

Greenberg v Serer

2007 NY Slip Op 34228(U)

December 21, 2007

Supreme Court, Nassau County

Docket Number: 0986-06/

Judge: Joseph DeMaro

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. JOSEPH A. DE MARO

Justice

----- TRIAL/IAS, PART 3
NASSAU COUNTY

MYRTLE GREENBERG,

Plaintiff,

MOTION DATE:
November 21, 2007
INDEX No. 986/2006

-against-

SEQUENCE No. 2

CORINA SERER, M.D. and NORTH SHORE UNIVERSITY
HOSPITAL,

Defendant.

The following papers read on this motion:

- Notice of Motion
- Affirmation in Opposition

Motion by defendant North Shore University Hospital at Plainview for summary judgment dismissing the complaint is granted in part and denied in part.

This is an action for medical malpractice. In March 2005, plaintiff Myrtle Greenberg, consulted defendant Dr. Corina Serer, a physician specializing in diseases of the intestinal tract, pancreas, and liver. Plaintiff had been referred to Dr. Serer by her primary care doctor because

she had tested positive for Hepatitis C antibodies and had elevated liver function.¹ Plaintiff was 59 years of age at the time of the consultation, and had a prior medical history which included the removal of her gall bladder and her left kidney.

After reviewing plaintiff's blood work, Dr. Serer concluded that plaintiff had some type of hepatitis C, which she likely acquired from a blood transfusion. Dr. Serer discussed possible treatments with plaintiff and recommended a needle biopsy of the liver in order to evaluate her condition. Dr. Serer explained the biopsy procedure to plaintiff as well as the risks, which included the puncturing of other organs and infection. Plaintiff was also given a packet containing this information. Although plaintiff was initially unsure whether she was willing to undergo the biopsy, she did agree to the other procedures recommended by Dr. Serer, an abdominal ultrasound and a colonoscopy. Following the colonoscopy on April 7, 2005 plaintiff agreed to the biopsy.

Dr. Serer is an attending physician at defendant North Shore University Hospital at Plainview. On April 12, 2005, plaintiff was scheduled to have the needle biopsy performed at North Shore Plainview by Dr. Serer. In preparation for the procedure, Dr. Serer ordered an ultrasound of the right upper quadrant of the abdomen for the purpose of locating the liver and marking the spot where the needle was to be inserted.

The ultrasound was performed by Gina Passaro, an ultrasound technician employed by the hospital. Ms. Passaro testified that marking the site for liver biopsies was part of her regular

¹Hepatitis C is a liver disease caused by the hepatitis C virus, which is found in the blood of persons who have the disease and is spread by contact with the blood of an infected person(See generally, "Hepatitis Health Center" at www.WebMD.com).

duties, and she had experience with two different methods for performing the procedure. The first method called for the technician to mark the spot on her own and the biopsy to then be performed in a separate room by the doctor. The technician would place the ultrasound wand transversely along the patient's ribs, locate the liver, and "measure" to a depth within the liver where a "sufficient specimen" could be obtained. Using the ultrasound machine, the technician would then take a "snapshot" of the liver. After taking the picture, the technician would lift the probe and using a "skin biopsy marker," place a dark blue dot on the patient's abdomen at the exact spot where the picture was taken. After the mark was made, the technician was to place the probe back on the mark to confirm that it corresponded to the picture. The patient would then be transferred to the room where the biopsy was to be taken.

According to Ms. Passaro, the other method is for the liver biopsy to be performed by an "interventional radiologist," with the technician performing "ultrasound guidance." As Ms. Passaro described the procedure, "The radiologist prepares his needle, inserts the needle with the ultrasound probe, guiding it in with the image of the liver, with the needle being inserted on my screen realtime." Ms. Passaro testified that the method of marking the abdomen by a technician without a doctor present has now been discontinued and was used during 2005 only for Dr. Serer's patients.

