

**Gilbert v Nahas**

2008 NY Slip Op 32576(U)

September 16, 2008

Supreme Court, Nassau County

Docket Number: 2998-02/

Judge: Ute W. Lally

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SCAN

SHORT FORM ORDER

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 6  
NASSAU COUNTY

JULIE GILBERT and JAN GILBERT,

Plaintiff(s),

-against-

MOTION DATE: 8/4/08  
INDEX No.: 12998/02  
MOTION SEQUENCE NO: 4  
X X X  
CAL. NO.: 2007H3672

CHRISTIAN NAHAS, D.O.,

Defendant(s).

The following papers read on this motion:

- Notice of Motion/ Order to Show Cause..... 1-4
- Answering Affidavits..... 5-8
- Replying Affidavits..... 9-11
- Briefs: .....

Upon the foregoing papers, it is ordered that this motion by defendant for an order pursuant to CPLR 3212 granting summary judgment in his favor dismissing the complaint against him is granted.

Plaintiffs in this action seek to recover money damages for medical malpractice and loss of consortium. They allege that the defendant's failure to diagnose plaintiff Julie Gilbert's ("the plaintiff") sinusitis in a timely fashion caused her to suffer from a chronic condition which has required extensive treatment and caused her a great deal of pain and discomfort. More specifically, they allege that Dr. Nahas was reckless, careless and negligent in failing to use proper skill and care in the diagnosis of the plaintiff's medical complaints and problems; in failing to properly and timely refer her to a specialist; in failing to properly perform and/or request certain tests and/or examinations that might have indicated the medical condition she was suffering from; in failing to perform indicated tests and studies; in failing to properly read and interpret the results of those tests which were taken; in abandoning her; in advising her that all of the problems were psychological in nature; and, in failing to treat her in accordance with good and accepted medical practice and standards.

The defendant seeks summary judgment dismissing the complaint

against him.

"On a motion for summary judgment pursuant to CPLR 3212, the proponent must 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." (Sheppard-Mobley v King, 10 AD3d 70, 74, aff'd. as mod., 4 NY3d 627, citing Alvarez v Prospect Hosp., 68 NY2d 320, 324; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." ( Sheppard-Mobley v King, supra, at p. 74; Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. (Alvarez v Prospect Hosp., supra, at p. 324). The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. (See, Demishick v Community Housing Management Corp., 34 AD3d 518, citing Secof v Greens Condominium, 158 AD2d 591).

The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted practice and evidence that such departure was a proximate cause of injury or damages. (Ramsay v Good Samaritan Hosp., 24 AD3d 645; see also, Thomason v Orner, 36 AD3d 791; DiMitri v Monsouri, 302 AD2d 420, 421); Holbrook v United Hospital Medical Center, 248 AD2d 358, 359). Where a delay in diagnosis is alleged, all that need be demonstrated to establish proximate cause is "that the delay was the cause of a diminution of a substantial chance of avoiding the devastating result that the injured plaintiff suffered." (Fellin v Sahgal, 35 AD3d 800, 802, citing Wong v Tang, 2 AD3d 840; Gagliardo v Jamaica Hosp., 288 AD2d 179, 180; Cavlin v New York Med. Group, 286 AD2d 469, 470; Jump v Facelle, 275 AD2d 345, 346). Proximate cause has been established "as long as evidence is presented from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased his injury." (Flaherty v Fromberg, 46 AD3d 743; Barbutto v Winthrop Univ. Hosp., 305 AD2d 623, 624); Wong v Tang, supra; Jump v Facelle, supra).

