

Devine v Pinapati

2009 NY Slip Op 33418(U)

May 8, 2009

Supreme Court, Albany County

Docket Number: 2493-06

Judge: John C. Egan, Jr.

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

20

mf

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

Albany County Clerk
Document Number 10409556
Rcvd 05/13/2009 2:07:14 PM



**JASON DEVINE and SHARON DEVINE, as parents
and Natural Guardians of JOSEPH MAXIMUS DEVINE,
an Infant, and JASON DEVINE and SHARON DEVINE,
Individually,**

Plaintiffs,

-against-

DECISION and ORDER
Index No: 2493-06
RJI No:01-06-087496

**SUHASINI PINAPATI, M.D., MICHAEL P. LOONEY,
M.D., VISITING NURSE ASSOCIATION OF ALBANY,
INC., MARY HANNELL, R.N. C.P.C.N., IAN THOMAS
COHEN, M.D., BRANKO FURST, M.D., KATHLEEN
DONELLY, M.D., MARILYN A. FISHER, M.D., ALBANY
MEDICAL COLLEGE and THE ALBANY MEDICAL
CENTER HOSPITAL, DAYO LANIER, M.D., Individually,
and as agent, servant and/or employee of SUHASINI PINAPATI,
M.D., and/or SUHASINI PINAPATI, M.D., P.C.,
SUHASINI PINAPATI, M.D., P.C.,**

Defendants.

APPEARANCES:

FEENEY, CENTI AND MACKEY
Attorneys for Plaintiffs
(L. Michael Mackey, Esq.)
116 Great Oaks Boulevard
Albany, New York 12203

ROSENBLUM, RONAN, KESSLER & SARACHAN
Co-Counsel for Plaintiffs
(Bruce A. Sutphin, Esq.)
110 Great Oaks Office Park
Albany, New York 12203

BROWN & TARANTINO, LLP

Attorney for Defendant, Suhasini Pinapati, M.D.
(Steven W. Kraus, Esq.)
White Plains Plaza
One North Broadway, 10th Floor
White Plains, New York 10601

MAYNARD, O'CONNOR, SMITH & CATALINOTTO, LLP

Attorneys for Defendant Albany Medical Center
(Christopher K.H. Dressler, Esq.)
6 Tower Place
Albany, New York 12203

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER

Attorneys for Defendant Visiting Nurse Association of Albany, Inc.
(F. Douglas Novotny, Esq.)
677 Broadway
Albany, New York 12207

HANLON, VELOCE & WILKINSON

Attorneys for Defendant Mary Hannell, RN CPCN
(Thomas J. Wilkenson, Esq.)
7 Executive Center Drive
Albany, New York 12203

BURKE, SCOLAMIERO, MORTATI & HURD, LLP

Attorneys for Defendant Dayo Lanier, MD
(Judith B. Aumand, Esq.)
302 Washington Avenue Extension
PO Box 15085
Albany, New York 12212

O'CONNOR, O'CONNOR, BRESEE & FIRST, PC

Attorneys for Defendant Michael Looney, M.D.
(Maria D. Ascenzo, Esq.)
20 Corporate Woods Boulevard
Albany, New York 12211

JOHN C. EGAN, JR., J.:

This is a medical malpractice action commenced in April, 2006, in which it is alleged that the defendants negligently diagnosed and treated the infant plaintiff, which resulted the

infant plaintiff sustaining brain injuries and other damages¹.

The defendant, Dayo Lanier, M.D. (defendant Lanier), moves, pursuant to CPLR §3042, CPLR §3124 and CPLR §3126, seeking an order compelling plaintiffs to serve a supplemental bill of particulars, *inter alia*, an order precluding plaintiffs from offering proof at trial for which the particulars were not provided, or an order dismissing plaintiffs' causes of actions asserted against the defendant Lanier. Plaintiffs oppose the defendant Lanier's motion. The defendants Suhasini Pinapati, M.D., P.C. and Suhasini Pinapati, M.D. support the defendant Lanier's motion.²

Insofar as plaintiffs have served a supplemental verified bill of particulars dated March 6, 2009, addressing most of the defendant Lanier's objections, this Decision and Order will only focus on the remaining few.

