

ORDER ON EMERGENT APPLICATION

HAROLD ST. JOHN and
FLORENCE ST. JOHN,

v.

AFFINIA GROUP, INC., et al

SUPERIOR COURT OF NEW
JERSEY

APPELLATE DIVISION
DOCKET NO. A-
MOTION NO. M-
BEFORE PART: E
JUDGE(S): WEFING
PARKER
LEWINN

EMERGENT APPLICATION

FILED: 3/3/2009 BY: KIM CATULLO

JAMES LYNCH, ESQ. joined in the application

ANSWER(S) FILED: 3/3/2009 BY: ARNOLD C. LAKIND

APPEARANCE ONLY:

ORDER

THIS MATTER HAVING BEEN ARGUED BEFORE THE COURT, IT IS ON
THIS 18TH DAY OF MARCH, 2009, HEREBY ORDERED AS FOLLOWS:

EMERGENT APPLICATION
FOR

-EMERGENT RELIEF

GRANTED DENIED OTHER

STATEMENT OF REASONS:

This matter commenced before this court with defendants' emergent motion for leave to appeal a trial court order which had denied their application for a limited autopsy upon the body of Harold St. John, who died on February 28, 2009. We granted defendants' motion, stayed the interment of Mr. St. John and remanded the matter to the trial court. We directed the trial court to conduct an evidentiary hearing on an expedited basis to determine "whether there is any evidentiary significance to the pending litigation to the samples of lung tissue sought to be obtained through such limited autopsy."

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The trial court conducted the hearing and adhered to its initial decision denying permission for a limited autopsy. Because of the sensitivity of the matter, we directed the parties to file supplemental briefs simultaneously on an expedited basis.

The trial court gave several reasons for its decision: that defendants had not demonstrated a need for the limited autopsy in accordance with the provisions of N.J.S.A. 52:17B-88.1 to -88.5; plaintiff's stated religious objections to a limited autopsy; and the insufficiency of the record presented by defendants in support of their application. While we disagree with the first two reasons, we agree with the third and thus affirm the trial court's order.

In our judgment, the statute upon which plaintiff has relied, N.J.S.A. 52:17B-88.1 to -88.5, is immaterial in the context of this present controversy. It deals with the scope of the power and duties of the county medical examiner. It does not bear on this private dispute between civil litigants.

Additionally, we do not agree with the trial court's apparent view that the mere assertion by a party of a religious objection is determinative, with no further exploration. The consequence of accepting such a premise would be to permit a litigant to thwart completely and without justification a proper request.

We do agree, however, that defendants did not present at the hearing a sufficient basis from which to conclude that retrieval of lung tissue samples would likely lead to evidence of such significance that a limited autopsy should be ordered over the objections of Mr. St. John's family.

Defendants, who were seeking the relief of a limited autopsy, clearly had the burden of showing the need for the autopsy at the hearing before the trial court. In Il Grande v. di Benedetto, 366 N.J. Super. 597 (App. Div. 2004), we said that the determination of whether to order an invasive medical procedure requires a balancing of the need of the requesting party against the "specific potential harm to the objecting party." Id. at 612. We further explained that the inquiry is "whether the examination is required to place the parties on an equal footing because the examination goes to a critical issue in the case." Id. at 615.

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We have reviewed the transcript of the proceedings before the trial court, at which defendants presented the testimony of Victor Roggli, M.D. Dr. Roggli is a board-certified pathologist and a professor of pathology at Duke University Medical Center, with a specialty in pulmonary pathology and particularly in asbestos-related diseases. We agree with the trial court that Dr. Roggli's testimony did not establish by a preponderance of the evidence that it is reasonably likely that a limited autopsy would yield results that are evidentially significant in terms of the pending trial.

Although Dr. Roggli testified that there are occasions upon which a mineral fiber burden analysis can reveal asbestos exposure that an individual might not have recalled, he also said that "in the vast majority of cases, what an individual tells us their exposure is[,] correlates with what we find in the lung tissue samples." Mr. St. John was deposed about the nature of his exposure to asbestos prior to his death. This portion of Dr. Roggli's testimony indicates that it is unlikely that mineral fiber burden analysis would produce evidence that would be at odds with that deposition testimony.

Dr. Roggli also testified that between 10% and 20% of the cases of pleural mesothelioma in the United States are idiopathic, that is of unknown origin. Cases of idiopathic mesothelioma are not related to asbestos exposure.

Dr. Roggli summarized the significance of the evidence that could be obtained through a limited autopsy in the following manner:

Well, I think that there are three scenarios that I could envision that you would see as a result of doing the fiber analysis in this case. One would be to find a fiber burden which is no different from our background or control population, which would indicate, in my opinion, that it's an idiopathic mesothelioma.

The second would be that you would find elevated levels of commercial amphibole

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fibers, indicating that there was some exposure that has not been identified, other than to friction products, and that likely was the cause of the mesothelioma.

And the third possibility is that you would find only elevated tremolite and/or chrysotile present in the tissues, and that would actually be a finding that would be favorable towards the Plaintiffs.

Dr. Roggli did not attempt to quantify the likelihood of any one of these results as opposed to another.

Further, we note that the death of Mr. St. John in such close proximity to the scheduled trial date was wholly coincidental. Defendants appeared on March 2, presumably ready to proceed to trial, when they learned that Mr. St. John had died on February 28. Absent his death on February 28, defendants would have gone to trial and defended themselves against plaintiff's allegations on the basis of the same evidence that is available to them now without a limited autopsy. Thus their trial preparation was in no way hampered by the denial of their request for a limited autopsy.

The order of March 2 denying defendants' request for a limited autopsy is affirmed. The stay imposed by our order of March 4, 2009 is vacated.

FOR THE COURT:



DOROTHEA O'C. WEFING, P.J.A.D.