"In a medical malpractice action, the party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by showing the absence of a triable issue of fact as to whether the defendant physician [and/or hospital] were negligent." (Taylor v Nyack Hospital, 18 AD3d 537, citing Alvarez v Prospect Hospital, supra). Thus, a moving defendant doctor or hospital has "the initial burden of establishing the absence of any departure from good and accepted medical malpractice or that the

plaintiff was injured thereby." ( Chance v Felder, 33 AD3d 645, quoting Williams v Sahay, 12 AD3d 366, 368, citing Alvarez v Prospect Hosp., supra; Johnson v Queens-Long Island Medical Group, P.C., 23 AD3d 525, 526; Taylor v Nyack Hospital, supra; see also, Thompson v Orner, supra). An expert may not make conclusions based on facts not in evidence or which are directly contradicted by the evidence. See, Holbrook v United Hospital Medical Center, supra; see also, Kaplan v Hamilton Medical Associates, P.C., 262 AD2d 609, 610 (2<sup>nd</sup> Dept. 1999). In fact, a qualified expert's opinion that a plaintiff's injuries were caused by a deviation from relevant industry standards has no probative force when the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation. See, Wong v Goldbaum, 23 AD3d 277 (1<sup>st</sup> Dept. 2005) citing Diaz v New York Downtown Hosp., 99 NY2d 542, 544 (2002).

If the defendant meets his burden, "in opposition, 'a plaintiff must submit a physician's affidavit of merit attesting to a departure from accepted practice and containing the attesting doctor's opinion that the defendant's omissions or departures were a competent producing cause of the injury.' " Domaradzki v Glen Cove Ob/Gyn Assocs., 242 AD2d 282 (2d Dept. 1997); see also, Mosezhnik v Berenstein, 33 AD3d 895 (2d Dept. 2006). The plaintiff's expert must address all of the pivotal facts relied on by the defendants' experts. See, Kaplan v Hamilton Medical Associates, P.C., 262 AD2d 609 (2d Dept. 1999); see also, Rebozo v Williams, 41 AD3d 457, 459 (2<sup>nd</sup> Dept. 2007); Slone v Salzer, 7 AD3d 609 (2d Dept. 2004); Ventura v Beth Israel Medical Center, 297 AD2d 801 (2d Dept. 2002); Fhima v Maimonides Medical Center, 269 AD2d 559 (2d Dept. 2000).

The pertinent facts are as follows:

Although Dr. Nahas treated the plaintiff from 1997 through 2002, the malpractice alleged in this action allegedly occurred in February 2000. More specifically, on February 5, 2000, Julie Gilbert went to see Dr. Nahas complaining of pain and stiffness in her hands, cervicitis, an infection in her lower genital tract and insomnia, as well as headaches, dizziness and decreased vision. She told him that she sat at a computer all day at work and that she felt a strange sensation in her forehead, dizziness and eye strain. Dr. Nahas recommended a rheumatoid panel to rule out arthritis; prescribed Celebrex and Ambien and told the plaintiff to consider Flexoril. He also advised the plaintiff to see an ophthalmologist for a full eye exam and a new eyeglass prescription. The plaintiff returned to Dr. Nahas on February 8, 2000 complaining of continuing headaches, as well as lightheadedness and dizziness. She stated that she felt like "a chemical was being released from her body" and "flowing through her." She told Dr. Nahas that she had seen an

ophthalmologist and gotten a new eyeglass prescription. Dr. Nahas prescribed Esgic Plus and Pamelor for plaintiff's headaches and panic attacks. He advised her to slowly get used to her new glasses and to get rest and increase her fluid intake. On February 12, 2005, Dr. Nahas spoke to the plaintiff on the telephone. She related that her severe headaches continued and that she was nauseated with neck pain. While her new glasses helped her vision, they did not help her headaches which she stated were worse when she worked on the computer. She also told Dr. Nahas that her work was increasingly stressful as she had more responsibility and that she was not sleeping well, either. Dr. Nahas told her to get a glare screen for her computer and prescribed Elavil. He told her to make an appointment with him in one to two weeks.

On February 13, 2000, the plaintiff was admitted to Long Beach Memorial Hospital. She reported that she felt like there was a balloon blown up inside her head and that it was going to pop any minute. She denied fever or chills. She was not discharging mucus. Her eyes and throat were clear. A history of fifteen years of chronic neck problems was reported. Her physical examination was normal and her laboratory tests were within normal limits. A CT scan of her head was normal. The plaintiff was admitted for intractable headaches and dizziness. When an ENT doctor reviewed the CT Scan of the plaintiff's head performed on February 13, 2000, a second CT scan was recommended. That CT scan performed on February 16, 2000 revealed sinusitis. On February 18, 2000, a nasal endoscopy and right maxillary sinus lavage was performed at Long Beach Medical Center, during which time the right maxillary sinus was aspirated. Plaintiff was discharged from Long Beach on February 20, 2000.

The plaintiff alleges that she now suffers from chronic sinusitis which has required numerous surgeries and caused her great pain, discomfort and disability.

In support of his motion, Dr. Nahas has submitted the Affirmation of a Board Certified Family Practitioner, Dr. Paris Phillips. Having reviewed the pertinent medical records, the pleadings and other legal records, Dr. Phillips opines with a reasonable degree of medical certainty that the care and treatment Dr. Nahas rendered to plaintiff was in accordance with good and accepted medical standards and that no act or omission by him proximately caused the plaintiff's injuries. Dr. Phillips explains that when the plaintiff saw Dr. Nahas on February 5, 2000, she complained of headaches, dizziness and decreased vision but told him that she worked all day at a computer and had a strange sensation in her forehead. Dr. Phillips notes that the plaintiff's physical exam was normal and concludes that Dr. Nahas' diagnosis of insomnia secondary to cervical neuralgia, his referral to an

ophthalmologist and direction that she follow up with him in two to three weeks was, under the circumstances, appropriate. Dr. Phillips further explains that when the plaintiff next saw Dr. Nahas on February 8, 2000, again complaining of headaches which Tylenol could not relieve as well as lightheadedness and dizziness, she related that she had seen an ophthalmologist who had prescribed two new pairs of glasses, one for distance and one for computer work, that day. Dr. Phillips notes that the plaintiff's physical exam was again normal. Thus, Dr. Phillips concludes that Dr. Nahas' conclusion that the plaintiff's headache was secondary to her eye strain and that she needed to adjust to her new glasses was appropriate. He further concludes that Dr. Nahas properly prescribed Esgic-Plus for the plaintiff's headaches and Pamelor for her headaches and panic attacks and told her to slowly adjust to her new eyeglasses and get rest and increase her fluids. Dr. Phillips further finds that when the plaintiff called Dr. Nahas on February 12, 2000 complaining of continued severe headaches which were worse when she was working, nausea, neck pain, as well as insomnia and increased stress and responsibility at work, Dr. Nahas properly prescribed Elavil, migraine medication to be taken each night, advised her to get a glare screen for her computer and instructed her to make an appointment to see him within a week or two.

Dr. Phillips notes that the plaintiff was admitted to Long Beach Memorial Hospital on February 13, 2000, complaining of headaches, nausea and dizziness. Even then, her physical exam was normal: she had no mucus discharge; a lumbar puncture was normal; her white blood count was normal; and, the electrocardiogram showed normal sinus rhythm. In fact, not until a second CT scan was done three days later on February 16, 2000 was plaintiff's sinusitis ultimately revealed. On February 18, 2000, she underwent a nasal endoscopy and right maxillary sinus lavage.

Dr. Phillips opines that the care and treatment provided to the plaintiff by Dr. Nahas was at all times appropriate and within the standards of good and accepted medical practice. He concludes that Dr. Nahas properly evaluated plaintiff's signs and symptoms at every visit and treated them appropriately. He explains that:

"Patients with sinusitis often present with a runny or stuffy nose, mucus discharge, coughing, pain in the roof of mouth and teeth, and fever. Plaintiff presented with none of these symptoms. Additionally, plaintiff reported that her symptoms were worse when sitting at a computer. Accordingly, after a physical examination revealed no abnormalities, Dr. Nahas referred her to an

ophthalmologist and recommended that she place a glare screen on her computer. When plaintiff reported that she suffered from insomnia and continued headaches, she also stated that she was experiencing increasing stress and responsibilities at work. In response to these complaints, and in light of a normal physical examination, Dr. Nahas appropriately prescribed Elavil, to prevent migraine headaches.

