

Anisis v Husain

2009 NY Slip Op 31480(U)

June 29, 2009

Supreme Court, Nassau County

Docket Number: 2837/06

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE

TRIAL/IAS PART 23

JOHN ANISIS and VALERIE ANISIS, X

Plaintiffs,

Index No.: 2837/06
Motion Sequence...03,05
Motion Date...04/28/09

-against-

MOHAMMAD S. HUSAIN, M.D., JULIUS A. BAZAN, M.D., DAVID D. LOWENKRON, M.D., JOSEPH EICHENBAUM, M.D., MOHAMMED MUNEERUDDIN, M.D., MERCY MEDICAL CENTER, FRANKLIN HOSPITAL MEDICAL CENTER, DR. MOHAMMAD S. HUSAIN, PHYSICIAN, P.C., JOSEPH EICHENBAUM, M.D. & DAVID WEINSTOCK, M.D., P.L.L.C. and MOHAMMED MUNEERUDDIN, M.D., P.C.,

Defendants.

Papers Submitted: X
Notice of Cross-motion.....X
Notice of Cross-motion.....X
Affirmation in Opposition.....X
Reply Affirmation.....X

This cross-motion by the Defendant, Julius A. Bazan and cross-motion by the Defendant, Mohammad S. Husain, M.D. and Mohammad S. Husain, Physician, P.C., for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint against them are **GRANTED**.

The facts of this case were set out in this Court's decision dated March 3, 2009, as were the legal principles applicable to medical malpractice actions in general.

The Plaintiff alleges that the moving defendants, Dr. Bazan and Dr. Husain negligently ruled out stroke of an embolic nature; failed to determine the etiology of his stroke; failed to properly prescribe and administer drugs, including, but not limited to anticoagulants such as Coumadin, Warfarin, Heparin or Lovenox; failed to perform timely and necessary diagnostic tests and procedures; failed to order anticoagulation therapy; failed to recognize the Plaintiff's increased risk for stroke; and, failed to appreciate the significance of his longstanding history of Tetralogy of Fallot.

In support of his motion, Dr. Bazan has submitted the affidavit of Mark A. Kaufman, a Board Certified Neurologist. He states that he is fully familiar with the standards of medical practice in the neurological field in 2005. Having reviewed the claims advanced by the Plaintiff in his Bill of Particulars as well as the Plaintiff's medical records and the testimony given at the examinations before trial, he opines to a reasonable degree of medical certainty that the Defendant, Dr. Bazan did not deviate from those standards in his care and treatment of the Plaintiff and that his care and treatment of the Plaintiff did not cause or contribute to his alleged injuries. Dr. Kaufman concludes that the tests performed at Mercy Medical Center ruled out a cardiac source of emboli for the Plaintiff's stroke as well as the lack of atrial fibrillation and that therefore, there was no indication to prescribe anticoagulant medication. Dr. Kaufman opines that when Dr. Bazan saw the Plaintiff three days following

his discharge from Mercy Medical Center, he properly concluded that he was post-cardiovascular accident and that due to his history of migraines, he was at higher risk for a stroke. Dr. Kaufman opines that Dr. Bazan properly advised him to continue on aspirin, to add folic acid and vitamin E and to modify his diet. Dr. Kaufman notes that the cardiologist, Dr. Lowenkron, who saw the Plaintiff the following day and performed his own echocardiogram confirmed Dr. Bazan's conclusions the very next day and did not recommend anticoagulant medicine either, and that when Dr. Lowenkron personally reviewed the Plaintiff's medical records, including the Plaintiff's echocardiogram and transesophageal echocardiogram at Mercy Medical Center, he concurred in Dr. Muneeruddin's earlier conclusion that there was no evidence of cardiac emboli or indication that the source of the Plaintiff's stroke was cardiac. He notes that Dr. Lowenkron noted that there was evidence of a very small ventricular septal defect just proximal to the aortic valve on the transesophageal echocardiogram but he felt that it did not appear to be hemodynamically significant and that Dr. Bazan and Dr. Lowenkron both believed that the stroke was more likely to be thrombotic. Dr. Lowenkron also felt that there was no abnormality that required Coumadin. Dr. Kaufman explains that where, like here, no cardiac source for the patient's stroke is identified and there is no evidence of atrial fibrillation, anticoagulant therapy is not indicated and could in fact be very dangerous and life threatening because it could lead to a significant hemorrhage. He notes that both Drs. Muneeruddin at Mercy Medical Center and Dr. Lowenkron, as the Plaintiff's follow-up cardiologist both

found that there was no cardiac source of emboli and therefore no reason to prescribe Coumadin and Dr. Kaufman concludes that as a neurologist, Dr. Bazan was justified in relying on them as the Plaintiff's cardiologists to interpret his echocardiogram and transesophageal echocardiogram as showing no cardiac source of emboli and determined that there was no reason to prescribe Coumadin. Dr. Kaufman explains that "[n]ot all strokes are determined to have a definitive cause and many patients experience stroke of unknown etiology [which] is referred to as idiopathic or cryptogenic stroke." He opines that "[a]nticoagulation therapy is not indicated in cases of cryptogenic stroke because it could lead to further hemorrhage." He notes that the Plaintiff was seen and evaluated at the Mayo Clinic in Minnesota and underwent a thorough evaluation by a cardiologist and a neurologist there [and that] there were still no findings which would conclusively suggest an intracardiac source for an embolic event and no evidence of thrombus within the heart." He notes that even the neurologist at the Mayo Clinic stated "... we have not identified any reason for Mr. Anisis to be on longstanding Coumadin." Dr. Kaufman notes that the Plaintiff was only put on anticoagulant therapy **after** he suffered a second stroke even though its source was not identified because anti-platelet therapy had not prevented the second stroke. In conclusion, Dr. Kaufman opines to a reasonable degree of medical certainty that there was no indication to put the Plaintiff on Coumadin before his second stroke in August, 2005; that Dr. Bazan was not negligent in ruling out a cardiac source of the Plaintiff's first stroke and in not finding a definitive source of it; and, in relying on the cardiologist, Dr. Lowenkron, to decide

that Coumadin was not indicated.

Dr. Bazan has established that he did not depart from good and accepted standards of medical practice by, *inter alia*, relying on the Plaintiff's cardiologists with respect to the decision not to prescribe Coumadin thereby establishing his entitlement to summary judgment thereby shifting the burden to the Plaintiff to establish the existence of a material issue of fact. See, *Weiss v Finkelstein*, 13 Misc.3d 1232(A) (Supreme Court Nassau County 2006); see also, *Wamer v Greenberg*, 2008 WL 549159 (Supreme Court Nassau County 2008); *Mikus v Rosell*, 19 Misc.3d 178 (Supreme Court Richmond County 2008); *Elias v Bash*, 54 A.D.3d 354 (2nd Dept. 2008).

In support of his motion, the Defendant, Dr. Husain, has submitted the affirmation of Suja Johnkutty, M.D., a Board Certified Neurologist and Psychiatrist. Having reviewed, *inter alia*, the pleadings and the plaintiff's medical records, he opines to a reasonable degree of medical certainty that Dr. Husain's evaluation and treatment of the Plaintiff was at all times within good and accepted standards of medical care and that nothing Dr. Husain did or failed to do departed from community medical standards or caused the Plaintiff's injuries. He adopts Drs. Bazan, Lowenkron and Muneeruddin's experts' opinions. He notes that Dr. Husain's only interaction with the Plaintiff was while he was at Mercy Medical Center and opines that he did a timely, thorough, appropriate neurological workup, timely required a cardiac consult by Dr. Muneeruddin and appropriately relied on his conclusion that there was not a cardiac source for the Plaintiff's stroke and that Coumadin

accordingly was not indicated. He agrees with Dr. Kaufman that there was “no cardiac source for the patient’s stroke and there is no evidence of atrial fibrillation, there is no indication for Coumadin or other anticoagulation therapy, [and that] [i]n the absence of a proven cardiac source of emboli as a cause for the stroke and without any evidence of atrial fibrillation, the use of anticoagulation therapy, including Coumadin, would not be indicated and in fact, could put the patient at risk for a significant and potentially life-threatening hemorrhage.” Similarly, he agrees with Dr. Kaufman that “[t]he fact that no specific etiology for the patient’s stroke was discovered is not malpractice.” He opines to a reasonable degree of medical certainty that there was no indication to prescribe Coumadin during the Plaintiff’s stay at Mercy Medical Center when he was attended to by Dr. Husain. He notes that despite extensive tests at Mercy Medical Center, the specific cause of the Plaintiff’s stroke was not found and so anticoagulation medicine was not indicated and that even the Plaintiff’s thorough medical workup at the Mayo Clinic did not identify the source of the Plaintiff’s stroke or a reason for him to be on Coumadin. He also agrees with Dr. Kaufman’s conclusion that the Plaintiff was only put on Coumadin after his second stroke not because a cardiac source for that stroke was determined but because he had suffered a second cardiovascular accident while on anti-platelet therapy. In conclusion, Dr. Johnkutty opines to a reasonable degree of medical certainty that Dr. Husain was not negligent in ruling out a cardiac source of the plaintiff’s first stroke and not finding a definitive source of it. It is Dr. Kaufman’s opinion that there was no neurologic indication for anticoagulant medication. It

is also Dr. Kaufman's opinion that Dr. Husain was justified in relying on the Plaintiff's treating cardiologist at Mercy Medical Center.

Dr. Husain has also established that he did not depart from good and accepted standards of medical practice by, *inter alia*, relying on the plaintiff's cardiologist with respect to the decision not to prescribe Coumadin thereby establishing his entitlement to summary judgment thereby shifting the burden to the Plaintiff to establish the existence of a material issue of fact. See, *Weiss v Finkelstein*, supra; see also, *Wamer v Greenberg*, supra; *Mikus v Rosell*, supra; *Elias v Bash*, supra.

In opposition, the Plaintiff has submitted the affirmation of Richard Lechtenberg, M.D., a Board Certified neurologist and psychiatrist. He affirms that the ventricular septal defect revealed via the Plaintiff's transesophageal echocardiogram on February 3, 2005 was a sign that the Plaintiff was at risk for a stroke due to a blood clot passing through the hole in the heart and going to the brain. He notes that in concluding that the stroke was not cardiac in nature, Dr. Lowenkron, a follow-up cardiologist, noted on the Plaintiff's chart: "[g]iven that two neurologists [Drs. Bazan and Husain] now feel the event was unlikely to be embolic and we have only echocardiographic finding that seems unlikely to predispose to a paradoxical embolus, I agree with the prior cardiologist and do not think Coumadin should be started at this time." Dr. Lechtenberg opines that Dr. Bazan's failure to prescribe Coumadin upon the Plaintiff's discharge from Mercy Medical Center was a departure from good and accepted medical practice. As for Dr. Bazan's reliance on the

Plaintiff's cardiologists for that decision, Dr. Lechtenberg opines that "Dr. Bazan cannot shield himself from responsibility by stating that he relied on the cardiac evaluation performed. Dr. Bazan, as the Plaintiff's treating neurologist, had a responsibility to review all available diagnostic testing and formulate a diagnosis for his patient. He opines that to a neurologist, the presence of a ventricular septal defect on a transesophageal echocardiogram of a patient with a surgically manipulated heart is an indication for Coumadin.

Dr. Lechtenberg opines that Dr. Husain departed from good and accepted medical practice by discharging the Plaintiff from Mercy Medical Center without prescribing Coumadin. He opines that given the fact that other sources of a stroke had been ruled out, it was more likely than not that the plaintiff's ventricular septal defect caused his stroke and so Coumadin was needed to prevent future clots from forming and traveling from his heart to his brain. As for Dr. Husain's reliance on the cardiologist, Dr. Lechtenberg simply opines "[t]hat the cardiologist did not recommend Coumadin is of no consequence; Dr. Husain as the attending physician should have ordered the medication himself. The presence of the ventricular septal defect on the transesophageal echocardiogram and the patient's history should have indicated to Dr. Husain that Coumadin was required."

"The existence of a duty is a question of law to be determined by the court."

Markley v Albany Medical Center Hosp., 163 A.D.2d 639 (3rd Dept. 1990); citing *Eiseman v State of New York*, 70 N.Y.2d 175 (1987); *DeAngelis v Lutheran Med. Center*, 58 N.Y.2d

1053, 1055 (1983); see also, *Chulla v DiStefano*, 242 A.D.2d 657 (2nd Dept. 1997). “Although physicians owe a general duty of care to their patients, that duty may be limited to those medical functions undertaken by the physician and relief on by the patient.” *Boone v North Shore Univ. Hosp. at Forest Hills*, 12 A.D.3d 338, 339 (2nd Dept. 2004), citing *Wasserman v Staten Island Radiological Associates*, 2 A.D.3d 713 (2nd Dept. 2003); see also, *Yasin v Manhattan Eye, Ear & Throat Hosp.*, 254 A.D.2d 281, 282-283 (2nd Dept. 1998); *Chulla v DiStefano*, 242 A.D.2d 657, 658 (2nd Dept. 1997), lv to app dism. 91 N.Y.2d 921 (1998); *Markley v Albany Med. Ctr. Hosp.*, *supra*.

The duty owing by the movants is for this court to decide, not the parties nor their expert. Under the circumstances, the moving neurologists properly and adequately discharged their duties by relying on the Plaintiff’s treating cardiologists to decide whether Coumadin should be prescribed. *Boone v North Shore Univ. Hosp. at Forest Hills*, *supra*, citing *Wasserman v Staten Island Radiological Associates*, *supra*; see also, *Yasin v Manhattan Eye, Ear & Throat Hosp.*, *supra*; *Chulla v DiStefano*, *supra*; *Markley v Albany Med. Ctr. Hosp.*, *supra*.

The moving Defendants’ motions are granted and the complaint against them is dismissed.

This constitutes the decision and order of the Court.

DATED: Mineola, New York
June 29, 2009

ENTERED
JUL 01 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE
Hon. Randy Sue Marber, J.S.C.