

**Sheffield v North Shore-Long Is. Jewish Health Sys.,
Inc.**

2010 NY Slip Op 30404(U)

March 2, 2010

Supreme Court, New York County

Docket Number: 100239/07

Judge: Alice Schlesinger

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
ALICE SCHLESINGER

Part A PART 16

PRESENT:

Index Number : 100239/2007

SHEFFIELD, GRAHAM

vs

NORTH SHORE-LONG ISLAND JEWISH

Sequence Number : 003

REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion to reargue Justice Carey's November 16, 2009 decision is granted, and upon reargument, the decision is clarified to the extent provided in the accompanying memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

MAR 03 2010

NEW YORK COUNTY CLERK'S OFFICE

MAR 02 2010

Dated: March 2, 2010

Alice Schlesinger

ALICE SCHLESINGER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 16

-----X
GRAHAM SHEFFIELD, as Administrator of the
ESTATE OF CAROLYN SHEFFIELD, deceased,
and GRAHAM SHEFFIELD, individually,

Plaintiffs,

- against -

NORTH SHORE-LONG ISLAND JEWISH HEALTH
SYSTEM, INC., FRANKLIN HOSPITAL MEDICAL
CENTER, PETER CHANG, M.D., SCOTT KESCHNER,
M.D., JOSEPH & DESROCHES, M.D., P.C, LIONEL
DESROCHES, M.D. and ANTONIO JOSEPH, M.D.

Defendants.

-----X
SCHLESINGER, J.:

Index No. 100239/07
Motion Seq. No. 003

FILED

MAR 03 2010

NEW YORK
COUNTY CLERK'S OFFICE

Defendants North Shore Long Island Jewish Health Care, Inc., s/h/a North Shore-Long Island Jewish Health System, Inc., and Franklin Hospital s/h/a Franklin Hospital Medical Center, move for an order, pursuant to CPLR §2221, granting leave to reargue the November 16, 2009 decision and order by Justice Carey which denied their motion for summary judgment dismissing the plaintiffs' complaint.¹ Defendants assert that the Court erred in denying their motion in that there is no evidence to raise a triable issue of fact as to whether the institutional defendants departed from good and accepted medical practice. Nor is there a triable issue with respect to whether the institutional defendants may be held vicariously liable for the acts or omissions of any of the individual co-defendants Dr. Peter Chang, Dr. Lionel Desroches, or Dr. Antonio Joseph, who are all private attending

¹ Justice Carey did dismiss the informed consent cause of action, but otherwise denied the defendants' motion. The Court also denied the summary judgment motions by defendants Dr. Desroches and Dr. Joseph and their P.C. The doctors have not moved to reargue, nor have they submitted papers on this motion.

physicians. Plaintiffs oppose the motion, asserting that the decision of Justice Carey was correct in all respects.

Background Facts

The relevant facts are detailed in the November 16, 2009 decision by Justice Carey. They will be briefly summarized here.

The decedent Carolyn Sheffield, a fifty-six year old woman, was visiting her daughter on July 3, 2005 when she began feeling ill. She was taken to the emergency room at Franklin Hospital, the nearest facility.² She was admitted by her nephrologist, defendant Dr. Antonio Joseph who, with his partner defendant Dr. Lionel Desroches, had been treating Ms. Sheffield's renal condition and monitoring her hemodialysis treatment since 1997.

Ms. Sheffield remained hospitalized at Franklin until July 17, 2005, when she passed away. During the admission, defendant Dr. Chang performed various surgical procedures involving the removal and placement of various catheters for venous access required for Ms. Sheffield's hemodialysis treatment. According to the autopsy report, the cause of Ms. Sheffield's death was perforation of the left pulmonary artery during the placement of the left jugular venous catheters.

Justice Carey's November 16 Decision

After detailing the facts and the procedural history of the case, Justice Carey addressed the merits of the summary judgment motion by North Shore and Franklin. She noted that the defendants' motion was based on two grounds: 1) that the institutions and

²Franklin Hospital is a member of the North Shore-Long Island Jewish Health System.

their staff had not departed from good and accepted medical practice; and 2) that the institutions were not vicariously liable for the actions of the private attending physicians Dr. Chang, Dr. Desroches, and Dr. Joseph.

The judge then reviewed the competing arguments by the parties and the evidence submitted in support of their respective positions. Justice Carey specifically referenced the applicable legal doctrine set forth in *Mduba v. Benedictine Hospital*, 52 AD2d 440 (3d Dep't 1976) and its progeny; that is, under the principle of ostensible agency, a hospital may be liable for the negligence of a private attending physician where the patient sought treatment from the facility, rather than directly from the individual physician. Regarding the relevant facts, Justice Carey noted that, after entering the emergency room, Ms. Sheffield had been admitted to Franklin Hospital by her private treating nephrologist Dr. Joseph. Justice Carey then wrote:

It appears that Dr. Joseph called Dr. Chang for a consultation of decedent. Although decedent had been treated by Dr. Chang on prior occasions, according to the affidavit of decedent's daughter, decedent was "never a private patient of [Dr. Chang]," "never treated with Dr. Chang at his offices," and "never sought the treatment of Dr. Chang." Decedent's daughter further sets forth in her affidavit that decedent "only received treatment from Dr. Chang when she was a patient of [North Shore and Franklin Hospital]," and the decedent believed that Dr. Chang was an employee of North Shore and Franklin Hospital.

