

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

FILED
2nd JUDICIAL DISTRICT COURT
Bernalillo County
10/22/2018 3:09 PM
James A. Noel
CLERK OF THE COURT
Edna Kasuse

TINA ATKINS, individually and as a personal
representative of the ESTATE OF KEISHA MARIE
ATKINS; and NICOLE ATKINS;

Plaintiffs,

vs.

CASE NO.: D-202-CV-2016-07498

CURTIS BOYD, M.D. P.C. d/b/a SOUTHWESTERN
WOMEN'S OPTIONS; CURTIS W. BOYD, individually;
CARMEN LANDAU, individually; SHANNON CARR, individually;
THE UNIVERSITY OF NEW MEXICO d/b/a UNM HEALTH SYSTEM;
THE UNIVERSITY OF NEW MEXICO BOARD OF REGENTS;
THE UNIVERSITY OF NEW MEXICO HEALTH SCIENCES CENTER;
LISA HOFER, M.D., individually; UNM MEDICAL GROUP, INC.;
LILY BAYAT, M.D., individually; BRENDA PEREDA, M.D., individually;
and LAUREN DVORSCAK, M.D., individually;

Defendants.

**REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANT'S
MOTION FOR PROTECTIVE ORDER**

COMES NOW Defendant, CURTIS BOYD, M.D. P.C. D/B/A SOUTHWESTERN
WOMEN'S OPTIONS, by and through counsel undersigned, hereby replies to PLAINTIFF'S
RESPONSE TO DEFENDANTS MOTION FOR PROTECTIVE ORDER, as follows:

I. Introduction

Defendants agree that under Rule 1-034 NMRA, parties to litigation may be permitted to enter and inspect the premises of another, but in this case, there is no legitimate reason for allowing Plaintiff to do so in this case. As noted in Defendants' Motion for Protective Order, Plaintiff must state with reasonable particularity what is to be inspected, and, logically must provide a legitimate reason for doing so. In response to the Motion, Plaintiff lists the grounds upon which she alleges Defendants were negligent and recites the rule which states that relevant

evidence is discoverable even if it is inadmissible at trial. She adds that inspection of the premises will facilitate depositions, with no explain how. None of these arguments creates legitimate grounds upon which Plaintiff's counsel may enter onto Defendant's property.

II. Argument

A. Plaintiff Does Not Describe What is to be Inspected with Reasonable Particularity, Except for "Equipment."

Plaintiff must describe what is to be inspected with "reasonable particularity". She only states that she wants to prove the inadequacy of the facility by determining what "equipment" was available. She does not describe anything else to be inspected. As discussed below, Plaintiff can find out what equipment was available at the time, through written discovery or depositions. Moreover, Plaintiff's attorney is not a health care provider, will not know what the equipment is, or what it is used for. Finally, Plaintiff offers no explanation as to how an inspection will facilitate depositions. As such, Defendant's Motion should be granted.

B. Plaintiff's Theories of Negligence Do Not Justify Entry onto the Premises.

Plaintiff asserts five grounds upon which she bases her claim for negligence, none of which justify allowing Plaintiff onto the property (to obtain photographs and video footage to use for another agenda). Plaintiff asserts, first, that the clinic did not abide by the standard of care for a "similarly equipped overnight facility capable of providing constant medical monitoring." SWO is not an overnight facility which provides constant medical monitoring; if it was, there would be patients present after hours and an inspection by Plaintiff would be a HIPAA violation. Even if it was an overnight facility, Plaintiff could determine how it was equipped without entering the premises. Plaintiff's other allegations of negligence provide no reason whatsoever for an inspection; whether Defendant met the standard of care in identifying and diagnosing sepsis and infection, and providing treatment for it, would come from an expert witness, and

experts do not inspect medical facilities to render such opinions. The same holds true for Plaintiff's allegation that Defendant failed to inform Ms. Atkins of the risks of not seeking medical care outside of the clinic, as this has nothing to do with visiting the facility. In short, Plaintiff has only established that she wants to know what medical equipment was available and this information could easily be obtained without an inspection.

It should be noted that infection and sepsis are diagnosed by clinical signs and symptoms, such as fever, chills or sweating, as well as bloodwork. Inspecting the facility will do nothing to aid in determining whether a proper diagnosis was made. Again, making a determination whether the Defendants met the standard of care is determined by experts, not by lawyers inspecting the clinic.

C. The Scope of Discovery Does Not Extend to the Subject Request

Plaintiff argues that she should be allowed on the premises simply because "evidence is discoverable even though it is not admissible", which is true. However, that argument does not apply here. Clearly the language of the rule can logically only apply to tangible evidence, not to a party's viewing of someone else's private property. More importantly, Plaintiff ignores the limitations on discovery, set forth herein below.

D. There are Other Means of Obtaining the Information Sought

If Plaintiff wants to know what equipment was available when Keisha Atkins was treated at the clinic, she can easily find out by requesting that information through interrogatories or at depositions. Indeed, Plaintiff ignores 1-026 (B)(2), which provides:

(2) Limitations. The court shall limit use of discovery methods set forth in this rule if it determines that:

(a) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

- (b) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or
- (c) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

As noted, the only information Plaintiff is actually seeking is what equipment Defendant had available at the facility. As noted, this information can be obtained in a much more convenient, less burdensome and less expensive way. An inspection of the premises after hours would require the time and expense of attorney's fees, and cause inconvenience to Defendants. Plaintiff has "ample opportunity by discovery in the action to obtain the information sought;" therefore an inspection of the clinic is neither reasonable nor necessary.

III. Conclusion

As demonstrated above, the only reason for inspecting the clinic that has been articulated by the Plaintiff is to determine what equipment it had at the time Ms. Atkins was treated. This can very easily be accomplished by written discovery requests, including the provision of photographs if desired, or by way of depositions, which will be taken in any event. Defendant's Motion should therefore be granted.

DATED this 22nd day of October 2018.

Respectfully submitted

RESNICK & LOUIS, P.C.

By: /s/ Carol M. Romano
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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of October 2018, I submitted for electronic filing and service the foregoing through “Odyssey File and Serve,” and that on such date, I served the foregoing to the participants/counsel in the manner indicated above.

By: /s/ Carol Sibiga
An Employee of RESNICK & LOUIS, P.C.