The instant action was commenced by the filing of a summons and complaint on April 13, 2006. After issue was joined, on December 3, 2007, defendant Lanier served plaintiffs with a demand for bill of particulars. The defendant Lanier's demand seeks the particulars regarding, in part:

3. The condition or conditions which the answering defendant undertook to treat.
4. Each and every act of omission and commission constituting the negligence and medical malpractice with which the plaintiffs' charge the answering defendant.

On February 5, 2008, plaintiffs served a verified bill of particulars in response to the

¹Plaintiffs also claim that the defendants failed to obtain the parents' informed consent prior to undertaking certain medical procedures and assert damages based on the loss of services, society and benefits.

²The defendants Suhasini Pinapati, M.D., P.C. and Suhasini Pinapati, M.D. request that the Court order an amended bill of particulars as to those defendants as well, yet, no motion was made seeking any such relief. Accordingly, any additional relief sought by the defendants Suhasini Pinapati, M.D., P.C. and Suhasini Pinapati, M.D. is hereby denied.

defendant Lanier's demand.³ Based on objections made by the defendant Lanier, on March 6, 2009, and in response to the defendant Lanier's motion, plaintiffs served a supplemental verified bill of particulars, and responded as follows:

3. Objected to as beyond the scope of a Bill of Particulars and asking for information that is better known to the defendants herein. Without waiving that objection, the answering defendants undertook to treat the infant plaintiff for his condition as he presented with during the period of treatment by the answering defendants, a failure to thrive, septic ileus, necrotizing enterocolitis (NEC), colonic stricture, malnourishment, dehydration, sepsis, complications therefrom, and any other condition in the differential diagnosis such physicians formed or should have formed or should have formulated.
4. It is claimed that the answering defendant failed to diagnose a failure to thrive and failed to evaluate the infant plaintiff to determine the cause of that failure to thrive, failed to diagnose the cause of the infant plaintiff's failure to gain weight, failed to diagnose an ongoing and worsening colonic stricture, failed to diagnose necrotizing enterocolitis and complications therefrom and sequella thereto, failed to formulate and communicate an appropriate differential diagnosis concerning the infant plaintiff's condition, failed to order indicated diagnostic testing to determine the cause of the infant plaintiff's condition, and failed to assure that ordered antibiotic therapy/medication was administered. Further, the answering defendant pediatrician was negligent as follows:
 - a. Failure to diagnose a failure to thrive condition/syndrome of the infant plaintiff and failure to diagnose the cause of a lack of weight gain by the infant plaintiff;
 - b. Failure to weigh/order weights be taken of the infant plaintiff at appropriate and indicated intervals;
 - c. Failure to diagnose persistent necrotizing enterocolitis and complications therefrom and sequella thereto;
 - d. Failed to order appropriate antibiotic therapy on November 16, 2003;
 - e. Failed to make certain that antibiotic therapy that was ordered on November 16,

³In his motion, the defendant Lanier initially objected to plaintiffs' responses to demands numbered 3, 4, 5 and 25. In opposition to the defendant's motion, plaintiff served a supplemental verified bill of particulars which addressed many of the defendant's objections.

2003 was timely, properly and expeditiously administered;

e. Failure to readmit the infant plaintiff to the hospital between October 8, 2003 and November 15, 2003 in light of his condition, signs and symptoms;

f. Failure to recognize the significance of a lack of weight gain of the infant plaintiff between October , 2003 and November 15, 2003 and at each visit in between, and failure to respond appropriately to the lack of weight gain;

g. Failure to recognize that after discharge from the Albany Medical Center Hospital on October 1, 2003 that the infant plaintiff was not gaining weight adequately and failure to respond appropriately;

h. Failure to order/institute nutritional therapy including nasogastric, orogastric or g- tube feedings; increased caloric intake, and/or TPN (total parenteral nutrition);

I. Failure to provide/order ventilatory assistance/oxygen to the child to reduce his metabolic demands;

j. Failure to recognize the significance of a failure to gain weight following discharge from the Albany Medical Center Hospital on October 1, 2003, and a failure to respond/react appropriately thereto;

k. Failure to consult with a nutritionist;

l. Failure to diagnose necrotizing enterocolitis;

m. Failure to determine whether the infant plaintiff was adequately hydrated;

n. failure to recognize the significance of decreased urine output and a failure to appropriately respond thereto;

o. Failure to recognize the significance of projectile vomiting and a failure to respond appropriately thereto;

p. Failure to advise and consult with the neonatologists at the Albany Medical Center Hospital concerning the infant plaintiff's condition on and after October 8, 2003;

q. Failure to order appropriate imaging and other diagnostic modalities to evaluate the infant plaintiff on and after October 8, 2003;

r. Failure to diagnose a colonic stricture;

- s. Failure to recognize the signs and symptoms of and sequella to necrotizing enterocolitis;
- t. Failure to recognize the signs and symptoms of a bowel stricture;
- u. Failure to recognize and appreciate the risk of bowel stricture relative to necrotizing enterocolitis;
- v. Failure to recognize the diagnostic significance of episodic/intermittent distension of the transverse colon;
- w. Failure to ascertain the hydration status of the infant plaintiff;
- x. Failure to recognize the significance of, and the clinical impact of, diarrhea, with respect to the infant plaintiff's condition, and failure to respond accordingly;
- y. Failure to recognize the significance, with respect to care needs, of an infant based on actual gestational age versus calendar age;
- z. Failure to request/obtain a consultation with a pediatric surgeon on November 16, 2003;
- aa. Failure to rule-out necrotizing enterocolitis (NEC) and its sequella on October 8, 2003 and November 16, 2003;
- bb. Failure to recognize and respond to hypovolemia;
- cc. Failure to order indicated and necessary diagnostic studies;
- dd. Failure to formulate an appropriate and proper differential diagnosis with respect to the infant plaintiff's condition at the Albany Medical Center Hospital on November 16, 2003, and a failure to order appropriate therapy and monitoring in response thereto;
- ee. Failed to have the infant plaintiff admitted to/transferred to the PICU (pediatric intensive care unit) on November 16, 2003 at the time she examined the infant plaintiff the morning of November 16, 2003;
- ff. Failure to recognize the need for admission/transfer of the infant plaintiff to the PICU (pediatric intensive care unit) on November 16, 2003 at the time she examined the infant plaintiff the morning of November 16, 2003; and
- gg. Failure to appropriately evaluate the level of care needed by the infant plaintiff

at the time she examined the infant plaintiff the morning of November 16, 2003.

The defendant Lanier objects to that part of response to demand number 3 which objects to the demand itself as beyond the scope of a bill of particulars, and alleges that the demand seeks information that is more within the knowledge of the defendants. Defendant Lanier asserts that he does not have the burden of presenting evidence of his involvement in the plaintiff's care. Thus, defendant Lanier asks this Court to strike the objection from the plaintiffs' supplemental bill of particulars. Defendant Lanier further asserts that the language "any other condition in the differential diagnosis such physicians formed or should have formulated" found in response to demand number 3 is open-ended and inappropriate.

With respect to plaintiffs' response to demand number 4, defendant Lanier asserts that the following paragraphs: 4[c], second (e), (f), (I), (l), (m), (n), (o), (q), [r], (s), (t), (u), (v), (x) and (bb), are insufficient in that plaintiffs failed to provide dates for the failures alleged therein. Yet, plaintiffs' affirmation in opposition to the defendant's motion asserts that such failure occurred from October 8, 2003 through November 16, 2003. Plaintiffs also assert that paragraph number 1 of their supplemental verified bill of particulars states that the infant plaintiff "was treated by, and advised for, his condition by defendant Dayo Lanier, M.D., on October 8, 2003 and November 13, 2003....". Defendant, nonetheless, would like an order compelling that plaintiffs allege this in a bill of particulars. Likewise, defendant notes that paragraph 4(bb) of the original bill of particulars alleged a failure to adequately and properly document the infant plaintiff's condition and course following discharge, yet that allegation does not appear in the supplemental bill of particulars. Paragraph 4(bb) of the supplemental bill of particulars alleges "[f]ailure to recognize and respond to hypovolemia".

Thus, defendant asserts that plaintiffs' reference to 4(bb) in their attorney's affirmation submitted in opposition to the defendant's motion is confusing.⁴

Defendant Lanier further argues that, with respect to plaintiffs' response to demand number 4, that plaintiffs should be required to provide particulars as to defendant's negligence in failing to appreciate the significance of the plaintiff's failure to gain weight, as alleged in 4(f) and (j). Finally, defendant Lanier alleges that plaintiffs have failed to set forth the particulars of the claims made in paragraphs 4(y), 4(cc), and 4(dd) of the supplemental bill of particulars.

Plaintiffs, in opposition to the defendant's motion assert that, with respect to plaintiffs' response to paragraph number 3, plaintiffs have particularized those conditions the infant plaintiff was treated for as documented in the medical records. Plaintiffs assert that it was within the knowledge of the defendant what he undertook to treat the infant plaintiff for. With respect to plaintiffs' response to demand number 4, plaintiffs assert, through their attorneys, that they have narrowed the time of defendant's involvement with the infant plaintiff from October 3, 2003 until November 16, 2003. Plaintiffs assert that discovery is not yet complete, and several witnesses remain to be deposed. Thus, plaintiffs assert, it is premature for plaintiffs to be compelled to provide responses that defendant seeks. Plaintiffs also assert that defendant is asking for particularizations as to matters which are the subject of expert opinion. Plaintiffs assert that striking the causes of actions or all allegations in the bill of particulars is a harsh remedy, and if the Court decides that defendant's argument has merit, plaintiffs request the opportunity to serve a supplemental bill of particulars.

The purpose of a bill of particulars is to amplify the pleadings, limit the proof and prevent

⁴Paragraph 10(e) of the Affidavit of Bruce A. Sutphin, Esq., states that paragraph 4(bb) has been narrowed to the period of October 8 through November 16, 2003.

surprise at trial. *Neissel v. Rensselaer Polytechnic Institute* 30 A.D.3d 881, 882 (3rd Dept. 2006)

To this end, a bill of particulars must specify the acts or omissions attributed to each defendant and the statutes, regulations or ordinances alleged to have been violated. *Id.*

CPLR §3042 sets forth the parameters for compliance with a demand for bill of particulars as follows:

[c] Failure to respond or to comply with a demand. If a party fails to respond to a demand in a timely fashion or fails to comply fully with a demand, the party seeking the bill of particulars may move to compel compliance, or, if such failure is willful, for the imposition of penalties pursuant to subdivision (d) of this rule.

(d) Penalties for refusal to comply. If a party served with a demand for a bill of particulars willfully fails to provide particulars which the court finds ought to have been provided pursuant to this rule, the court may make such final or conditional order with regard to the failure or refusal as is just, including such relief as is set forth in section thirty-one hundred twenty-six of this chapter.

CPLR §3126 empowers the Court to issue an order striking out pleadings and dismissing the complaint on the grounds that plaintiff wilfully failed to disclose information which the Court finds ought to have been disclosed. The Court has broad discretion in determining the nature and degree of the penalty to be imposed where a party has refused to comply with discovery demands. *Ashline v. Kestner Engineers, P.C.*, 219 A.D.2d 788, 790 (3rd Dept. 1995). When examining a bill of particulars, the Court must examine the demands made and responses provided on a case by case basis. *Bellin v. Baghei-Rad*, 148 A.D.2d 827 (3rd Dept. 1989). It is well settled that plaintiff need not include in the bill of particulars evidentiary materials in the form of, or gleaned from, expert testimony. *Heyward v. Ellenville Community Hospital*, 215 A.D.2d 967, 968 (3rd Dept. 1995); *McKenzie v. St. Elizabeth Hospital*, 81 A.D.2d 1003, 1004 (4th Dept. 1981); *Morris v. Fein*, 177

A.D.2d 915, 916 (3rd Dept. 1991).

Upon review of the supplemental bill of particulars served by plaintiffs herein, the same are more than sufficient to allow defendant Lanier to determine plaintiffs' claims. Although plaintiffs' responses contain some boiler plate language in response to defendant's boiler plate demand, the responses are detailed enough for the defendant to defend the claims. Furthermore, the issue of what constitutes medical malpractice is within the ken of plaintiffs' expert and would more likely be served in response to defendant's demand for experts. Plaintiffs likely do not have sufficient knowledge or expertise regarding infant weight gain, actual gestational age versus calendar age, the infant plaintiff's diagnosis, what diagnostic tests were required, what certain diagnostic tests would reveal, or what defendant should have done, if anything, in response to those test results. Here, clearly, plaintiffs have included enough particularized information relating to the infant plaintiff's condition to allow defendant to ascertain the nature and extent of the allegations against him.

However, there seems to be some confusion with respect to the allegation of 4(bb) found in the original bill of particulars dated February 5, 2008, the absence of that allegation in the supplemental bill of particulars dated March 6, 2006, and paragraph 10(e) of the Affidavit of Bruce A. Sutphin, Esq., sworn to on March 6, 2009. Furthermore, while plaintiffs, through their attorneys, assert that October 8, 2003 through November 16, 2003 is the time frame associated with the allegations set forth in paragraphs 4[c], second (e), (f), (l), (l), (m), (n), (o), (q), [r], (s), (t), (u), (v), (x) and (bb) of the supplemental verified bill of particulars,⁵ this time frame is not specifically alleged in the plaintiffs' supplemental verified bill of particulars.

Accordingly, the Court hereby directs that plaintiffs serve an amended supplemental verified


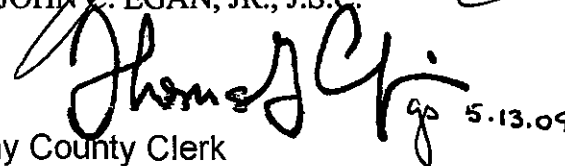
⁵See, Affidavit of Bruce A. Sutphin, Esq., ¶9.

bill of particulars, within 10 days of the date of this Decision and Order, 1) either alleging or not alleging that the defendant failed to adequately and properly document the infant plaintiff's condition and course following discharge (as more fully set forth in plaintiffs' verified bill of particulars dated February 5, 2008, paragraph 4(bb)); and 2) specifically asserting the time frames associated with the failures alleged in plaintiffs' supplemental verified bill of particulars paragraphs 4[c], second (e), (f), (l), (m), (n), (o), (q), [r], (s), (t), (u), (v), (x) and (bb). The defendant Lanier's motion is otherwise denied. The parties are reminded of the Court's Scheduling Order dated March 26, 2009.

This memorandum shall constitute both the decision and the order of the Court. All papers, including this decision and order, are being returned to Rosenblum, Ronan, Kessler & Sarachan. The signing of this decision and order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provisions of that section relating to filing, entry and notice of entry.

IT IS SO ORDERED.

Dated: May 8, 2009
Albany, New York


JOHN C. EGAN, JR., J.S.C.


The Court considered the following papers:

By Plaintiffs:

Affidavit of Bruce A. Sutphin, Esq., sworn
Memorandum of Law, dated March 6, 2009

Albany County Clerk
Document Number 10409556
Rcvd 05/13/2009 2:07:14 PM ibit A;



By Defendant Dayo Lanier, M.D.:

Notice of Motion, dated February 6, 2009;
Affirmation of Judith B. Aumand, Esq., dated February 6, 2009, with Exhibits A-E;
Memorandum of Law, dated February 6, 2009;
Reply Affirmation of Judith B. Aumand, Esq., dated March 13, 2009.

By Defendants Suhasini Pinapati, M.D., P.C. and Suhasini Pinapati, M.D.:

Affirmation of Steven W. Kraus, Esq., dated March 4, 2009, with Exhibits A-C.