**BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS**
**STATE OF GEORGIA**

| | | |
|---|---|---|
| **GEORGIA COMPOSITE MEDICAL BOARD,** | : | **Docket No.:** |
| **Petitioner,** | : | **OSAH-CSBME-PHY-1511102-89-Malihi** |
| | : | |
| **v.** | : | |
| | : | |
| **STEPHEN WEISS, M.D.,** | : | |
| **Respondent.** | : | |

# ORDER

## I. BACKGROUND

The above-docketed matter concerns the Georgia Composite Medical Board's (hereinafter "the Board") proposed disciplinary action against Respondent Stephen Weiss, M.D (hereinafter "Dr. Weiss" or "Respondent"). Respondent filed an Objection and Motion in Limine on November 20, 2014, seeking to exclude depositions taken during the course of a separate medical malpractice lawsuit arising from the same facts that prompted the present action of the Board. Respondent filed a separate written *Daubert* Challenge to the depositions during the December 1, 2014 evidentiary hearing on this matter and submitted supplemental briefs on December 8, 2014 and January 16, 2015. The Board responded to Dr. Weiss's Motion in Limine and *Daubert* Challenge on January 7, 2015.

After careful consideration of the parties' motions and arguments and for the reasons set forth below, Respondent's objection is overruled and his *Daubert* Challenge and Motion in Limine are **DENIED**.

**A. Respondent's Hearsay Objections and Motion in Limine**

The Georgia Rules of Evidence ("GRE") provide that testimony given in a deposition taken in compliance with law in the course of another proceeding shall not be excluded by the hearsay rule if the declarant is unavailable as a witness and the party against whom the testimony is now offered "had an opportunity and similar motive to develop the testimony by direct, cross, or re-direct examination." O.C.G.A. § 24-8-804 (2014) [hereinafter "Rule 804"]. Respondent contends that the depositions are not admissible under the hearsay exception expressed in Rule 804 because the Board has failed to show (1) that the declarants are unavailable and (2) that Respondent had similar motive to develop the testimony by cross-examination.[1]

1. "Unavailable as a witness"

According to Rule 804(a), "the term 'unavailable as a witness' includes situations in which the declarant . . . [i]s absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance . . . by process or other reasonable means." O.C.G.A. § 24-8-804(a)(5) (2014). The Court concludes that the declarants are unavailable as that term is defined in Rule 804(a). As the Board noted in its brief, all of the declarants are out of the state and, therefore, their attendance could not be secured by process available to the Board in this administrative proceeding. Ga. Comp. R. & Regs. 616-1-2-.19(8) (2014) ("A subpoena may be served at any place within Georgia . . ."); *see Moss v. Ole South Real Estate, Inc.*, 933 F.2d 1300, 1311 n.11 (5th Cir. 1991) (declarant determined to be unavailable where she was outside of court's subpoena power).

2. "Similar Motive"

In order for a deposition taken in the course of a prior proceeding to meet the Rule 804(b) hearsay exception, the party against whom the testimony is offered must have had a "similar

[1] Respondent does not dispute that he had the opportunity to develop the declarants' testimony.

motive to develop the testimony by direct, cross, or redirect examination." O.C.G.A. § 24-8-804(b)(1) (2014). Similar motive does not mean identical motive. *United States v. Miles*, 290 F.3d 1341, 1353 (11th Cir. 2002). The inquiry as to whether a party had similar motive to develop prior testimony is inherently factual, and "depends in part on the similarity of the underlying issues and on the context of the questioning." *United States v. Kennard*, 472 F.3d 851, 855-856 (11th Cir. 2006); *Miles*, 290 F.3d at 1353. The Court must therefore consider the similarity of the underlying issues of the medical malpractice suit and the present action, as well as the similarity of Respondent's degree of interest in that issue. *King v. Cessna Aircraft Co.*, Case No. 03-20482-CIV-Moreno/Torres, 2010 U.S. Dist. LEXIS 53585, *25-26 (S.D. Fla. May 6, 2010).

The underlying issue in the present matter is whether Dr. Weiss's treatment of patient A.R. "depart[ed] from, or fail[ed] to conform to, the minimum standards of acceptable and prevailing medical practice." O.C.G.A. § 43-34-8(a)(7) (2014). This issue is similar, albeit not identical, to an underlying issue of the medical malpractice suit: whether Dr. Weiss's treatment of A.R. "violat[ed] the degree of care and skill required of a physician . . . which, under similar conditions and like circumstances, is ordinarily employed by the medical profession generally." *Cope v. Evans*, 329 Ga. App. 354, 355 (2014). Although the underlying issue of the medical malpractice suit does not mirror that of the present action, it nonetheless presented Respondent with similar motivation to develop the declarants' testimony by cross-examination.[2]

[2] *See also* Cheryl A. Peterson, *What Constitutes Similar Motive for Purposes of Rule 804(b)(1) of Federal Rules of Evidence, Excepting Such Testimony From Hearsay Rule if Party Against Whom Such Testimony is Offered had Opportunity and "Similar Motive" to Develop Testimony*, 138 A.L.R. Fed. 367 (1996-1997):

> similar motive can be established by demonstrating that the different proceedings had a common nucleus of operative facts or a community of interests which governed the development of the testimony in the prior proceeding when compared to the instant proceeding. The same basic interest in the testimony development should exist on the part of the one against whom testimony is later offered in both proceedings. Such interest is generally shown by establishing by a substantial identity of facts

In his supplemental brief, Respondent contended that he did not have similar motive to develop the declarants' testimony during the medical malpractice depositions because those depositions were conducted solely for the purpose of discovery. However, as a general rule, a strategic choice to limit cross-examination in a discovery deposition does not preclude use of the depositions in subsequent proceedings. *Hendrix v. Raybestos-Manhattan*, Inc., 776 F.2d 1492, 1506 (11th Cir. 1985)*; see Gill v. Westinghouse Electric Corp.*, 714 F.2d 1105, 1107 (11th Cir. 1983) ("pretrial depositions are not only intended as a means of discovery, but also serve to preserve relevant testimony that might otherwise be unavailable for trial"); *see also Miles*, 290 F.3d at 1353 ("While the availability of foregone cross-examination opportunities is one factor to consider, it is not conclusive . . . .") (citing *United States v. DiNapoli*, 8 F.3d 909, 914 (2nd Cir. 1993)).

The Board has demonstrated that the depositions are admissible under the Rule 804 hearsay exception. Therefore, Respondent's objection is overruled and his motion in limine is **DENIED**.

However, since the declarants were not present at the evidentiary hearing, and their opinions were therefore not tested by cross-examination, the Court affords the depositions significantly less evidentiary weight than that of the live testimony presented at the hearing.

---

between the two proceedings. If such a commonality of interests exists, then the incentive to develop testimony may be deemed similar in the two proceedings, and the motive requirement of [FRE] Rule 804(b)(1) is satisfied.

**B. Respondent's *Daubert* Challenge**

Respondent further contends that there is insufficient evidence in the record to allow the Court to conclude that the deposition witnesses are qualified as expert witnesses under Rule 702 of the Georgia Rules of Evidence (O.C.G.A. § 24-7-702).[3] Specifically, Respondent argues that the Board failed to demonstrate that the witnesses met the criteria of Rule 702(c), which provides that "in professional malpractice actions, the opinions of an expert, who is otherwise qualified as to the acceptable standard of conduct of the professional whose conduct is at issue, shall be admissible only if, at the time the act or omission is alleged to have occurred, such expert:

> (1) Was licensed by an appropriate regulatory agency to practice his or her profession in the state in which such expert was practicing or teaching in the profession at such time; and
> (2) In the case of a medical malpractice action, had actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in:
>  (A) The active practice of such area of specialty of his or her profession for at least three of the last five years, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in performing the procedure, diagnosing the condition, or rendering the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue . . .

O.C.G.A. § 24-7-702(c) (2014).

Respondent's contention that the deposition witnesses must meet the strictures of Rule 702(c)(2) in order to be qualified as expert witnesses is without merit. By its own language, Rule 702(c)(2) is limited to "case[s] of medical malpractice action[s]." O.C.G.A. § 24-7-702(c)(2) (2014). The "same profession" requirement expressed in 702(c)(2) was enacted by the legislature in order to "impose more exacting requirements on expert witnesses in *medical malpractice cases.*" *Hankla v. Postell*, 293 Ga. 692, 695–96 (2013) (emphasis added).

[3] This Code Section is sometimes referred to as "the *Daubert* statute" because it is modeled after Federal Rule of Evidence 702, which incorporated the test of the admissibility of expert opinion set forth by the United States Supreme Court in *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579 (1993).

Moreover, application of the 702(c) criteria would conflict with the legislature's directive that Rule 702 not be "strictly applied . . . in administrative proceedings conducted pursuant to [the Administrative Procedure Act]." O.C.G.A. § 24-7-702(g) (2014).

For purposes of this administrative proceeding, whether a witness is qualified to render expert testimony is governed by OSAH Rule 18(4), which provides:

> (4) If scientific, technical, or other specialized knowledge may assist the Administrative Law Judge to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Ga. Comp. R. & Regs. 616-1-2-.18(6) (2014).[4] Having carefully reviewed the deposition transcripts at issue, the Court concludes that the witnesses are qualified as experts pursuant to the applicable rule. The witnesses are all possess sufficient knowledge, skill, experience, training, and education to render them qualified experts. Moreover, the declarants' specialized knowledge will assist the trier of fact in understanding the evidence. Accordingly, Respondent's *Daubert* challenge is **DENIED**.

Respondent may file any objections to the substance of the deposition transcripts, including specific page and line objections, as requested in his supplemental brief. In the interest of judicial efficiency, the Court will not obligate the parties to submit Proposed Findings of Fact and Conclusions of Law if they do not wish to do so. However, if the parties prefer to submit Proposed Findings of Fact and Conclusions of Law or post-hearing filings of any kind, they may

[4] OSAH Rule 18(4) bears close resemblance to Rule 702(b) of the Georgia Rules of Evidence, which provides: "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if:

> (1) The testimony is based upon sufficient facts or data;
> (2) The testimony is the product of reliable principles and methods; and
> (3) The witness has applied the principles and methods reliably to the facts of the case which have been or will be admitted into evidence before the trier of fact.

O.C.G.A. § 24-7-702(b) (2014).

do so within fifteen (15) days of issuance of this Order.

**SO ORDERED, this 9th day of February, 2015.**

_____

**MICHAEL MALIHI, Judge**



Volume: _____ Page: _____