

Hare v Donato

2009 NY Slip Op 33230(U)

August 24, 2009

Supreme Court, Richmond County

Docket Number: 100622/06

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index. 100622/06
Motion No.:002**

**ROSEMARY HARE, as Administratrix of the Estate of
STEPHANIE HARE, deceased,**

Plaintiff

DECISION & ORDER

against

HON. JOSEPH J. MALTESE

**MICHAEL J. DONATO, D.D.S.,
ORTHODONTIC SPECIALIST, P.C.,
MARK STEIN, D.D.S., and
RAYMOND G. REMUZZI, D.D.S.**

Defendants

The following items were considered in the review of the following motion for summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendants, Michael J. Donato, D.D.S. (“Dr. Donato”) and Orthodontic Specialist, P.C. (“Orthodontic Specialist”) move for summary judgment dismissing the plaintiff’s complaint. The defendants’ motion is denied in part and granted in part.

Facts

This is an action based on alleged incidences of dental malpractice resulting in the death of Stephanie Hare. Stephanie first presented to Orthodontic Specialist and was examined by Dr. Donato on or about August 2, 2000. According to the records maintained by the moving defendants Stephanie chose not to go forward with orthodontic treatment at that time. On or about July 10, 2002 after Stephanie completed high school she returned to Orthodontic Specialist to begin her treatment for “crowding.” According to records maintained by the defendants it was

recommended that Stephanie undergo a phase II treatment plan with fully banded braces for 24 months. Prior to commencing her orthodontic treatment in 2002, Dr. Donato screened Stephanie for oral cancer, which according to Dr. Donato's testimony was negative.

On two subsequent occasions Stephanie was examined by two different dentists that did not find evidence of oral cancer or lesions in Stephanie's mouth. On or about October 17, 2003 Dr. Raymond G. Remuzzi, a general dentist, performed an oral cancer exam that resulted in a negative assessment. Subsequently, on or about October 21, 2003 Stephanie was seen by Dr. Mark Stein, an oral surgeon, in connection with the extraction of several teeth. According to Dr. Stein's notes Stephanie's mouth showed no signs of lesions.

According to the testimony of Rosemary Hare, she first observed a "small bump" under Stephanie's tongue after Thanksgiving, but before December.¹ Stephanie had a routine visit with Dr. Donato on December 19, 2003. Dr. Donato testified that his notes on the day of that visit do not reflect that Stephanie complained about a sore in her mouth.²

Stephanie next saw Dr. Donato on January 24, 2004. At that time Dr. Donato testified that his notes reflect that he smoothed a band, however his notes did not reflect that Stephanie complained of a sore in her mouth.³ When questioned about Stephanie's January 24, 2004 visit Dr. Donato testified as follows:

- Q. From your note of January 24, 2004 that you did in fact smooth the band that we just discussed, would that indicate to you that Stephanie Hare was complaining of some type of irritation from the band?
- A. I did not see any irritation.
- Q. Did she complain to you of any irritation on January 24, 2004?

¹ Hare, Rosemary transcript at 50.

² Donato, transcript at 48-49.

³ *Id.* at 49-50.

A. The fact that I smoothed the band she might have said to me that the band is rough. That is all I could surmise from that note. If there was an irritation I would have noted it.⁴

Q. You just said it was common for orthodontic patients to have irritation in their mouth. Did Stephanie Hare have any type of irritations in her mouth, that you did not note in any of your notes up until January of 2004?

A. Once again up until January 2004 if there was a sore in her mouth, I would have noted it if it was a sore that was not what I considered a typical orthodontic sore.

Q. What about the sores that you just described as common or typical orthodontic sores, what do they generally appear like?

A. An irritation on a cheek.⁵

Q. So the common orthodontic sores that you just mentioned they only occur on the cheek areas?

A. They can happen in different places, but braces are put on the outside of the teeth, so often these sores are noted on cheeks, lower lips.

Q. The band that was smoothed out on January 24, 2004, that would have been on the side that faces her tongue, correct?

A. Correct.

Q. You said there is two kinds of sores. There is the ones you think are typically related that you don't make notes about, right?

A. Right.

Q. You said some are idiopathic or not related to the appliances that you note. On the January 24, 2004 note there is no note of a sore, correct?

A. Correct.

Q. On that date did she have a sore on her tongue, that you would have considered an atypical orthodontic sore that you would not have noted?

⁴ *Id.* at 50.

⁵ *Id.* at 51.

A. I can't say.⁶

Stephanie's sister, Laura Hare testified that Dr. Donato on occasions saw her and her sister together during their routine visits. Laura testified that she heard Stephanie tell Dr. Donato that she had a sore on her tongue and it was bothering her.⁷ According to Laura, she heard Dr. Donato tell Stephanie that everyone has problems.⁸ However, Laura was unable to state with specificity the date she heard this conversation.

