

Williams v Halpern

2004 NY Slip Op 30100(U)

September 3, 2004

Supreme Court, New York County

Docket Number: 0011113/2002

Judge: Alice Schlesinger

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

ALICE SCHLESINGER

PART **IA Part 16**

PRESENT:

0111138/2002

Justice

WILLIAMS, FREDDIE
vs
HALPERN, SEYMOUR M.D.

SEQ 4

PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

FILED

SEP 10 2004

Upon the foregoing papers, it is ordered that this motion

NEW YORK
COUNTY CLERK'S OFFICE

**ORDER IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: SEP 03 2004

Alice Schlesinger

ALICE SCHLESINGER J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 16

-----X
FREDDIE WILLIAMS,

Plaintiff,

Index No.111138/02

-against -

SEYMOUR L. HALPERN, M.D.

Defendant.

SCHLESINGER, J:

FILED
SEP 10 2004
NEW YORK
COUNTY CLERK'S OFFICE

Re: Motion Seq. 004

Before me is a motion by defendant Dr. Seymour L. Halpern seeking partial summary judgment in two ways. First defendant asks to dismiss the cause of action alleging that Dr. Halpern negligently transmitted the Hepatitis C virus to plaintiff Freddie Williams. Counsel urges that there is no factual basis for this assertion. Defendant also asks to dismiss Mr. Williams' request for punitive damages. All discovery has now been completed.

Dr. Halpern relies on reports from the New York City Department of Health (DOH) and the Center for Disease Control (CDC), the deposition testimony of Dr. Sharon Balter, the epidemiologist from DOH who investigated Dr. Halpern's practices and information cited by Dr. Balter in the Morbidity and Mortality Weekly Report (MMWR) dated September 26, 2003, as well as a press release and letter sent out by DOH, and an affidavit and report from Dr. Franklin Klion. Dr. Klion's report was prepared in connection with examinations of Mr. Williams on November 5, 2003 and February 19, 2004. The affidavit was prepared expressly for this motion. A summary of the relevant parts of that evidence follows.

The final report from the City's Department of Health of their "Investigation of Hepatitis B Infections Associated with a Private Practice in Manhattan, 2001-2" (the Halpern report) dated October 31, 2002 notes (at p. 6) that of the 255 patients that agreed to be

tested for Hepatitis C, 7 or 2.7% were EIA and RIBA positive, which the report notes "is consistent with the prevalence of hepatitis C expected in the general population."

A copy of the CDC's memo/report dated March 28, 2002 and prepared by Dr. Taraz Samandari on his "Epi-Aid" trip to New York to help investigate the "outbreak of Hepatitis B virus infection at a physician's practice" contains the statement (at p. 3): "Preliminary analysis of the serum samples indicates no evidence of transmission of HCV or HIV". This statement is found under the heading "Results, Identification of Case Patients". Presumably HCV refers to the Hepatitis C virus.

Dr. Balter was deposed on May 22 and December 2, 2003. On the latter date she was asked if she agreed with respect to Dr. Halpern's practice that there was no evidence of Hepatitis C virus transmission, and she answered: "We found no evidence of it". Further, Dr. Balter stated that the CDC reported in the MMWR of September 26, 2003 that there was *no evidence of Hepatitis C virus transmission in connection with Dr. Halpern's practice*. Finally, Dr. Balter responded that the Department had not asked the defendant or his staff to undergo tests for Hepatitis C, "Because we determined that there was no good evidence for there having been an outbreak of Hepatitis C".

With regard to the affidavit of Dr. Klion, a doctor board certified in internal medicine and gastroenterology, he opines, with a reasonable degree of medical certainty, that Mr. Williams did not contract his Hepatitis C from treatment he received at Dr. Halpern's office. He also states that he believes there is no scientific basis to conclude otherwise.

By way of elaborating on these opinions, Dr. Klion points out that from his examination of Mr. Williams and review of his records, Mr. Williams was positive for chronic Hepatitis C as early as February 2002. (He also tested positive in blood taken by Dr. Klion

in February 2004). That means, according to this expert, that Mr. Williams could have contracted the virus anytime in his life. Relying on the NYCDOH report of an incidence of 2.7% of this virus in the 255 patients of the defendant tested for Hepatitis C, Dr. Klion comments that this percentage is statistically consistent with the prevalence of this virus in the general population, generally calculated to be 1.8%. Yet in New York City, where the Department has estimated there are an estimated 200,000 to 300,00 cases of chronic Hepatitis C out of a population of 8 million people, the percentage for City residents is 2.5% to 3.7%.

Also Dr. Klion points out that Freddie Williams, as a black man living in this City, would statistically be demographically in a group that has an even higher incidence of this virus. In fact, Dr. Klion states that United States Government data show that the percentage of non-hispanic black males in Mr. Williams' age group (64) infected with Hepatitis C is approximately 5%. Finally, Dr. Klion notes that the plaintiff had other risk factors for Hepatitis C such as having past surgery and prior hospitalization.