As for causation, Dr. Phillips opines that Dr. Nahas' failure to diagnose the plaintiff's sinusitis was not the proximate cause of her chronic sinusitis and need for multiple surgeries. He notes that nearly one week after she last saw Dr. Nahas when she was admitted to Long Beach Memorial Hospital, her physical exam was normal. Even then she exhibited no signs of mucus discharge; an examination of her eyes, ears and nose was normal; and, her white blood count was normal. Thus, the initial impression at the hospital was an intractable headache. Again, not until three days later did the plaintiff's CT scan reveal sinusitis. Thus, Dr. Phillips concludes that it is unlikely that an earlier diagnosis of sinusitis by Dr. Nahas would have prevented the plaintiff's need for a nasal endoscopy and right maxillary sinus lavage.

The defendant has established his entitlement to summary judgment thereby shifting the burden to plaintiff to establish the existence of a material issue of fact.

In opposition, the plaintiff has submitted the affirmation of Dr. Michael Setzen, a board certified otolaryngologist, and the affidavit of Dr. Robert Buynak, M.D., a board certified internist who is licensed to practice medicine in Indiana. While Dr. Buynak is not licensed to practice medicine in New York State, he alleges to "be familiar with the issues of care and treatment involved" and "to have familiarity with the standard of care in the State of New York on the matters at issue herein."

While Dr. Setzen chronicles in detail the plaintiff's subsequent treatment, he does no more than recite the medical treatment that the plaintiff has undergone since February 2000, and in particular since he began treating her in October, 2001. Moreover, he explains "[s]inusitis can be a difficult condition to treat, and by its very nature, can become chronic **despite no prior history of sinus problems**. This is what happened to [plaintiff] who never had a prior sinus condition and now has a chronic disease that is refractive to treatment despite our attempts to resolve her condition and intractable pain (emphasis added)." Dr. Setzen failed to raise an issue of fact concerning the quality of care Dr. Nahas

provided the plaintiff and whether his care caused the injuries.

Dr. Buynak opines that "in the face of Plaintiff's continuing complaints of facial and sinus pain, headache, decreased visual acuity, dizziness, fullness in the ears, and facial pain, defendant, Christian Nahas, D.O., negligently failed to timely diagnose and treat sinusitis." He avers that all of the signs and symptoms the plaintiff suffered were "consistent with and classical for sinusitis" and that a reasonably prudent physician would have ruled out that diagnosis sooner. He opines that "a two week delay occasioned by Dr. Nahas' negligence proximately caused or contributed to the plaintiff's chronic sinusitis," i.e., that the delay in treating the plaintiff's serious head infection had permanent adverse effects.

Dr. Buynak's alleged familiarity with the "issues of care and treatment involved" and "familiarity with the standard of care . . . on the matters at issue" fails to set forth a foundation establishing the reliability of his opinion. (See, Behar v Cohen, 21 AD3d 1045, lv to app den., 6 NY3d 705; see also, Postlethwaite v United Health Servs. Hosps., 5 AD3d 892, 895; LaMargue v North Shore Univ. Hosp., 227 AD2d 594). Assuming, *arguendo*, that Dr. Buynak was qualified to render an opinion on the matters at hand, nowhere is there evidence that plaintiff presented to Dr. Nahas with facial and sinus pain and fullness in the ears. Thus, his opinion is not based on facts in the record, thus rendering his opinion of no probative value.

The plaintiff has failed to establish the existence of an issue of fact.

The defendant's motion for summary judgment is granted and the complaint is dismissed.

Dated: SEP 16 2008

*Michael S.*  
J.S.C.  
**ENTERED**  
SEP 19 2008  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE