

**Simon v Widlitz**

2007 NY Slip Op 33745(U)

November 14, 2007

Supreme Court, Nassau County

Docket Number: 3284-05/

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

PHYLLIS SIMON, as Administratrix of the Estate of  
CONRAD S. SIMON, deceased, and PHYLLIS  
SIMON, Individually,

Plaintiff(s),

INDEX No. 13284/05

-against-

MOTION DATE: 8/10/07

STEPHEN I. WIDLITZ, JAMES K. STERN,  
Individually, and d/b/a WIDLITZ & STERN, and  
WIDLITZ & STERN, P.C.,

Defendant(s).

MOTION SEQ. No. 1-MG  
XXX

The following papers read on this motion:

- Notice of Motion/Affirmation/Affidavits/Exhibits
- Memorandum of Law
- Affirmation in Opposition/Affidavits/Exhibits
- Memorandum of Law
- Reply

In this action plaintiff is seeking damages she claims she suffered due to the legal malpractice committed by the defendants in the handling of a medical malpractice claim of the late Conrad Simon. Defendants seek an Order granting them summary judgment. Plaintiff opposes.

In their Complaint if plaintiffs allege that the defendant law firm and individual attorneys committed legal malpractice in the advice they gave plaintiffs in connection to a medical malpractice and negligence claim against Dr. Alan Mechanic and North Shore University Hospital, wherein plaintiffs claim that the

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doctors failed to properly diagnose and treat an Arterio Venous malformation in decedent Conrad Simon while he was a patient at North Shore in October and November, 2001.

It is noted and defendant JAMES STERN is a shareholder of the defendant Law firm but did not handle or supervise plaintiff's medical malpractice action. Thus, the defendants argue that at the onset, all claims against him individually should be dismissed. Business Corporation Law § 1505(a); *We're Associates Co. v. Cohen, Stracher & Bloom, P.C.*, 103 AD2d 130 (2<sup>nd</sup> Dept 1984), aff'd 65 NY2d 148 (1985).

The plaintiffs allege that in investigating the underlying potential medical malpractice claim defendant WIDLITZ relied upon the expert opinion of Dr. Marshall Matz, a credentialed neurosurgeon, who informed WIDLITZ that there was no medical malpractice to pursue. It is uncontested that WIDLITZ arranged for the plaintiff PHYLLIS SIMON, a physician, to speak directly with Dr. Matz. It is also undisputed that as a result of that conversation, and others between WIDLITZ and SIMON, plaintiff's son and a referring attorney, Raymond Corleto, plaintiff advised Mr. WIDLITZ that she decided not to pursue the claim.

In support of their application for summary judgment the defendants also provide an affidavit from Jeff Korek, an attorney, who states that WIDLITZ did not depart from good and accepted legal practice standards in exercising his legal judgment to accept the opinion of the medical expert and in advising Simon not to pursue the AVM claim. Mr. Korek opines that this is an exercise in judgment, not legal malpractice.

In support of their application for summary judgment, the defendants also provide an affidavit from their medical expert, Dr. George W. Tyson, a neurosurgeon, who states that in his opinion the treating neurosurgeon, Dr. Mechanic did not depart from good and accepted medical standards in his diagnosis, treatment and care of the decedent. Dr. Tyson states that in diagnosing the cause of Mr. Simon's cerebellar hemorrhage as a "hypertensive bleed" was not negligent as there was nothing to suggest the presence of an AVM during the decedent's surgery, which, in his opinion would be rare in a man of Mr. Simon's age. He states that it was not regular practice to test for an AVM under these circumstances.

Counsel for the defendants argues that in light of this affidavit, the plaintiff cannot demonstrate that but for any legal malpractice committed by the defendants, she would have succeeded on the underlying medical malpractice claim.

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In opposition to summary judgment the plaintiffs argue that but for the defendants' legal advice, they would have been successful in an underlying medical malpractice action.

The underlying surgery of Dr. Mechanic was performed on the decedent, then 64 years old, on October 25, 2001. Mr. Simon remained at the defendant hospital under Dr. Mechanic's care until November 21, 2001. Plaintiff alleges that during the course of the surgery and care, Dr. Mechanic and the hospital failed to identify the bleed, nor did they order diagnostic studies, such as an MRI, MRA and/or angiogram in an effort to determine the source or cause of her bleed, any of which would have revealed the AVM. While Mr. Simon was at the hospital, recovering from the surgery, he fell requiring an ophthalmology consult and further surgical intervention. He was then discharged to a rehabilitation facility.

On December 12, 2001, while still a patient at the rehabilitation center, the decedent suffered another hemorrhage in his cerebellum. He was taken to Saint Catherine of Sienna Hospital where he underwent further surgery and the AVM was discovered. The decedent died on June 9, 2002.

Plaintiff, a doctor specializing in Obstetrics and Gynecology, first met with the defendant WIDLITZ in or around March 2002, prior to her husband's death. She signed a retainer with the defendant law firm to instigate the case to determine if a lawsuit should be pursued. Plaintiff complains that Mr. WIDLITZ did not take any action on the file for all of 2003, and only advised the plaintiff of the opinions of Dr. Matz until late April or early May 2004, only weeks prior to the expiration of the Statute of Limitations. She complains that Dr. Matz only provided an incomplete opinion to WIDLITZ. She also claims that WIDLITZ committed legal malpractice in advising her not to pursue the action on this incomplete report, without having spoken to the alleged expert himself, instead of relying upon a nurse employed by the law firm.

Plaintiff provides an affidavit from Mark Bodner, a trial attorney experienced in medical malpractice actions. Mr. Bodner states that an attorney who takes such actions has the responsibility of identifying the "medical-legal" issues and timely investigating the merits. He opines that WIDLITZ improperly ignored the case. He also states that in his opinion WIDLITZ should not have relied on the incomplete report. Mr. Bodner also states that WIDLITZ should have filed the Notice and/or Summons and Complaint to avoid a Statute of Limitations bar to gain time to either obtain a further, more complete medical opinion or to allow Dr. SIMON to seek another legal opinion.

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Plaintiff also provides an affidavit from Dr. Gary Lustgarten, a neurosurgeon, not licensed to practice in the State of New York, but in Florida and Maine. He opines that Dr. Mechanic was responsible to determine what caused the initial hemorrhage which required the surgery of October 21, 2001. He opines that Dr. Mechanic departed from good and accepted medical practice in failing to order diagnostic testing to rule out AVM as a cause of the bleed and in just presumptively assuming that hypertension was the cause. He opines that if the AVM were detected, the patient was capable of withstanding another surgical procedure to correct it, and the failure to diagnose and surgically correct the AVM “would have been a departure from good and accepted medical practice.”

It is undisputed that defendant WIDLITZ recommended that the lawsuit be discontinued, but stated that they could attempt to go forward if she wished. It is further undisputed that WIDLITZ advised the plaintiff of this, sharing with her the report and providing her an opportunity for her to speak to Dr. Matz, the expert he retained. The plaintiff also had an opportunity to speak with her own referring attorney, Raymond Corleto, who has previously represented her in two medical malpractice actions.

It is undisputed that after this time, the plaintiff then told WIDLITZ that she did not wish to pursue the action.

Counsel for plaintiff argues that plaintiff may have made a different decision if WIDLITZ had proceeded in a different fashion.

The Court notes that the plaintiff concedes that WIDLITZ did not guarantee that a medical malpractice action would go forward at all. She concedes that he informed her that only if upon such investigation, there turned out to be meritorious cause of action, his firm would handle the suit. Plaintiff concedes that WIDLITZ admitted up-front that it was possible that she would not have a viable cause of action.

Plaintiff contends that defendant departed from the standards of good and accepted practice for a lawyer in failing to fully and timely investigate her claims against Dr. Mechanic and North Shore University Hospital for failing to diagnose and treat the decedent’s AVM in October and November, 2001, and in failing to present her with the defendant’s opinion and expert opinion until shortly before the Statute of Limitations for any claims in a potential medical malpractice action expired.

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Plaintiff, however concedes that she had a full chance to speak with the expert, and that the defendants agreed to commence a suit on her behalf if she wanted. Further plaintiff conceded that the defendants presented her with their expert report and advise more that a month prior to the expiration of the Statute of limitations.

The plaintiff has not stated a claim for legal malpractice, as she cannot prove there was a departure from accepted legal practice. The plaintiff has failed to come forward with admissible evidence that the defendants failed to exercise that degree of care, skill and diligence commonly possessed by a member of the legal community. *Volpe v. Canfield*, 237 A.D.2d 282 (2nd Dept. 1977). Further, she cannot demonstrate that she would have been successful in the underlying action and therefore plaintiffs cannot establish a prima facie case that they would succeed on a claim alleging legal malpractice. *Zasso v. Maher*, 226 A.D.2d 366 (2nd Dept. 1996).

In order to allege a legal malpractice claim, a plaintiff must allege the defendant attorney; (1) failed to exercise that degree of care, skill and diligence commonly possessed by a member of the legal community; (2) that the attorney's negligence was a proximate cause of the loss sustained, that the plaintiff incurred damages as a direct result of the attorney's action; and (3) that the plaintiff would have been successful if the attorney had exercised due care. *Zeitlin v. Greenberg, Margolis, Ziegler, Schwartz, Dratch, Fishman, Franzblau & Falkin, P.A.*, 209 A.D.2d 510 (2nd Dept. 1994). A plaintiff must also plead and prove that she sustained actual and ascertainable damages proximately caused for the alleged negligence of the attorney. *Mendoza v. Schlossman*, 87 A.D.2d 606 (2nd Dept. 1982); *Lauer v. Rapp*, 190 A.D.2d 778 (2nd Dept. 1993); *Murphy v. Stein*, 156 A.D.2d 546 (2nd Dept. 1989); *McCoy v. Tepper*, 261 A.D.2d 592 (2nd Dept. 1999).

Counsel for plaintiff presents a legal expert who states that an attorney must refer a client to another attorney for another opinion, even where the client agrees with him in exercising proper "legal medical" advice. Counsel for plaintiff offers no expert evidence that a lawyer must be a "medical-legal" expert in order to handle this type of action. In addition, the expert does not state that if not for what he claims are departures from good and accepted practice, the outcome of any legal action brought against the doctor and hospital, would have been successful. He also concedes that an attorney evaluating a potential medical

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malpractice action is not required to have expertise in that particular field of medicine involved. The Court finds that this expert blurs the clear professional distinction between the legal and medical professions in using the term “medical legal” issue. That term is not the standard of care governing a legal malpractice claim, thus the references to any departures from it, are not dispositive, and do not defeat a defendant’s motion for summary judgment on a Complaint alleging legal malpractice.

The plaintiff has failed to allege facts demonstrating that but for the defendants’ alleged negligence, there would have been a more favorable outcome in the underlying action. *Colleran v. Rockman*, 275 AD2d 222 (1<sup>st</sup> Dept 2000). This is not a situation where the plaintiff’s attorney failed to consult an expert, or was unwilling to represent the plaintiff if she chose to go forward with the case. *Blackburn v. Shapiro, P.A., Inc.*, 288 AD2d 870n (4<sup>th</sup> Dept 2001); *Burke v. Landau, Miller & Morgan*, 289 AD2d 16 (1<sup>st</sup> Dept 2001).

The plaintiff in this matter has not only failed to show that the defendants departed from the legally recognized standard of care he must possess, but also, even if he committed malpractice, that there would have been a different outcome in the underlying medical malpractice action.

The plaintiff’s claims of negligence against Dr. Mechanic and the Hospital allege that they were negligent in failing to diagnose and treat an AVN.

With respect to Dr. Mechanic, this doctor came in contact with the plaintiff for the first time when the plaintiff presented at the hospital emergency room. It is not alleged that the surgeon was negligent in performance of the surgery, but in failing to properly diagnose the initial bleed in the decedent’s postoperative stay at the hospital.

It is undisputed that the decedent had a history of hypertension and was taking prescription medication for that condition, which Dr. Mechanic diagnosed was the cause of the bleed.

As to the plaintiff’s medical expert, Dr. Lustgarten is not licensed to practice in the State of New York. Thus, the Court must scrutinize his opinion more carefully. Dr. Lustgarten opines that the decedent was “certainly capable of withstanding post operative diagnostic testing”, yet offers no facts to support that conclusion. Thus, this opinion in on its face, insufficient to defeat summary judgment. *Mondo v. Ellstein*, 302 AD2d 437 (2<sup>d</sup> Dept 2003). The plaintiff’s expert fails to distinguish less invasive surgical procedures

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performed on the plaintiff to remove or reposition drains, after the October 21, 2001 surgery, with the neurosurgery which would be necessary to remove an AVM, and does not discuss any trauma to the brain by the initial stroke and surgery. The conclusory statement that he “could clearly” undergo this surgery, is therefore found without proper foundation and merit. *Gargiulo v. Geiss*, 40 AD3d 811 (2<sup>nd</sup> Dept 2007). He also fails to discuss the potential risks of further surgery as compared to the risk of even a detected AVM rebleed. Thus the opinion of defendant’s expert that the chance of a rebleed from the AVM, is only 5%, is unchallenged. As is the defense expert’s conclusion that such a low risk as compared to a higher risk of complications from further surgery, could reasonably support a doctor’s decision not to perform surgery to remove an AVM in a patient with the decedent’s condition, even if discovered. *John William Costello Associates, Inc. v. Standard Metals Corp.*, 99 AD2d 227 (1<sup>st</sup> Dept 1984).

The defendants rely upon the expert opinion of Dr George Tyson, a board certified vascular surgeon licenced in the State of New York, who states that he reviewed plaintiff’s medical records and the parties’ deposition opines that the care and treatment provided by Dr. Mechanic and the Hospital as indicated above, was appropriate and conformed with the standards of medical care and practice. He relies on the facts that the decedent had a long history of hypertension with no indication of active or arterial bleeding and presented himself at the Hospital with a cerebellar hemorrhage. He states that in his opinion there were no departures from good and accepted medical practice in not testing for an AVM, largely due to the fact that Mr. Simon’s brain was severely traumatized by the initial stroke and subsequent further to evacuate the cerebellar hematoma. He opines that the surgical procedures thereafter performed during his hospital stay were limited and not comparable to any surgery which would have to take place to remove an AVM. He notes the hospital records which clearly state that while the patient was alert, he was clearly confused and had suffered obvious cognitive defects, and ambulatory problems.

Dr. Tyson states that it would not have been advisable to attempt surgery to remove an AVM from a patient in the decedent’s condition even if one were diagnosed. He states that in his opinion there is a relatively low probability that if the initial bleed were caused by an AVM, it would re-bleed. He states that in his opinion the applicable standard of care did not require post surgical diagnostic studies looking for

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an AVM in a patient in Mr. Simon's condition, as they are not required in cases where there would be no reasonable medical judgment to act on the results of such testing. (Reply Tyson Affirmation).

He opines that Dr. Mechanic's evaluation of the patient without further diagnostic testing was not a departure from acceptable diagnosis and treatment.

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).

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).

The affidavit must provide an opinion that defendant was negligent and that negligence harmed plaintiff, when accompanied by the specific factors used as the basis of that opinion, in order to be sufficient to raise a triable issue of fact. *Menzel v. Plotnick*, 202 AD2d 558 (2nd Dept. 1994). The 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).

Plaintiff's expert, opines that Dr. Mechanic and the Hospital deviated from accepted medical standards of care of vascular surgeons in failing to perform post operative diagnostic testing to determine the cause of the initial bleed. He does not say that if detected, the alleged deviations would have prevented the ultimate or were a substantial factor in causing the injury sustained.

The Court finds that the medical proof offered by plaintiff does not state that any alleged failures of the doctor or hospital with respect to plaintiff's treatment actually caused an injury. The expert is not sufficiently specific with respect to causation.

While the physician speaks of what is generally accepted practice, he does not address the specifics of this situation, including plaintiff's history and severe brain stroke and surgical trauma which precipitated

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his hospitalization. While he opines that the plaintiff was suffering from the AVM he does not discuss the risk of developing one under these circumstances as presented at the time of plaintiff's admission or his weakened condition during his stay at the hospital in October and November, 2003.

The fact that the expert is not licensed to practice in the State of New York causes the Court to scrutinize his opinion more carefully. *Corsetti v. Koppers Co. Inc.*, 226 AD2d 205 (1st Dept. 1996). He does not state that the alleged failures caused plaintiff's injury. *Falotico v. Frankel*, 232 AD2d 607 (2nd Dept. 1996). There is no statement from the expert as to what kinds of action would have prevented plaintiff's injuries under the circumstances presented, or that if the diagnostic tests were performed, the decedent's ultimate injury would not have occurred. *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 cannot find that plaintiff's expert has established what actions of Dr. Mechanic and the Hospital caused plaintiff's injuries.

Based on the proof presented, the Court finds that there are no triable issues of fact in dispute which preclude summary judgment on the underlying medical malpractice claims.

It is, SO ORDERED.

Dated: Nov. 14, 2007

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

**ENTERED**

NOV 16 2007

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**