Justice Carey concluded by denying the Hospital summary judgment, stating that:

Based on the foregoing, the Court finds that an issue of fact exists as to whether decedent reasonably believed that Dr. Chang was acting at the facility's behest, and, thus, whether North

Shore and Franklin Hospital may be held vicariously liable for the acts or omissions of Dr. Chang. As North Shore and Franklin Hospital have not set forth any evidence relating to the adequacy of Dr. Chang's treatment of decedent their summary judgment motion with respect to plaintiffs' medical malpractice and wrongful death causes of action must be denied.

The Court then turned to the summary judgment motion by Dr. Joseph and Dr. Desroches. Again, the Court detailed the competing evidence submitted by each party, quoting in detail from the expert affirmations and discussing the various points made. Justice Carey concluded by denying summary judgment based upon "the conflicting expert affidavits submitted" which raised issues of fact and credibility in connection with two specific alleged departures. Those departures related to the surgical clearance the physicians provided without ordering a Doppler study and/or venogram, and in not documenting an accurate history in Ms. Sheffield's medical chart.

The Motion for Reargument

To establish its entitlement to reargument under CPLR §2221, a party must establish that the court "overlooked or misapprehended" relevant facts or law. Here defendants claim that Justice Carey erred in not expressly finding that plaintiffs had failed to present sufficient evidence of any departure by the Hospital. Defendants further claim that the Court erred in finding a triable issue regarding whether the Hospital could be held vicariously liable for Dr. Chang. Lastly, they contend that the Court erred in not expressly holding that the Hospital was not vicariously liable for the acts or omissions of Dr. Joseph and Dr. Desroches.

This Court cannot say that Justice Carey "overlooked or misapprehended" anything,

as the arguments and the evidence were carefully reviewed and the controlling law was properly stated. Nevertheless, reargument will be granted to clarify why Franklin Hospital and North Shore are still viable defendants here, although these points were implicitly included in Justice Carey's decision.

There is insufficient evidence of any departures from good and accepted practice on the part of the hospital staff, including anything involved with the right-sided attempt at catheterization. While the plaintiffs can well argue such departures vis-a-vis Dr. Chang individually, there is no evidence of negligence by the hospital staff itself.

However, as Justice Carey expressly held, a triable issue exists as to whether the Hospital is vicariously liable for any departures by Dr. Chang under the theory of ostensible agency articulated in *Mduba, supra*, even though Dr. Chang is not an employee of the Hospital. While there may be some question as to whether Dr. Chang saw Ms. Sheffield at a hospital other than Franklin on a prior occasion, it appears to be undisputed that Ms. Sheffield never saw Dr. Chang in his office and did not personally seek out his care at Franklin.

The cases cited by defendants are distinguishable from the case at bar. For example, in *Schultz v. Shreedhar*, 66 AD3d 666 (2nd Dep't 2009), the patient went to the emergency room at the specific direction of her private physician who then arranged for a surgeon. Here, Ms. Sheffield went to the ER at Franklin on her own based on its proximity to her daughter's home where she was visiting, and she could well have understood that Dr. Chang was a surgeon provided by the Hospital.

However, as defendants correctly assert, the Hospital cannot be held vicariously liable for any malpractice by Dr. Joseph or Dr. Desroches. As indicated above, both

doctors were private physicians, and Ms. Sheffield had a long-standing patient -physician relationship with them dating back to 1997 for the care and treatment of her renal problems based on their speciality in nephrology.

Accordingly, it is hereby

ORDERED that the motion for reargument by defendants North Shore and Franklin Hospital is granted; and upon reargument it is hereby

ORDERED that that part of Justice Carey's November 16, 2009 decision, which expressly held that a triable issue exists, as to whether the institutional defendants are vicariously llable for Dr. Chang, shall stand; and it is further

ORDERED Justice Carey's November 16, 2009 decision is clarified to expressly hold that the institutional defendants are not vicariously liable for Dr. Joseph or Dr. Desroches and that any alleged departures on the part of the hospital staff are dismissed; and it is further

ORDERED that counsel shall appear on March 10, 2010 at 11:30 a.m. as previously scheduled to proceed with a pre-trial conference and to select a trial date.

This constitutes the decision and order of the Court.

Dated: March 2, 2010

MAR 02 2010

FILED

MAR 03 2010

NEW YORK COUNTY CLERK'S OFFICE

Alice Schlesinger

J.S.C.

ALICE SCHLESINGER