing Company**, 21 NY2d 403, 288 NYS2d 449, 235 NE2d 430). Clearly what Enrique Victoriano saw on the plaintiff Sari Rauch's Thin Prep Pap Test that was collected on April 17, 2001 are factual issues in this litigation. Although the defendant Quest Diagnostics argues that the plaintiffs are seeking to elicit an expert's opinion from Mr. Victoriano, the Court notes that no questions have been posed to Mr. Victoriano as to what he observed and/or observes when he reviews the plaintiff's slide. A party is entitled to explore factual issues with a witness at a deposition (see, **Allen v Crowell-Collier Publishing Company**, supra). In light of the fact that the Court finds a review of plaintiff's Thin Prep Pap Test to be material and necessary to the facts in issue, the defendant Quest Diagnostic Incorporated's claim of prejudice is best addressed by the Trial Court.

Based upon the foregoing, the defendant Quest Diagnostic Incorporated's application for an Order of Protection, pursuant to CPLR §3103, restricting the scope of the deposition of Enrique Victoriano, an employee of Quest Diagnostics Incorporated, and denying the request of plaintiffs' attorneys for a further deposition of Enrique Victoriano to ask questions as to his opinions of a certain Pap Test slide pertaining to the plaintiff, Sari Rauch, is denied.

The further depositions of the defendant Quest Diagnostic Incorporated by Enrique Victoriano shall be held on or before **November 16, 2004**.

SO ORDERED.

DATED: 10/26/2004

NASSAU INDEX# 20  
FILED Roop S. Malen  
OCT 28 2004  
COUNTY CLERK OF  
NASSAU COUNTY  
J.S.C.