SHORT FORM ORDER

INDEX No. 05-1218
CAL. No. 06-01961-MM

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 10/3/06
ADJ. DATE 12/1/06 (004) 12/6/06 (003)
Mot. Seq. # 003 - MD
004 - MD

SELMA STEIN, Plaintiff, - against - DARIAN G. WIGGINS, M.D., MARGARET WHELAN and SOUTHAMPTON HOSPITAL, Defendants.	TOMAO AND MARANGAS Attorneys for Plaintiff 300 Garden City Plaza, Suite 404 Garden City, New York 11530 WAGNER, DOMAN & LETO, P.C. Attorneys for Deft. Wiggins 227 Mineola Boulevard Mineola, New York 11501 VARDARO & HELWIG, LLP Attorneys for Deft. Whelan 732 Smithtown Bypass, Suite 203 Smithtown, New York 11787 BARTLETT McDONOUGH BASTONE, et al. Attorneys for Deft. Southampton Hospital 300 Old Country Road Mineola, New York 11501

Upon the following papers numbered 1 to 43 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-11; 19-31; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 12-14; 32-37; Replying Affidavits and supporting papers 15-18; 38-43; Other _____; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motions (#003, 004) by plaintiff for summary judgment are consolidated and determined herein; and it is further

ORDERED that this motion (#003) by plaintiff for an order pursuant to CPLR 3212 granting summary judgment in her favor on the issue of liability as against defendant Darin G. Wiggins, M.D. is denied; and it is further

ORDERED that this motion (#004) by plaintiff for an order pursuant to CPLR 3212 granting summary judgment in her favor on the issue of liability as against defendant Margaret Whelan, M.D. is denied.

This is a medical malpractice action to recover damages for injuries allegedly sustained by the then 73 year old plaintiff as a result of the negligence of emergency room physician defendant Darin G. Wiggins, M.D. (Dr. Wiggins) and radiologist defendant Margaret Whelan, M.D. (Dr. Whelan) in failing to promptly diagnose and treat a fracture of the femoral head of plaintiff's left hip when she was seen at the emergency room of defendant Southampton Hospital on June 22, 2004 after plaintiff slipped and fell on a concrete sidewalk outside of a supermarket. Plaintiff alleges that defendants merely diagnosed a pelvic fracture/chip fracture of the iliac crest of the pelvis. Plaintiff further alleges that the failure to promptly diagnose and treat her hip fracture and the failure to warn her not to bear weight on and use her left hip when she was discharged from Southampton Hospital on June 22, 2004 proximately caused the fracture to change from non-displaced to displaced requiring plaintiff to return to the emergency room of Southampton Hospital (Hospital) on June 26, 2004 and to undergo a full hip replacement, which was performed on June 30, 2004 at another hospital. The Court's computer records indicate that the note of issue in this action was filed on September 5, 2006.

Plaintiff now moves (#003) for summary judgment in her favor on the issue of liability as against Dr. Wiggins on the grounds that he departed from good and accepted standards of medical practice by failing to properly read the x-ray films taken and to appreciate and promptly treat plaintiff's hip fracture at an early stage proximately causing the fracture to be displaced and requiring a total hip replacement. In support of her motion, plaintiff submits the summons and complaint; defendants' answers; the deposition transcripts of plaintiff and Dr. Wiggins; plaintiff's Hospital records from June 22, 2004 and June 26, 2004; and the affidavit dated June 9, 2006 of Robert Tantleff, M.D., a board certified radiologist[1].

The proponent of a motion for summary judgment is required to establish a prima facie entitlement to judgment as a matter of law by tendering sufficient, competent, admissible evidence demonstrating the absence of any genuine issue of fact (*see*, ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). The burden shifts to the opponent to come forward with appropriate evidentiary material establishing the existence of a triable issue of fact if, and only if, the proponent of the motion for summary judgment establishes a prima facie entitlement through the submission of appropriate and sufficient evidence (*see*, *id.*, at 324, 508 NYS2d 923 [1986]).

