

Urban v Groth

2008 NY Slip Op 32356(U)

July 25, 2008

Supreme Court, Suffolk County

Docket Number: 0019988/2004

Judge: John J.J. Jones

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Urban v Groth
Index No. 04-19988
Page No. 2

ORDERED that for the purposes of this determination the motion by defendant Robert G. Peyster, M.D. for summary judgment is consolidated and decided together with the motion by defendants Rahman Pourmand, M.D. and Patricia K. Coyle, M.D. for summary judgment; and it is further

ORDERED that the motion by defendant Robert G. Peyster, M.D. is granted; and it is further

ORDERED that the motion by defendants Rahman Pourmand, M.D. and Patricia K. Coyle, M.D. is granted as to defendant Pourmand and denied as to defendant Coyle.

This is an action to recover damages for, *inter alia*, the alleged malpractice of the moving defendants in the medical care rendered to plaintiff Tina Urban, then 38 years of age, during her admission to Stony Brook University Hospital (SBUH) between January 29, 2003 and February 6, 2003. The gravamen of the complaint as to the moving defendants is that they failed to timely diagnose and treat Ms. Urban for Cauda Equina¹ Syndrome causing her to suffer from paraplegia, paralysis and incontinence. A derivative cause of action is alleged on behalf of Ms. Urban's husband, plaintiff Ronald Urban.

The record reflects that on January 29, 2003, the plaintiff presented to the hospital's emergency room with complaints of lower back pain, severe headache and neck tenderness. The record also reveals that Ms. Urban had a long history of chronic back pain and had previously undergone a number of surgeries on her back. Just prior to her admission to the hospital she underwent a course of pain treatment with defendant Timothy Groth, M.D. at the defendant North Shore Surgi-Center. These treatments included a series of three epidural injections, the last of which was administered the day before her admission to the hospital. While a patient at SBUH plaintiff was treated by physicians from the hospital's Neurology Department including defendant Patricia Coyle, M.D. who became plaintiff's attending physician and defendant Rahman Pourmand, M.D. who succeeded Dr. Coyle as plaintiff's attending physician. Plaintiff also underwent an MRI of her lumbar spine which was interpreted by defendant Robert G. Peyster, M.D.²

The requisite elements of proof in an action to recover damages for medical malpractice are a deviation or departure from accepted practice and evidence that such departure was a proximate cause of injury or damage (*Feinberg v Feit*, 23 AD3d 517, 806 NYS2d 661 [2005]; *Lyons v McCauley*, 252 AD2d 516, 675 NYS2d 375 [1998] *lv denied* 92 NY2d 814). To make a prima facie

¹Cauda equina is the bundle of spinal nerve roots arising from the lumbosacral enlargement and medullary cone and running through the lumbar cistern (subarachnoid space) within the vertebral canal below the first lumbar vertebra; it comprises the roots of all the spinal nerves below the first lumbar (*Stedman's Medical Dictionary*, 27th Edition, pg. 303).

² The report of Dr. Peyster's findings was prepared by defendant Maha Baranzanji, M.D, against whom this action has been discontinued by stipulation, dated 5/22/07.

Urban v Groth
Index No. 04-19988
Page No. 5

showing of entitlement to summary judgment in an action to recover damages for medical malpractice, a defendant physician must establish through medical records and competent expert affidavits that the defendant did not deviate or depart from accepted medical practice in defendant's treatment of the patient (*Mendez v City of New York*, 295 AD2d 487, 744 NYS2d 847 [2002]). To rebut a prima facie showing by the defendant physician, a plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice and containing an opinion that the defendant's acts or omissions were a competent-producing cause of the injuries of the patient (see, *Lifshitz v Beth Israel Med. Ctr.-Kings Highway Div.*, 7 AD3d 759, 776 NYS2d 907 [2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [1997]).

In support of his request for summary judgment Dr. Peyster submits, *inter alia*, his personal affidavit in which he states that he did not deviate from the acceptable standards of medical care in interpreting the MRI of plaintiff's lumber spine. He avers that cauda equina syndrome is a condition caused by the compression of nerve roots and that the MRI he interpreted revealed no evidence of cauda equina compression or pathology. He also avers that the MRI of the plaintiff was of sufficient diagnostic quality to render a radiologic opinion, and in fact, was the best type of study available to evaluate plaintiff's condition. He opines that there was no other study available at the time of this interpretation that would have yielded more information than the study performed. Dr. Peyster concludes with a reasonable degree of medical certainty that his involvement with plaintiff's care completely conformed to the generally accepted standards of radiology care in 2003 and that the injuries claimed in this action are in no way related to or caused by his interpretation of the radiographs in question.

Where, as here, the affidavit of a defendant physician is detailed, specific and factual in nature and does not assert in simply conclusory form that the physician acted within the accepted standards of medical care, the affidavit is sufficient to establish a prima facie entitlement to summary judgment (*Toomey v Adirondack Surgical Assocs., P.C.*, 280 AD2d 754, 720 NYS2d 229 [2001]). It was therefore incumbent upon the plaintiffs to produce evidence in admissible form to establish the existence of material issues of fact requiring a trial of the action (*Payne v Selesnick*, 236 AD2d 529, 654 NYS2d 641 [1997]). Inasmuch as plaintiffs have offered no proof to rebut defendant Peyster's showing, he is clearly entitled to summary judgment dismissing the complaint against him and his motion is granted (see, *Suib v Keller*, 6 AD3d 805, 774 NYS2d 608 [2004]).

In support of their motion for summary judgment defendants Rahman Pourmand, M.D. and Patricia Coyle, M.D. submit, *inter alia*, copies of plaintiff's medical records for the time she was a patient at SBUH; copies of the transcripts of their examination before trial testimony; and the affirmation of Howard Reiser, M.D.

By his affirmation, defendants' expert, Dr. Reiser avers that he is a board-certified neurologist and that he reviewed the pleadings and bills of particulars in this action, Ms. Urban's

Urban v Groth
Index No. 04-19988
Page No. 4

medical records as they pertained to her admission to SBUH for the period of January 29, 2003 to February 6, 2003, the records of her treatment at the Neurology Clinic at Stony Brook and the records of her treatment by Dr. Groth at the North Shore Surgi-Center. Dr. Reiser states that Ms. Urban's medical records and her deposition testimony reflect that she had a longstanding history of back problems for which she had undergone a number of surgeries including a laminectomy, a discectomy and a spinal fusion but that her complaints of back pain continued after these surgeries. In January 2003, plaintiff sought treatment with defendant Groth who administered a course of treatment including the three epidural injections the last of which was done the day before her admission to SBUH. On January 29, 2003 she was admitted to SBUH through its emergency room with complaints of headaches and a stiff neck. She was given a neurological examination and treated with steroids as an anti-inflammatory agent for possible chemical meningitis. According to Dr. Reiser the rigidity in her neck and her headaches began to subside and by January 31, 2003, the neck rigidity had resolved.

Dr. Reiser continues that on January 31, 2003, the neurology department's notes indicate that the plaintiff had complaints of occasional numbness and tingling. An MRI of her lumbar spine was ordered to rule out a structural lesion as her symptoms had worsened after the epidural procedure. The MRI performed on January 31st as reviewed by Dr. Peyster showed no hematoma or any compression lesion. When plaintiff continued to have complaints of numbness in her lower extremities with additional complaints of stool incontinence and being unable to void, a neurosurgeon was called in for a consult. The neurosurgeon reviewed the MRI of the plaintiff and found no evidence of a collection or lesion and no root compression. He found the conus was normal and he did not note any arachnoiditis. His assessment was partial Cauda Equina Syndrome or a lumbosacral cord dysfunction or a conversion reaction. The etiology of plaintiff's condition was not clear but the cause was not compressive in nature and he did not recommend surgery.

Dr. Reiser opines that based upon plaintiff's condition, her records, including the neurosurgeon's consult, that surgery was not warranted. He asserts that the defendant neurologists had the right to rely upon the expertise of the neurosurgeon in determining whether surgery was warranted. As surgery was not warranted the only treatment would be medical treatment for some type of inflammatory reaction with the use of steroids which was done in this case. Dr. Reiser continues that plaintiff continued to have parathesia as well as difficulties with incontinence of her urine and bowel which was not the result of any care or treatment rendered by the defendant neurologists. Dr. Reiser concludes that the defendant neurologists did not cause the plaintiff's condition and that surgery was not warranted as treatment for her condition. He also concludes that the defendant neurologists had the right to rely upon the physician called in for a consult to evaluate plaintiff's condition to decide whether surgery was warranted.

The submissions by defendants Pourmand and Coyle in support of their motion are sufficient to demonstrate, prima facie, that in rendering care to Ms. Urban, they did not deviate from accepted standards of medical care and that the care rendered by them was not a proximate cause of Ms.

Urban v Groth
Index No. 04-19988
Page No. 5

Urban's claimed injuries. To rebut this prima facie showing by defendants, plaintiffs are required to submit evidentiary facts or materials in opposition to this motion demonstrating the existence of a triable issue of fact as to whether Drs. Pourmand and Coyle deviated or departed from accepted practice and whether such departure was a proximate cause of the injury or damage (*Holbrook v United Hosp. Med. Ctr.*, 248 AD2d 358, 669 NYS2d 631 [1998]).

Inasmuch as plaintiffs have not opposed the motion for summary judgment by defendant Rahman Pourmand, M.D. on its merits, plaintiffs have failed to raise any triable issue of fact and the motion for summary judgment dismissing the complaint against this defendant is granted (*see, Fernandez v Elemam*, 25 AD3d 752, 809 NYS2d 513 [2006]; *Ericson v Palleschi*, 23 AD3d 608, 806 NYS2d 667 [2005]). Plaintiffs have, however, submitted the affidavit of their expert in opposition to the request for summary judgment on behalf of Dr. Coyle.

By his affirmation, plaintiff's expert, Paul Lerner, M.D. avers that he is board certified in Neurology and Psychiatry and that he reviewed plaintiff's medical records and the deposition testimony. Dr. Lerner opines to a reasonable degree of medical certainty that Dr. Coyle deviated from the appropriate standard of medical care in her treatment of Ms. Urban from January 29, 2003 to February 2, 2003. The expert avers that Dr. Coyle failed to recognize and treat the plaintiff's signs and symptoms of cauda equina/conus syndrome. Dr. Coyle failed to properly perform a complete physical examination on the plaintiff in that no rectal tone examination was conducted. Dr. Coyle also failed to order a myelogram or repeat MRI for the plaintiff. The expert opines that these departures from good and accepted medical practice permitted Ms. Urban's nerve root compression to progress and worsen, ultimately, resulting in permanent injury to her back and legs.

The plaintiff's expert continues that while he agrees that Dr. Coyle did not cause the plaintiff's initial cauda equina and/or conus nerve root compression, the defendant's "inaction" permitted this condition to progress undiagnosed and untreated, resulting in permanent nerve damage. He asserts that had the compression of the nerve roots been timely diagnosed, Ms. Urban would have been given different treatment options, including surgery to remove the pathology causing the compression or medication to address this issue. He concludes that either option would have significantly increased the plaintiff's chances of achieving a better outcome than the one achieved.

In reply, defendant Coyle submits the affirmation of counsel who, among other things, challenges the accuracy of plaintiff's expert's opinion. Inasmuch as counsel has not established himself as a medical expert, his evaluation of plaintiff's expert's opinion is without any probative value.

Summary judgment may not be awarded in a medical malpractice where the parties adduce conflicting opinions of medical experts. Where, as here, medical experts offer conflicting opinions, a credibility question is presented requiring a jury resolution (*Feinberg v Feit*, supra; *Dandrea v*

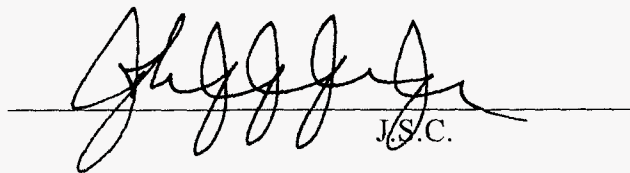
Urban v Groth
Index No. 04-19988
Page No. 6

Hertz, 23 AD3d 332, 804 NYS2d 106 [2005]; *Shields v Baktidy*, 11 AD3d 671, 783 NYS2d 652 [2004]). The request by defendant Coyle for summary judgment is, therefore, denied.

Finally, the Court notes that plaintiffs' affirmative request for relief, to wit, that the Court deny any claims which the remaining defendants may assert pursuant to CPLR article 16 at the trial of this action and preclude those defendants from attempting to blame or otherwise find fault with or apportion any liability to Drs. Peyster and Pourmand is not properly before the Court and has not been considered (CPLR 2215). Plaintiffs may, however, renew their request for such relief before the justice presiding at the trial of this action.

Accordingly, summary judgment is granted dismissing the complaint as against defendants Peyster and Pourmand and is denied as to defendant Coyle. The action is severed and shall continue as against the remaining defendants.

Dated: 25 July 2008


J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION