

Scat

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

LYNNE YUROSKO,

TRIAL/IAS PART 13

INDEX NO. 20241/05

Plaintiff(s),

MOTION SEQUENCE  
NO. 1 & 2

- against -

BETTY NYHLEN, M.D., NASSAU RADIOLOGIC  
GROUP, P.C., QUEST DIAGNOSTIC INC.,  
HENRY SHIH, M.D, ERA KHURANA, M.D.  
and MARIE CHEN, M.D.,

MOTION SUBMISSION  
DATE: July 21, 2006

Defendant(s).

The following papers read on this motion:

Notice of Motion	X
Order to Show Cause	X
Affirmation in Opposition	X
Reply Affirmation	X
Memorandum of Law	X

Upon the foregoing papers, the motion by the plaintiff brought by Order to Show Cause for an Order compelling the defendants, Quest Diagnostic Inc. (hereinafter referred to as Quest), Henry Shih, M.D. (hereinafter referred to as Shih) and Era Khurana, M.D. (hereinafter referred to as Khurana) to identify the full name and business address of the physician or physicians whose patient it was whose slides were incorrectly identified with the name and/or identifying information of the plaintiff, Lynne Yurosko, and as a result received the negative interpretation of said biopsy specimen in November, 2004, and said patient's slides being mis-labeled with the identification of the plaintiff; with said exchange to be made by a date certain and the motion by plaintiff for an Order compelling the defendant, Quest to (A) identify, in camera, the full name and address of the person, or persons, whose slide, or slides, and bodily tissue were incorrectly marked, labeled and identified with the name and identifying information of the plaintiff, Lynne Yurisko; (B) provide to the Court, in camera, copies of all of the documentation provided to the aforesaid person, or persons, or in the event of said person's death their next of kin, and/or their physicians and health care providers, regarding the interpretation of their slides and bodily tissue, which were submitted for diagnosis, including the original report and all amendments and changes submitted thereafter; © provide the Court with proof that the aforesaid person or persons, or in the event of their death their next of kin,

whose bodily tissues and/or slides prepared therefrom were marked with the name and identification of Lynne Yurosko, were initially diagnosed as breast cancer and caused the plaintiff to be informed, diagnosed and treated for breast cancer, have been informed that: (i) the initial interpretation of their bodily tissue by Quest was incorrect; (i) the appropriate interpretation of said tissue was breast cancer; (ii) the aforesaid error was that of Quest in its error in labeling, identifying and marking of the tissue and/or slides prepared therefrom and (iii) this cancer required immediate treatment, are both determined as hereinafter provided:

The Court initially observes that oral argument was heard on the respective motions before the Court on July 21, 2006 at the direction of the Court.

The respective applications by the plaintiff seek certain non-party discovery related to the medical malpractice action filed by the plaintiff on December 19, 2005 in which the respective defendants have all been served and appeared. As of the date of this Order, a Preliminary Conference has not been held. In pertinent part, the plaintiff sets forth in the plaintiff's Notice of Medical, Dental or Podiatric Malpractice Action.

"Substance of claim. It is alleged that defendants mislabeled, mismarked and misidentified the plaintiff's breast tissue and she was given an erroneous diagnosis of breast cancer and that the defendants did not question an error based on information later obtained raising the diagnosis into question."

The plaintiff contends that on November 22, 2004 she had a left breast tissue biopsy performed at the defendant Nassau Radiology Group, PC by the defendant Betty Nyhlen, MD, a radiologist. This biopsy was subsequent to a mammography which had been interpreted as showing suspicious findings to warrant the breast tissue biopsy to rule out cancer. The biopsy was performed and received by the defendant Quest on November 23, 2004. The Final Report which the defendant Quest does not object to in the respective submissions, in pertinent part sets forth:

**"PATIENT INFORMATION  
YUROSKO, LYNNE**

DOB: ...  
GENDER: F  
SS: ...

...

**SPECIMEN INFORMATION  
SPECIMEN: ST040075113  
REQUISITION**

**CLIENT INFORMATION ...**

COLLECTED:	NONE	00:00
RECEIVED:	11/23/2004	06:52
REPORTED:	11/29/2004	11:22

REPRINT: The original copy of this report was printed on: 11/28/2004 at 09:51

Tissue Pathology Report

**TISSUE PATHOLOGY**

Report Status: FINAL

Clinical Information and/or Impression  
54 year old nulliparous

DIAGNOSIS: A) Left breast:  
Infiltrative ductal carcinoma  
Nottingham's combined histologic grade-low  
(tubular formation 2/3, nuclear pleomorphism 2/3,  
mitotic rate 1/2, total 5/9).

HS:lsd

COMMENT:  
Key portions of this case have been reviewed by  
one or more department members.

PATHOLOGIST: electronically signed by Henry Shih, M.D.

GROSS DESCRIPTION: A) Specimen is received in formalin, labeled  
with the patient's name, and consists of  
multiple piece(s) of cylindrically shaped  
light tan soft tissue measuring in  
1.3 x .2 x .1  
All submitted 2 blk/6 slids.

rs:lsd"

The tissue sample that was reviewed at the defendant Quest was forwarded to the non-party Long Island Jewish Medical Center for review. In pertinent part, said review which is not objected to dated December 7, 2004 sets forth:

"GROSS DESCRIPTION

RECEIVED FROM QUEST DIAGNOSTICS TWO SLIDES LABELLED STO4-75113 AND LABELLED WITH PATIENT'S NAME YUROSKO, LYNNE. ALSO RECEIVED IS A COPY OF SURGICAL PATH REPORT. THIS REVIEW IS REQUESTED BY DR. MARIE CHEN.

Dictated by : TAWFIQUL BHUIYA, MD

\*MICROSCOPIC DIAGNOSIS\*\*

LEFT BREAST, CORE BIOPSY  
- INFILTRATING DUCTAL CARCINOMA WITH FOCI OF LOBULAR  
DIFFERENTIATION

COMMENT:  
1. SBR SCORE IS 5/9 (TUBULE FORMATION 2/3, NUCLEAR ATYPIA 2/3  
AND MOTOTIC INDEX 1/3).

2. NEGATIVE FOR VASCULAR INVASION.
3. BACKGROUND BREAST SHOWS MILD PROLIFERATIVE FIBROCYSTIC DISEASE.

Dictated by : TAWFIQUL BHUIYA, MD

PROCEDURES: 174.9, 88321 CONSUL SL.,

MARKERS: OSS-2, RB, TAWFIQUL BHUIYA, MD, TUMOR REGISTRY"

Based upon the Final Report, the plaintiff was referred for surgery to the defendant Marie Chen, MD who performed a lumpectomy and lymph node biopsy on December 17, 2004. The biopsy of the tissue taken at the time of the surgery was negative for cancer. Notwithstanding this finding, the plaintiff underwent radiation therapy for approximately eight weeks.

Prior to commencing chemotherapy, the plaintiff sought an opinion from the non-party Dr. Shevde. The plaintiff contends that on February 28, 2005 Dr. Shevde requested that the plaintiff's breast tissue samples maintained at Quest be tested for certain receptors for estrogen and progesterone. During the course of this testing it was determined that the breast tissue that the defendant Quest had tested as positive for cancer was not the breast tissue biopsy taken from the plaintiff on November 22, 2004 but rather a breast tissue biopsy taken from another unnamed patient. The defendant Quest issue a Revised Report for the plaintiff on March 15, 2005. In pertinent part, said Revised Report which the defendant Quest does not object to provides:

"PATIENT INFORMATION  
YUROSKO, LYNNE

DOB: ...  
GENDER: F  
SS: ...

ORDERING PHYSICIAN ...

...

SPECIMEN INFORMATION  
SPECIMEN: ST050016654

...

Tissue Pathology Report

TISSUE PATHOLOGY

Report Status: \*\*\*Revised Report\*\*\*

Clinical Information and/or Impression:  
54 year old nulliparous

DIAGNOSIS: A) Left breast:  
Fibrocystic condition of breast with duct ectasia,  
stromal fibrosis, focal epithelial proliferation,  
and focal sclerosing adenosis. Bare  
microcalcification is identified.

EK:mg

**NOTE:** This specimen was noted to require a revised report. Please disregard previous report number ST040075113, issued on 11/28/94.  
(Final revised report discussed with Dr. N. Shiude on 3/14/05).

**PATHOLOGIST:** electronically signed by Era Khurana, MD

**GROSS DESCRIPTION:** A) Specimen is received in formalin, labeled with the patient's name, and consists of multiple piece(s) of cylindrically shaped light tan soft tissue measuring in cm., 11.3 x 8.2 x 8.1. All submitted. Blk 2/6sl/6rc."

In opposition to the requested relief, in the respective applications, the defendants Quest, Shih, and Khurana, submit affidavits of the defendant Era Khurana, MD, the Medical Director of Quest's Syosset facility. Of significance to the application brought by Order to Show Cause, is the more extensive affidavit of Dr. Khurana submitted herein which states:

"2. After conducting a thorough investigation into the circumstances surrounding this lawsuit, I can state with absolute certainty, that the laboratory first became aware of the labeling issue in March 2005. The facts leading up to that determination are as follows: (a) plaintiff Lynn Yurosko's treating physician contacted the lab in February 2005, and requested that additional testing be performed on plaintiff's November 2004 specimen so that she could determine which form of treatment to provide - in order to perform the additional testing, the lab needed to go back to the original specimen, obtain deeper cuts, prepare a whole new set of slides, and use special stains; i.e the additional testing could not be performed on the slides that were prepared from the specimen back in November 2004; (b) Quest Diagnostics Incorporated's Nichols Institute printed a report on February 24, 2005, stating that it could not perform the additional testing as there was no evidence of a tumor/tumor cells on the newly prepared slides; (c) I immediately contacted plaintiff's physician, as well as the other patient's physician, and put them on notice of a potential labeling issue with the November 2004 slides - I also advised them that the lab was in the process of sending tissue samples to an outside laboratory for DNA analysis to confirm whether that was the case; (d) on March 4, 2005, the outside laboratory issued a report stating that plaintiff's blood sample did not match the tissue on the slides that had been diagnosed as malignant; (e) I immediately contacted plaintiff's physician, as well as the other patient's physician to apprise them of the situation, and issued revised reports.

3. When I spoke to the other patient's treating physician on March 17, 2005, the physician informed me that after he/she had received a copy of the laboratory's November 2004 report stating that the other patient's tissue was benign, he/she performed a second biopsy. Importantly, he/she sent the second biopsy to another laboratory for analysis (this statement is based

upon the information the other physician relayed to me, as well as my own investigation of the other patient's Quest Diagnostics Incorporated records which reveal that the laboratory was not involved in the analysis of the second specimen). The other patient's physician also advised me that the second biopsy specimen was reported as malignant in November 2004 and that the other patient had been referred for treatment.

4. During my conversation with the other patient's physician, I also became aware that he/she did not contact Quest Diagnostics Incorporated after he/she became aware that the second biopsy had been read as malignant.

5. In light of the above, Quest Diagnostics Incorporated did not know and never had any reason to know, that there was an issue regarding the labeling of the slides until March 2005."

The plaintiff seeks discovery from the defendants Quest, Shih, and Khurana, of the name of the unknown patient's physician whom Dr. Khurana contacted. The plaintiff argues that notwithstanding the submission of Dr. Khurana that discovery is required to determine if the unknown physician contacted any representative of Quest in November 2004 regarding the determination that the unknown patient's medical condition warranted a second biopsy or reevaluation of the breast tissue submitted. The plaintiff argues that such discovery may lead to evidence that the defendant Quest, Shih, and Khurana were on notice of the plaintiff's actual condition prior to undergoing radiation therapy which could support a claim for gross negligence and punitive damages. In response to the submission of Dr. Khurana, the plaintiff questions the "carefully drafted [affidavit]" and seeks her own discovery.

In salient and succinct terms, the Court in **Allen v Crowell-Collier Publishing Company**, 21 NY2d 403, 288 NYS2d 449 articulated the boundaries of discovery:

"The courts do undoubtedly possess a wide discretion to decide whether information sought is "material and necessary: to the prosecution or defense of an action (see, e.g., *Paliotto v Hartman*, 2 AD2d 866) but that discretion is not unlimited. Where, as here, an issue exists as to whether there has been an abuse of discretion, a reviewable question of law is presented. Indeed, the parties have argued the question before us solely as one of law, and so the courts below have decided it, in accordance, we note, with generally accepted practice. (See, e.g., *Matter of Rothschild*, 298 NY 538; *Solomon v LaGuardia*, 295 NY 970; *Drake v Herrman*, 261 NY 414, 416; see, also, *DiRusso v Kravitz*, 19 NY2d 1012; *Cohen and Karger, Powers of the New York Court of Appeals*, §§88, 157, 158).

The words, "material and necessary", are, in our view, to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason. CPLR 3101 (subd. [a]) should be construed, as the leading text on practice puts it, to permit discovery of testimony "which is sufficiently related to the issues in litigation to make the effort to obtain it in preparation for trial reasonable" (3 *Weinstein-Korn-Miller, NY Civ Prac*, par. 3101.07, p. 31-13). Even under former section 288 of the Civil Practice Act, the courts tended to follow this

more liberal construction as pretrial examinations became "concerned more acutely with the preparation of the case than with the preservation of testimony." (*Southbridge Finishing Co. v Golding*, 2 AD2d 430, 434; see, also, *Cornell v Eaton*, 286 App. Div. 1124; *Dorros, Inc. v Dorros Bros.*, 274 App. Div. 11, 13-14) And, since the enactment of CPLR 3101, the courts have continued "to enlarge the permissible use of pretrial procedure" begun under the former statute. (*Rios v Donovan*, 21 AD2d 409, 411 [1st Dept.]; see, also, *Matter of Comstock*, 21 AD2d 843, 844 [4th Dept.]; *Nomako v Ashton*, 20 AD2d 331, 332-333 [1st Dept.]; see, also *Siegel, Disclosure under the CPLR: Taking Stock After Two Years, Eleventh Annual Report of Administration Board of Judicial Conference, 1965* [NY Legis. Doc., 1966, No. 90], pp. 148, 185) "The purpose of disclosure procedures", declared the Appellate Division for the First Department in the *Rios* case (21 AD2d at p 411). "is to advance the function of a trial to ascertain truth and to accelerate the disposition of suits" and, in the *Comstock* case (21 AD2d at p. 844), the Appellate Division, Fourth Department, wrote that, " '[i]f there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross-examination, it should be considered "evidence material in the prosecution or defense" ' (3 *Weinstein-Korn-Miller, NY Civ Prac*, par. 3101.07)"

Although there may seem to be a little more immediacy and substantiality to the word "material" than to "relevant" the term contained in the more liberal Federal statute (*Fed. Rules Civ. Pro.*, rule 26, subd. [b]; see also, 4 *Moore's Federal Practice* [2d ed., 1967], par. 26.16 p. 1174 et seq.) we believe that a broad interpretation of the words "material and necessary" is proper. In this connection, we note, the word "necessary", even under former section 288 of the Civil Practice Act, was held to mean "needful" and not indispensable. (*Taylor v Smith & Corona Typewriters*, 179 Misc, 290, 292, *affd.* 266 App. Div. 903)"

