

<b>Espinal v Jamaica Hosp. Med. Ctr.</b>
2009 NY Slip Op 33387(U)
April 8, 2009
Supreme Court, Kings County
Docket Number: 49078/00
Judge: Gerard H. Rosenberg
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At an I.A.S. Term, Part MMTRP, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 8<sup>th</sup> day of April, 2009.

**P R E S E N T:**

**HON. GERARD H. ROSENBERG,**  
Justice.  
-----X

**STEVEN ESPINAL,**  
*Plaintiff,*  
*-against-*

**JAMAICA HOSPITAL MEDICAL CENTER,  
ROGER TORRES, MARITZA TORRES and  
RICHARD MODICA,**  
*Defendants.*  
-----X

**DECISION & ORDER**

Index No. 49078/00

Cal No. 2008-007622T

Motion Seq. No. 007

The following papers numbered 1 to 4 read on this motion.

	Papers Numbered
Notice of Motion, Affirmation(s)/Affidavit(s) and Exhibits Annexed _____	1 - 2
Affirmation(s) in Opposition and Exhibits Annexed _____	3
Reply Affirmation(s) and Exhibits Annexed _____	4

Upon the foregoing papers, and upon oral argument, defendants Jamaica Hospital Medical Center (JHMC) and Roger Torres (Mr. Torres) move pursuant to CPLR 3212 for an order granting summary judgment and dismissing the complaint.

***Background***

This is an action alleging negligence, intentional tort, and negligent hiring, training and supervision. Plaintiff was involved in a serious vehicular accident on September 18, 1999 when he was riding his motorcycle and was struck by an automobile whose driver and owner are co-defendants Maritza Torres and Richard Modica. Plaintiff allegedly was not wearing

a helmet and was thrown 50 to 60 feet. Upon his arrival at JHMC plaintiff had a lacerated forehead with visible brain matter. He remained at JHMC for months. He claims that on December 18, 1999, during his admission to JHMC, he was involved in a physical altercation with defendant Roger Torres, a security guard assigned to the plaintiff while under one-to-one watch, in which plaintiff's head was allegedly pushed into a bulletin board. Plaintiff alleges that as a result of this "assault" he was caused to suffer additional physical injuries.

*The Motion*

In support of the motion JHMC and Mr. Torres submit the affirmation of Stephen Burstein, M.D., a physician board certified in Neurosurgery. After review of the medical records and radiological films from JHMC, the deposition transcripts and plaintiff's subsequent medical records, Dr. Burstein opines that all of the plaintiff's claimed injuries from the alleged altercation are entirely attributable to the original massive head injury sustained by the plaintiff on September 18, 1999, and that there is no competent medical proof that the alleged altercation on December 18, 1999 contributed in any way to the plaintiff's head trauma. Moreover, Dr. Burstein opines that the treatment rendered to the plaintiff throughout his stay at JHMC was entirely within accepted standards of medical care.

Dr. Burstein explains that the head trauma the plaintiff sustained in the motorcycle accident on September 18, 1999 was very serious, and that the survival rate for patients with similar injuries was very low. Radiological films taken of the plaintiff's head the day of the accident revealed the following: subarachnoid hemorrhage; hematoma in the frontal lobe; facial fractures and contusions; an orbital roof fracture which was comminuted and displaced

with bone fragments in plaintiff's brain; a maxillary sinus fracture; an ethmoid sinus fracture; and white matter tracts which were damaged from the sudden deceleration of the accident. Dr. Burstein opines that with these types of extensive head injuries the injury typically gets worse before it gets better, as swelling and bleeding increase over time before they begin to subside. Furthermore, Dr. Burstein opines that any contact the plaintiff may have had with security guard Torres on December 18, 1999 had absolutely no effect upon his brain injury. As evidenced by the medical records from September 1999 through January 2000, Dr. Burstein opines that it is unequivocal that the plaintiff did not sustain any additional trauma from the time of the motor vehicle accident until the time of his release from JHMC.