From the above, I find that defendant has in the first instance met his burden and made out a prima facie case showing a lack of causation between any practices of Dr. Halpern and the transmission of the Hepatitis C virus to Freddie Williams. Therefore, plaintiff was obliged to submit evidence of a contrary nature, sufficient to raise an issue of fact.

Was he able to do that? His counsel argues vigorously that he has. The opposition consists primarily of an affidavit from a licensed physician, Dr. Alan Green, who concludes, with a reasonable degree of medical certainty, that Freddie Williams contracted Hepatitis C (as well as Hepatitis B) from contaminated needles in Dr. Halpern's office. Consistent

with this opinion is his belief that Mr. Williams had not contracted the C virus before late 2001, when he was a patient of Dr. Halpern's.

Dr. Klion's position was that there was no way of telling when the plaintiff's chronic Hepatitis C began. However, Dr. Green bases his opinion upon a review of Mr. Williams' laboratory tests from 1987-2001, wherein he was routinely tested for liver enzymes which were all negative. He states at (¶)3:

Had the patient contracted Hepatitis C prior to 2001, the "liver enzymes" would have been elevated.

Dr. Green also comments on the significance of the 2.74% occurrence rate found among Dr. Halpern's patients tested for the C virus. In his opinion, this rate which is higher than the general population rate of 1.8%, is significant because Dr. Halpern's patients, including Williams, were older middle class adults without any of the other high risk factors for Hepatitis C. In this regard, counsel for plaintiff also points to Dr. Balter's deposition testimony to the effect that the age group of the patients was not taken into account when it was determined that the percentage of patients with the C virus was within the norm for the general population.

Counsel also challenges some of Dr. Klion's claims, for example in regard to the 5% infection rate for non-hispanic black males and his contention that prior surgery is a risk factor. Finally, counsel relies on the opinion testimony of the defendant Seymour Halpern as to the issue of when Freddie Williams contracted Hepatitis C. Dr. Halpern was asked at his deposition about Williams' liver tests in early 2001. He stated they were "all normal" and then, in answer to the question:

Did you have an opinion as to whether or not he was suffering from Hepatitis?

Dr. Halpern responded:

My opinion from these lab reports was that he did not have it.

In reply, defense counsel denigrates plaintiff's expert, his opinions, as well as the arguments put forth by Williams' counsel. However, because his discussion relating to the significance or lack thereof of the liver enzymes relies, it appears, solely on his own opinion, a skilled attorney no doubt, but not a licensed doctor, it has no real probative value.

For example, counsel says (at ¶22) in commenting on Dr. Green's opinion that: "Patients with Hepatitis C often do not have any abnormal findings when administered liver enzyme tests. In fact, it is undisputed that plaintiff Williams has Hepatitis C currently and since February of 2002, and his liver enzyme tests since that diagnosis have returned to normal. See Exhibit U." Similarly as to Dr. Halpern's opinion regarding whether plaintiff had the virus in 2001, cited to by counsel for Williams, defense counsel points out that that the referenced liver function test had been performed on only one date, January 24, 2001. He then opines (at ¶30) that if Williams had either the B or C virus before then, "his liver function tests would have been normal", and he adds that the Halpern opinion dealing only with a single date "are not probative of anything other than possibly that plaintiff Williams had not been recently infected at that time."

But there is no supporting affirmation from Dr. Klion or any other physician that these opinions are medically supportable; i.e., that liver enzyme tests are irrelevant to a diagnosis of the C virus or the effect of when the disease was contracted on these enzyme tests. Even the defendant Dr. Halpern fails to explain or clarify his earlier testimony.

As to the statistical data discussed in the opposition papers, though counsel refers the Court to an exhibit for the 5% number regarding non-hispanic black males, I fail to find it. And there is no clarification of Dr. Klion's inclusion of Williams' past surgery as an added risk factor. Nor is there any statement from a doctor refuting Dr. Green's opinion as to the significance of the 2.7% figure among an older population that has few obvious risk factors.

Therefore, I find that the plaintiff has successfully met the challenge to show the existence of issues as to whether the Hepatitis C virus was transmitted to him as a result of Dr. Halpern's practices. The reports by the CDC and NYCDOH, while probative on this point, are not conclusive. Those agencies clearly were focusing on the much more obvious transmission of the B virus.

On the issue of punitive damages, which Williams has included in his complaint for contracting both Hepatitis B and C, the motion to strike these is also denied for the reasons stated in a motion made in a related case under Index No.105606/02 and decided on September 1, 2004.

Defendant's motion for partial summary judgment is therefore denied in its entirety. This decision constitutes the order of the Court.

Dated: September 3, 2004

SEP 03 2004

Alice Schlesinger
ALICE SCHLESINGER

FILED
SEP 10 2004
NEW YORK
COUNTY CLERK'S OFFICE