

Strafford v Bezalel

2008 NY Slip Op 33468(U)

December 16, 2008

Supreme Court, Nassua County

Docket Number: 5552/05

Judge: William R. LaMarca

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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 17**

**Present: HON. WILLIAM R. LaMARCA
Justice**

**CLAUDIA STRAFFORD and BRIAN
STRAFFORD,**

**Motion Sequence #6, #7
Submitted October 10, 2008**

Plaintiffs,

-against-

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**REBECCA BEZALEL, D.O., ATHANASIOS
ANTONIADIS, M.D., NASSAU SUFFOLK
OB GYN, BENJAMIN M. SCHWARTZ, M.D., and
GOOD SAMARITAN HOSPITAL MEDICAL CENTER,**

Defendants.

The following papers were read on these motions:

BEZALEL, ANTONIADIS and OB GYN Notice of Motion.....1
GOOD SAM Notice of Motion.....2
Plaintiffs' Affirmation in Opposition.....3
Plaintiffs' Affirmation in Opposition.....4
GOOD SAM Reply Affirmation.....5
BEZALEL, ANTONIADIS and OB GYN Reply Affirmation.....6

Defendants, REBECCA BEZALEL, D.O. (hereinafter referred to as "Dr. BEZALEL"),
ATHANASIOS ANTONIADIS, M.D. (hereinafter referred to as "Dr. ANTONIADIS"), and
NASSAU SUFFOLK OB GYN (hereinafter referred to as "OB-GYN") (hereinafter
collectively referred to as "defendants"), move for an order, pursuant to CPLR §3212,
granting them summary judgment dismissing plaintiffs' complaint. Subsequently,

defendant, GOOD SAMARITAN HOSPITAL MEDICAL CENTER (hereinafter referred to as "GOOD SAM" or "the hospital"), moves for an order, pursuant to CPLR §3211(a)(7) and §3212(b), dismissing plaintiffs' complaint. The plaintiffs, CLAUDIA STRAFFORD (hereinafter referred to as "plaintiff") and BRIAN STRAFFORD, who has interposed a derivative action, oppose the motions, which are determined as follows:

This is a medical malpractice action in which plaintiff alleges, *inter alia*, that defendants were negligent in failing to diagnose plaintiff's endocervical glandular dysplasia; in failing to properly perform a supracervical hysterectomy; in causing serious injuries and complications to the plaintiff's bladder; in causing a vesicovaginal fistula; in causing continued leaking of urine; and in causing plaintiff to suffer permanent urinary complications requiring the need for further surgical procedures. The alleged malpractice occurred between December 4, 2000 and May 10, 2004.

In her bill of particulars, plaintiff claims that she sustained the following injuries: "transvaginal vesicovaginal fistula; fistulous connection between the posterior aspect of the base of the bladder and the vaginal cuff with two separate fistula tracts; urine leaking into the vagina; severe urinary incontinence; exacerbation of voiding problems; suprapubic pain; postoperative ileus; scarring and disfigurement; and an inability to have more children". In addition, plaintiff alleges that the foregoing injuries were accompanied by and produced the following: "adjustment disorder with emotional dysfunction; severe reactive psychological, emotional and personality disorders; depression; frustration; overwhelming anxiety; loss of motivation and desire for life's activities; lethargy; fatigue; despair; mental distress; anxiety; anger; nightmares; embarrassment; irritability; tension; feelings of inadequacy; loss of self-esteem; sleeplessness; need for sleep aid medication; anguish

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and severe emotional trauma; and need for anxiety medications”.

As to defendant, OB- GYN, plaintiffs essentially combine the allegations of negligence that were made against Dr. BEZALEL and Dr. ANTONIADIS.

Dr. BEZALEL was the voluntary attending gynecologist for plaintiff's elective supracervical hysterectomy. Dr. BEZALEL performed the surgery with the assistance of Dr. ANTONIADIS. The operation took place at GOOD SAM Hospital.

With respect to the claims against Dr. ANTONIADIS, he asserts that his role in plaintiff's care and treatment was limited. In support of his motion to dismiss, defendants submit, *inter alia*, an affirmation of Carmel Cohen, M.D. Dr. Cohen is board certified in obstetrics & gynecology and is sub-certified in gynecological oncology. Dr. Cohen opines that since Dr. BEZALEL was plaintiff's voluntary attending gynecologist for the elective hysterectomy, it was Dr. BEZALEL's role to determine what the surgery would entail (supracervical hysterectomy versus total abdominal hysterectomy), how it would be performed and whether or not to perform the surgery. Dr. Cohen further states that since Dr. BEZALEL was plaintiff's voluntary attending gynecologist for the hysterectomy, it was her role to discuss with plaintiff the risks, alternatives and benefits of the surgery and to obtain plaintiff's informed consent. In sum, Dr. Cohen concludes, within a reasonable degree of medical certainty, that plaintiff's allegations in the bill of particulars are not applicable to Dr. ANTONIADIS who was simply the first assistant.

In opposition to the motion, plaintiffs' expert does not address any of these facts, or the opinions expressed by Dr. Cohen. Instead, plaintiffs' expert broadly concludes that all defendants, including Dr. ANTONIADIS, were negligent for failing to perform a Pap smear on plaintiff within some unspecified time frame before the supracervical

hysterectomy. As such, plaintiffs have failed to refute the *prima facie* showing of entitlement to summary judgment demonstrated by Dr. ANTONIADIS and plaintiffs have failed to raise an issue of fact with respect to the care and treatment provided by Dr. ANTONIADIS. Accordingly, that portion of the motion which seeks summary judgment dismissing the complaint against Dr. ANTONIADIS is granted.

As to the remaining defendants, Dr. Cohen affirms that, because the records of KMLT Gynecology Associates, P.C. and OB GYN establish that plaintiff underwent Pap Smear tests on May 21, 1996, May 30, 1997, June 15, 1999, October 16, 2000, January 9, 2002 and March 19, 2003, and the results from all of these studies were normal, it was not the standard of care to perform a Pap Smear test on plaintiff before the supracervical hysterectomy, done on February 11, 2004. Dr. Cohen further opines that it was not a departure from the standard of care that a supracervical hysterectomy was performed, as opposed to a total abdominal hysterectomy.

“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, 778 NYS2d 98 [2nd Dept. 2004], *aff'd. as mod.*, 4 NY3d 627, 797 NYS2d 403, 830 NE2d 30 [C.A.2005], citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923, 501 NE2d 572 [C.A.1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316, 476 NE2d 642 [C.A. 1985]). “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 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, 808 NYS2d 374 (2d Dept. 2005); *see also*, *DiMitre v Monsouri*, 302 AD2d 420, 754 NYS2d 674 (2d Dept. 2003); *Holbrook v United Hospital Medical Center*, 248 AD2d 358, 669 NYS2d 631 (2d Dept. 1998). "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, 795 NYS2d 317 (2d Dept. 2005) citing *Alvarez v Prospect Hospital*, *supra*). "On a motion by a defendant for summary judgment in a medical malpractice action, the defendant has the initial burden of establishing, *prima facie*, that he or she did not depart from good and accepted medical practice, or if there was such a departure, that it was not a proximate cause of the plaintiff's injuries". *Rosenman v Shrestha*, 48 AD3d 781, 852 NYS2d 378 (2nd Dept. 2008), citing *Rebozo v Wilen*, 41 AD3d 457, 838 NYS2d 1121 (2nd Dept. 2007); *Thompson v Orner*, 36 AD3d 791, 828 NYS2d 509 (2nd Dept. 2007); *Williams v Sahay*, 12 AD3d 366, 783 NYS2d 664 (2nd Dept. 2004).

Once a defendant has met his burden, to defeat the application, a "plaintiff [is] obligated to submit competent, rebuttal medical evidence establishing that defendants

deviated from the applicable standard of care, as well as a causal nexus between their conduct and her injuries (citations omitted)". *Hoffman v Pelletier*, 6 AD3d 889, 775 NYS2d 397 (3rd Dept. 2004). Thus, "[i]n 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'". *Thompson v Orner, supra*, at p. 792, quoting *Domaradzki v Glen Cove Ob/Gyn Assocs.*, 242 AD2d 282, 660 NYS2d 739 (2nd Dept. 1997).

In opposition to the motion, plaintiff asserts that "[h]igh grade endocervical glandular dysplasia could have easily been diagnosed before the supracervical hysterectomy through a Pap smear". Plaintiff's expert expressly states, "within a reasonable degree of medical certainty that had the Pap smear been performed prior to the supracervical hysterectomy, the high-grade cervical glandular dysplasia would have been diagnosed". Plaintiff's expert further states that reliance on a negative Pap smear that was, at the time, almost a year old, was a departure from accepted medical practice. Specifically, plaintiff's expert opines as follows:

in a situation in which a patient is going to undergo a surgical procedure in which her cervix is going to be left in place, as in this case a supracervical hysterectomy, that a simple, safe, effective, inexpensive and accurate exam such as a Pap smear should be performed to see whether this is the appropriate surgery for the patient. The Pap smear is performed by scraping a few cells from the cervix with an instrument. The scrapings are then sent to a lab for evaluation. In the plaintiff Claudia Strafford's case it had been eleven (11) months since her last Pap smear, she had had inconclusive Pap smears in the past and a history of an abnormal Pap smear documented by the history in the Nassau Suffolk Ob Gyn record. It is my opinion within a reasonable degree of medical certainty that the moving defendants departed from accepted standards in they failed to perform a Pap smear in

this instance.

Defendants concede that plaintiff suffered from high grade endocervical glandular dysplasia necessitating the removal of her cervix and the resultant sequella and that the plaintiff's bladder was injured during the laparoscopic trachelectomy. As to the lack of informed consent, plaintiff's expert avers that, since there was no Pap smear taken in anticipation of the supracervical hysterectomy, plaintiff was not notified of her need for a total abdominal hysterectomy to remove her cervix. As a result, plaintiffs assert that defendants did not obtain a full informed consent from plaintiff to perform any surgical procedure.

Summary judgment may not be awarded in a medical malpractice action where the parties offer conflicting expert opinions, which present a credibility question requiring a jury's resolution (citations omitted)" (*Dandrea v Hertz*, 23 AD3d 332, 804 NYS2d 106 [2nd Dept. 2005]; see also *Rosen v Mossi*, 23 AD3d 289, 808 NYS2d 15 [1st Dept. 2005]). The conflicting experts' affidavits establish the existence of issues of fact (*Zymunt v Berkowitz*, 301 AD2d 593, 754 NYS2d 313 [2nd Dept. 2003]; *Thomas v Brookdale Hosp. Med. Center*, 287 AD2d 448, 731 NYS2d 67 [2nd Dept. 2001]).

As to the Hospital

Initially, plaintiffs raises an issue as to the timeliness of the hospital's motion for summary judgment. The motion was clearly submitted thirty-three (33) days after the ninety (90) day period directed in the Certification Order of the Court. An untimely motion for summary judgment may be considered while a timely motion for summary judgment is still pending and involves similar issues for determination (*Joyner-Pack v Sykes*, 54 AD3d 727,

864 NYS2d 447 [2nd Dept. 2008]; *James v Jamie Towers Hous. Co.*, 294 AD2d 272, 743 NYS2d 85 [1st Dept. 2002], *aff'd*. 99 NY2d 639 [C.A.2003]; *Grande v Peteroy*, 39 AD3d 590, 833 NYS2d 615 [2nd Dept. 2007]; *Barca v City of New York*, 13 Misc3d 464, 819 NYS2d 631 [Supreme Bronx Co. 2006]). Accordingly, the Court will address the merits of the hospital's motion for summary judgment.

The hospital moves for summary judgment on the grounds that it cannot be held vicariously liable for the alleged malpractice of private attending physicians nor otherwise liable to plaintiffs based on alleged breach of informed consent. At his examination before trial, defendant, BENJAMIN M. SCHWARTZ, M.D., testified that, at the time of the events in question, he was an attending physician on the staff of GOOD SAM. Similarly, Dr. BEZALEL testified that, in 2004, she was "affiliated" with three (3) hospitals, one of which was GOOD SAM. Dr. ANTONIADIS also testified that he too was "affiliated" with GOOD SAM during the period of time of the subject events.

Ordinarily, a hospital may not be held liable for the malpractice of a physician who is not an employee of the hospital (*see Ventura v Beth Israel Medical Center*, 297 AD2d 801, 747 NYS2d 595 [2nd Dept. 2002], *lv to app den*. 99 NY2d 510; *Cook v Reisner*, 295 AD2d 466, 744 NYS2d 426 [2nd Dept. 2002]; *Ryan v New York City Health & Hospitals Corp.*, 220 AD2d 734, 663 NYS2d 500 [2nd Dept. 1995]; *Sledziewski v Cioffi*, 137 AD2d 186, 528 NYS2d 913 [3rd Dept. 1988]). However, a hospital may be held vicariously liable for the acts of independent physicians if the patient enters the hospital through the emergency room and seeks treatment from the hospital, not from a particular physician (*see Mduba v Benedictine Hospital*, 52 AD2d 450, 384 NYS2d 527 [3rd Dept. 1976]; *see*

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also *Noble v Porter*, 188 AD2d 1066, 591 NYS2d 669 [4th Dept. 1992]; *Agustin v Beth Israel Hosp.*, 185 AD2d 203, 586 NYS2d 470 [1st Dept. 1992]; *Soltis v State of New York*, 172 AD2d 919, 568 NYS2d 470 [3rd Dept. 1991]).

As the court observed in *Rivera v Bronx-Lebanon Hospital Center* (70 AD2d 794, 417 NYS2d 79 [1st Dept. 1979]), there may be circumstances under which liability may be imposed upon independent contractors, and such answer lies in the degree of control exercised by the hospital.

In this case, the co-defendant physicians, BEZALEL, ANTONIADIS and SCHWARTZ, were private attending physicians independently retained by the plaintiff to treat her. While the surgery in question was performed at GOOD SAM, the record is devoid of any proof that any individually and specifically identified hospital employee was involved in the decision to perform the surgery in question nor in its execution. All those actions were performed by private attending physicians, not hospital employees. Moreover, the record is devoid of any proof that the hospital controlled the manner in which the surgery was performed or that it committed any act for which it would otherwise be vicariously liable for the acts of private attending physicians.

Similarly, a hospital is ordinarily not answerable to a plaintiff in breach of informed consent claims (*Fiorentino, supra; Nagengast, supra*). A hospital is under no duty to obtain a patient's informed consent if there is no reason to suspect malpractice would occur (*Fiorentino, supra; Nagengast, supra*). The record is devoid of any proof that the hospital should have interceded in the physician-patient relationship (*Fiorentino, supra*). Based upon the foregoing, it is the judgment of the Court that GOOD SAM is entitled to summary

judgment dismissing the complaint against it. Accordingly, it is hereby

ORDERED, that the BEZALEL, ANTONIADIS and OB GYN motion for summary judgment is granted only to the extent that the action is dismissed against Dr. ANTONIADIS; and it is further

ORDERED, that the motion by GOOD SAM for summary judgment is granted and the action is dismissed against the hospital.

All further requested relief not specifically granted is denied.

This configures the decision and order of the Court.

Dated: December 16, 2008


WILLIAM R. LAMARCA, J.S.C.
ENTERED

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