In order to establish a prima facie case of liability in a medical malpractice action, a plaintiff must prove (1) the standard of care in the locality where the treatment occurred, (2) that the defendant breached that standard of care, and (3) that the breach was the proximate cause of injury (*see*, ***Gibson v D'Amico***, 97 AD2d 905, 470 NYS2d 739 [3d Dept 1983], *appeal denied* 61 NY2d 603, 472 NYS2d 1027 [1984]). On a motion for summary judgment, a plaintiff must submit a physician's affidavit of merit attesting to a departure from accepted medical practice and containing the attesting doctor's opinion that the defendant's omissions or departures were a competent producing cause of the injury (*see*, ***Domaradzki v Glen Cove Ob/Gyn Assocs.***, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]).

While it is true that a medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in that field (*see*, ***Fuller v Preis***, 35 NY2d 425, 431-433, 363 NYS2d 568 [1974]; ***Payant v Imobersteg***, 256 AD2d 702, 704-705, 681 NYS2d 135 [3d Dept 1998]), the expert witness nonetheless must possess the requisite skill, training, knowledge, or experience to ensure that an opinion

---

[1]The Court notes that plaintiff has not submitted a copy of her bill of particulars with either motion.

rendered is reliable (***Matott v Ward***, 48 NY2d 455, 423 NYS2d 645 [1979]; ***Matter of Enu v Sobol***, 171 AD2d 302, 304, 576 NYS2d 378 [3d Dept 1991]). Thus, where a physician opines outside his or her area of specialization, a foundation must be laid tending to support the reliability of the opinion rendered (*see*, ***Romano v Stanley***, 90 NY2d 444, 451- 452, 661 NYS2d 589 [1997]; ***Nangano v Mount Sinai Hosp.***, 305 AD2d 473, 759 NYS2d 538 [2d Dept 2003]).

At her deposition, plaintiff testified that following her fall on concrete in front of a supermarket in East Hampton on June 22, 2004 she drove herself to the Hospital, entered the emergency room and told the triage nurse that she was feeling pain in her groin. Plaintiff later told Dr. Wiggins that she fell on her left hip and was feeling pain in her groin. Plaintiff could not recall if Dr. Wiggins performed a physical examination but did recall that he sent her for an x-ray of her left side. According to plaintiff, Dr. Wiggins spoke to plaintiff after the x-ray saying that plaintiff had a chip on her pelvic area but that it must be an old fracture because plaintiff did not feel pain when he squeezed both of her hips. Plaintiff testified that she did not feel any pain when Dr. Wiggins squeezed her pelvic area while she was lying down and that Dr. Wiggins told her that there were no findings of anything wrong so plaintiff could go home. Plaintiff added that the papers that she was given prior to discharge advised that if she continued to feel uncomfortable within the next two days that she should go see her own physician. Although plaintiff was still feeling pain when she walked, she was all right when she was seated and was able to drive home from the Hospital. Plaintiff stated that she remained at home the next two days, still feeling pain as she moved about, that she scheduled an appointment to see an orthopedist the following Monday but that the night of June 25, 2004 when she went to the bathroom she "felt a terrible crunching noise" and that it took her an hour to walk a short distance from the bathroom to her bed. The following morning plaintiff was transferred by ambulance to the Hospital where she was x-rayed and an orthopedist told plaintiff that she needed hip surgery.

