

Lampach v University Hosp. at Stony Brook

2007 NY Slip Op 33974(U)

December 4, 2007

Supreme Court, Suffolk County

Docket Number: 0020919/1997

Judge: Emily Pines

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

PRESENT:

Hon. EMILY PINES
Justice of the Supreme Court

MOTION DATE 10-03-07
ADJ. DATE 10-24-07
Mot. Seq. # 012 - MG

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Upon the following papers numbered 1 to 34 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 26; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 27-30; 31-32; Replying Affidavits and supporting papers 33-34; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is

ORDERED that this motion (012) by third-party defendant, Steven Bernardini, D.C., pursuant to CPLR 3212 granting summary judgment dismissing the third-party complaints by Dr. Krupp and Dr. Kaufman against him, is granted.

The complaint of this action sets forth causes of action sounding in medical malpractice and lack of informed consent on behalf of plaintiff Jennifer Lampach, with a derivative cause of action for loss of services asserted on behalf of her parents, Susan and John Lampach. Jennifer Lampach was admitted to University Hospital at Stony Brook Emergency Department on or about April 1, 1995 for treatment of head injuries. It is claimed that defendants were negligent in their care and treatment of plaintiff and negligently discharged her despite her alleged need for continued medical care and treatment, causing her to sustain further injury, necessitating further care and treatment.

A third-party action was commenced by Mark Kaufman, M.D., defendant in the main action, against Sharwan K. Bagla, M.D., Sharwan K. Bagla, M.D., P.C., Steven M. Bernardini, D.C., and Miriam Cosca-Cruz, M.D. Another third-party action was commenced by Lauren Krupp, M.D., defendant in the main action, against the same third-party defendants. The third-party plaintiffs allege the third-party defendants were negligent in their care and treatment of plaintiff. The third-party plaintiffs claim third-party defendant Steven Bernardini departed from good and accepted chiropractic practice in the treatment he rendered to plaintiff, by, *inter alia*, negligently causing a blood clot in plaintiff's neck to be dislodged and travel to her brain resulting in a cerebral vascular accident caused by the manipulation and ultrasound treatment performed prior to obtaining appropriate history and diagnostic studies including MRI's, CT Scans and sonograms. Third-party defendant Steven M. Bernardini now moves for summary judgment dismissing the complaint, asserting he bears no liability for plaintiff's claimed injuries and his treatment did not proximately cause plaintiff's injuries.

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 [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 [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 [1979]).

In support of this motion, defendant Steven Bernardini has submitted, *inter alia*, an attorney's affirmation; a copy of the summons and complaint, amended verified answers of Dr. Kaufman and Lauren Krupp, M.D.; copies of the Notice of Intent to File a Claim and the Claim; copies of the third-party summons and complaints and answers; copies of the transcripts of the examinations before trial of Jennifer Lampach, John Lampach, Susan Lampach, Steven Bernardini, D.C., Lauren Krupp, M.D., and Mark Kaufman, M.D.; copies of various medical records and MRI reports of plaintiff; and the affidavit of defendant Bernardini's expert, Robert E. Harbaugh, M.D.

Dr. Harbaugh states that plaintiff began treating with Dr. Bernardini in 1987 at age 13, on and off through 1994, for a variety of ailments including scoliosis, brachial neuritis/radiculitis and temporal mandibular joint dysfunction (TMJ), and treatments consisted of, for the most part, cervical and thoracic spinal manipulations and ultrasound. Her last visit prior to the assault and her hospitalization of April, 1995, was on June 3, 1994 at which time the TMJ was treated with ultrasound.

He states that plaintiff was admitted to Stony Brook University Hospital on April 1, 1995 after being choked by her boyfriend, and was released on April 3, 1995 with instructions to return in one week for an MRI. It is Dr. Harbaugh's opinion based upon a reasonable degree of medical certainty that plaintiff suffered a carotid artery dissection at the time of her admission to Stony Brook University Hospital on April 1, 1995 as a result of being choked by her boyfriend. It is Dr. Harbaugh's further opinion that plaintiff's carotid artery dissection, or tearing of the innermost lining of the arterial walls of the carotid arteries, was directly caused by the trauma that she had suffered on April 1, 1995, as the carotid arteries, located on either side of the neck, are particularly vulnerable to high impact traumas such as car accidents or choking and compression. He further opines that the blood under the arterial pressure dissects along the artery to create an intramural hematoma, which can narrow the carotid artery lumen or cause an aneurysmal dilation, often resulting in neck and head pain without further neurological symptoms. He also states that neurological symptoms arise from subsequent clots or emboli resulting from the dissection.

Dr. Harbaugh opines with a reasonable degree of medical certainty that Dr. Bernardini always acted appropriately and committed no departures from the standard of good and accepted medical practice which proximately caused plaintiff's claimed injuries. Specifically, he states, there is no evidence that Dr. Bernardini performed a cervical manipulation upon plaintiff during either the April 5, 1995 or April 7, 2005 visit. Dr. Harbaugh further states, that even assuming *arguendo* that Dr. Bernardini performed the alleged cervical manipulations, it is his expert opinion with a reasonable degree of medical certainty that any such manipulation was not the proximate cause of plaintiff's carotid artery dissection, cerebrovascular accident or injuries flowing therefrom.

Dr. Harbaugh states that at the time of the visit on April 5, 1995, Dr. Bernardini took note of plaintiff's recent hospitalization at Stony Brook, her unremarkable recent head CT scan, the fact that she was being followed by a neurologist, internist and psychiatrist, and had an MRI scheduled. In reviewing the depositions, he states that Dr. Bernardini was never informed by plaintiff or her parents of any problems subsequent to her release from Stony Brook, nor were any effects, including unsteady gait and incoherent speech, observed at the time of presentation to his office. Dr. Harbaugh states Dr. Bernardini treated plaintiff with a left and right ultrasound at the April 5th visit for TMJ symptoms.

Plaintiff then returned for further treatment of her TMJ on April 7, 1995, at which time, states Dr. Harbaugh, she was treated with ultrasound. Dr. Harbaugh further states that his review of the materials indicate there is no evidence to indicate that Dr. Bernardini was informed of any episodes of weakness or drooling that the plaintiff had experienced between her visit of April 5th and April 7th, or halting speech or overall weakness since discharge from Stony Brook.

It is Dr. Harbaugh's further opinion that Dr. Bernardini was not trained and capable of reading the brain MRI performed between the April 5th and April 7th visits, or interpreting the MRI report during the time in issue, thus any alleged failure to read and interpret the MRI report of April 5, 1995 could not be viewed as a departure from good and accepted practice as he was not qualified or trained to do so, and such reading is generally beyond the scope of a chiropractor's expertise as well. Such interpretations of the MRI's, he opines, are best left to the radiologists, neuro-radiologists or neurosurgeons, and physicians specifically trained to make such interpretations. He further stated that Dr. Bernardini testified that while he is capable of reading MRI reports relating to the spine, he is incapable of interpreting a brain MRI. Dr. Harbaugh further opines that it is his opinion that the responsibility to ensure follow-up, should the need arise as a result of the MRI, lies with the referring physician, and it is uncontroverted that Dr. Bernardini was not the referring physician.

It is Dr. Harbaugh's opinion based upon a reasonable degree of medical certainty that there is no medical evidence to support a claim that chiropractic manipulations such as the ones alleged to have been performed herein create an increased risk of carotid artery dissection and embolization, and that most reported cases of chiropractic stroke involve vertebral artery dissections based upon rotational movement which cause a dissection high, which is not the case here as the alleged manipulation herein is a cervical one. Thus, opines Dr. Harbaugh, there is no proximate cause between the alleged manipulations and the plaintiff's dissection, stroke and injuries.

It is defendant's expert opinion also that the performance of an ultrasound upon plaintiff was not a departure from good and accepted medical care as among the diagnostic tests used to diagnose the existence of carotid artery disease are magnetic resonance angiographies, computed tomographic angiographies and ultrasounds. He states that, in fact, ultrasounds are effectively used millions of times a year to diagnose carotid artery dissections, and said treatment are often implemented to follow patients who have suffered from carotid artery dissection, and there was nothing in plaintiff's history which contraindicated the use of ultrasound to treat her TMJ. Dr. Harbaugh opines that therefore, the performance of ultrasound on plaintiff was not a departure from good and accepted medical practice, and that there is no appreciable risk of an ultrasound causing a carotid artery dissection or making a dissection worse by causing a stroke, and that plaintiff's carotid artery dissection was a result of the assault she suffered on April 1, 1995, and that her subsequent cerebrovascular accident was a direct consequence of the dissection.

Susan Lampach testified at her deposition that Jennifer did not display any medical problems on April 5, or April 6, 1995. However, on the afternoon of April 6, 1995, at about 3:30 p.m. after taking a ride with her father to the scene of the assault, she became weak and needed assistance walking to help her into the house and up six steps to her bedroom and into her bed. Jennifer was noted to be drooling from the right side of her mouth, she was a little confused and looked dazed and a little upset. Within a few minutes she looked and felt and acted fine. Susan Lampach then called Dr. Bagla who told her he did not yet have the results of the MRI. He told her that Jennifer had a concussion and should stay rested.

Susan Lampach also testified that on April 7, 1995 her daughter seemed fine until about 6:30 p.m. When she finished eating dinner she said she felt very tired and wanted to lay down. She appeared weak and looked tired and drained and she sounded confused. Within a few minutes of lying down, she felt fine again and no longer seemed confused. However, later that night, she threw up, but did not seem confused. She had no further problems throughout the night. Susan Lampach further testified that the following morning, April 8, 1995, she woke her daughter up to make sure she was ok, but found Jennifer to be very confused, very out of it, weak all over, and not speaking right. She then telephoned Dr. Bagla who saw Jennifer at St. John's Hospital emergency department and admitted her to the Intensive Care Unit.

Dr. Bernardini testified that he saw Jennifer on April 5, 1995 at which time he took a history of the recent incident from Jennifer's parents. He stated he did not perform an examination, but palpated her jaw for the condition he always treated her for, spasm of her jaws. He testified there were no adjustments to the cervical spine. He also testified that he updated his office notes he kept on Jennifer after he received an authorization for the records, adding the notes for April 5 and 7, 1995, written on post-it notes, to clarify exactly what was done during those treatments, but stated he did not "alter the record." On April 5, 1995, he stated he performed ultrasound treatments and further stated he chose to use ultrasound as opposed to electrical stimulation because it worked in the past with her. He stated his note indicates that she felt relief with the treatment, so he presumed she was doing better. His future plan was to have her come back for more treatment if she continued to have tightness in her jaw. He did not recall that Jennifer had any problems communicating with him at the time of the visit. He presumed she walked in and walked out of his office because he did not do an examination as she came in for a temporal mandibular joint problem. If he was told of any problems, he would have written it in his notes, he stated.

Dr. Bernardini testified Jennifer returned to see him on April 7, 1995. He did not know if he received or reviewed a copy of the MRI report before that visit. He stated he spoke to Jennifer at the visit and wrote down that she was having pain and spasms and that she felt relief with the treatment. He performed a palpation prior to commencing treatment with ultrasound for temporal mandibular joint dysfunction. He testified he did not perform any manipulations of any areas of the spine on this visit. His plan was that if she continued to have any TMJ problems to come back.

Dr. Bernardini also testified that he was not told by Jennifer or her parents that on April 6th she had a ten-minute episode of weakness, dizziness, difficulty getting out of the car and walking up the stairs and drooling, and if he were told, he would have notated that. He never saw or treated Jennifer after that last visit of April 7th.

Based upon the foregoing, defendant Dr. Bernardini has demonstrated prima facie entitlement to an order granting summary judgment on liability and proximate cause of the claimed injuries.

Both Dr. Kaufman and Dr. Krupp oppose Dr. Bernardini's motion. Dr. Kaufman has submitted merely an attorney's affirmation and argues that where records have been falsified, the Court cannot determine what the facts are and therefore cannot grant the party who falsified the records summary judgment. Dr. Kaufman further argues that Dr. Bernardini added to his notes that he did not perform any adjustments to Jennifer Lampach's cervical spine and that this raises a factual issue to be determined by the jury as to whether or not Dr. Bernardini performed such cervical spine adjustments. In this instance, however, Dr. Bernardini's expert has opined with a reasonable degree of medical certainty that assuming *arguendo* for the purpose of this motion that whether or not cervical adjustments were performed, there is

no medical evidence to support a claim that chiropractic manipulations such as the ones alleged to have been performed herein create an increased risk of carotid artery dissection and embolization. He further opined that most reported cases of chiropractic stroke involve vertebral artery dissections based upon rotational movement which cause a dissection high, which is not the case here as the alleged manipulation was cervical. Thus, opines Dr. Harbaugh, there is no proximate cause between the alleged manipulations and the plaintiff's dissection, stroke and injuries. Defendant Kaufman has not submitted an affidavit on his own behalf or an affidavit by his expert to raise a factual issue in this regard. Therefore, Dr. Kaufman's motion is deficient in this regard to demonstrate that even if the record was altered by Dr. Bernardini, how this proximately caused plaintiff's claimed injuries. However, this very issue is addressed by Dr. Krupp via the affirmation of Dr. Stephen Burstein, M.D. and this court is compelled to search the record to identify if a factual issue exists (CPLR 3212(b)).

In opposing this motion, Dr. Krupp has submitted an attorney's affirmation and the affirmation of Dr. Stephen D. Burstein, M.D., a board certified neurosurgeon licensed to practice in the State of New York. It is Dr. Burstein's opinion with a reasonable degree of medical certainty that there exists questions of fact as to the treatment rendered to Jennifer Lampach by Dr. Bernardini as to whether or not Dr. Bernardini performed cervical manipulations on Jennifer Lampach. It is his expert opinion that any such manipulation was the proximate cause of plaintiff's carotid artery dissection, cerebrovascular accident or injuries flowing therefrom. Dr. Burstein states that chiropractic manipulations such as the ones alleged to have been performed herein create an increased risk of carotid artery dissection and embolization, and that there are case reports of cervical manipulations being correlated with worsening of carotid artery dissection.. He further states that any form of excessive or abrupt cervical motion may dislodge an embolus. Thus, he states, there is proximate cause between the alleged manipulations and plaintiff's dissection, stroke and injuries.

However, Dr. Harbaugh opined with a reasonable degree of medical certainty that Dr. Bernardini did not depart from good and accepted standards of chiropractic care. Dr. Burstein does not dispute this and does not set forth that Dr. Bernardini departed from good and accepted standards of care if he did in fact, perform the cervical manipulations.

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*, 253 AD2d 852, 678 NYS2d 503[1998], *app denied* 92 NY2d 818, 685 NYS2d 420). 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 [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 [1985]; *Lyons v McCauley*, 252 AD2d 516, 517, 675 NYS2d 375 [1993], *app denied* 92 NY2d 814, 681 NYS2d 475; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [1994]).

Based upon the foregoing, although this court determines there are factual issues concerning whether or not cervical manipulations were performed by Dr. Bernardini, and if so, did they proximately

cause or worsen any carotid artery dissection and embolization and contribute to plaintiff's injuries, the moving parties have failed to rebut Dr. Harbaugh's opinion or demonstrate by competent medical evidence that defendant Bernardini departed from good and accepted standards of care in his treatment of plaintiff. Dr. Burstein only set forth in a conclusory statement in his Conclusion that a cervical manipulation performed on either April 5, 1995 or April 7, 1995 would have been contraindicated and would thus constitute a departure from good and accepted medical practice. However, Dr. Burstein does not set forth the basis for this conclusion or set forth how Dr. Bernardini knew or should have known that plaintiff had a carotid artery dissection or potential for embolization. He does not set forth that a diagnosis for the same had been made prior to any treatment rendered by Dr. Bernardini, or how Dr. Bernardini knew, or should have known of the same, and thus departed from good and accepted standards of chiropractic care based upon such diagnosis. Therefore, the third-party plaintiffs have failed to demonstrate that Dr. Bernardini departed from good and accepted standards of medical care to meet their burden in this motion for summary judgment, and have further failed to even offer any evidence in this regard.

Accordingly, motion (012) by third-party defendant Dr. Bernardini for dismissal of the third-party complaints of Dr. Kaufman and Dr. Krupp is granted and the third-party complaints are hereby dismissed as against Dr. Bernardini.

Dated: 12/4/07

Emily Pines
J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION