

254 A.D.2d 325
Supreme Court, Appellate Division, Second Department, New York.

Frank GILROY, etc., et al., Appellants,
v.
Eucharia McCARTHY, etc., et al., Respondents.

Oct. 13, 1998.

In action for medical malpractice and wrongful death, the Supreme Court, Nassau County, Burke, J., granted the defendants' respective motions for leave to conduct further depositions of plaintiff and nonparty witness, and authorizations for the medical records of the decedent's siblings and for other family records made available to doctors during the course of a genetic survey. Plaintiffs appealed. The Supreme Court, Appellate Division, held that: (1) physician-patient privilege was waived; (2) trial court correctly directed the plaintiffs and nonparty witness to appear for further depositions to answer questions previously objected to; and (3) defendants successfully demonstrated that information sought was material and necessary to their defense of the action, and that it could not be obtained from another source.

Affirmed.

Attorneys and Law Firms

**644 Polstein, Ferrara & Dwyer, P.C., New York, N.Y. (Patrick J. Dwyer and Mario Castellitto of counsel), for appellants.

Schiavetti, Geisler, Corgan, Soscia, DeVito, Gabrielle and Nicholson, L.L.P., New York, N.Y. (Lori A. Marano and Samantha E. Quinn of counsel), for respondent Eucharia McCarthy.

Santangelo, Benvenuto & Slattery (James W. Tuffin, Manhasset, N.Y., of counsel), for respondents L. Iurato and Steven Luke.

Owen B. Walsh, County Attorney, Mineola, N.Y. (Catherine M. Van Der Waag of counsel), for respondents County of Nassau, Nassau County Police Department, Nassau County Emergency Medical Service, and Nassau County Medical Center.

RITTER, J.P., SANTUCCI, ALTMAN and KRAUSMAN, JJ.

Opinion

MEMORANDUM BY THE COURT.

*325 In an action, inter alia, to recover damages for medical malpractice and wrongful death, the plaintiffs appeal from so much of an order of the Supreme Court, Nassau County (Burke, J.), dated August 22, 1997, as granted the defendants' respective motions for leave to conduct further depositions of the plaintiff Frank Gilroy and nonparty witness Peggy Gilroy, and authorizations for the medical records of the decedent's siblings and for other family records made available to doctors during the course of a genetic survey.

ORDERED that on the court's own motion, the appellants' notice of appeal from so much of the order as granted the defendants' **645 respective motions for leave to conduct further depositions of the plaintiff Frank Gilroy and nonparty witness Peggy Gilroy is treated as an application for leave to appeal from that part of the order, and leave to appeal is granted (see, CPLR 5701[c]); and it is further,

ORDERED that the order is affirmed insofar as appealed from, with one bill of costs to the respondents appearing separately and filing separate briefs.

^[1] Contrary to the plaintiffs' contention, the Supreme Court *326 properly determined that the physician-patient privilege was waived by the responses of the plaintiffs and nonparty witness, the decedent's mother, made at an examination before trial, relating to the family medical history (see, *Herbst v. Bruhn*, 106 A.D.2d 546, 483 N.Y.S.2d 363), and by their disclosure of the family's medical history to various physicians in the treatment of the decedent after his birth (see, *Yetman v. St. Charles Hosp.*, 112 A.D.2d 297, 491 N.Y.S.2d 742).

^[2] Upon finding that the plaintiffs and nonparty witness were directed by their attorney not to answer certain questions concerning "mere facts and incidents of [the] medical histori[es]" (*Williams v. Roosevelt Hosp.*, 66 N.Y.2d 391, 396, 497 N.Y.S.2d 348, 488 N.E.2d 94), of the decedent's siblings, the Supreme Court correctly directed the plaintiffs and nonparty witness to appear for further depositions to answer questions previously objected to (see, *Williams v. Roosevelt Hosp.*, *supra*; *Bolos v. Staten Is. Hosp.*, 217 A.D.2d 643, 644, 629 N.Y.S.2d 809).

^[3] Finally, the defendants successfully demonstrated that the information sought was material and necessary to their defense of the action (see, *Kekis v. Park Slope Emergency Physician Serv.*, 244 A.D.2d 463, 664 N.Y.S.2d 609), and that the information could not be obtained from another source (see, CPLR 3101 [a][4]; *Dioguardi v. St. John's Riverside Hosp.*, 144 A.D.2d 333, 533 N.Y.S.2d 915).

Parallel Citations

254 A.D.2d 325, 678 N.Y.S.2d 644, 1998 N.Y. Slip Op. 08710