Plaintiff's ultrasound marking was performed according to the first method. Dr. Serer was not present when the ultrasound was performed, nor did she view the ultrasound picture prior to the biopsy. After the ultrasound was completed, plaintiff was transferred to the endoscopy room where she met with Dr. Serer. At that time, plaintiff signed a written form, consenting to a liver biopsy with intravenous sedation. On the pre-printed form, the patient

acknowledges that the nature and purpose of the procedure has been explained to her and she has been informed of the expected benefits and complications and the risks that may arise from the procedure.² Dr. Serer then examined plaintiff by percussion, or tapping the surface of the abdomen to confirm the location of the liver. Dr. Serer also listened to plaintiff's lungs with a stethoscope "to generally get an idea of the [pleural] line."³ Thus, based upon her examination, Dr. Serer made her own determination that the spot marked by the technician was the appropriate site to perform the biopsy.

Immediately following the biopsy, plaintiff was taken to the Post-Anesthesia Care Unit, where her vital signs were monitored by nursing staff employed by the hospital. After plaintiff complained of chest pain and difficulty breathing, a chest X-ray and a CAT scan were taken. Based upon these tests, it was determined that plaintiff had developed hemothorax, a condition of blood collecting in the pleural cavity.

This action for medical malpractice was commenced on January 13, 2006.

Plaintiff alleges that the hemothorax was caused by the needle penetrating her pleural cavity when Dr. Serer attempted to perform the biopsy. The court notes that plaintiff's theory appears to be confirmed by the surgical pathology report which was prepared the day following the biopsy. The report states that fragments of skeletal muscle and fibrous tissue were present, but no liver tissue was identified.⁴ Plaintiff alleges that Dr. Serer departed from good and accepted

²See defendant's Ex. N1.

³Deposition of Dr. Serer at p.120.

⁴At her deposition, Dr. Serer described the sample as "grayish" in color. According to Dr. Serer, healthy liver tissue is yellowish-tan, while liver tissue infiltrated with the hepatitis virus will appear more yellow. Dr. Serer asserted that if the liver is disrupted by fibrosis or cirrhosis,

medical practice by failing to perform the biopsy with ultrasound or CAT scan guidance. Plaintiff alleges that North Shore was negligent in failing to have a radiologist perform the biopsy. Plaintiff alleges that as a result of Dr. Serer's malpractice and North Shore's negligence, she sustained injury to her lungs caused by the collection of blood in her pleural cavity. Plaintiff also asserts a cause of action for lack of informed consent, claiming that defendants failed to disclose to her the risks of the liver biopsy procedure. Defendant North Shore moves for summary judgment dismissing the complaint claiming that it did not deviate from the standard of care expected of a hospital and its care and treatment did not proximately cause plaintiff's injuries.

The liability of a hospital may arise in several different ways. As a general proposition, a hospital may be vicariously liable for the malpractice, or ordinary negligence, of its employees under the principal of respondeat superior (*N.X. v. Cabrini Medical Center*, 97 NY2d 247 [2002]). Thus, a hospital will be vicariously liable for malpractice committed by a doctor who is an employee of the hospital, if the doctor acted in furtherance of the hospital's business and within the scope of the doctor's employment. On the other hand, a hospital is not vicariously liable for the malpractice of an independent physician retained by the patient, merely because the physician has attending privileges at the hospital (*Welch v. Medical Center*, 21 AD3d 802, 807 [1st Dep't 2005]).

Aside from vicarious liability, a hospital may also be directly liable for breach of a duty that it, as an institution, owes to its patients. Although a hospital is, in a general sense, always

the tissue may appear fragmented and whitish in color. Dr. Serer's post-operative report, dictated the same day as the procedure, states only that, "Tissue was obtained," without describing the sample by type or color.

furnishing medical care to patients, not every act of negligence toward a patient is medical malpractice (*Bleiler v. Bodner*, 65 NY2d 65, 73 [1985]). For example, a hospital may be liable in negligence for failing to use due care in furnishing competent medical personnel if the failure was a proximate cause of plaintiff's injury (Id).

A hospital may be liable on a theory of lack of informed consent, if the hospital knew or should have known that the surgeon was acting without the informed consent of the patient (*Bailey v. Owens*, 17 AD3d 222 [1st Dep't 2005]). "A hospital is not required to pass upon the efficacy of treatment; it may not decide for a doctor whether an operation is necessary, or if one be necessary, the nature thereof..." (*Fiorentino v. Wenger*, 19 NY2d, 407, 415 [1967]). However, the hospital owes to every patient whom it admits the duty of saving her from an illegal procedure based upon lack of informed consent (Id). Nonetheless, a court, having the benefit of hindsight, may not impose liability on a hospital for its failure to intervene in the independent physician-patient relationship (Id). The level of detail concerning a proposed procedure as to which a patient should be informed is within the physician's medical judgment (Id). Thus, the hospital should not ordinarily meddle in the doctor's exercise of discretion or the delicacy of the physician-patient relationship (Id at pgs. 415-16).

On a motion for summary judgment, it is the proponent's burden to 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 (*JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373, 384 [2005]). Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Id). However, if this showing is made, the burden shifts to the party opposing the summary judgment motion to

produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]).

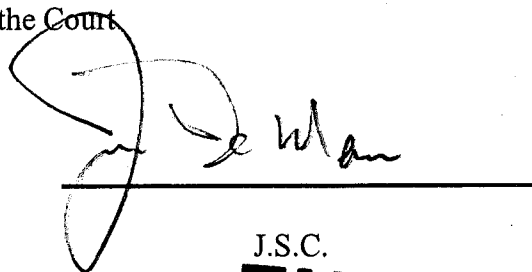
Since Dr. Serer was not an employee of North Shore, the hospital cannot be liable on a theory of respondeat superior for Dr. Serer's malpractice. Nevertheless, the court concludes that North Shore's motion for summary judgment must be denied as to plaintiff's claim for negligence. In support of its motion for summary judgment, North Shore submits the affidavit of Dr. Sanford Goldberg. In his affidavit, Dr. Goldberg states, "Dr. Serer, not the hospital staff, was responsible for determining the best treatment plan for the plaintiff and rendering treatment to the plaintiff in that regard." In opposition to Defendant Hospital's motion, Plaintiff provides the affirmation of Dr. Mark A. Korsten, who reviewed the medical records of co-defendant Corina Serer as well as the North Shore University Hospital records at Plainview as it pertains to the treatment they rendered to the Plaintiff, Myrtle Greenberg. Upon explanation of the possible scenarios that caused Plaintiff's injuries, it is his expert opinion that either or both Dr. Serer or the hospital deviated from good and accepted medical practice. Thus, defendant North Shore's motion for summary judgment is denied as to plaintiff's negligence claim.⁵

The court reaches a contrary conclusion as to plaintiff's claim of lack of informed consent. In view of plaintiff's medical history, including prior surgeries, her expressed anxiety concerning a needle biopsy, and her "fluctuating indications" as to whether she wished to undergo the procedure, the level of detail as to which plaintiff was to be informed was particularly within Dr. Serer's discretion (*Fiorentino v. Wenger*, supra, 19 NY2d at 415). In

⁵The court expresses no opinion as to whether the liver biopsy performed by Dr. Serer was in compliance with good and accepted medical practice.

these circumstances, the execution of the consent form by plaintiff establishes prima facie that plaintiff gave her informed consent. Thus, the burden shifts to plaintiff to establish a triable issue as to whether North Shore should have known that Dr. Serer was acting without the informed consent of the patient. Plaintiff's conclusory testimony that she was not told of the possible complications of a liver biopsy before she signed the consent form is insufficient to meet this burden.⁶ Accordingly, defendant North Shore's motion for summary judgment is granted as to plaintiff's claim for lack of informed consent.

This shall constitute the Decision and Order of the Court



Dated: December 21, 2007

J.S.C.
ENTERED
DEC 27 2007
NASSAU COUNTY
COUNTY CLERK'S OFFICE

⁶See plaintiff's deposition at pgs.151-153.