

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D25129
G/nl

_____AD3d_____

Argued - April 2, 2009

PETER B. SKELOS, J.P.
ANITA R. FLORIO
JOHN M. LEVENTHAL
L. PRISCILLA HALL, JJ.

2007-11315

DECISION & ORDER

Thomas Dockery, et al., appellants, v Stanley Sprecher,
etc., et al., respondents, et al., defendants.

(Index No. 20379/04)

Duffy, Duffy & Burdo (Pollack, Pollack, Isaac & De Cicco, New York, N.Y. [Brian J. Isaac and Michael H. Zhu], of counsel), for appellants.

Mauro Goldberg & Lilling LLP, Great Neck, N.Y. (Caryn L. Lilling and Richard J. Montes of counsel), for respondents M. Chris Overby, and Levine Overby Hollis, M.D.s, P.C.

Bréa Yankowitz, P.C., Floral Park, N.Y. (Patrick J. Brea of counsel), for respondents Stanley Sprecher, Peninsula Radiology Associates, P.C., and Peninsula Hospital Center.

In an action, inter alia, to recover damages for medical malpractice, etc., the plaintiffs appeal, as limited by their brief, from so much of a judgment of the Supreme Court, Queens County (Hart, J.), entered July 10, 2008, as, upon the granting of that branch of the motion of the defendants Stanley Sprecher, Peninsula Radiology Associates, P.C., and Peninsula Hospital Center pursuant to CPLR 4401, made at the close of the plaintiffs' case, which was for judgment as a matter of law dismissing the complaint insofar as asserted against them, upon a jury verdict finding the defendants M. Chris Overby, and Levine Overby Hollis, M.D.s, P.C., 45% at fault, and nonparties Philip Howard

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Gutin, and Memorial Sloan Kettering Cancer Center 55% at fault for the injuries sustained by the plaintiff Thomas Dockery, and that the plaintiff Thomas Dockery sustained damages in the principal sums of \$10,000,000 for past pain and suffering, \$27,750,000 for future pain and suffering, \$370,000 for past loss of earnings, \$80,000 for future loss of earnings over a period of 28 years, and \$21,636 for loss of social security income, and that the plaintiff Karen Dockery sustained damages in the principal sum of \$18,000,000 for past loss of services, and \$48,700,000 for future loss of services, and upon so much of an order of the same court entered December 3, 2007, as granted, after the jury verdict, that branch of the motion of the defendants M. Chris Overby and Levine Overby Hollis, M.D.s, P.C., pursuant to CPLR 4401, made at the close of the plaintiffs' case, which was for judgment as a matter of law dismissing the complaint insofar as asserted against them, dismissed the complaint insofar as asserted against the defendants Stanley Sprecher, Peninsula Radiology Associates, P.C., Peninsula Hospital Center, M. Chris Overby, and Levine Overby Hollis, M.D.s, P.C.

ORDERED that the judgment is modified, on the law, on the facts, and in the exercise of discretion, by deleting the provision thereof dismissing the complaint insofar as asserted against the defendants M. Chris Overby and Levine Overby Hollis, M.D.s, P.C.; as so modified, the judgment is affirmed insofar as appealed from, without costs or disbursements, the motion of the defendants M. Chris Overby and Levine Overby Hollis, M.D.s, P.C., pursuant to CPLR 4401, made at the close of the plaintiffs' case, for judgment as a matter of law dismissing the complaint insofar as asserted against them is denied, the order entered December 3, 2007, is modified accordingly, and the matter is remitted to the Supreme Court, Queens County, for a new trial as to the defendants M. Chris Overby and Levine Overby Hollis, M.D.s, P.C., on the issues of apportionment of fault and damages for past and future pain and suffering and past and future loss of services unless, within 30 days after service upon the plaintiffs of a copy of this decision and order with notice of entry, the plaintiffs shall file in the office of the Clerk of the Supreme Court, Queens County, a written stipulation consenting to the apportionment of 10% of the fault to the defendants M. Chris Overby and Levine Overby Hollis, M.D.s, P.C., and 90% of the fault to nonparties Philip Howard Gutin and Memorial Sloan Kettering Cancer Center, and to reduce the damages for past pain and suffering from the principal sum of \$10,000,000 to the principal sum of \$1,200,000, the damages for future pain and suffering from the principal sum of \$27,750,000 to the principal sum of \$6,750,000, the damages for past loss of services from the principal sum of \$18,000,000 to the principal sum of \$350,000, and the damages for future loss of services from \$48,700,000 to the principal sum of \$1,000,000, and to the entry of an amended judgment accordingly; in the event that the plaintiffs so stipulate, then the judgment, as so reduced and amended, is affirmed, without costs or disbursements.

A defendant's motion pursuant to CPLR 4401 should be granted only when, accepting the plaintiff's evidence as true, and according that evidence the benefit of every favorable inference that can reasonably be drawn from it, "there is no rational process by which the jury could find for the plaintiff against the moving defendant" (*Wong v Tang*, 2 AD3d 840, 840; *see DiGiovanni v Rausch*, 226 AD2d 420). In considering the motion, "the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant" (*Szczerbiak v Pilat*, 90 NY2d 553, 556; *see Bryan v Staten Is. Univ. Hosp.*, 54 AD3d 793, 793-794; *Hand v Field*, 15 AD3d 542, 543).

To establish a prima facie case of liability in a medical malpractice action, a plaintiff must prove that the defendant departed from good and accepted standards of medical practice, and that the departure was a proximate cause of the injury (*see Hanley v St. Charles Hosp. & Rehabilitation Ctr.*, 307 AD2d 274; *Biggs v Mary Immaculate Hosp.*, 303 AD2d 702). Generally, expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause (*see Texter v Middletown Dialysis Ctr., Inc.*, 22 AD3d 831; *Berger v Becker*, 272 AD2d 565; *Lyons v McCauley*, 252 AD2d 516, 517; *see also Koehler v Schwartz*, 48 NY2d 807, 808).

The Supreme Court properly granted the motion of the defendants Stanley Sprecher (hereinafter Dr. Sprecher), Peninsula Radiology Associates, P.C., and Peninsula Hospital Center pursuant to CPLR 4401, made at the close of the plaintiffs' case, for judgment as a matter of law dismissing the complaint insofar as asserted against them. The plaintiffs' contention that Dr. Sprecher, a radiologist, departed from accepted medical practice by failing to include, as a differential diagnosis, in his magnetic resonance imaging (hereinafter MRI) report dated March 14, 2002, the possibility that a lesion discovered in the brain of the plaintiff Thomas Dockery (hereinafter Dockery) might have been a brain abscess caused by infection, overlooks the limited nature of the legal obligations of Dr. Sprecher relating to his treatment of Dockery. "Although physicians owe a general duty of care to their patients, that duty may be limited to those medical functions undertaken by the physician and relied on by the patient" (*Chulla v DiStefano*, 242 AD2d 657, 658; *see Markley v Albany Med. Ctr. Hosp.*, 163 AD2d 639, 640). In this case, Dr. Sprecher was not Dockery's treating physician; his role was to interpret the MRI film and document his findings. He did not assume a general duty of care to independently diagnose the patient's medical condition (*see Mosezhnik v Berenstein*, 33 AD3d 895, 897; *Wasserman v Staten Is. Radiological Assoc.*, 2 AD3d 713, 714; *Giberson v Panter*, 286 AD2d 217). Furthermore, viewing the evidence in a light most favorable to the plaintiffs, the record contains no evidence that Dr. Sprecher's misreading of the March 12, 2002, CAT scan or the alleged delay in performing the aforementioned MRI was a substantial factor in causing Dockery's injuries (*see Kennedy v Peninsula Hosp. Ctr.*, 135 AD2d 788).

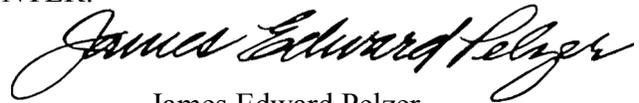
However, the Supreme Court erred in granting, after the jury verdict, that branch of the motion of the defendants M. Chris Overby (hereinafter Dr. Overby) and Levine Overby Hollis, M.D.s, P.C. (hereinafter together the Overby defendants) pursuant to CPLR 4401, made at the close of the plaintiffs' case, which was for judgment as a matter of law dismissing the complaint insofar as asserted against them on the ground that the plaintiffs failed to establish a prima facie case of causation. The evidence at trial was sufficient for the jury to infer that Dr. Overby's conduct in failing to recommend that surgery be performed on Dockery within 24 hours diminished his chance for a better outcome or increased his injuries (*see Wong v Tang*, 2 AD3d 840; *Barbuto v Winthrop Univ. Hosp.*, 305 AD2d 623, 624; *Jump v Facelle*, 275 AD2d 345, 346).

As the jury apportioned fault and awarded damages, and the plaintiffs and the Overby defendants fully briefed these issues, we consider the issues in the interest of judicial economy. We find that the jury's apportionment of fault was contrary to the weight of the evidence, and that an apportionment of 10% of the fault to the Overby defendants and 90% of the fault to nonparties Philip Howard Gutin and Memorial Sloan Kettering Cancer Center better reflects a fair interpretation of the

evidence (*see Mandel v New York County Pub. Adm'r*, 29 AD3d 869; *Stevens v New York City Tr. Auth.*, 19 AD3d 583; *Cintron v New York City Tr. Auth.*, 22 AD3d 248). Moreover, we conclude that the damages awarded here were excessive to the extent indicated, as they deviate materially from what would be reasonable compensation (*see CPLR 5501[c]*).

SKELOS, J.P., FLORIO, LEVENTHAL and HALL, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style with a large initial "J".

James Edward Pelzer
Clerk of the Court