

Morton v Carleo

2007 NY Slip Op 32948(U)

September 13, 2007

Supreme Court, Suffolk County

Docket Number: 0007560/2004

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 6-28-07
ADJ. DATE 8-15-07
Mot. Seq. # 002 - MG

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SHERELLE MORTON, an infant by her mother	:	GALASSO LANGIONE & BOTTER
and natural guardian, HAYLEY MORTON and	:	Attorneys for Plaintiffs
HAYLEY MORTON, individually,	:	377 Oak Street, Suite 101
Plaintiffs,	:	Garden City, New York 11530
	:	
- against -	:	SIMMONS, JANNACE & STAGG, L.L.P.
	:	Attorneys for Defendants Carleo & Johnson
CHRISTOPHER CARLEO, M.D., SCOTT	:	75 Jackson Avenue, Suite 100
JOHNSON, M.D. and SUSAN HARALABATOS,	:	Syosset, New York 11791-3139
M.D.,	:	
Defendants.	:	
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Upon the following papers numbered 1 to 18 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 67-74; Replying Affidavits and supporting papers ; Other ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion (002) by defendant, Scott Johnson, M.D., for summary judgment is granted and the complaint as against him is dismissed.

This is an action premised upon the alleged medical malpractice by defendants in their alleged failure to diagnose a slipped capital femoral epiphysis, and then, *inter alia*, failing to properly immobilize the injury and in ordering crutches for the infant to use. Causes of action have been set forth in the complaint for negligence, lack of informed consent, and a derivative cause of action.¹

Defendant Scott Johnson, M.D. seeks an order granting summary judgment, arguing he was not negligent in the care and treatment he provided to the infant plaintiff in the emergency department at Stony Brook University Hospital, and that the treatment rendered was not the proximate cause of plaintiff's injuries.

¹ The derivative cause of action set forth in the complaint sets forth that it is a "Third Cause of Action on Behalf of Plaintiff Victoria Morgan although the infant plaintiff's mother is set forth in the caption as Haley Morton.

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (*Holton v Sprain Brook Manor Nursing Home et al*, 253 AD2d 852, 678 NYS2d 503 [2nd Dept 1998]). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (see, *Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166 [1980]; *Prete v Rafla-Demetrious*, 221 AD2d 674, 638 NYS2d 700 [2nd Dept 1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (see, *Fiore v Galang*, 64 NY2d 999, 489 NYS2d 47 [3rd Dept 1985]; *Lyons v McCauley*, 252 AD2d 516, 517, 675 NYS2d 375, *app denied* 92 NY2d 814, 681 NYS2d 475 [2nd Dept 1998]; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2nd Dept 1994]).

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 eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [2nd Dept 1979]).

In support of the motion (002), defendant Johnson has submitted, *inter alia*, an attorney's affirmation; copies of the summons and complaint; amended verified answer of defendant Johnson; copy of the verified bill of particulars; copies of the transcripts of the examinations before trial of plaintiffs Sherelle Morton and Haley Morton, defendants Christopher Carleo, M.D., Scott Johnson, M.D., Susan Haralabatos, M.D., and non-party witnesses Ian Morton and Marjorie McLeod; uncertified copies of the plaintiff's medical records; and the affidavit of Andrew E. Sama, M.D.

Dr. Sama sets forth in his affidavit submitted in support of defendant Johnson's motion for summary judgment that he is a physician duly licensed to practice medicine in the State of New York and is Board Certified in Internal Medicine, Critical Care Medicine and Emergency Medicine with a subspecialty in Pediatric Emergency Medicine. Dr. Sama sets forth he has reviewed the pleadings, verified bill of particulars, the party and non-party deposition transcriptions, Sherelle Morton's medical records, reports, and films from Stony Brook University Hospital (SBUH), Stony Brook Orthopedic

Associates and Just Kids Diagnostic Treatment Center. It is Dr. Sama's opinion, within a reasonable degree of medical certainty that Dr. Johnson did not depart from good and accepted medical practice in the care and treatment he rendered to Sherelle Morton at the emergency department of Stony Brook University Hospital.

Dr. Sama states that the SBUH records from August 3, 2002 indicate Sherelle Morton presented to the Emergency Room several days after falling from her bicycle. She was diagnosed with febrile illness and right thigh contusion and discharged with instructions, including rest and light activity for seventy two hours and to return to the ER and contact her doctor if her condition worsened. Sherelle then returned to the SBUH emergency department on August 10, 2002 with complaints referable to her right leg. At that time, she was seen by Dr. Johnson who ordered x-rays of the site of the injury. He reviewed the x-ray films and made a diagnosis of a slipped capital femoral epiphysis (SCFE). A Pediatric consult was obtained and the Pediatric Orthopedist recommended that Sherelle remain non-weight bearing on her right leg and follow up at the clinic the following day. She was discharged with crutches from the emergency room. On August 12, 2002, Sherelle saw Dr. Haralabatos, a pediatric orthopedic surgeon, who confirmed the diagnosis of SCFE, recommended surgical intervention and discharged the child home with instructions to remain non-weight bearing on the right leg with crutches. She was scheduled for surgery on August 14, 2002. Later that day, the child fell at home from her crutches. Again she was seen at SBUH emergency room where x-rays were taken which revealed the SCFE was likely increased compared with the previous study of August 10, 2002. Sherelle had a previous history of an injury to her left foot/ankle on July 5, 2001, having been seen at SBUH emergency room. That injury required casting for approximately four weeks and crutches were ordered for ambulating. Sherelle received proper crutch walking technique instructions for that injury, as documented on her hospital record.

Dr. Sama opines that Dr. Johnson's note indicates an appropriate history was taken on August 10, 2002 when the child presented to SBUH, appropriate x-rays were ordered, and a correct diagnosis of SCFE was made by him. A pediatric orthopedic consultation was properly obtained by Dr. Johnson, the appropriate specialist who concurred in the diagnosis and ordered non-weight bearing on the right leg and ambulating with crutches upon discharge from the emergency department. All this was within the appropriate standard of care. Dr. Sama further opines that the discharge of Sherelle on August 10, 2002 did not proximately cause any injury and there is no objective medical proof that Sherelle suffered any further slippage of her right capital femoral epiphysis between the time she was discharged from Dr. Johnson's care until her fall on August 12, 2002 after being released by Dr. Haralabatos, who was then treating Sherelle.


Sherelle testified at her examination before trial that she was not given crutches after her first emergency room visit when she was seen after she fell off her bike. She was given crutches at the second emergency room visit. Her father took her for that second visit because when she went on a boat ride with her father and his family she couldn't walk and her father had to carry her everywhere. She testified the doctor gave her crutches at that second emergency room visit at SBUH and asked her if she knew how to use them. She said she told him "yes." He then showed her how to use them and had her use them before she was discharged. She further testified she had no difficulty using the crutches. She had used them during the summer when she broke her heel.

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Based upon the foregoing, it is determined that defendant Scott Johnson, M.D. has demonstrated prima facie entitlement to summary judgment. Plaintiff has not opposed this motion and therefore has failed to raise any triable issues of fact as to Dr. Johnson to preclude summary judgment.

Accordingly, motion (002) by defendant Scott Johnson, M.D. for summary judgment is granted and the complaint is dismissed as against him.

Dated: SEP 13 2007



J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION