

Ackerman v Winthrop Univ. Hosp.

2007 NY Slip Op 33612(U)

October 26, 2007

Supreme Court, Nassau County

Docket Number: 4774-06/

Judge: Geoffrey J. O'Connell

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. GEOFFREY J. O'CONNELL

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

LAURENCE ACKERMAN and JOANNE
ACKERMAN,

Plaintiff(s),

INDEX No. 4774/06

-against-

MOTION DATE: 8/6/07

WINTHROP UNIVERSITY HOSPITAL and
RONALD LO, M.D.,

Defendant(s).

MOTION SEQ. No. 1-MD

The following papers read on this motion:
Notice of Motion/Affirmation/Exhibits
Affirmation in Opposition

In this medical malpractice action, defendants seek an Order granting them summary judgment. Plaintiff opposes.

Plaintiff alleges that between July 1 through July 4, 2005 defendants were negligent in his treatment following a cardiac catheterization performed at WINTHROP UNIVERSITY HOSPITAL. Plaintiff alleges that he suffered a right groin pseudoaneurysm, and that the defendants were negligent in providing post cardiac catheterization care which resulted in a failure to timely diagnose and treat the pseudoaneurysm.

The defendants seeks summary judgment contending that plaintiff has no proof of any negligence committed by the defendants. They offer an affidavit from a Board Certified physician who states that after reviewing the relevant medical records and deposition testimony, in his opinion, within a reasonable degree of medical certainty, the employees of WINTHROP and Dr. LO did not deviate from good and accepted

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medical practice in their care and treatment of the plaintiff. This physician, Dr. David Farr, opines that the pseudoaneurysm is a known complication of cardiac catheterization, and there is no way to prevent the development. He specifically notes that there is no indication of a pseudoaneurysm upon the plaintiff's discharge from WINTHROP.

Dr. Farr opines that the defendants appropriately referred the plaintiff to an Emergency Room when he made complaints. Dr. Farr states that when the pseudoaneurysm was diagnosed and the plaintiff transferred to WINTHROP, he was given appropriate treatment, a thrombin injection, on July 5, 2005 which resulted in the curing of the pseudoaneurysm in his right groin.

Dr. Farr states that regardless of whether the plaintiff had the thrombin injection on July 1, 2, 3 or July 4th, his course of treatment would have been identical. He opines that the residual injury, if any, would be present despite the timing of the injection. (Motion, Exh. D)

The plaintiffs oppose summary judgment. Plaintiff provides a medical affidavit from a Board Certified Internist who states that in his opinion with a reasonable degree of medical certainty, the care rendered by the defendants deviated from good and accepted medical practice and was the "competent producing cause" of plaintiff's injuries.

The Internist notes the deposition testimony of the plaintiff, wherein he states that prior to his being discharged, ACKERMAN told a doctor at the hospital that he thought his right leg felt "oversized". He testified that the doctor told him it looked fine, and that he should go home.

The Internist notes that the plaintiff called the hospital to speak with a cardiac fellow later that day and spoke to Dr. LO. He noted the plaintiff's testimony that he told Dr. LO that he did not feel well and could see a blood formation under his skin approximately the size of his palm. And his testimony that Dr. LO told him to ice it and take Tylenol, Advil or Motrin. He noted that plaintiff's testimony that his wife called and spoke to Dr. LO later that night still July 1, 2005 at which time she told the defendant that the plaintiff was complaining of groin pain and the formation was larger. They testified that Dr. LO told her that this was normal and to continue compresses and over the counter pain medication. She also testified that Dr. LO advised her that he should not return to the hospital, but lie down. The plaintiff testified that they called with

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complaints of worsening pain and swelling on July 2, 2005 and July 3, 2005 at which time Dr. LO still advised them not to return to the hospital. Another call by the plaintiffs was made on July 3, 2005 at which time the plaintiffs claim that they informed Dr. LO that the blood formation was now extending below plaintiffs knee and the pain was extraordinary. This time, plaintiffs claim, Dr. LO told them to report to any emergency room, not necessarily WINTHROP.