Dr. Wiggins testified at his deposition that in 2004 he was chairman of the department of emergency medicine at the Hospital and that he recalled plaintiff presenting with complaints that she had pain on her left side, from her iliac crest, going into her groin on June 22, 2004. He indicated in the emergency room record that she was complaining of left hip/groin pain. In addition, Dr. Wiggins testified that he recalled performing a full examination of plaintiff's pelvis, left hip and left leg through inspection, palpation, range of motion, deformity and neurovascular examination. He also recalled ordering one x-ray film, A.P. pelvis, and stated that he did not request any additional x-rays because he did not think that they were warranted because plaintiff's examination was not consistent with any other injury other than a pelvis injury. Dr. Wiggins further testified that his clinical suspicion was a pelvis fracture because plaintiff had pain in her groin and a femoral head hip fracture would usually cause more hip pain, although it could also cause groin pain. Dr. Wiggins added that the other indication of a pelvis fracture was plaintiff's mechanism of injury, that she tripped and fell on her side. Dr. Wiggins stated that he viewed the x-ray films after they were taken and had the opinion that she had a chip fracture of the iliac crest but was unsure whether it was recent or old. He also stated that he ruled out a hip fracture through an examination that he conducted while plaintiff was lying on the stretcher and that he never asked plaintiff to walk while she was in his presence.

During the deposition, Dr. Wiggins looked at the x-ray film again and testified that besides observing what appeared to be a pelvic fracture, the femoral head looked suspicious with a notch, and that he had not seen it on June 22, 2004 because he was looking at the pelvis. In addition, Dr. Wiggins testified that had he noted the notch, he would have done more formal studies, x-rays, of the hip and he would have called in an orthopedist. Dr. Wiggins also testified that it was his custom and practice in June 2004 to read the x-rays himself and not to discuss the results of the x-rays with the radiologists. He added that his diagnosis on June

22, 2004 was solely his own, that he had no discussion with the radiologist Dr. Whelan with respect to plaintiff and that he did see her radiological report regarding the June 22, 2004 x-ray on that date. Dr. Wiggins testified that he had treated a patient with a femoral head fracture in the emergency department by prescribing pain medication and rest and that the patient would not be weight bearing because they might make the fracture worse.

Plaintiff's expert, Dr. Tantleff, Board Certified in Diagnostic Radiology and Radiographic Imaging, stated in his affidavit that he reviewed plaintiff's Southampton Hospital record for June 22, 2004 and June 26, 2004 as well as the x-ray films taken on both dates. Based on said review, Dr. Tantleff opined within a reasonable degree of medical certainty that Dr. Wiggins, defendant Hospital and its employees departed from the generally accepted standards of medical care in their treatment of plaintiff by failing to fully investigate and treat the clinical picture plaintiff presented with on June 22, 2004. In addition, Dr. Tantleff opined that Dr. Wiggins departed from good and accepted medical care in failing to observe and consequently diagnose a femoral head fracture of the left hip on the x-ray films of the pelvis that were taken on June 22, 2004, despite the presence of said fracture. Dr. Tantleff further opined within a reasonable degree of medical certainty that Dr. Wiggins' failure to observe said fracture and thus treat the femoral head fracture at its early stage proximately caused the fracture to become displaced resulting in plaintiff's suffering pain and debilitation and proximately causing the necessity of a total hip replacement.

Initially, the Court notes that the proffered proof reveals a discrepancy concerning how plaintiff described the manner of her fall to the Hospital staff. Although plaintiff testified that she told the triage nurse that she had groin pain and that she subsequently told Dr. Wiggins that she fell on her left hip, the triage nurse recorded in her section of plaintiff's Hospital emergency room record for June 22, 2004 that "plaintiff fell on left buttock." This discrepancy, as well as Dr. Wiggins' testimony, raise issues of fact as to how plaintiff described her fall, her complaints and the intensity of her pain to the Hospital staff and, consequently, whether the measures that the Hospital staff took in addressing plaintiff's complaints on June 22, 2004 departed from accepted medical practice and proximately caused plaintiff's injuries.

In addition, although plaintiff's expert, Dr. Tantleff, Board Certified in Diagnostic Radiology and Radiographic Imaging, established that Dr. Wiggins departed from good and accepted medical care in failing to observe and consequently diagnose a femoral head fracture of the left hip on the pelvic x-ray film, he failed to lay a proper foundation to render an opinion concerning the applicable standards of care and procedures of an emergency department such as that of defendant Hospital in treating a patient such as plaintiff. More importantly, plaintiff's expert failed to lay a proper foundation to render an opinion with respect to proximate cause. In particular, plaintiff's expert did not indicate any training, knowledge or experience concerning orthopedic medicine so as to render an opinion on the symptoms of a patient with a non-displaced femoral head hip fracture; proper treatment of a non-displaced femoral head hip fracture, specifically, whether or not treatment might include the need for a total hip replacement; and the process or mechanics of fracture displacement. Thus, even if plaintiff's expert established that Dr. Wiggins departed from good and accepted medical care in failing to observe and consequently diagnose a femoral head fracture of the left hip from the pelvic x-ray film, without the aforementioned foundation, the expert affidavit is of no probative value on the issue of proximate cause (*see*, ***Behar v Coren***, 21 AD3d 1045, 803 NYS2d 629 [2d Dept 2005], *lv denied* 6 NY3d 705, 812 NYS2d 34 [2006]; *see also*, ***Postlethwaite v United Health Services Hospitals, Inc.***, 5 AD3d 892, 773 NYS2d 480 [3d Dept 2004]; ***Perrone v Grover***, 272 AD2d 312, 707 NYS2d 196 [2d Dept 2000]). Thus, plaintiff failed to sustain her initial burden and her motion (#003) for

summary judgment on the issue of liability as against Dr. Wiggins is denied.[2]

Plaintiff now moves (#004) for summary judgment on the issue of liability as against Dr. Whelan on the grounds that Dr. Whelan's failure to observe and diagnose the femoral head fracture when she read the x-ray film of plaintiff's pelvis taken on June 22, 2004 constituted a departure from accepted standards of medical care and that said failure resulted in the lack of proper treatment and discharge instructions in the emergency room which, in turn, proximately caused the fracture to become displaced necessitating a total hip replacement on June 30, 2004. In support of her motion, plaintiff submits the summons and complaint; defendants' answers; the deposition transcripts of plaintiff, Dr. Whelan and Dr. Wiggins; plaintiff's Hospital records from June 22, 2004 and June 26, 2004, including Dr. Whelan's radiology report; and the affidavit dated July 24, 2006 of plaintiff's expert, Dr. Tantleff.

At her deposition, Dr. Whelan testified that she had been on the staff of the Hospital since July 2000. Dr. Whelan explained that she was part of a group, East End Radiology, P.C., that had a contract with the Hospital for radiology services and that her duties involved interpreting radiology films. Dr. Whelan further explained that she reported to the radiology department of the Hospital, which is run by East End Radiology, P.C. In addition, Dr. Whelan testified that she would not order x-rays, that x-rays would be taken with explicit instructions from the referring clinician, and that occasionally she would recommend further x-rays after speaking with the referring physician and obtaining clinical input on the patient's history. Dr. Whelan also testified that she would not examine patients. Dr. Whelan stated that the fracture of the femoral head was not readily appreciable to her eye on plaintiff's x-ray taken on June 22, 2004 and pointed out that with older patients who have a demineralization of the bones there is a condition called "occult fractures" which are fractures that cannot be readily appreciated on routine, plain films. According to Dr. Whelan, MRI scans are the definitive study for occult fractures because marrow edema can be readily observed. When she looked at the film again at the deposition, Dr. Whelan noted a little asymmetry of the hip. She recalled telephoning Dr. Wiggins after the x-ray was taken and prior to her interpretation to find out plaintiff's history and that Dr. Wiggins told her that plaintiff had fallen and that he did not have an index of suspicion that she had a fracture because plaintiff could weight bear, move her legs well and that plaintiff's pain was located at the anterior superior iliac crest. After reviewing the film, Dr. Whelan did not speak directly to Dr. Wiggins and instead sent her interpretation with the x-ray technician to communicate it to Dr. Wiggins prior to plaintiff's discharge. According to Dr. Whelan, Dr. Wiggins did not tell her about any groin pain and she explained that with such pain, routine films of the hip are part of the initial workup.

Dr. Whelan's radiology report of June 23, 2004 indicated that she reviewed an AP film of the pelvis of "a 73 year old female status post fall with pain on the left." Dr. Whelan provided the following impression:

> 1) A linear density projecting from the lateral aspect of the left iliac crest most suggestive of an avulsion fracture at that level. Correlate with focal pain over the left

---

[2] The Court notes that in opposition to this motion Dr. Wiggins submitted an affirmation dated November 16, 2006 of his expert Board Certified in Orthopedic Surgery who opined that the presence of plaintiff's initial injury alone may have ultimately caused the need for a total hip replacement, despite any treatment. A party opposing summary judgment may submit an unidentified expert's affidavit provided that the Court may require submission of an unredacted copy for an in camera inspection (see, ***Marano v Mercy Hosp.***, 241 AD2d 48, 670 NYS2d 570 [2d Dept 1998]; ***McCarty v Community Hosp.***, 203 AD2d 432, 610 NYS2d 588 [2d Dept 1994]). Counsel for Dr. Wiggins has offered to provide this Court with the unredacted original version of the expert's affidavit for an in camera inspection.

iliac crest.

2) Degenerative change associated with the hips bilaterally with hypertrophic change associated with the lateral acetabulum.

3) Hypertrophic change associated with the greater trochanter bilaterally, greater on the right than on the left.

4) If it is necessary to fully evaluate the pelvis and iliac crest for fracture, MRI scan would be the study of choice since the extent of pelvic fractures is difficult to appreciate on routine plain films.

By his affidavit, plaintiff's expert, Dr. Tantleff, opines within a reasonable degree of medical certainty that Dr. Whelan departed from good and accepted medical care in failing to observe and consequently diagnose a femoral head fracture of the left hip on the x-ray films of the pelvis taken on June 22, 2004 and/or to order further testing resulting in a lack of treatment for the non-displaced fracture, which should have included surgical pinning and an order directing plaintiff to remain non-weight bearing. Dr. Tantleff further opines within a reasonable degree of medical certainty that said failure to provide timely treatment proximately caused the fracture to become displaced and proximately caused the necessity for a total hip replacement.

In opposition to the motion, Dr. Whelan contends that she did not depart from accepted medical practice inasmuch as her standard of care as a radiologist was limited in scope to evaluating the films ordered by Dr. Wiggins based on the patient information provided to her by Dr. Wiggins. In support of her opposition, Dr. Whelan submits, among other things, plaintiff's bill of particulars with respect to Dr. Whelan; the deposition transcript of Dr. Wiggins and the affirmation dated November 15, 2006 of her expert, Scott S. Coyne, M.D. (Dr. Coyne).

Dr. Whelan's expert radiologist, Dr. Coyne, stated in his affirmation that he is Board Certified in Diagnostic Radiology and has been actively practicing in the field of radiology for over 25 years and addressed the allegations of negligence against Dr. Whelan in plaintiff's bill of particulars. Dr. Coyne opined that given the fact that Dr. Whelan did not examine plaintiff and that her sole source of information was from Dr. Wiggins who was suspicious of a pelvic fracture, Dr. Whelan's interpretation was well within the standard of care. In addition, Dr. Coyne opined that it is not the responsibility of the radiologist to order additional radiology studies and that Dr. Whelan appropriately recommended an MRI if there was any need for further evaluation. Dr. Coyne concluded by opining that Dr. Whelan's interpretation of the films at the time of her reading, given the information provided to her at the time, and the recommendation of further study was totally appropriate and well within the standard of medical care and not a departure from good and accepted medical practice.

In reply to Dr. Whelan's opposition, plaintiff argues that Dr. Whelan's expert failed to take into account the x-ray requisition sheet that had been marked as plaintiff's exhibit on August 9, 2006 during the deposition of the radiology technician who took plaintiff's x-ray on June 22, 2004, non-party witness Mary Carol Cannuscio (Ms. Cannuscio), who testified that she wrote "left groin pain" on the sheet to note plaintiff's complaint. Plaintiff argues that based on Ms. Cannuscio's testimony, Dr. Whelan would have had the requisition form with said notation as well as the film prior to her evaluation and based on Dr. Whelan's

own testimony, Dr. Whelan should have recommended routine films of the hip. Plaintiff points out that Dr. Whelan's expert did not review the requisition form since it was not part of the Hospital record. With her reply, plaintiff submits Dr. Tantleff's affidavit dated July 24, 2006; the subject x-ray requisition sheet; and the deposition transcript of Ms. Cannuscio.

During her deposition, Ms. Cannuscio testified that she was a part-time x-ray technician at the Hospital on June 22, 2004 but did not have any independent recollection of having any involvement with plaintiff's films. She described her duties as obtaining a requisition, performing an x-ray according to the requisition, following through and making sure that the patient is either discharged or taken back to the emergency room or to the floor of the Hospital. Ms. Cannuscio explained that as the x-ray technician she would take the film to the radiologist's office; if the radiologist was present, the x-ray technician would show the x-ray film and the requisition; and the radiologist would read the film. Ms. Cannuscio continued that the x-ray technician would then write down the radiologist's reading on a card with the patient's name printed on it; the x-ray technician would read back what was written on the card to verify its contents; then the x-ray technician would take the films, the card containing the radiologist's reading, and the patient back to the emergency room. According to Ms. Cannuscio, once in the emergency room, the x-ray technician would clip the card containing the radiologist's reading to the doctor's area and leave the films on a pile. She did not know what happened to the card containing the radiologist's evaluation after it was clipped in the emergency room. During the deposition, Ms. Cannuscio reviewed the x-ray requisition sheet of plaintiff's June 22, 2004 x-ray and recognized her initials as well as her notation "left groin pain" and pointed out that she always asked a patient what kind of pain the patient had and the pain's location. She also testified that she had no input into the reading of the x-rays with the radiologist.

Here, the evidence adduced on the motion and in opposition thereto raise triable issues of fact, including those of credibility, warranting the denial of summary judgment (*see*, ***Savage v Long Is. Jewish Med. Ctr.***, 170 AD2d 665, 567 NYS2d 84 [2d Dept 1991]). Dr. Whelan's deposition testimony and the opinions of the respective experts raise issues of fact as to how readily recognizable the fracture was from the pelvic x-ray and how much involvement was required of Dr. Whelan to satisfy the standard of care (*see generally*, ***Mosezhnik v Berenstein***, 33 AD3d 895, 823 NYS2d 459 [2d Dept 2006]). In addition, Dr. Tantleff's affidavit regarding Dr. Whelan has the same deficiency as his affidavit concerning Dr. Wiggins, it lacks a proper foundation to render an opinion on the issue of proximate cause (*see*, ***Behar v Coren***, *supra*; *see also*, ***Postlethwaite v United Health Services Hospitals, Inc.***, *supra*; ***Perrone v Grover***, *supra*). Moreover, just as defendants' experts make no reference to the aforementioned x-ray requisition sheet, neither does plaintiff's own expert and it appears that the defendants were not deposed with respect to said x-ray requisition sheet either. Plaintiff's counsel fails to indicate from where and when said sheet was obtained, given that it was not part of the Hospital record nor originally submitted with plaintiff's own motion papers. Thus, the Court cannot make a determination of liability based on said evidence. Furthermore, Dr. Wiggins' deposition testimony calls into question whether any of Dr. Whelan's findings entered into his final diagnosis. Therefore, plaintiff's motion (#004) for summary judgment on the issue of liability with respect to Dr. Whelan is denied.

Accordingly, the motions are denied.

Dated: MAR 05 2007

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION