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Excluding Histories In Hospital Records As Evidence

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A person is injured in an accident. He or she is taken to a hospital for emergency treatment. In the hustle and bustle of a busy emergency room, while numerous people are all speaking at once and shouting over the din of loud speakers blaring codes and paging various doctors, notes are made by overworked, exhausted and understaffed hospital personnel concerning the medical history of the injured person. Sometimes these entries are erroneous, sometimes they are based on hearsay by third parties, or by incompetent interpreters.

In the prosecution of a plaintiff's personal injury lawsuit, counsel should be mindful that frequently these erroneous or misleading entries concerning the plaintiff's medical history are inadmissible. The purpose of this article is to assist all parties in redacting such highly prejudicial entries from the plaintiff's hospital records.

In the seminal case of *Williams v. Alexander*, 309 N.Y. 283 (1955), the Court of Appeals clearly held that notations in hospital records are admissible only as they relate to the diagnosis, prognosis or treatment of the patient. In *Williams*, supra, the Court of Appeals reversed the trial and appellate courts for allowing into evidence a hospital record entry that gave a different account by the plaintiff of how the accident occurred than the account given by the plaintiff at trial.

As the statute makes plain, and we do not more than paraphrase it, entries in a hospital record may not qualify for admission in evidence unless made in the regular course of the business' of the hospital, and for the purpose of assisting it in carrying on that business. The business of a hospital, it is self-evident, is to diagnose and treat its patients' ailments. Consequently, *the only memoranda that may be regarded as within the section's compass are those reflecting acts, occurrences or events that relate to diagnosis, prognosis or treatment or are otherwise helpful to an understanding of the medical or surgical aspects of... [the particular patient's] hospitalization.* 309 N.Y. at 287 (emphasis added).

In *Williams v. Alexander*, supra, plaintiff claimed that while he was a pedestrian crossing the street, the defendant's automobile struck him. Defendant disputed plaintiff's version and claimed that his vehicle was stopped at a traffic light and hit from behind by another vehicle, causing it to be propelled forward and upon plaintiff. In the early stages of the trial, plaintiff introduced into evidence those portions of the hospital record relating to his injuries and their treatment. Defendant offered the balance of the records and they were received into evidence over the plaintiff's objection.

Plaintiff challenged as inadmissible hearsay an entry to the effect that he had stated to a physician at the hospital that he was crossing the street and an automobile ran into another automobile that was at a standstill, causing this car (standstill) to run into him. Plaintiff denied making any such statement, and the doctor who recorded it was not called as a witness. The jury returned a defense verdict. The Court of Appeals reversed the Appellate Division for affirming the verdict. 309 N.Y. at 285.

The Court noted that while in some instances, the patient's explanation as to how he was hurt may be helpful to an understanding of the medical aspects of his case, whether the patient was hit by car A or car B, by car A under its own power or propelled forward by car B, or whether the injuries were caused by the negligence of the defendant or of another, cannot possibly bear on diagnosis or aid in determining treatment. 309 N.Y. at 288.

In applying this rule of law, the Courts have traditionally held certain entries regarding the history of how the plaintiff became injured to be inadmissible. For example, in *Edelman v. City of New York*, 81 A.D.2d 904 (2nd Dept. 1981), the Appellate Division reversed the trial court for allowing into evidence an entry stating that the plaintiff fell getting out of a cab when the plaintiff claimed she took a step after exiting a cab and fell in a hole. The court erroneously admitted the statement as an admission against interest.

In *Echeverria v. City of New York*, 166 A.D.2d 409 (2nd Dept. 1990), the Appellate Division reversed the trial court for allowing into evidence a hospital record entry to the effect that the plaintiff became injured due to a fall at home, when the plaintiff was claiming that he became injured as a result of being assaulted by police officers.

In *Passino v. DeRosa*, 199 A.D.2d 1017 (4th Dept. 1993), the trial court committed reversible error when it denied the plaintiff's motion in limine to exclude statements in plaintiff's hospital record that she became injured when she fell on her icy driveway. At trial, the plaintiff was claiming that she tripped on a raised portion of a walkway and her foot landed in a four-inch gully on the edge of the driveway.

In *Haulette v. Prudential Ins. Co.*, 266 A.D.2d 38, 39 (1st Dept. 1999), the Appellate Division held that the trial court properly redacted three references in the hospital record indicating that the plaintiff fell off a ladder, there being no basis for defendant's speculation that the plaintiff was the source of the information. Plaintiff testified at trial that he fell from a four-foot high mobile scaffold that was missing guard rails and the wheels of which were not in the locked position. The Appellate Court also noted that even if the plaintiff was the source of the information, the references were not relevant to the diagnosis of his injuries and treatment.

In *Quispe v. Lemle & Wolff, Inc.*, 266 A.D.2d 95 (1st Dept. 1999), the Appellate Division noted that whether a plaintiff fell from a height of eight feet or jumped from that height is not germane to plaintiff's diagnosis or treatment, and the history portion of the hospital record was not admissible.

In *Musaid v. Mercy Hospital of Buffalo*, 249 A.D.2d 958, 959 (4th Dept. 1998), the Appellate Court held that the trial court erred in denying plaintiff's motion to preclude the admission into evidence of an entry in the hospital record of plaintiff's daughter and an incident report prepared by a nurse employed in the emergency department of the Hospital.

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Requisite Foundation

In order to attempt to establish the foundation for the admission of the statement, the proponent must produce the witness who recorded the statement. See, *Mikel v. Flatbush General Hosp.*, 49 A.D.2d 581 (2nd Dept. 1975); *Gunn v. City of New York*, 104 A.D.2d 848 (2nd Dept. 1984). Only that witness can say what the basis of his or her notes was.

Without the foundation witness, it is unknown who wrote the note, what it means and for what purpose it was written. What, if any, significance is to be attached to the note is a matter of sheer speculation and conjecture. The author of the note and expert testimony are required in order to even attempt to lay foundation for its admission.

The witness should then be produced for a hearing outside the presence of the jury in an attempt to lay the foundation for the admission of the statement as an admission against interest. Because of the extremely prejudicial value of the statement, if the requisite foundation is not laid, there will then be no prejudice to the plaintiff. If a proper foundation is laid, the testimony can either be read back to the jury or the witness may now be questioned in front of the jury, or the statement will now be allowed into evidence and read to the jury.

Where the source of the information in the hospital or doctor's record is unknown, the record is inadmissible. *Ginsberg v. North Shore Hospital*, 213 A.D.2d 592 (2nd Dept. 1995), lv. to app. den., 86 N.Y.2d 701 (1995). The recorder must have an unequivocal recollection concerning the statement and its source. *Musaid v. Mercy Hospital of Buffalo*, 249 A.D.2d 958, 960 (4th Dept. 1998); *Sanchez v. MABSTOA*, 170 A.D.2d 402, 404 (1st Dept. 1991).

Moreover, CPLR 4518 does not make admissible voluntary hearsay statements by third persons not employed by the hospital nor under any duty in relation to the hospital or its business. *Del Toro v. Carroll*, 33 A.D.2d 160, 165 (1st Dept. 1969). If the hospital record is to be used against the plaintiff as an admission, it should affirmatively appear that he furnished it. Id. It must be established by the proponent of the evidence that the plaintiff was the source of the information recorded, and that the translation was provided by a competent, objective interpreter whose translation was accurate. *Quispe v. Lemle & Wolff, Inc.*, 266 A.D.2d 95, 96 (1st Dept. 1999). See, *Gaudino v. NYCHA*, 23 A.D.2d 838 (1st Dept. 1965); *Scotto v. Dilbert Bros., Inc.*, 263 App. Div. 1016 (2nd Dept. 1942).

Where the plaintiff makes the purported statement through an interpreter, the recorder can only testify to what the interpreter said, and as such constitutes inadmissible hearsay. *Gaudino v. NYCHA*, 23 A.D.2d 838 (1st Dept. 1965); *Scotto v. Dilbert Bros., Inc.*, 263 App. Div. 1016 (2nd Dept. 1942); *Quispe v. Lemle & Wolff, Inc.*, 266 A.D.2d 95 (1st Dept. 1999).

Expert Testimony

If the defendant is attempting to claim that the alleged statements were relevant to medical diagnosis, prognosis and treatment, then he can only do so through expert testimony. Obviously, only an expert witness can determine whether a statement is relevant to medical diagnosis, prognosis and treatment and that such a determination is outside the ken of ordinary lay people. See, *Haulotte v. Prudential Ins. Co of America*, 266 A.D.2d 38, 39 (1st Dept. 1999); *Rodriguez v. TBTA*, __ A.D.2d __, 716 N.Y.S.2d 24, 26 (2nd Dept. 2000).

Usually, the plaintiff has served a Notice for Discovery and Inspection, and pursuant to that notice and/or a typical Preliminary Conference Order, the defendant was required to serve all the names of all witnesses, including expert witnesses. The failure of the defendant to furnish CPLR 3101(d)(1) expert disclosure on these topics should result in the defendant's being precluded from attempting to offer such testimony at trial. Without expert testimony, the defendant cannot prove that the purported statement was related to the plaintiff's medical diagnosis, prognosis or treatment. Without expert testimony, how can the notation be interpreted without engaging in total speculation?

Exchange of Statements

In most cases a Preliminary Conference Order was entered into, and pursuant to the terms of said Order, all parties are typically required to furnish all adverse party statements. See, CPLR 3101(e). If the defendant failed to disclose the statement in a timely fashion, and having done so in total violation of a discovery notice and a Court Order, plaintiff should request that the court preclude the defendant from offering said statements at the time of trial.

Plaintiff should point out that had the defendant exchanged this information in a timely fashion, plaintiff could have investigated and interviewed hospital personnel and attempted to pin down the facts and circumstances surrounding the alleged statements: who said what, when and where it was said and to whom, and in what language, who interpreted, what proficiency they had, and under what conditions this all occurred under. Plaintiff should note that as a result of the defendant's failure to comply with court-ordered discovery, the plaintiff will have been effectively precluded from being able to investigate the witness(es) with regards to their backgrounds, potential biases and motives, and the facts and circumstances surrounding the occurrence so that counsel could properly prepare to cross-examine and impeach their credibility or otherwise probe and question their memory and its accuracy, completeness and veracity.

Frequently, the name of the proposed witness is illegible in the records. In such a situation, counsel opposing the introduction of the statement may have a good faith basis for not anticipating the testimony of the previously unknown witness, and would therefore suffer real prejudice by the testimony. The party that violated the Court Order and discovery notice should not profit from its wrongdoing.

Additionally, pursuant to CPLR 3121(a), ... where a party obtains a copy of a hospital record as a result of the authorization of another party, he *shall* deliver a duplicate of the copy to such party. (emphasis added). Once again, if the defendant has violated the CPLR and never served a duplicate copy of the hospital record on the plaintiff, they should not be allowed to benefit from their willful omission.

Moreover, plaintiff cannot be impeached with extrinsic evidence on a collateral matter. *Badr v. Hogan*, 75 N.Y.2d 629 (1990); *Ingebretsen v. Manha*, 218 A.D.2d 784 (2nd Dept. 1995).

Psychiatric History

Where the plaintiff does not claim psychiatric damages, his psychiatric records are not discoverable and not admissible. *Cottrell v. Weinstein*, 270 A.D.2d 449 (2nd Dept. 2000). If there is a dispute, the court should conduct an in camera review of the records and make a determination outside the presence of the jury. Id.; *Sadicario v. Stylebuilt Accessories, Inc.*, 250 A.D.2d 830 (2nd Dept. 1998); *Zappi v. Pedigree Ski Shop*, 244 A.D.2d 331 (2nd Dept. 1997); *Latibeaudiere v. City of New Rochelle*, 239 A.D.2d 318 (2nd Dept. 1997).

Where the plaintiff has withdrawn his claims of psychiatric damages, his psychiatric history is not admissible. *L.S. v. Harouche*, 260 A.D.2d 250 (1st Dept. 1999); *Strong v. Brookhaven Memorial Hospital Medical Center*, 240 A.D.2d 726 (2nd Dept. 1997); *Kohn v. Fisch*, 262 A.D.2d 535 (2nd Dept. 1999).

In a case involving a claim of wrongful death, pursuant to CPLR 4504(c), a record of a psychiatric history may be inadmissible as it may tend to disgrace the memory of the decedent. *Eder v. Cashin*, 281 App. Div. 456, 461 (3rd Dept. 1953).

Conclusion

Plaintiff should make an appropriate motion in limine prior to counsel giving their opening statements seeking to preclude the defendant from discussing the prejudicial history contained in plaintiff's hospital record in defendant's opening statement, during cross examination of the plaintiff, during questioning of any expert or lay witnesses, and to have any such entries in the hospital records redacted.