

Dobsovits v Esposito
2009 NY Slip Op 31221(U)
May 26, 2009
Supreme Court, Nassau County
Docket Number: 9284-07
Judge: Thomas P. Phelan
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 4
NASSAU COUNTY

JANET M. DOBSOVITS, Individually, and as the
Administratrix of the Estate of PAUL DOBSOVITS,
Deceased,

Plaintiff(s),

ORIGINAL RETURN DATE: 03/04/09
SUBMISSION DATE: 04/16/09
INDEX No.: 9284/07

-against-

EDWARD LOUIS ESPOSITO, D.C., PORT
WELLNESS CHIROPRACTIC, P.C., ELIZABETH
DIAS DUNST, F.N.P., RUSSELL HENRY SAMUEL,
M.D., and THE MED STATION, P.C.,

MOTION SEQUENCE #2,3

Defendant(s).

The following papers read on this motion:

Notice of Motion.....	1,2
Answering Papers.....	3
Reply.....	4,5

Motions by defendants for an order pursuant to CPLR 3212 granting defendants summary judgment dismissing the complaint against them are determined as hereinafter set forth.

This is an action sounding in medical malpractice and wrongful death for the care and treatment rendered to plaintiff's decedent, Paul Dobsovits.

Defendant Edward L. Esposito, D.C., a licensed chiropractor, first saw Mr. Dobsovits on November 22, 2005, with complaints of waking up with pain in the back and sternum after sleeping on a large pillow. The symptoms started the day before. Mr. Dobsovits' pain was reported to be sharp, constant and radiated to his arms with an estimated pain of 8 out of 10. He had not consulted with a medical provider for the complaints. He was out of work one day as a result of the complaints. Mr. Dobsovits advised Dr. Esposito that he had a brother who had a heart attack. Plaintiff (decedent's surviving spouse) testified that Mr. Dobsovits' two brothers and father had heart attacks, but the records and testimony do not indicate that Mr. Dobsovits informed Dr. Esposito of this family history. On physical exam, Mr. Dobsovits was noted to be

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5'4" tall and to have a blood pressure of 147/99 (left) and 155/101 (right). Cervical flexion, extension and rotation were all notably limited. Dr. Esposito considered the significance of pain in both arms and felt that this could indicate a neck problem, a heart problem or a lung infection when considered with sternum pain. He evaluated this pain with a Bakody's test which showed that the patient's complaint of pain radiating down both arms was caused by a neck problem. Dr. Esposito checked the jugular veins by turning the patient's head to the left and right and observed that the patient did not get dizzy. Dr. Esposito provided neck adjustment, shoulder adjustment and ultrasound treatment on November 22, 2005. Neck and shoulder adjustments were done with the patient lying on his back. Ultrasound was used to decrease swelling in the neck and upper back via a Mettler Machine for 10 to 15 minutes. The doctor had felt swelling in the neck and back, and the swelling was reduced after the ultrasound treatment. After treatment, the patient's high blood pressure and heart rate continued to indicate a possible heart problem, and consequently Dr. Esposito referred the patient to a medical doctor to be evaluated. Mrs. Dobsovit does not refute Dr. Esposito's assertion that he instructed Mr. Dobsovit to see a medical doctor. The night of the aforesaid examination, Dr. Esposito called Mrs. Dobsovit to see if Mr. Dobsovit had gone to a doctor. Although that conversation is not recorded in the chiropractic records, Dr. Esposito did refer to a conversation of the following evening, where he noted that he had called to see if Mr. Dobsovit had rechecked his blood pressure and again advised the patient to see a medical doctor. Mrs. Dobsovit recalled one phone call from Dr. Esposito, the day after decedent's initial visit. Dr. Esposito spoke directly to Mrs. Dobsovit, and she recalled that the doctor was concerned regarding Mr. Dobsovit rechecking his blood pressure. Mr. Dobsovit returned to Dr. Esposito on December 7, 2005, at which time he reported that he had been seen by a medical doctor who had diagnosed bronchitis, but that no chest x-rays were taken by the physician. Dr. Esposito then provided further chiropractic treatment for the patient's complaints of pain. He asserts he did not take repeat blood pressure measurements because the patient was then under the care of a medical doctor. However, the medical doctor was not made aware that Mr. Dobsovit was also receiving chiropractic treatment.

On November 28, 2005, Mr. Dobsovit visited The Med Station, P.C., where he was examined by defendant Elizabeth Dunst, F.N.P., who obtained a five-day history of fever, chills and night sweats. Mr. Dobsovit's blood pressure was 126/82 with a temperature of 100.8. Mr. Dobsovit had last visited The Med Station on February 12, 2002. Nurse Dunst testified that Mr. Dobsovit gave no medical or family history other than reporting about the previous five days. Further, Nurse Dunst found Mr. Dobsovit had a stuffy nose, postnasal drip and ear wax. His heart sounds were normal with no wheezing. Blood was drawn and showed an elevated white blood count of 13.5 and lymphocytes were low at 11.5. Nurse Dunst made a differential diagnosis of "cerumen impaction" (ear wax) and "fever." Nurse Dunst prescribed a seven-day course of Ceftin, an antibiotic, as well as nasal spray and an allergy medication. Mr. Dobsovit did not return until 10 days later. On December 8, 2005, the day after his second visit to Dr. Esposito, Mr. Dobsovit returned to The Med Station where he was examined by defendant Russell Samuel, M.D. Mr. Dobsovit had a pulse of 78 and a normal temperature of 98.8. Dr. Samuel noted that Mr. Dobsovit's appetite was okay, he was fatigued and had night sweats, a productive cough with clear mucous and his chest was clear to auscultation. Dr. Samuel's physical examination found that Mr.

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Dobsovits had no wheezes, rales or rhonchi in his lungs. Mr. Dobsovits' white blood count was now elevated to 17.5 while his lymphocytes were decreased to 13.5. Based on this examination, Dr. Samuel made a diagnosis of leukocytosis (an increase in the white blood cell count). No chest x-ray or sputum culture were obtained. Mr. Dobsovits did not have a fever or other respiratory symptoms indicative of a respiratory infection on that date. Dr. Samuel diagnosed Mr. Dobsovits with an unresolved respiratory infection and prescribed another seven-day course of antibiotics. Mr. Dobsovits was instructed to return on Wednesday, December 10, 2005, to repeat the blood count. Mr. Dobsovits next returned to The Med Station on December 15, 2005, where he was again seen by Dr. Samuel. Dr. Samuel's medical record indicates that the patient was "very short of breath and complained of shortness of breath." Blood work showed that Mr. Dobsovits' white blood count was now elevated to 24,000 and his platelet count was decreased to 76,000. Dr. Samuel indicated that Mr. Dobsovits' symptoms and complaints were due to a respiratory infection. Dr. Samuel ordered a nebulizer treatment for him and observed that Mr. Dobsovits was in "borderline respiratory distress" at the time he presented to The Med Station on December 15, 2005. Following the nebulizer treatment, Mr. Dobsovits became unresponsive and CPR commenced. One hour later Dr. Samuel called for an ambulance to transport Mr. Dobsovits to Glen Cove Emergency Room where he died. The autopsy performed by the Nassau County Medical Examiner determined that Mr. Dobsovits' death on December 15, 2005, at 6:40 PM was caused by cardiac tamponade due to a myocardial infarction and coronary artery disease.

Defendants Nurse Dunst and Dr. Samuel and The Med Station, P.C. submitted an expert report by Paul E. Harnick, M.D., Board Certified in both Internal Medicine and Cardiovascular Disease. Dr. Harnick opined that with a reasonable degree of medical certainty all of the care and treatment rendered by The Med Station, Dr. Samuel and Nurse Dunst was in all respects in accordance with good and accepted medical practice and did not cause or contribute to the injuries and damages complained of in the lawsuit. Dr. Harnick stated that based on Mr. Dobsovits' presenting signs, symptoms and complaints, Nurse Dunst performed an appropriate, focused examination directed to these complaints. Further, there was no need to refer the patient at that time for any consultations with other specialists or for any outside diagnostic testing such as a cardiologist, nor was there reason to suspect impending myocardial infarction or cardiac disease at the time. Dr. Harnick found no indication in Dr. Esposito's notes for the December 7th visit as to any complaints by the patient as to chest pains radiating down the arm. Further, Dr. Harnick states that Dr. Samuel properly performed a focused physical exam on the patient at that time based on the presenting complaints. Dr. Harnick also stated that it was proper for Dr. Samuel to start the patient on a nebulizer treatment in order to alleviate his respiratory difficulties. There was no indication of contraindications to Albuterol. The nebulizer treatment did not cause or contribute to the death of Mr. Dobsovits. Dr. Harnick states that the treatment rendered by Dr. Samuel during the visits of December 8th and December 15th, as well as the first visit with Nurse Dunst, did not cause or contribute to the death of Mr. Dobsovits. It was not possible, based on the complaints, physical findings and examination, to have made a diagnosis of impending myocardial infarction. They properly arrived at a diagnosis of upper respiratory infection and properly treated the patient for that diagnosis. Also, Dr. Harnick stated that since The Med Station was an acute care facility and the purpose of such facilities is to treat patients with acute medical problems, as

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was the case with Mr. Dobsovits when he came in with very specific complaints, Dr. Samuel and Nurse Dunst properly carried out their role as acute-care providers in their diagnosis and treatment. Defendant's medical expert opines that the care and treatment rendered to Mr. Dobsovits did not cause or contribute to Mr. Dobsovits' death.

In support of their motion for summary judgment defendants Dr. Esposito and Port Wellness Chiropractor, P.C. submit an expert's affidavit by Fred B. Rudin, D.C., a licensed chiropractor. Dr. Rubin stated that Dr. Esposito properly limited his chiropractic examination and treatment pending a medical evaluation of Mr. Dobsovits' condition. Mr. Dobsovits was properly advised by Dr. Esposito to see a medical doctor for evaluation.

Section 6521 of the Education Law defines the practice of medicine as "diagnosing, treating, operating or prescribing for any human disease, pain, injury, deformity or physical condition." Section 6522 of the Education Law provides that "[o]nly a person licensed or otherwise authorized under this article shall practice medicine or use the title 'physician'." Subdivision 1 of section 6551 of the Education Law states:

"The practice of the profession of chiropractic is defined as detecting and correcting by manual or mechanical means structural imbalance, distortion, or subluxations in the human body for the purpose of removing nerve interference and the effects thereof, where such interference is the result of or related to distortion, misalignment or subluxation of or in the vertebral column."

It is apparent from the statutory scheme that chiropractic treatment is a service distinct from medicine and that chiropractors do not practice medicine. *See Vidra v Shoman*, 59 AD2d 714, 715 [2d Dept. 1977]. Dr. Rubin opines that to a reasonable degree of chiropractic certainty Dr. Esposito's actions were within the mandate of Education Law § 6551. Dr. Rubin found that Dr. Esposito correctly determined that the patient's presenting signs, symptoms and complaints warranted medical evaluation. Those presenting signs, symptoms and complaints, including continued high blood pressure and sternum pain radiating to the arms, could, to a reasonable degree of chiropractic certainty, indicate a neck problem, a heart problem or a lung infection, all of which Dr. Esposito included as differential diagnoses. As the diagnosis and treatment of at least two of those differential diagnoses were outside the realm of chiropractic, Dr. Esposito timely and properly instructed the patient to obtain a medical evaluation. He further timely and appropriately determined that the patient had indeed been evaluated by a medical doctor, and he thereafter properly limited his treatment to chiropractic management. Dr. Rubin states that it is not within the chiropractic standard of care for a chiropractor to continue to refer a patient for medical diagnosis once the chiropractor has already done so and is aware that the patient has been seen and diagnosed by a medical doctor. Here, once Dr. Esposito was informed on the decedent's second visit that the decedent had seen and been diagnosed by a medical doctor, Dr. Rubin stated that the standard of care did not call for Dr. Esposito to make any further referrals regarding his initial differential diagnoses, including heart problem or lung infection. Given that Mr. Dobsovits

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was initially seen at The Med Station on Dr. Esposito's instruction for evaluation of the differential diagnoses, that he continued to treat at The Med Station for medical complaints and that the decedent's ultimate injuries were medical in nature, it is Dr. Rubin's opinion to a reasonable degree of chiropractic certainty that the care and treatment rendered by Edward L. Esposito, D.C. did not cause or contribute to any of the injuries alleged by the plaintiff. It is Dr. Rubin's opinion that to a reasonable degree of chiropractic certainty, defendant Edward L. Esposito, D.C. adhered to and did not depart from the applicable standard of care in his care and treatment of the decedent Paul Dobsovits and that no alleged departure on the part of defendant Edward L. Esposito, D.C. caused or contributed to any of the alleged injuries.

On a motion for summary judgment, the Court's function is to decide whether there is a material factual issue to be tried, not to resolve it. (*Sillman v. Twentieth Century-Fox Films Corp.*, 3 NY2d 395, 404 [1957]) A prima facie showing of a right to judgment is required before summary judgment can be granted to a movant. (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York University Med. Ctr.*, 64 NY2d 851 [1986]; *Fox v Wyeth Laboratories, Inc.*, 129 AD2d 611 [2d Dept. 1987]; *Royal v. Brooklyn Union Gas Co.*, 122 AD2d 132 [2d Dept. 1986]) Each of the defendants herein has made an adequate prima facie showing of entitlement to summary judgment.

Once a movant has shown a prima facie right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. (*Friends of Animals, Inc. v. Associated Fur Mfgs., Inc.*, 46 NY2d 1065 [1979]) Conclusory statements are insufficient. (*Sofsky v. Rosenberg*, 163 AD2d 240, aff'd 76 NY2d 927 [1990]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]; see, *Indig v. Finkelstein*, 23 NY2d 728 [1968]; *Werner v. Nelkin*, 206 AD2d 422 [2d Dept. 1994]; *Fink, Weinberger, Fredman, Berman & Lowell, P.C. v. Petrides*, 80 AD2d 781 [1st Dept. 1981], app. disp. 53 NY2d 1028; *Jim-Mar Corp. v. Aquatic Construction, Ltd.*, 195 AD2d 868 [3d Dept. 1993], lv. app. denied 82 NY2d 660.)

In a medical malpractice action, a defendant can make the requisite prima facie showing of entitlement to summary judgment through a medical expert's affidavit. (*Bellino v Spatz*, 233 AD2d 355 [2d Dept. 1996]; *Fritz v Southside Hosp.*, 182 AD2d 671 [2d Dept. 1992]) To rebut this showing, plaintiff must present more than conclusory statements unsupported by evidence. (*Alvarez v Prospect Hosp.*, supra; *Ferrar v South Shore Orthopedic Assoc., P.C.*, 178 AD2d 364 [1st Dept. 1991])

To prove medical malpractice, a plaintiff must show both that there was a departure from an accepted standard of care and that such departure was the approximate cause of the harm complained of (*Amsler v Verilli*, 119 AD2d 786 [2d Dept. 1986]). Critical to plaintiff's proof is evidence that the subject doctor took part in the act which plaintiff claims caused the harm. (*Tessier v New York City Health and Hosps. Corp.*, 177 AD2d 626 [2d Dept. 1991]; *Lucas v Long Island Physicians Assoc.*, 103 AD2d 841 [2d Dept. 1984])

In opposition to the motion by defendants Nurse Dunst and Dr. Samuel, plaintiff has submitted a redacted affidavit by a physician board certified in thoracic and cardiovascular surgery.

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Plaintiff's expert opined that Nurse Dunst and Dr. Samuel failed to elicit a complete prior medical history from Mr. Dobsovits. Plaintiff's expert asserts that had The Med Station defendants properly triaged Mr. Dobsovits, they would have learned of recent visits to Dr. Esposito and his complaints of chest pain with radiation, the family history of a brother suffering a heart attack at an early age, as well as his presenting symptoms of fever, chills and sweats for the previous five days. The gravamen of plaintiff's argument is that had The Med Station defendants conducted a proper triage, a diagnostic EKG and a cardiac work-up would have been ordered revealing coronary artery disease. Plaintiff's expert also claims that Dr. Samuel's alleged failure to adequately ascertain the prior medical history of Mr. Dobsovits and the "superficial physical examination of Mr. Dobsovits on December 5, 2008, precluded him from timely and properly analyzing and treating the cause of an increased white blood count and decreased lymphocytes count as they related to Mr. Dobsovits' coronary artery disease and pending catastrophic myocardial infarction."

Counsel for The Med Station defendants argue that for reasons known only to Mr. Dobsovits he did not deem it important enough to tell Dr. Samuel or Ms. Dunst about the prior chest pain and as such hindered their evaluation of the patient. The Med Station defendants argue that Nurse Dunst and Dr. Samuel documented the fact that they took steps to obtain a complete history from Mr. Dobsovits, but the deceased failed to tell them about his chest pain complaints. Mrs. Dobsovits testified that neither she nor Mr. Dobsovits told Dr. Samuel about those complaints. Consequently, The Med Station defendants assert that both Ms. Dunst and Dr. Samuel performed "focus" examinations to deal with Mr. Dobsovits' presenting complaints and findings, since The Med Station was an urgent care facility whose purpose was to deal with "acute" problems. Dr. Harnick opines that since Mr. Dobsovits did not offer complaints of chest pain radiating down his arms, as he did earlier to Dr. Esposito, there was nothing in the presenting complaints that would have suggested an impending myocardial infarction or that would warrant cardiac work-up.

The motion papers by defendants Nurse Dunst and Dr. Samuel and the opposition papers by the plaintiff raise credibility issues between the plaintiff's and The Med Station experts, and issues of credibility are properly left to a jury for resolution. In light of the conflicting medical expert opinions, defendants Nurse Dunst and Dr. Samuel's motion for summary judgment dismissing the complaint against them is denied. *See Monsels v Sinclair*, 52 AD3d 487 [2d Dept. 2008]; *see also Barbuto v Winthrop Univ. Hosp.*, 305 AD2d 623 [2d Dept. 2003]; *Stoves v City of New York*, 293 AD2d 666 [2d Dept. 2002]; *Halkias v Otolaryngology-Facial Plastic Surgery Assocs.*, 282 AD2d 650 [2d Dept. 2001]; *Zarzana v Sheepshead Bay Obstetrics & Gynecology*, 289 AD2d 570 [2d Dept. 2001]; *Bennett v Knipfing*, 262 AD2d 260 [2d Dept. 1999]; *Weissman v Wider*, 235 AD2d 474 [2d Dept. 1997]. Further, defendants raise an issue of the comparative negligence of Mr. Dobsovits in allegedly failing to furnish a complete and accurate medical history. *See Elkins v Ferencz*, 263 AD2d 372, 373 [1st Dept. 1999].

Plaintiff's attorneys have given no legal authority to support their assertion that the identity of the chiropractic expert may be redacted pursuant to *McCarty v Community Hosp. at Glen Cove*, 203 AD2d 432 [2d Dept. 1994]. (Plaintiffs' attorneys have submitted for an *in camera* inspection an unredacted copy of the chiropractic expert's report. The last page contains the chiropractor's

signature with a jurat notarized on March 30, 2009). The names of medical, dental or podiatric experts may be omitted in actions for medical, dental or podiatric malpractice. CPLR 3101(d)(1)(I). Plaintiff's expert opinion as against defendants Esposito and Port Wellness is not by a physician but by a chiropractor and regards claims of chiropractic malpractice rather than medical malpractice. CPLR 3101(d)(1)(I) is not applicable to actions for chiropractic malpractice. See *Rivera v City of New York*, 150 Misc 2d 566 [Sup. Ct. New York Co. 1991]; see also *Salva v Blum*, 277 AD2d 985 [4th Dept. 2000]; compare *Travis v Wormer*, 136 AD2d 933 [4th Dept. 1988]. Assuming *arguendo* that plaintiff's chiropractic expert's affidavit is deficient because plaintiff failed to submit an unredacted copy with his opposition papers, this Court will nevertheless consider the affidavit as if it were in proper form and grant Dr. Esposito's application for summary judgment.

Given that Mr. Dobsovits was initially seen at The Med Station on Dr. Esposito's instruction for medical evaluation, that the decedent continued to treat at The Med Station for medical complaints and that the decedent's ultimate injuries were medical in nature, plaintiff has failed to rebut Dr. Esposito's *prima facie* showing to a reasonable degree of chiropractic certainty that Dr. Esposito adhered to and did not depart from the applicable standard of care in his care and treatment of Mr. Dobsovits and that no alleged departure on the part of Dr. Esposito caused or contributed to any of the alleged injuries.

The motion by defendants Edward L. Esposito, D.C. s/h/a Edward Louis Esposito, D.C. and Port Wellness Chiropractic P.C. for summary judgment dismissing the plaintiff's complaint against them is granted.

Accordingly, the caption of this action is amended to read as follows:

"JANET M. DOBISOVITS, Individually, and as the Administratrix of the Estate of PAUL DOBISOVITS, Deceased,

Plaintiff,

-against-

ELIZABETH DIAS DUNST, F.N.P., RUSSELL HENRY SAMUEL, M.D., and THE MED STATION, P.C.,

Defendants."

This decision constitutes the order of the court.

Dated: 5-26-09 **ENTERED**  **MAY 29 2009** _____ J.S.C.
NASSAU COUNTY COUNTY CLERK'S OFFICE

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