Between January 24, 2004 and April 5, 2004 the record does not indicate that Stephanie voiced any further complaints to Dr. Donato despite being examined on March 3, 2004. On April 5, 2004 Dr. Donato noted the appearance of a leukoplakia type lesion on Stephanie's tongue. Dr. Donato removed an orthodontic band from the area near the lesion and prescribed a saline rinse, and directed that Stephanie return in two weeks. On April 17, 2004, Stephanie presented again to Dr. Donato. At that time Dr. Donato removed another orthodontic band and referred Stephanie to an oral surgeon, Dr. Stein and directed that she return to him in one week.

On April 21, 2004 Dr. Mark Stein, an oral surgeon, examined Stephanie and prescribed antibiotics. Subsequently, on April 28, 2004 Stephanie returned to Dr. Donato who did not see a change in the lesion. On April 29, 2004, Dr. Stein changed Stephanie's antibiotics and scheduled a biopsy for May 4, 2004. On May 12, 2004 Dr. Stein communicated that the biopsy results were positive for squamous cell carcinoma and referred her to Dr. Shaha at Memorial Hospital for Cancer and Allied Diseases.

After undergoing surgery to remove 2/3 of her tongue, a neck dissection, radiation and chemotherapy the cancer spread throughout her body to most of her major organs. Stephanie Hare died on November 30, 2004, approximately six months after being diagnosed with

⁶ *Id.* at 51-53.

⁷ Hare, Laura transcript at 12.

⁸ *Id.*

squamous cell carcinoma.

The defendants move for summary judgment dismissing the plaintiff's complaint arguing that Dr. Donato acted within the prescribed standard of care for orthodontists; that there is no basis for plaintiff's lack of informed consent cause of action; and that a wrongful death action absent a viable underlying claim for malpractice or negligence. The plaintiff offers no opposition to the defendants' motion to dismiss the lack of informed consent cause of action.

Discussion

Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. "Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion."⁹ Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.¹⁰ As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.¹¹ On a motion for summary judgment, the function of the court is issue finding, and not issue determination.¹² In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.¹³

⁹ *Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [2d Dept 1990].

¹⁰ *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1st Dept 1994].

¹¹ *Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.*, 301 AD2d 500 [2d Dept 2003].

¹² *Weiner v. Ga-Ro Die Cutting*, 104 AD2d 331 [2d Dept 1984]. *Aff'd* 65 NY2d 732 [1985].

¹³ *Glennon v. Mayo*, 148 AD2d 580 [2d Dept 1989].

I. Standard of Dental Care Provided to Stephanie Hare

To support their motion for summary judgment, the defendants offer the expert affirmation of George J. Cisneros, D.M.D. Dr. Cisneros affirms that he is licensed to practice dentistry in New York state and is a Diplomate of the American Board of Orthodontics and a Diplomate of the American Board of Pediatric Dentistry.

Dr. Cisneros' affirmation states that Dr. Donato acted within the proper standard dental of care at the time he treated the decedent during her routine orthodontic office visit. It was his opinion that “. . . orthodontic patients often experience sores or irritations in their mouths which are routinely benign.”¹⁴ Additionally, Dr. Cisneros affirms that “. . . the overwhelming majority of patients who experience cancer of the tongue are males over the age of 40 who smoke and drink alcohol to excess.”¹⁵ As such, Dr. Cisneros's affirmation concludes that Dr. Donato's conservative approach to treating the decedent was within the reasonable standard of dental care.

This court finds that the evidence presented by defendants adequately met their burden to demonstrate a prima facie entitlement to judgement as a matter of law. Once the moving party has made a showing of sufficient evidence, the burden shifts to the party opposing summary judgment to put forth evidence in admissible form to establish a triable issue of fact.¹⁶

In opposition the plaintiff introduces the affirmation of Myron Gurman, D.D.S., F.A.C.D.. Dr. Gurman affirms that he is a 1963 graduate of New York University College of Dentistry, with post graduate training in Orthodontics also at the New York University College of Dentistry. Dr. Gurman is a Diplomate of the American Board of Orthodontics and a Fellow of the American College of Dentists. Dr. Gurman affirms that Dr. Donato departed from the

¹⁴ Affirmation of George J. Cisneros, D.M.D. at ¶ 7.

¹⁵ *Id.*

¹⁶ *Zuckerman v. City of New York*, 49 NY2d 557 [1980].

standards of good and accepted dental practice when he treated the decedent. Dr. Gurman affirms that:

In my experience as an Orthodontist, for a patient to suddenly start complaining about a band irritating her tongue, especially if that band has been present for over a year, is a symptom of tongue enlargement, which is warning of a growth developing. Additionally, I find it highly suspect that a patient would complain about an Orthodontic band and that there was absolutely no irritation as Dr. Donato maintains.¹⁷

Based on the expert opinion of Dr. Gurman, this court finds that there is an issue of fact concerning the appropriate standard of dental care appropriate where a patient complains of tongue irritation. As such, this court finds that where there is a conflict with regard to there was a departure from prevailing standard of dental care an issue of fact exists.¹⁸

II. Causal Connection between the alleged breach of the duty of care and Stephanie Hare' Death

The defendants argue that in the event this court found that a question of fact existed with respect to whether Dr. Donato departed from the standard of care, they are entitled to summary judgment because, they argue, that none of his acts or omissions were the proximate cause of Stephanie Hare's death from cancer.

In support of their motion the defendants annex the expert affirmation of Ivan K. Rothman, M.D. Dr. Rothman is licensed to practice medicine in New York state and is a Diplomate of the American Board of Internal Medicine and a Diplomate of the American Board of Internal Medicine, Medical Oncology. In his affirmation Dr. Rothman posits that:

¹⁷ Affirmation of Myron Gurman, D.D.S., F.A.C.D. at ¶ 25.

¹⁸ *Prigorac v. Park*, 20 AD3d 363, [1st Dep't 2005].

Stephanie Hare was diagnosed with advanced cancer in May 2004 and with terminal, widespread Stage IV cancer in November 2004, only eleven months from the time she first allegedly complained to Dr. Donato of an irritation on her tongue. It is my opinion within a reasonable degree of medical certainty that Ms. Hare's tongue cancer was present although not clinically detectable, for years before she developed any symptoms. It is also my opinion within a reasonable degree of medical certainty that Ms. Hare already had incurable Stage IV cancer by the time she first complained to Dr. Donato of an irritation on her tongue and therefore, Dr. Donato's alleged failure to diagnose the patient's cancer between December 19, 2003 and April 17, 2004 (when he referred her to the oral surgeon) had no adverse impact whatsoever upon Ms. Hare's treatment options, prognosis or life expectancy. It is my opinion, within a reasonable degree of medical certainty that even with earlier diagnosis, Stephanie Hare would still have needed surgery to remove a significant portion of her tongue, she still would have needed a neck dissection, she still would have needed reconstruction surgery and she still would have needed chemotherapy and radiation. Dr. Donato's treatment was not the proximate cause of Ms. Hare's injuries or her death. . .¹⁹

Contrary to the assertions of the plaintiff, the expert affirmation of Dr. Rothman satisfies the defendants' burden of demonstrating a prima facie entitlement to judgment as a matter of law. Unlike the defendant expert affirmation in *Francis v. Mishra*, Dr. Rothman clearly addressed whether the delay in diagnosing the cancer impacted upon the surgery and treatment required, as well as the Stephanie Hare's prognosis after such treatment.²⁰ In opposition, the plaintiff proffers the expert affirmation of Jeffrey N. Myers, M.D., Ph.D., F.A.C.S. a physician licensed to practice medicine in the State of Texas. Dr. Myers is a 1991 graduate of the University of Pennsylvania School of Medicine. He is board certified in Otolaryngology by the American Board of Otolaryngology and am a Diplomate of the American Academy of Otolaryngology-Head and Neck Surgery Foundation. Dr. Myers is currently the Ashbel Smith Professor in the Department of head and neck surgery at the University of Texas, M.D. Anderson

¹⁹ Affirmation of Ivan K. Rothman, M.D. at ¶ 15.

²⁰ *Francis v. Mishra*, 60 AD3d 806, [2d Dep't 2009].

Cancer Center.

Dr. Myers affirms that:

23. The surgical pathology indicated a “. . . 5cm invasive squamous cell carcinoma, moderately to poorly differentiated, with perineural invasion and no vascular invasion.” The total size of 5cm makes the “Tumor” stage III for Oral Carcinoma. Based on my training, experience and research, and within a reasonable degree of medical certainty, the cellular description of the tumor as “moderately to poorly differentiated” is typical of a Oral Carcinoma tumor with a doubling time of less than 1 month; and my opinion is consistent with the descriptions of the tumor progression by Mark Stein, D.D.S., M.D. and the doctors at Memorial Sloan Kettering Hospital. Dr. Stein noted a visible difference in the tumor in 8 days; as well as Mrs. Hare’s testimony that amass was visible in December of 2003. However, I don not believe the tumor’s doubling size was so rapid to be invisible on March 3 and be ~3cm on April 5, as Dr. Donato maintains.

24. Additionally, the surgical pathology report noted that out of 33 lymph nodes examined there were two described as “. . . L(ef) Level III lymph node measuring 2.5cm with extracapsular extension. There was an additional left neck node involved with metastatic tumor measure 0.9cm without extracapsular extension.” Based on my trainin, experience and research, and within a reasonable degree of medical certainty, the two (out of 33) lymph nodes positive for metastatic cancer indicate local metastasis; and there was no evidence of distant metastasis at the time of surgery. It took an additional 5-6 months for distant metastasis to manifest itself. The pathology indicated only 1 lymph node extended beyond the extracapsular area, and there was “. . . no vascular invasion . . . “ of the primary tumor. Based on my training, experience and research, and within a reasonable degree of medical certainty that had the primary been detected and treated 4 months earlier, the probability of local and distant metastasis would have been less than 50% . . . ²¹

As such this court finds that the plaintiff satisfied her burden to demonstrate that an issue

²¹ Affirmation of Jeffrey N. Myers, M.D., Ph.D., F.A.C.S. at ¶¶ 23 and 24.

of fact exists concerning whether Dr. Donato's alleged failure to diagnose the squamous cell carcinoma in Stephanie Hare resulted in her ultimate death.²²

III. Plaintiff's Expert Opinions

The defendants argue that the opinions of both Dr. Gurman and Dr. Myers must not be considered by this court. According to the defendants, Dr. Gurman failed qualify himself with respect to his knowledge and familiarity with the rate of cancer progression, as well as, the effectiveness of surgical or medical treatment of the disease. This court did not rely on Dr. Gurman's opinions with respect to the progression of the cancer in Stephanie Hare; rather, this court accepted Dr. Gurman's opinion as an orthodontist in defining a completing standard of dental care when a patient complains of irritation to their tongue after a significant period of time elapsed from the date the orthodontic appliance was first attached to the patient's tooth and their complaints. There is no question that an individual with Dr. Gurman's qualifications cannot offer an opinion with respect to the standard of dental care relating to the care of patients with orthodontic appliances.

Dr. Meyers is an expert Otolaryngologist, not an oncologist. The Appellate Division, Second Department has held that a medical expert need not be a specialist in a particular field to testify or submit an affidavit regarding accepted practices in that particular field, but the witness nonetheless should possess the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable. Thus, when a physician ventures outside his or her area of specialization, he or she must lay a foundation that supports the reliability of the opinion rendered.²³ In this case, Dr. Myers affirmed that as the Director of Research, Department of Head and Neck Surgery, Division of Surgery at the University of Texas,

²² See, *Francis v. Mishra*, 60 AD3d 806, [2d Dep't, 2009]; see also, *Borawski v. Huang*, 334 AD3d 409, [2d Dep't 2006].

²³ *Behar v. Coren*, 21 AD3d 1045 [2d Dep't. 2005].

M.D. Anderson Cancer Center he conducts research on “squamous cell carcinoma of the oral cavity.”²⁴ In addition, Dr. Myers affirms that he has authored articles specific to oral cancer and has examined patients with squamous cell carcinoma similar to Stephanie Hare.²⁵ This court finds that Dr. Myers affirmation properly laid a foundation to base his opinion in opposition to the defendants’ motion for summary judgment.

Conclusion

A motion for summary judgment must be denied if there are “facts sufficient to require a trial of any issue of fact” (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. “Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion.”²⁶ Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.²⁷ In this case, the plaintiff came forward with expert evidence that demonstrated a triable issue of fact with respect to her first and third causes of action. However, the plaintiff offered no opposition to the defendant’s arguments that the second cause of action for lack of informed consent be dismissed. As such, the defendants’ summary judgment motion is granted only to the extent that it sought the dismissal of the plaintiff’s second cause of action.

Accordingly, it is hereby:

ORDERED, that Michael J. Donato, D.D.S. and Orthodontic Specialist, P.C.’s motion for

²⁴ Affirmation of Jeffrey N. Myers, M.D., Ph.D., F.A.C.S. at ¶ 4.

²⁵ *Id.* at ¶ 5.

²⁶ *Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [2nd Dept 1990].

²⁷ *American Home Assurance Co., v. Amerford International Corp*, 200 AD2d 472 [1st Dept 1994].

summary judgment is granted to the extent that they sought the dismissal of the plaintiff's second cause of action for lack of informed consent, and it is further

ORDERED, that Michael J. Donato, D.D.S. and Orthodontic Specialist, P.C.'s motion for summary judgment dismissing the plaintiff's first and third causes of action for dental malpractice and wrongful death respectively is denied; and it is further

ORDERED, that the parties return to DCM Part 3 for a pre-trial conference on **Monday, September 28, 2009 at 10:00 A.M.**

ENTER,

DATED: August 24, 2009

Joseph J. Maltese
Justice of the Supreme Court