**Allen v Crowell-Collier Publishing Company, supra at pgs 406-407**

Based upon a review of the foregoing, discovery of the name and business address of the unknown physician who treated the unknown patient is material and necessary to the contentions raised by the plaintiff as to the alleged degree of negligence of the defendants Quest, Shih, and Khurana. It is clear from the defendants' submission in the form of Dr. Khurana's affidavit that said defendants have access to this physician and have discussed this action with said physician. While the defendants Quest, Shih, and Khurana, albeit in inadmissible form articulate this physician's position regarding communications or lack thereof with the defendant Quest regarding the apparent mislabeling of said physician's patient's breast tissue by the submission of the defendant Dr. Khurana's affidavit, the Court finds that the plaintiff should be afforded the same opportunity to examine this physician that the defendants Quest, Shih, and Khurana, have already availed themselves of. The Court stresses that by this Order the Court is not directing a deposition of this physician but rather that said physician's name and business address be provided to the plaintiff. Thereafter the plaintiff may undertake if the plaintiff so desires, the requisite procedural steps to procure discovery from this non-party. At that time, the propriety of any inquiry as to discovery addressed to the non party may properly be addressed to the Court.

Based upon the foregoing, that portion of the plaintiff's application brought by Order to Show Cause for an Order compelling the defendants, Quest Diagnostic Inc., Henry Shih, M.D. and Era Khurana, M.D.

to identify the full name and business address of the physician or physicians whose patient it was whose slides were incorrectly identified with the name and/or identifying information of the plaintiff, Lynne Yurosko, is granted. The defendants shall provide the requested discovery on or before **August 18, 2006**.

In pertinent part, CPLR §4504 provides:

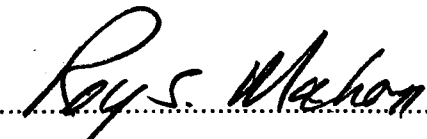
§4504. Physician, dentist, podiatrist, chiropractor and nurse.

(a) Confidential information privileged. Unless the patient waives the privilege, a person authorized to practice medicine, registered professional nursing, licensed practical nursing, dentistry, podiatry or chiropractic shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity. The relationship of a physician and patient shall exist between a medical corporation, as defined in article forth-four of the public health law, a professional service corporation organized under article fifteen of the business corporation law to practice medicine, university faculty practice corporation organized under section fourteen hundred twelve of the not-for-profit corporation law to practice medicine or dentistry, and the patients to whom they respectively render professional medical services."

The plaintiff in the plaintiff's additional application seeks, amongst other things, an in-camera review of the unnamed patient's diagnostic/medical records and then to insure that said unnamed patient is informed of her actual medical condition by the Court. As such, the plaintiff advocates that the Court should create a remedy whereby the Court notifies an unnamed individual who is not a party to an action before the Court of a sensitive and privilege medical diagnosis related to that individual. While potentially laudable in the context of this case, the Court cannot find and the plaintiff has not provided any authority for such action to be undertaken by the Court. As such, the plaintiff's application for an Order compelling the defendant, Quest Diagnostics Inc., to (A) identify, in camera, the full name and address of the person, or persons, whose slide, or slides, and bodily tissue were incorrectly marked, labeled and identified with the name and identifying information of the plaintiff, Lynne Yurisko; (B) provide to the Court, in camera, copies of all of the documentation provided to the aforesaid person, or persons, or in the event of said person's death their next of kin, and/or their physicians and health care providers, regarding the interpretation of their slides and bodily tissue, which were submitted for diagnosis, including the original report and all amendments and changes submitted thereafter; (C) provide the Court with proof that the aforesaid person or persons, or in the event of their death their next of kin, whose bodily tissues and/or slides prepared therefrom were marked with the name and identification of Lynne Yurosko, were initially diagnosed as breast cancer and caused the plaintiff to be informed, diagnosed and treated for breast cancer, have been informed that: (i) the initial interpretation of their bodily tissue by Quest was incorrect; (i) the appropriate interpretation of said tissue was breast cancer; (ii) the aforesaid error was that of Quest in its error in labeling, identifying and marking of the tissue and/or slides prepared therefrom and (iii) this cancer required immediate treatment, is denied.

SO ORDERED.

DATED: 7/27/2006

  
.....  
**ENTERED** J.S.C.

AUG 01 2006