Dr. Burstein notes that films taken of the plaintiff's head on September 20, 1999 indicate that a catheter had been placed in the ventricles. There was edema of the frontal lobes and some arteries had been occluded. Two epidural hematomas were present - one on the left side and one on the right. Further, the entire brain had been pushed back from the impact and was not in the correct positioning in the skull. In addition, there were pieces of broken cranial roof in his brain. Films taken on September 27, 1999 showed additional fluid collection and more swelling in the ventricles. Some of the bleeding was resolving, but the brain was still very swollen. Films taken on October 6, 1999 indicated that the brain was no longer as swollen and that the edema was resolving, but that the brain was developing atrophy. It appeared that the epidural hematomas had been operated on. Films taken on October 20, 1999 indicated that the orbital roof on the right had been surgically repaired. These films also showed fractures at the bases of the skull. Films taken on October 21, 1999 showed air in the

brain. Dr. Burstein states that this is a common occurrence with this type of injury - a combination of facial fractures and the damage to the brain create changes in nasal pressure which then allows air into the brain. Also seen on these films were subdural fluid collections. Dr. Burstein opines that each of these conditions were complications of the severe brain injury which plaintiff sustained as a result of the motor vehicle accident, and that due to the complexity and severity of the brain injuries sustained in the motor vehicle accident, the plaintiff's brain condition was constantly changing as is normal and necessary for the brain to heal.

Dr. Burstein states that the records reflect that the patient and/or his family refused any additional head films be taken after October 21, 1999, until after the altercation with security guard Torres, which occurred on December 18, 1999. Films taken four days later - on December 22, 1999 - showed that the plaintiff's brain appeared slightly improved, the air was gone and the subdural fluid collections were gone. While areas of hydrocephalus and encephalomalacia were seen, Dr. Burstein opines that the hydrocephalus and encephalomalacia had absolutely nothing to do with the altercation with security guard Torres and were entirely attributable to plaintiff's original brain injury.

He explains that hydrocephalus is defined as an abnormal expansion of cavities (ventricles) within the brain that is caused by the accumulation of cerebrospinal fluid, which results from bleeding in the brain, and that the development of hydrocephalus is extremely common in the months following a severe head injury. Dr. Burstein opines that the hydrocephalus which was seen in the December 22, 1999 films is entirely attributable to the

initial injury. In this instance, blood in the subarachnoid space from the initial trauma caused the hydrocephalus to develop over time. Additionally, because the plaintiff sustained subarachnoid hemorrhage as a result of the motor vehicle accident, the pathways which absorb spinal fluid became blocked, causing hydrocephalus months after the initial trauma. Further, as hydrocephalus results from bleeding in the brain, significant bleeding would have been required to cause the acute hydrocephalus seen in the plaintiff's brain as seen on the December 22, 1999 films. As there was no bleeding shown on these films, Dr. Burstein opines that this was indicative of the fact that this was a slow developing hydrocephalus, entirely attributable to the original brain injury sustained on September 18, 1999.

Dr. Burstein further explains that encephalomalacia is a softening of the brain tissue, usually caused by vascular insufficiency or degenerative changes, and that the development of encephalomalacia takes at least two weeks from the date of the injury. Thus, he opines that it is medically impossible for the alleged altercation which took place on December 18, 1999 to have caused the encephalomalacia seen on the December 22, 1999 films, as the four-day interval was not sufficient time for encephalomalacia to develop.

Dr. Burstein opines that having reviewed all CT films from both before and after the alleged scuffle with the security guard, there are no additional injuries to the brain other than what was caused by the initial motorcycle accident in September, 1999. He opines that the hydrocephalus and encephalomalacia would both have been seen had the head films been taken prior to the December 18, 1999 scuffle with security guard Torres, and that the films and records show absolutely no injury attributed to the December 18, 1999 incident.

Moreover, the surgical area of craniotomy remained intact, even after the alleged incident with security guard Torres.

Dr. Burstein therefore opines that all of the plaintiff's claimed injuries from the alleged altercation are entirely attributable to the original massive head injury sustained by the plaintiff on September 18, 1999, including traumatic brain injury; multiple facial and orbital fractures; the CT scan of the brain following the alleged altercation which indicated bilateral frontal encephalomalacia; hydrocephalus with enlargement of all ventricles; and brain damage causing deficits in speech, language, attention, intellectual functioning and short term memory loss. He further opines that there is no competent medical proof that the alleged altercation on December 18, 1999, contributed in any way to the plaintiff's head trauma, and that there is absolutely no medical proof that the plaintiff sustained any injuries as a result of the alleged altercation.

#### *Plaintiff's Opposition*

In opposition to the motion plaintiff submits an affidavit from Juan Espinal, plaintiff's father, and a "Neuropsychological Evaluation" report from Jason Brown, M.D. which is submitted as an affirmation pursuant to CPLR 2106.

In his affidavit, plaintiff's father states that neither he, the plaintiff, nor any member of plaintiff's family refused any medical test or treatment during plaintiff's admission to JHMC until after December 18, 1999. He states that on December 18, 1999 the plaintiff was assaulted by security guard Torres, who slammed his son's head into a corkboard on the wall and threw him down on the bed, as a result of which "Steven sustained a new head injury."

Mr. Espinal states that prior to the assault the plaintiff's condition and abilities had been improving and his aggressive tendencies which had developed from the accident were subsiding, whereas after the assault, the reverse was true. His son became more aggressive, and for the first time complained that his vision was impaired and he could not see out of his left eye. Plaintiff's father therefore claims that the assault of December 18, 1999 "either created, exacerbated, or aggravated the brain injuries, cognitive deficits and sensory difficulties" from which his son currently suffers.

The affirmation of Dr. Brown<sup>1</sup> indicates that he has reviewed the JHMC records and the affirmation of defendant's expert. He notes that the plaintiff was originally in a coma for 19 days following the motor vehicle accident. By mid-October he was awake and responsive, but required restraints in bed. He began a rehabilitation program, and in December was placed on one-to-one watch due to his agitation. Dr. Brown indicates that the JHMC records contain no mention of the incident with Mr. Torres on December 18, 1999, and states: "However, it is apparent that a neuropsychological re-evaluation was conducted on 12/20 with no explanation of the reason for re-testing."

Dr. Brown notes and concurs with the findings of Dr. Burstein that the encephalomalacia, or softening of the brain, was attributable to the effects of the accident. However, he disagrees with Dr. Burstein on the question of hydrocephalus. He notes that a

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<sup>1</sup> Dr. Brown does not indicate his qualifications to render an opinion in this matter. However, reference to the Internet website "New York State Physician Profile" (<http://www.nydoctorprofile.com>, [accessed April 8, 2009]) indicates that a Jason Walter Brown, M.D. is board certified in Psychiatry and Neurology.

shunt was surgically placed in the plaintiff a short time after the assault, and states: "It is possible that the reported blow to the head, coming at a time when brain tissue was still in a relatively acute state of recovery, may have caused the hydrocephalus or aggravated the underlying condition, requiring the shunt to remove ventricular fluid or relieve increased intra-cranial pressure."

Dr. Brown opines that the statement by Dr. Burstein that the plaintiff did not sustain any additional trauma from the contact with the security guard on December 18, 1999 is "quite astonishing" as Dr. Burstein "is relying totally on the hospital chart, and it strains the imagination to think that the staff would write that the patient had been beaten by one of their own. Moreover, if there was a beating with injury to the head, would Dr. Burstein say so categorically that any such physical assault would have no effect on the brain? If the beating were to have been severe, would he be willing to admit it could cause brain damage in a normal individual and that a person with a pre-existing injury would be more sensitive to the effects of a subsequent head injury?"

Dr. Brown acknowledges that bleeding is a common cause of hydrocephalus. He states that in spite of the finding of hemorrhage on the initial scans in September, hydrocephalus did not develop in the month following the accident. He opines that if, as Dr. Burstein maintains, the accident was the sole cause of the hydrocephalus, there should have been some evidence of its onset in the October 21, 1999 films more than a month post-injury.

Dr. Brown notes Dr. Burstein's statement that the absence of blood on the December 22, 1999 films indicates a slowly developing hydrocephalus unrelated to the assault. Dr.

Brown opines, however, that "it might not take much to tip someone predisposed by an injury into a hydrocephalic state. Repeat bleeding is not the only possible cause. There are mechanical factors that also play a role. A slight shift in the mechanics of fluid removal might well initiate hydrocephalus without further bleeding. It is possible that these mechanics and Mr. Espinal's increased predisposition to this type of brain injury caused the development of hydrocephalus following the reported [December 18, 1999] assault."

Dr. Brown concludes that a reported assault on December 18, 1999 would have been a sufficient cause to initiate the hydrocephalus and aggravate the head injury suffered in the motorcycle accident, exacerbating pre-existing cognitive deficits and behavioral problems. The necessity of taking films four days after the assault is suggestive that the assault did occur and that there were clinical or other reasons to examine the brain shortly afterwards.

*Defendants' Reply*

In reply defendant submit an additional affirmation from Dr. Burstein, in which he notes that plaintiff's expert's report never states that he reviewed the brain films taken on December 22, 1999, four days after the alleged altercation, whereas Dr. Burstein has reviewed all head films taken at JHMC for this patient and reiterates "that there is no evidence of any trauma or other additional injuries on any of these films separate and apart from those caused by the initial motorcycle accident." He disputes Dr. Brown's opinion that the claimed assault "would have been a sufficient cause to initiate the hydrocephalus and aggravate the head injury" as not based in fact and as not a medically sound assertion. He opines that for "mechanical factors" to cause hydrocephalus, trauma would have to be observed on the films,

and there is none other than that from the initial motorcycle accident. He also states that he disagrees that hydrocephalus, caused from any blow to the head which may have occurred on December 18, 1999, could have been seen on films taken on December 22, 1999. He opines that hydrocephalus simply does not develop that quickly from any trauma or mechanical event. Dr. Burstein also takes issue with plaintiff's expert's statement that if hydrocephalus were caused by the initial motorcycle accident it probably would have been noted on the films taken one month later. He opines that this is simply untrue as hydrocephalus takes time to form, often several months, after a trauma.

Dr. Burstein also opines that the fact that films were taken on December 22, 1999 does not prove anything, other than that plaintiff "finally agreed to have follow-up films taken after the alleged altercation with the security guard." He states that his review of the chart indicates numerous places which show that plaintiff refused all testing in the weeks leading up to the incident, contrary to the plaintiff's assertions. He also notes that it is typical after major brain surgery and a major head trauma for numerous follow-up brain scans to be performed, as was done in this case. He finds multiple evidence in the chart that plaintiff's headaches, behavioral problems and visual problems were all present prior to the alleged incident in December 1999 and opines that none of plaintiff's symptoms were exacerbated or caused by the scuffle with the security guard.

Lastly, Dr. Burstein states that Dr. Brown's report is filled with language such as "it is possible" and "may have caused" and "strongly suggestive" and "might" and "it is probable" and fails to state, within a reasonable degree of medical certainty, that the alleged

altercation with the security guard caused hydrocephalus and exacerbated plaintiff's neurological symptoms. In contrast, Dr. Burstein opines, within a reasonable degree of medical certainty, that the altercation with the security guard, even if that scuffle resulted in repeated banging of the head, did not cause hydrocephalus or an exacerbation of neurologic issues.

#### *Analysis*

"It is well settled that 'the drastic remedy of summary judgment is appropriate only 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'" (*Marine Midland Bank N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 610 [1990]). The focus on a summary judgment motion is one of issue finding, not issue determination (*Sillman v Twentieth-Century Fox Film Corp.*, 3 NY2d 395), and a court on a summary judgment motion does not determine credibility (see, *S.J. Capelin Associates, Inc. v Globe Manufacturing Corp.*, 34 NY2d 338, 341).

Preliminarily, defendant's expert has opined that the treatment rendered to the plaintiff throughout his stay at JHMC was entirely within accepted standards of medical care. That plaintiff's expert has not addressed this issue at all is not entirely surprising since a reading of the summons and verified complaint does not reveal a cause of action sounding in medical malpractice. Rather, plaintiff alleges causes of action in negligence, intentional tort, and negligent hiring, training and supervision. It appears that defendants' expert addressed the

medical malpractice issue based upon several allegations set forth in the bills of particulars which are in the nature of medical malpractice. In any event, since defendants have established their prima facie entitlement to summary judgment on issues of medical malpractice "by adducing expert opinion evidence that they did not deviate from good and accepted medical practice in their treatment of the [plaintiff]" (*Dandrea v Hertz*, 23 AD3d 332, 332 [2005]), and since plaintiff has failed to raise a triable issue of fact thereto (see *Rebozo v Wilen*, 41 AD3d 457 [2007]), summary judgment is granted to the defendants on any issues of medical malpractice which may have been alleged as to these defendants.

The main focus of the motion obviously focuses on the alleged assault by Mr. Torres upon the plaintiff and the alleged sequelae of that incident. Through the affirmation of Dr. Burstein defendants have established their prima facie entitlement to summary judgment insofar as Dr. Burstein unequivocally opines that all of the plaintiff's claimed injuries from the alleged assault are entirely attributable to the original massive head injury sustained by the plaintiff in the motorcycle accident.

In opposing the defendants' motion, plaintiff has submitted an affidavit from plaintiff's father which is in the nature of hearsay to the extent that it speaks of the assault, since Mr. Espinal does not state that he was present when it occurred, and incompetent to the extent that Mr. Espinal offers his opinion that the assault "either created, exacerbated, or aggravated the brain injuries, cognitive deficits and sensory difficulties" from which his son suffers. These are medical opinions which Mr. Espinal has not established he is entitled to render.

While the affirmation of Dr. Brown may be permeated, as defendants alleged, with

such phrases as “it is possible” and “may have caused” and “strongly suggestive” and “might” and “it is probable”, the court has looked beyond those phrases and examined plaintiff’s opposition in a light most favorable to the plaintiff, as is required (*Mullin v 100 Church LLC*, 12 AD3d 263 [2004]; *Marine Midland Bank N.A. v Dino & Artie’s Automatic Transmission Co.*, 168 AD2d 610, supra; *Strychalski v Mekus*, 54 AD2d 1068 [1976]).

Defendant’s expert asserts that in claiming that the hydrocephalus was caused by the altercation with the security guard, plaintiff’s expert has failed to specifically state “that he reviewed the brain films taken at the Hospital, specifically, the head films taken on December 22, 1999, four days after the alleged altercation . . .” However, Dr. Brown’s affirmation indicates that he has reviewed the JHMC records, including the Department of Radiology records. Dr. Brown indicates that a CT scan of the was conducted on December 22, 1999 and states that “films of the brain were taken 4 days [after the December 18, 1999 incident] and showed some hydrocephalus” (at pg 3 of Dr. Brown’s affirmation). He then questions defendant’s expert’s opinion that the motorcycle accident was the sole cause of the hydrocephalus by referencing to the October 21, 1999 films, which Dr. Brown opines do not show any evidence of hydrocephalus. It thus appears that Dr. Brown has reviewed relevant radiological films.

With respect to his expert opinions, Dr. Brown concludes that the alleged assault would have been a sufficient cause to initiate the hydrocephalus and aggravate the head injury suffered in the motorcycle accident, exacerbating pre-existing cognitive deficits and behavioral problems. He clearly opines that in spite of the finding of hemorrhage on the initial

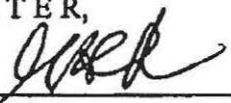
scans in September, hydrocephalus did not develop in the month following the accident, so that if, as Dr. Burstein maintains, the accident was the sole cause of the hydrocephalus, there should have been some evidence of its onset in the October 21, 1999 films more than a month post-injury. He further opines that a mechanical factor other than bleeding, such as a slight shift in the mechanics of fluid removal, might well have initiated hydrocephalus without further bleeding. These opinions are stated in clear, non-conclusory terms, and are based upon review of the pertinent medical records and films.

*Conclusion*

The Court finds, therefore, that plaintiff has established the existence of triable issues of fact, since what is presented here is a clear case of conflicting expert opinions on the causes of plaintiff's hydrocephalus in December of 1999. The motion for summary judgment is denied, except as to limited extent noted above with respect to any issues of medical malpractice which may have been alleged as to these defendants.

This constitutes the decision and order of the court.

ENTER,



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RON. GERARD H. ROSENBERG  
J. S. C.