According to plaintiffs they went to New Island Hospital, which transferred him to WINTHROP the next day. At that time, a Lower Extremity Arterial Duplex study performed, revealed abnormal results, with evidence of a right groin pseudoaneurysm and a large right thigh hematoma.

The doctor opines that Dr. LO deviated from good and accepted medical practices when he failed to advise the plaintiffs to return to WINTHROP on July 1st, July 2nd and July 3rd as his condition symptoms, as reported, warranted same. (Opposition, Exh. G) He opines that the plaintiff's stated symptoms were indicative of a pseudoaneurysm and based upon the subject complaints medical attention was urgent to prevent further growth, expansion, harm, pain and discomfort.

The doctor also opines that the deviation from proper care was a competent producing cause of the patients severe and permanent neurological injuries. He states that he disagrees with defendants' expert who states that there is no way to prevent a pseudoaneurysm. The expert states that in his opinion, within a degree of medical certainty, earlier intervention would have prevented the condition from expanding and intensifying, as well as prevented extraordinary pain.

The expert states that the pseudoaneurysm can expand daily, and every day that it expands leads to a greater injury to neighboring tissue. He opines that the permanent neurological injuries sustained by plaintiff, including, but not limited to distal sensorimotor neuropathy and right femoral mononeuropathy, as well as Dr. Gutstein's diagnosis of femoral nerve injury are causally related to the subject delay in diagnosis and care which resulted in the expansion and growth of the pseudoaneurysm. (Opposition, Exh. G) He states that this diagnosis is supported by two facts: (1) the daily worsening of the symptoms (which supports expansion); and (2) the size of the subject pseudoaneurysm when diagnosed. He opines within a reasonable degree of medical certainty that the persistence of the pressure on the local tissue related in the neurological injuries sustained

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by the plaintiff as diagnosed by his treating neurologists. He also notes that the defendant's expert does not reference or discuss the patient's care and treatment since his second discharge from WINTHROP, including the statements from the Plaintiff's treating physician and diagnosis of distal sensorimotor neuropathy and right femoral mononeuropathy of Dr. Gutstein's opinion that the permanent femoral nerve injury was a result of defendant's malpractice. (Opposition, Exh. G)

Plaintiff also provides an affirmation from a Board certified Neurologist Dr. Hal Gutstein, who states that he reviewed the plaintiff's medical records and the parties' depositions, among other relevant documents. Dr. Gutstein opines that within a reasonable degree of medical certainty the defendants deviated from good and accepted medical practice resulting in the plaintiff suffering permanent neurological injuries.

The plaintiff reported to WINTHROP UNIVERSITY HOSPITAL for an elective coronary angiogram on July 1, 2005. After the study was done, leaving the arteriograph suite, the plaintiff noted a "weird" feeling in his right leg, groin and thigh, which he reported. He was advised that this would go away, and was discharged with the instruction to call the hospital with any concerns, and ask for a cardiac fellow. He called twice that day, and once on July 2, and July 3rd, when he was directed to report to an Emergency Room. On each occasion the plaintiff or his wife spoke to Dr. LO. When he was transferred to WINTHROP on July 3rd, he was found to have a pseudoaneurysm and hematoma which required emergency care and continued hospital confinement. The plaintiff was seen for a neurological consultation on January 12, 2006, when he was diagnosed with a right cutaneous neuralgia secondary to local injury. Plaintiff underwent an EMG on October 2, 2006 which revealed distal sensory neuropathy and right femoral mononeuropathy. Dr. Gutstein opines that the defendants departed from good and accepted medical practice in not advising the plaintiff to return on July 1, 2nd or 3rd, and that these departures resulted in a worsening of the pseudoaneurysm, and that the growth of the pseudoaneurysm resulted in his neurological injuries. (Opposition, Exh. H)

In a medical malpractice action a plaintiff opposing a motion for a dismissal through summary judgment must submit evidentiary facts or materials to rebut the prima facie showing by defendant that there was no negligence in the treatment rendered. *Alvarez v. Prospect Hospital*, 68 NY 320 (1986); *Fileccia v. Massapequa General Hospital*, 63 NY2d 639 (1986).

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The plaintiff must submit an affidavit of a medical expert setting forth that expert's opinion that the defendant did not, in fact, follow good and accepted medical practice. The plaintiff must demonstrate not only a deviation or departure from accepted practice by defendants, but also evidence that such departure was a proximate cause of the injury. *Ansler v. Verrilli*, 119 AD2d 786 (2nd Dept. 1986). An affidavit of a medical expert stating an opinion that defendant was negligent and that negligence harmed plaintiff, when accompanied by the specific factors used as the basis of that opinion, is sufficient to raise a triable issue of fact. *Menzel v. Plotnick*, 202 AD2d 558 (2nd Dept. 1994). Absent any indicia of such proof of medical malpractice in the opposing papers, defendant's motion should be granted. *Fileccia v. Massapequa Gen. Hosp.*, 63 NY2d 639 affd. 99 AD2d 796 (N.Y. 1984).

The requirements for expert testimony in medical malpractice actions are narrowly defined. An expert witness must possess the requisite skill, training, knowledge, or experience to ensure that an opinion rendered is reliable. *Matott v Ward*, 48 NY2d 455 (1979). Here, the plaintiff's expert opines that the defendant Dr. LO, departed from accepted standards of care and that those failures caused or contributed to the plaintiff's injuries. The Court finds that the medical proof offered by plaintiff raises a triable issue of fact whether Dr. LO departed from good and accepted standards of care, and does state with the necessary specificity that these failures caused an injury. The expert is specific with respect to causation.

Plaintiff's physician speaks of what is generally accepted practice, he addresses the specifics of this situation, including the expansion of the pseudoaneurysm and interference with surrounding tissue. Further, his recitation of the facts mirrors the records and testimony with respect to the time the plaintiff was ultimately returned for treatment to WINTHROP. *Daum v Auburn Mem. Hosp.*, 198 AD2d 899 (4th Dept. 1993); *McDonnell v Nassau, supra.*; *LaMarque v. North Shore University Hosp.*, 227 AD2d 594 (2nd Dept. 1996); *Kaffka v. New York Hosp.*, 228 AD2d 332 (1st Dept 1996).

The plaintiff's medical expert states that the alleged failures of Dr. LO to have the plaintiff immediately examined after hearing his symptoms on the first three phone calls, caused or contributed to plaintiff's injury. *Falotico v. Frankel*, 232 AD2d 607 (2nd Dept. 1996). He states that the administration of the proper drugs prior to advanced cervical dilation, are very effective in preventing labor. He gives his expert opinion as to what kinds of action would have prevented labor under the circumstances presented, or

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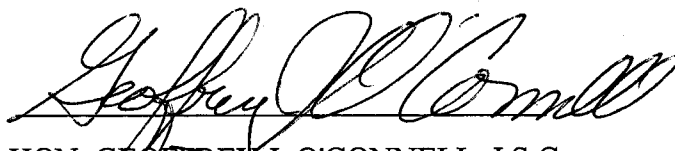
that if administered, the proposed treatment would definitely have prevented the premature labor. *Tucker v. Elinelech*, 184 AD2d 636 (2nd Dept. 1992); *Lee v. Shields*, 188 AD2d 637 (2nd Dept. 1992).

Based on the proof presented, the Court finds that plaintiff's experts have sufficiently asserted that certain actions or omissions by Dr. LO caused or contributed to plaintiff's injuries. Due to the discrepancies in testimony of the plaintiff and Dr. LO as to what was said in the phone calls, and due to the dispute in the expert opinions as to whether the defendants departed from good and accepted medical care, and as to whether those departures were the proximate cause of the plaintiff's injuries, the defendants's motion for summary judgment is Denied. Summary judgment should not be awarded in medical malpractice cases, where, as here, the parties adduce conflicting opinions of medical experts. *Shields v. Baktidy*, 11 A.D.3d (2nd Dept 2004); *Barbuto v. Winthrop Univ. Hosp.*, 305 AD2d 623 (2nd Dept. 2003); *Viti v. Franklin Gen's Hosp.*, 190 AD2d 790 (2nd Dept. 1993).

It is, SO ORDERED.

Dated:

OCT 26, 2007



HON. GEOFFREY J. O'CONNELL, J.S.C.

ENTERED

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COUNTY CLERK'S OFFICE