

Alvarez v Gerberg

2009 NY Slip Op 32174(U)

August 28, 2009

Supreme Court, New York County

Docket Number: 992/07

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 20 NASSAU COUNTY**

PRESENT:

**Honorable Karen V. Murphy
Justice of the Supreme Court**

_____ x

**ADELINA ALVAREZ and JOSE ALVAREZ,
individually and as the Administrators of the Estate
of MATTHEW ALVAREZ, deceased,**

Index No. 992/07

Motion Submitted: 7/20/09
Motion Sequence: 002, 003

Plaintiff(s),

-against-

**BRUCE E. GERBERG, M.D., HUNTINGTON
PEDIATRICS, P.C., DIANE PETERMAN, M.D.,
BERNARD BECKERMAN, M.D., U. MOUSTAFA,
M.D., WILLIAM MICHAEL MARTIN, M.D.,
HUNTINGTON HOSPITAL, ASHOK
CHINTAMAN SHENDE, M.D., SCHNEIDER'S
CHILDREN'S HOSPITAL, ALEXANDER S.
FUCHS, M.D., ELSA VALDERRAMA, M.D.,
TAWFIQUL ALAM BHUTYA, M.D., NORTH
SHORE-LONG ISLAND JEWISH HEALTH
SYSTEM,**

Defendant(s).

_____ x

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....	XX
Answering Papers.....	X
Reply.....	X
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

Motion by defendants Diane Peterman, M.D., Bernard Beckerman, M.D. and Huntington Hospital for an order pursuant to CPLR §3212 granting them summary judgment dismissing the complaint is granted as to Diane Peterman, M.D. and denied as to Dr. Beckerman and Huntington Hospital. Motion by defendant William Michael Martin, M.D. for an order pursuant to CPLR §3212 granting him summary judgment dismissing the complaint is denied.

This is an action to recover damages for medical malpractice. Plaintiff alleges that defendants departed from good and accepted medical practice in treating plaintiffs in that they negligently and carelessly failed to diagnose the infant decedent's cancerous condition; in negligently failing to perform a complete and proper physical examination; . . . in failing to take heed of the infant plaintiff's complaints and his parents' complaints of unremitting abdominal, testicular and back pain; in negligently failing to immediately refer the infant decedent to an oncologist; in negligently failing to be cognizant of, read and interpret CT scan reports ordered by the defendant herein; in negligently failing to follow up for and obtain all radiological reports and CT scan reports in a timely fashion; in negligently arriving at erroneous diagnoses; in failing to arrive at any diagnosis; in failing to perform diagnostic studies in light of persistent symptoms that the infant patient and his parents were complaining of; in negligently treating the infant patient's condition; in allowing the infant patient's medical condition to progress in an unfettered manner to a point beyond which the infant could avoid suffering from serious, permanent and debilitating injuries which ultimately caused and led to his untimely death.

On May 15, 2005, Matthew Alvarez presented to Huntington Hospital ("the hospital") complaining of right testicular pain that started two days earlier without associated injury. Dr. Bernard Beckerman, the attending emergency room physician assigned to Matthew, performed an examination and documented a normal exam. Dr. Beckerman ordered a testicular sonogram, which was negative for torsion. The decedent was discharged on Motrin with instructions to see his primary care physician Dr. Bruce Gerberg of Huntington Pediatrics, P.C. in the morning.

On May 20, 2005, the decedent was seen in Dr. Gerberg's office complaining of abdominal, low back and testicular pain for five days with a decreased appetite and one episode of vomiting. Dr. Gerberg referred the decedent to the emergency room at the hospital. The decedent was initially evaluated by a resident, Dr. Moustafa. In addition, Dr. Beckerman, the emergency room attendant, evaluated the decedent again. Dr. Beckerman's examination revealed abdominal tenderness in the right lower quadrant with no guarding or rebound. An abdominal CT scan and surgical consult was ordered. The abdominal and pelvic CT without intravenous contrast demonstrated marked retroperitoneal lymphadenopathy extending into the right hemipelvis. There was right pelvic sidewall adenopathy with masses.

A surgical consultation was provided by Dr. William Martin and he noted that the abdominal and pelvic CT scan showed "some increased adenopathy without evidence of acute appendicitis, free air or abscess." Dr. Martin's impression was a possible viral process requiring no surgical intervention. Dr. Gerberg was also consulted regarding the labs and the CT findings. The infant was discharged and instructed to take Motrin every six hours for pain, to follow up with his private doctor in the morning and return for any worsening symptoms.

On May 21, 2005, the infant returned to Huntington Pediatrics and was seen by Dr. Eileen Sheehy, then an employee of the practice. Dr. Sheehy's assessment was a questionable dietary indiscretion with a questionable supratentorial component. The plan was for a bland diet and to re-check in the morning.

On May 22, 2005, Dr. Gerberg spoke with the decedent's mother who reported that he was still complaining of body aches, back, abdominal and testicular pain. The plan was to follow in two to three days if the pain persisted. On May 26, 2005, the infant returned to Huntington Pediatrics with continued complaints of abdominal, back and hip pain with occasional vomiting. Dr. Gerberg's plan was to check the labs including amylase and lipase levels and to obtain a CT scan of the abdomen and an MRI of the back.

On May 28, 2005, the decedent returned to Huntington Pediatrics with a fever of 102°, with slight improvement of the back and testicular pain. Dr. Gerberg examined the decedent and noted that his tonsils were erythematous. Dr. Gerberg's assessment was viral syndrome.

On June 8, 2005, the decedent's mother called to report that the infant had back, pelvic and testicular pain, and treatment with a heating pad was recommended. On this same date, the decedent returned to the emergency room at the hospital for an MRI of the abdomen. This could not be completed due to pain. On exam, a mobile non-tender cyst was found in the left lateral neck together with abdominal tenderness. The impression remained back pain. The decedent was discharged with instructions to follow-up with his pediatrician and complete a CT scan and MRI that week.

On June 9, 2005, the decedent presented to the Long Island Jewish Medical Center emergency room with complaints of testicular pain radiating to his back, dysuria and vomiting. A renal sonogram was suspicious for adenopathy in the right lower quadrant, and a CT scan confirmed a right-sided retroperitoneal process. An incisional biopsy frozen section was obtained and ultimately the pathology was reported as acute myelogenous leukemia. Subsequent studies found lung nodules suspicious for metastasis, with a destructive bony lesion in the proximal right tibia.

The decedent received chemotherapy from June 15, 2005 through June 28, 2005. On July 18, 2005, a CT scan revealed an increase in the retroperitoneal mass and lymphadenopathy and a new abdominal wall mass. The new lesion was biopsied and significant for myelogenous leukemia as reported by Dr. Fuchs. The decedent received an additional course of chemotherapy along with radiation therapy consisting of an abdominal bath. A repeat CT scan performed on August 3, 2005 found decrease in the size of the lesions. However, on August 9, 2005, a biopsy was performed of a new right forearm nodule, and the pathological evaluation was reported as anaplastic large cell lymphoma (ALCL) with a notation that review of the two previous biopsies were also anaplastic large cell lymphoma.

Subsequently, various pathology specimens were sent to Memorial Sloan Kettering Cancer Center where the diagnosis of anaplastic large cell lymphoma was confirmed. On August 11, 2005, the decedent was transferred to this facility for further treatment. The decedent remained at Memorial Sloan Kettering Cancer Center until his death on September 21, 2005.

Initially, we note that plaintiff has not submitted any opposition to the branch of the motion which seeks summary judgment as to Dr. Peterman. Hence, the complaint is dismissed as against Dr. Peterman.

Dr. Beckerman, Huntington Hospital and Dr. Martin all move for summary judgment dismissing the complaint claiming that they did not depart from good and accepted medical malpractice and that they did not cause or contribute to any injury allegedly sustained by the decedent.

In opposition to the motion, plaintiff alleges that during the deceased infant's admission to the emergency room of Huntington Hospital on May 20, 2005, defendants negligently failed to diagnose and treat the infant's cancer, namely, anaplastic large cell lymphoma. As a result, the cancer was allowed to go untreated, causing the infant to lose a substantial chance of remission, leading to his death on September 21, 2005. While plaintiff concedes that this form of cancer is relatively aggressive, it supposedly responds well to treatment if diagnosed and treated promptly.

“[O]n a motion for summary judgment dismissing the complaint in a medical malpractice action, ‘the defendant doctor has the initial burden of establishing the absence of any departure from good and accepted medical malpractice or that the plaintiff was not injured thereby’” (*Starr v. Rogers*, 44 A.D.3d 646, 843 N.Y.S.2d 371 (2d Dept., 2007), quoting *Williams v. Sahay*, 12 A.D.3d 366, 368, 783 N.Y.S.2d 664 (2d Dept., 2004); see *Gargiulo v. Geiss*, 40 A.D.3d 811, 836 N.Y.S.2d 276 (2d Dept., 2007); *Alvarado v. Miles*, 32 A.D.3d 255, 820 N.Y.S.2d 39 (1st Dept., 2006), lv to app granted 8 N.Y.3d 810 (2007),

aff'd. 9 N.Y.3d 902 [2007]. “General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant physician’s summary judgment motion (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325, 501 N.E.2d 572, 508 N.Y.S.2d 92 (1986); see *Kremer v. Buffalo Gen. Hosp.*, 269 A.D.2d 744, 703 N.Y.S.2d 622 (4th Dept., 2000); *Juba v. Bachman*, 255 A.D.2d 492, 493, 680 N.Y.S.2d 626 (2d Dept., 1998), lv to app den. 93 N.Y.2d 809 [1999]).

In support of their motion, defendants rely upon the affirmation of Gregory Mazarin, a physician who is board certified in emergency medicine. In his affirmation, Dr. Mazarin opines that:

“with a reasonable degree of medical certainty that at all times the care and treatment rendered to the plaintiff-decedent by Bernard Beckerman, M.D. and Huntington Hospital was in accordance with good and accepted standards of practice. Further, it is my opinion with a reasonable degree of medical certainty that no act or omission by Bernard Beckerman, M.D. or Huntington Hospital caused or contributed to any injury allegedly sustained by the plaintiff-decedent.”

Specifically, Dr. Mazarin attests that the care rendered by the movants on May 15, 2005 “was within accepted standards of care as the clinical and diagnostic evaluation undertaken was appropriate given the patient’s presenting complaints. Dr. Mazarin attests that when Matthew Alvarez returned on May 20, 2005, he received a thorough and complete evaluation and that the movants acted in accordance with accepted standards of care as the results of the clinical and diagnostic evaluations were communicated to the infant-decedent’s pediatrician prior to the infant-decedent being discharged. With regard to the June 8, 2005 presentation, Dr. Mazarin opined that Matthew Alvarez was appropriately evaluated, treated, and released. In sum, Dr. Mazarin [concludes] that all of the care rendered to the plaintiff by Bernard Beckerman, M.D. and Huntington Hospital was rendered in accordance with good and acceptable medical practice and, as such, no act by Bernard Beckerman, M.D. and/or Huntington Hospital caused or contributed to any injury to the plaintiff decedent.”

Preliminarily, it is undisputed that Dr. Martin’s sole contact with the decedent was limited to providing a surgical consultation on May 20, 2005 during the decedent’s Huntington Hospital emergency room presentation. Dr. Martin performed the consultation, ruled out appendicitis, acknowledged an incidental non-emergent finding of lymphadenopathy and referred the decedent back to Dr. Gerberg, his pediatrician, for further follow-up.

In support of his motion for summary judgment, Dr. Martin relies upon the medical records, deposition testimony and expert affirmation of Laurence A. Gordon, a board certified general surgeon. Dr. Gordon opines that Dr. Martin acted within the accepted standard of care. Specifically, Dr. Gordon opines within a reasonable degree of medical certainty that Dr. Martin appropriately performed a surgical consultation to rule out appendicitis in that Dr. Martin documented the decedent's history of testicular and abdominal pain; performed a physical examination of the decedent, including evaluating the decedent's abdomen; reviewed the findings of the abdominal CT scan performed that day in Huntington Hospital; determined that surgical intervention was not indicated and referred the decedent back to his primary care physician for further evaluation.

Dr. Gordon further concludes within a reasonable degree of medical certainty that the findings of adenopathy on the CT scan was not an urgent or emergent surgical condition and that this finding did not warrant a biopsy in the absence of input from further consultants. Dr. Gordon opines that it was not the responsibility of Dr. Martin to request additional consults or further evaluations as Dr. Martin was acting as a consulting physician, and the decedent was the patient of a board-certified, well-qualified pediatrician. Dr. Gordon further opines within a reasonable degree of medical certainty that the care and treatment rendered by Dr. Martin did not cause or contribute to the decedent's alleged injuries.

In sum, Dr. Martin asserts that his contact was limited to performing a surgical consultation to rule out appendicitis and that he referred the decedent back to Dr. Gerberg for further evaluation of the adenopathy reported on the CT scan.

In opposition to the motion, plaintiff submits an expert affirmation of a physician duly licensed to practice medicine in the State of New York, who is board certified in Pediatrics and Pediatric Hematology/Oncology.

In her affirmation, plaintiffs' expert, Joann Porter, opines that the medical care and treatment rendered to the decedent by the movants on May 20, 2005 deviated from accepted standards of medical care and treatment in the clinical and diagnostic evaluation of the decedent and that the deviations were a proximate and significant causative factor of a delay in diagnosis and the spread of Matthew's cancer leading to his death on September 21, 2005.

These deviations consisted of the following:

1. By failing to rule out intra-abdominal pathology, including cancer, as the cause of the child's complaints of right groin pain and dysuria.

2. By failing on May 20, 2005 on the part of the Huntington Hospital, by and through its agents, servants and/or employees, Dr. Beckerman and Dr. Martin, and Dr. Beckerman and Dr. Martin individually, to appreciate, consider and rule out cancer as a cause of the child's history of continuing and progressive signs and symptoms of severe groin, abdominal and back pain, emesis, dysuria and positive test findings, specifically including the abnormal CAT scan of the abdomen.
3. By failing on May 20, 2005 to immediately order and/or recommend to the child's pediatrician and to the parents, hospitalization and performance of a biopsy of the pathology in the abdomen to rule out cancer as the cause of the CAT scan finding and the child's complaints.

Plaintiffs' expert further opines within a reasonable degree of medical certainty that the three-week plus delay in obtaining the appropriate testing and diagnosis of his cancer, exacerbated Matthew's prognosis for remission of his cancer and was a proximate cause of his cancer spreading, all of which was a substantial causative factor in the loss of a significant change of his cancer going into remission, the spread of the cancer, the resulting pain and suffering and his death on September 21, 2005.

Based upon the record submitted, multiple questions of fact exist with respect to whether the defendants failed to report/treat/diagnose the symptoms of the plaintiff in a timely fashion, and as such, summary judgment is inappropriate where the parties offer conflicting expert opinion and thus a credibility issue arises requiring a jury's resolution (*Dandrea v. Hertz*, 23 A.D.3d 332 (2d Dept., 2005); *Rosen v. Moss*, 23 A.D.3d 289 (1st Dept., 2005); *Shields v. Baktidy*, 11 A.D.3d 671 (2d Dept., 2004); *Barbuto v. Winthrop University Hosp.*, 305 A.D.3d 623 [2d Dept., 2003]).

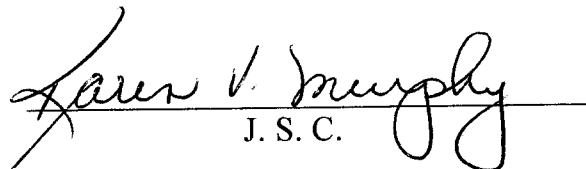
As to Dr. Beckerman, a question of fact exists as to whether he should have performed or recommended a biopsy based upon a CT Scan, which showed a questionable intra-abdominal mass.

In view of the foregoing, the motion is granted as to Dr. Peterman, and denied as to Dr. Beckerman, Huntington Hospital and Dr. Martin.

Accordingly, the complaint is dismissed as against Dr. Peterman and the action is hereby severed and continued as against the aforementioned defendants.

The foregoing constitutes the Order of this Court.

Dated: August 28, 2009
Mineola, N.Y.


J. S. C.

ENTERED

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