

Jackson v Waltzer

2007 NY Slip Op 30119(U)

March 5, 2007

Supreme Court, Suffolk County

Docket Number: 0003211

Judge: Robert W. Doyle

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

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 5/31/06 (#006)
4/21/06 (#007,008)
(#009)

ADJ. DATE 12/5/06
Mot. Seq. # 006 - MD
007 - XMG
008 - MG
009 - MG; CASEDISP

-----X
SHIRLEY JACKSON, as Administratrix of the :
Estate of CARL JACKSON, deceased, and :
SHIRLEY JACKSON, individually, :
 :
 : Plaintiffs, :
 :
 :
 : - against - :
 :
 :
 : WAYNE WALTZER, M.D., ZELIK FRISCHER, :
 : M.D., AUGUSTO HSIA, M.D., HUI YE, M.D., :
 : FEDERICO DOCTOR, M.D., MICHAEL :
 : OSHONSKY, M.D. a/k/a MICHAEL OSTRONSKY, :
 : M.D. and DARREN S. KAUFMAN, M.D., :
 :
 : Defendants. :
-----X

HARRIET A. GILLIAM, ESQ.
Attorney for Plaintiffs
711 Union Avenue, P.O. Box 1485
Riverhead, New York 11901

FUREY FUREY LEVERAGE MANZIONE
WILLIAMS & DARLINGTON, P.C.
Attys for Defts Waltzer, Frischer & Kaufman
600 Front Street
Hempstead, New York 11550

ELIOT SPITZER, ESQ.
New York State Attorney General
By: Daniel Chu, Esq.
Atty for Defts Hsia, Ye, Doctor & Oshonsky
120 Broadway, 23rd Floor
New York, New York 10271

Upon the following papers numbered 1 to 60 read on these motions and cross motion for summary judgment and to "so order" a stipulation of discontinuance; Notice of Motion/ Order to Show Cause and supporting papers 1-5; 6-21; 22-29; Notice of Cross Motion and supporting papers 30 - 33; Answering Affidavits and supporting papers 34 - 56; Replying Affidavits and supporting papers 57 - 60; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#006) by defendants Michael Ostrovsky, M.D. s/h/a Michael Oshonsky, M.D. and Michael Ostronsky, M.D., Augusto Hsia, M.D., Federico Doctor, M.D. and Hui Ye, M.D. for an order pursuant to CPLR 3217 granting and "So Ordering" the discontinuance of the instant action with prejudice as against them is denied as academic; and it is further

ORDERED that the cross motion (#007) by defendants Wayne Waltzer, M.D. and Zelik Frischer, M.D. for summary judgment pursuant to CPLR 3212 dismissing the action as against them is granted; and it is further

ORDERED that the motion (#008) by defendants Augusto Hsia, M.D., Hui Ye, M.D., Federico Doctor, M.D. and Michael Ostrovsky, M.D., s/h/a Michael Ostronsky and Michael Oshonsky, for summary judgment pursuant to CPLR 3212 dismissing the action as against them is granted; and it is further

ORDERED that the motion (#009) by defendant Darren S. Kaufman, M.D. for summary judgment pursuant to CPLR 3212 dismissing the action as against him is granted.

In this medical malpractice action, plaintiff, Shirley Jackson, as Administratrix of the Estate of Carl Jackson, deceased, and individually, alleges that defendants departed from accepted standards of medical care in the treatment of plaintiff's decedent while a patient at non-party Stony Brook University Hospital from February 10, 1999 through February 23, 1999, the date of his death and also alleges a derivative cause of action. The record reveals that decedent (hereinafter referred to as "the patient") was suffering from end stage renal disease, high blood pressure and obesity and was admitted for the purpose of undergoing elective living related donor kidney transplant surgery.

The patient was evaluated by defendant, Darren S. Kaufman, a nephrologist on February 10. The surgery was performed on February 11, 1999 by defendant, Wayne Waltzer, M.D., which was reported to be without complication. Defendant Zelik Frischer, M.D. inserted a catheter into the patient's bladder during surgery. Defendant Hui Ye attended to the donor kidney as the perfusionist prior to the surgery. It is not disputed that defendant Waltzer was the attending physician responsible for the patient's care. Defendants Augusto Hsia, M.D., Hui Ye, M.D., Federico Doctor, M.D. and Michael Ostrovsky, M.D. were fellows and residents assigned to the renal transplantation service who assisted defendants Waltzer and Frischer in the patient's post-operative care. The record reveals that twelve days post-operatively the patient went into cardio/pulmonary arrest and expired. The autopsy report reveals that the transplanted kidney's renal artery was unattached to the patient's external iliac artery which showed sutures where the renal artery had previously been attached. Autopsy findings were consistent with dehiscence of the renal artery anastomosis (transplant kidney) and left lower quadrant hemorrhage. Before the court are two motions and a cross motion for summary judgment and a motion to discontinue the action.

Procedurally, by order dated April 18, 2006 (Doyle, J.), the Court granted an order to show cause by plaintiff's prior attorney to be relieved as counsel and stayed the action for sixty days for the plaintiff to retain new counsel. In addition, the pending motions and cross motion were denied with leave to renew upon the expiration of the stay. The court now determines the motions and cross motion after several adjournments were granted to plaintiff's new counsel.

In the bill of particulars, plaintiff alleges that defendants departed from accepted standards of medical care by their failure to treat, examine and diagnose the patient's condition prior to his death; failure to order the proper diagnostic tests; failure to exercise the requisite degree of knowledge, skill and diligence; failure to appreciate the risks of proceeding with surgery in light of the patient's physical

condition; failure to employ proper and adequate surgical techniques; failure to recognize signs and symptoms of complications which occurred; failure to maintain proper medical records; and failure to institute timely surgery and other therapeutic measures to treat the patient's deteriorating condition.

The requisite elements of proof in a medical malpractice case are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (*Amsler v Verrilli*, 119 AD2d 786, 501 NYS2d 411 [1986]; *De Stefano v Immerman*, 188 AD2d 448, 591 NYS2d 47 [1992]). The issue of the duty owed as between physicians, and, ultimately, to the patient, is a question of law (*Lipton by Lipton v Kaye*, 214 AD2d 319, 624 NYS2d 590 [1995], *reh den, sub nom* 1995 NY App Div LEXIS 8590). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; *Zuckerman v New York*, 49 NY2d 557, 562, 427 NYS2d 595 [1980], *reh den*, 3 NY2d 941; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404, 165 NYS2d 498 [1957], *reh den* 3 NY2d 941).

Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v New York, supra*). In a medical malpractice action, a plaintiff, in opposition to a defendant physician's summary judgment motion, must submit evidentiary facts or materials to rebut the prima facie showing by defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact (*Fileccia v Massapequa Gen. Hosp.*, 63 NY2d 639, 479 NYS2d 520 [1984]; *Neuman v Greenstein*, 99 AD2d 1018, 473 NYS2d 806 [1984]; *Buonagurio v Drago*, 65 AD2d 830, 409 NYS2d 835 [1978], *lv denied* 46 NY2d 708 [1979], *lv denied* 57 NY2d 609 [1982]).

Defendants Hsia, Ye, Doctor and Ostrovsky move for summary judgment and for an order discontinuing the action as against them. The court notes that plaintiff's prior attorney executed a stipulation discontinuing the action as against them, however, plaintiff's new counsel affirms that plaintiff was unaware of this act by the prior attorney and opposes both motions. The Court will first determine the motion for summary judgment. In support, defendants submit, among other things, the pleadings, bill of particulars; copies of their examination before trial transcripts and those of defendants Waltzer and Frischer; and the affirmation of their expert, Thomas Diflo, M.D. Defendants Waltzer and Frischer cross-move for summary judgment and rely upon the above submissions (*see, Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]).

Defendant Hsia testified to the effect that in 1999 he was a renal transplant fellow during Mr. Jackson's admission. On February 10, he advised the patient of the risks of surgery and witnessed his signature. He stated that on February 11, he wrote an operative note, which is routine for the fellows to do, and later Dr. Waltzer dictated an extensive summary. He also stated that he saw the patient during his post-operative course and wrote in the progress notes. On February 23, he observed that the patient was doing well in the early morning, however, the patient became unresponsive at 12:55 p.m. and cardiac resuscitation was initiated. Defendant Hsia ordered medications during the resuscitation effort and wrote a death summary in the progress notes.

Defendant Ostrovsky testified to the effect that he was a clinical fellow in the Department of Transplantation in 1999 during decedent's stay in Stony Brook. He stated that his responsibility was to follow orders of the attending physicians, work in the clinic and take care of patients on the floor. He examined patients, checked laboratory results and reported findings to the attending physician.

Defendant Doctor testified to the effect that he was a resident in the transplant department in 1999 and assisted defendant Waltzer in Mr. Jackson's surgery. He stated that he assessed the patient's status, ordered lab tests, recorded volumes accumulated by the patient, and discussed his findings with defendant Waltzer, the attending physician, who approved, rejected or modified all orders.

Defendant Waltzer testified to the effect that is been Board Certified in urology and has performed kidney transplants for the past twenty years. He states that on February 10, 1999 he advised the patient of the risks of surgery including infection, rejection, hemorrhage, side effects of immunosuppression treatment, greater risks for complications because of obesity, wound infection and dehiscence, deep venous thrombosis, pulmonary embolism, and graft failure. The patient understood, accepted and agreed to proceed with the planned surgery. On February 11, 1999, he performed the surgery. He stated that all orders were written by the residents under his direction and were first discussed with him. He stated that he was on vacation from February 13 to February 22, however, the nephrology attending and the transplant team saw the patient every day. In addition, defendant Frischer saw the patient on rounds.

Upon his return from vacation on February 22, defendant Waltzer noticed a small separation in the middle of the surgical wound with some drainage. On February 23 the patient was unresponsive and a code was called to resuscitate the patient. He read the autopsy report into the record and stated that dehiscence of the renal artery was a known possible risk of transplant surgery in 1999, however, he did not know how the patient died. He stated that until the time the patient was unresponsive, there was no evidence of rejection or infection. He stated that defendant Ye played no role in the actual transplant procedure. He stated that defendant Hsia assisted in surgery by holding retractors. Defendant Doctor assisted in surgery but did not make incisions or sutures. He stated that defendant Ostrovsky did not participate in the surgery. In addition, he stated that none of these physicians played any role in determining that the transplant surgery was appropriate in this case. There was no evidence that any of the residents or fellows failed to follow any direction or instruction defendant Waltzer gave them in connection with the patient's care.

Defendant Frischer, also an attending physician, testified to the effect that his part of the surgery was to place a tube into the patient's bladder. He stated that he was the attending physician in the transplant department who covered the patient while defendant Waltzer was on vacation. He saw the patient several times a day on rounds and made physical assessments, checked the lab tests and checked the patient's wound and tubes. He noted that the lab tests showed that the donor kidney had good perfusion and was working well from February 13 through February 22, the last day that he saw the patient. Dr. Frischer stated that he did not know why the patient died.

Dr. Diflo avers that he is Board Certified in General Surgery and Surgical Critical Care and is the Director of Renal Transplants at New York University Medical Center. He states that he is experienced in the supervision and training of residents and fellows. He states pursuant to custom and

practice at teaching hospitals in the New York metropolitan area that while a resident or clinical fellow may assist in the care and/or work-up of a patient, the medical management remains the responsibility of the attending physician. He opines that at no time during the transplant surgery did defendants make decisions concerning surgical procedure. The patient's chart and deposition testimonies establish resolutely that defendants always worked under the direct supervision of the attending physicians, Waltzer and Frischer.

He further opines that defendant Waltzer performed the kidney transplant surgery on the patient and did not contemplate any assistance from any other physicians for the procedure. Co-defendant Frischer was not involved with the vascular anastomosis and only performed the placement of a tube in the bladder during the surgical procedure. He states that defendant Frischer provided post-operative care and treatment as an attending physician from February 13 to 22, when defendant Waltzer was out of town. He states that there is no proof in the record establishing that the patient died from arterial anastomotic dehiscence and related internal bleeding, as opposed to a cardiac arrhythmia, which would have been unrelated to any dehiscence.

Further, he avers that there is no proof that the dehiscence took place prior to, rather than during, the post-cardiac arrest code and resuscitation procedures. Those procedures, which would have involved, among other things, aggressive chest compressions, could well have caused the dehiscence. Thus there is no proof in the record that the patient died from arterial anastomotic dehiscence and internal bleeding, the cause of death alleged by plaintiff in this lawsuit. He opines that the treatment rendered by defendants was at all times relevant hereto, within the standard of care and that the defendants did not commit any departures from good and accepted practice. There was nothing that defendants did or did not do that was a proximate cause of the patient's death or other injuries alleged by the plaintiff in the bill of particulars. With these submissions, defendants have established, prima facie, their entitlement to judgment as a matter of law (*see, Alvarez v Prospect Hosp., supra*).

Defendant Kaufman, in support of his motion for summary judgment, submits, among other things, a copy of his examination before trial testimony and the affidavit of Steven W. Rucker, M.D. Defendant Kaufman testified to the effect that he is Board Certified in nephrology and internal medicine and is an Associate Professor of clinical medicine at Stony Brook. On February 10, 1999, a request for a consultation was made to his department by the transplant service to assess the patient's need for dialysis. A routine cardiogram was found to be abnormal and the patient was seen by a cardiologist prior to surgery. After surgery, Kaufman and a nephrology fellow saw the patient daily. They checked the lab tests which were ordered by the primary transplant service and evaluated the patient's status to make sure no complications related to the patient's kidney disease arose. He stated that he deferred checking the surgical wound to the surgeons. After February 15, his participation in the consultative service elapsed and was assumed by another nephrology attending physician.

Dr. Rucker avers that he is licensed to practice in New York and is Board Certified in internal medicine and nephrology. He states with a reasonable degree of medical certainty that the care and treatment of the patient by defendant Kaufman was in accord with good and accepted standards of practice and plaintiff's allegations against Kaufman are without merit. He states that Kaufman was not present at the surgery. Post-operatively Kaufman saw the patient with a nephrology resident on February 12, 13, 14 and 15. According the chart, the patient's medical condition and kidney function

steadily improved as expected. It is his opinion that the monitoring and management of the renal function postoperatively by Kaufman was completely appropriate. In addition it is his expert opinion that during his hospitalization, there was no evidence that the patient was experiencing any internal bleeding, acute renal failure, postoperative infection or rejection of the donor kidney. No alleged departure by Kaufman was the cause of the patient's death. None of the departures alleged by the plaintiff in her Bill of Particulars were a proximate cause of the sudden, unfortunate death of this patient. With these submissions, defendant Kaufman has demonstrated his prima facie entitlement to judgment as a matter of law (*see, Alvarado v Prospect Hospital*, supra).

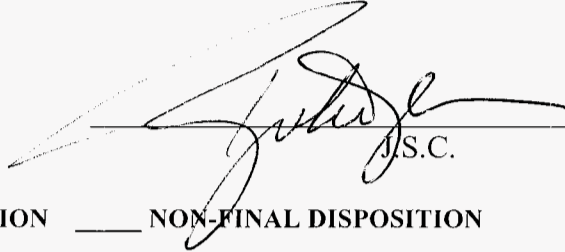
In opposition, plaintiff's counsel affirms that there is no opposition to the motion by defendant Ye. Accordingly, summary judgment is awarded to defendant Ye. In opposition to the motions and cross motion, plaintiff submits the affirmation of counsel and the affidavit by John Daller, M.D. Initially, counsel's affirmation which states that defendants, Hsai, Doctor and Ostrovsky independently wrote orders in the patient's chart and acted independently of the attendings is rejected by the Court as not probative. These opinions and conclusions are not supported by, corroborated by or referenced to any medical expert. Neither is plaintiffs' attorney qualified to render medical opinions (*see, Armstrong v Wolfe*, 133 AD2d 957, 520 NYS2d 466 [1987]).

Dr. Daller avers that he is licensed to practice medicine in the State of New York and other states. He is Board Certified in General Surgery with added qualifications in Surgical Critical Care and is a Diplomate of the National Board of Medical Examiners. He is also an Associate Professor of Surgery at Temple University College of Medicine in the Renal Transplant Program. He also states that he is experienced in the supervision and training of resident physicians and fellows. Although he opines that the patient died of hemorrhage from the dehiscence of the arterial anastomosis he gives no opinion as to how defendants Hsia, Doctor or Ostrovsky departed from accepted standards of medical care in the patient's treatment. In any event, since the evidence demonstrates that the hospital residents and clinical fellows had no contact with the patient except while they were under, and thus bound by, the direct supervision of their attending physicians, no rational trier of fact could find that the hospital residents' and fellows' acts or failures to act were a proximate cause of the patient's injuries and therefore, summary judgment is awarded to defendants Hsai, Doctor and Ostrovsky (*see, Smith v Vosburgh*, 176 AD2d 259, 574 NYS2d 73 [1991], *lv den* 79 NY2d 757 [1992]). Therefore the motion for an order discontinuing the action is denied as academic.

Dr. Daller disagrees with Dr. Diflo regarding the cause of death and opines that there most likely would have been some ongoing process internally that would result in the total dehiscence that was found at the autopsy. He concedes, however, that it is unlikely that the interrupted prolene stitches placed by defendant Waltzer at the anastomotic site would all fail at once, 12 days post-surgery without evidence of infection in the autopsy. He opines that any pressure or chest compressions generated during the cardio-pulmonary resuscitation would not cause or be a contributing factor of any renal artery anastomosis dehiscence. However, he gives no opinion as to how defendants Waltzer, Frischer or Kaufman departed from accepted standards of medical care. Although conflicting opinions may raise a question of fact, neither the affidavit of plaintiff's expert nor any other evidence in the record before this court supplies the requisite nexus between the malpractice allegedly committed by defendants Waltzer, Frischer or Kaufman and the demise of the patient (*Ferrara v South Shore Orthopedic Assoc., P.C.*, 178 AD2d 364, 577 NYS2d 813 [1991]) and accordingly, summary judgment is granted.

Accordingly, the motion by defendants Ye, Hsai, Doctor and Ostrovsky is granted and their motion for an order to discontinue the action per stipulation is rendered academic. The cross motion by defendants, Waltzer and Frischer, for summary judgment is granted. The motion for summary judgment by defendant, Kaufman, is granted.

Dated: MAR 05 2007



J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION