

**Horn v Guillory**

2010 NY Slip Op 30555(U)

March 12, 2010

Supreme Court, New York County

Docket Number: 106472/2008

Judge: Joan B. Lobis

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

PRESENT: Jean B. Lolis  
Justice

PART 6

Index Number : 106472/2008  
HORN, FREDERICK  
vs.  
GUILLORY, SAMUEL L.  
SEQUENCE NUMBER : 002  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE 1/5/10  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

in this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1-20  
21-29  
30-35

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

**FILED**

MAR 17 2010

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

NEW YORK  
COUNTY CLERK'S OFFICE

MOTION DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION AND ORDER

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

Dated: 3/12/10

JBL  
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: PART 6**

-----X  
FREDERICK HORN and MARY HORN,

Plaintiffs,

Index No. 106472/2008

-against-

**Decision and Order**

SAMUEL L. GUILLORY, M.D. and  
THE MOUNT SINAI HOSPITAL,

Defendants.

**FILED**

MAR 17 2010

-----X  
JOAN B. LOBIS, J.S.C.:

NEW YORK  
COUNTY CLERK'S OFFICE

In this medical malpractice action, arising out of cataract surgery performed on plaintiff, Frederick Horn (Horn), by defendant ophthalmologist, Samuel L. Guillory, M.D. (Dr. Guillory), at defendant Mount Sinai Hospital (the hospital), both defendants seek an order granting them summary judgment dismissing this action, which asserts causes of action based on a lack of informed consent, departures from accepted standards of medical care, and Horn's wife's attendant loss of services.<sup>1</sup>

After having blurred and impaired vision in his right eye for about six months, Horn saw Dr. Guillory, who diagnosed a cataract in Horn's right eye, which had a decreased corrected vision of 20/60. Dr. Guillory performed cataract surgery on September 22, 2006, after having Horn sign consent forms. During the surgery, a tear occurred in the posterior capsule, causing the vitreous and lens fragments to prolapse through the tear. Consequently, Dr. Guillory, while Horn was still in the operating room, performed an anterior vitrectomy to remove the vitreous and lens fragments.

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<sup>1</sup> By stipulation dated February 4, 2010, the cause of action sounding in hospital negligence (third cause of action) was withdrawn.

According to his deposition testimony, Dr. Guillory believed that he had removed all of the cortical material, but stated that sometimes microscopic parts can be retained.

Dr. Guillory saw Horn the next day and noted that his vision was 20/70 and that he had mild cystoid macular edema (CME).<sup>2</sup> A topical anti-inflammatory steroid and antibiotic drops were prescribed. Dr. Guillory next saw Horn on September 27, at which time his CME had increased. The drops were continued. When Horn next presented on October 4, his cornea was edematous; so, Dr. Guillory referred Horn to his colleague, Dr. Fuchs, a retinal specialist, who noted mild to moderate CME and a residual cortical fragment in the posterior part of Horn's eye. In a letter to Dr. Guillory, Dr. Fuchs agreed that Horn should stay on the anti-inflammatory drops prescribed by Dr. Guillory, and indicated he would be happy to see Horn again, whenever Dr. Guillory chose. Horn was next seen by Dr. Guillory on October 10, and was continued on the drops.

When Dr. Guillory saw Horn on October 25 with complaints of increasingly blurred vision, Dr. Guillory found that the CME had worsened and that Horn's vision was 20/400. Dr. Guillory again referred Horn to Dr. Fuchs, who saw him that day. In a letter dated October 27, Dr. Fuchs informed Dr. Guillory that he had found retained cortical material and CME, and that the patient was advised to continue his anti-inflammatory medication. Dr. Fuchs also stated that Horn may be a candidate for a periocular/intravitreal injection of steroids in the future, and that if the CME did not respond to anti-inflammatories, surgical removal of the residual cortical material was another

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<sup>2</sup> CME is a swelling with fluid of the macula, a portion of the "retina responsible for detailed central vision" needed for tasks such as reading.

option. Again, Dr. Fuchs advised that he would be happy to see Horn again, whenever Dr. Guillory decided. On November 1, Dr. Guillory discussed with Horn the possibility of prescribing systemic oral steroids, and prescribed them on November 3. There is no indication in any party's deposition testimony that Dr. Guillory ever discussed with Horn the possibility of an injection of steroids into or around Horn's eye.

On November 16, Horn, who resided in New Jersey, independently consulted a retinal specialist near his home, Dr. David Yarian, who noted that Horn's vision was 20/200 and that there was significant inflammation. Dr. Yarian, in a letter to Dr. Guillory dated November 16, observed residual capsular remnants, and stated that it was possible there were other remnants present, which would only be visible with scleral depression at the time a vitrectomy was performed, and that these additional remnants could cause a continuing inflammatory response. Dr. Yarian recommended a more aggressive approach, in light of the fact that Horn had been experiencing increased significant inflammation two months postoperatively, which approach included an intraocular injection, to be followed by a pars plana vitrectomy, if necessary, depending on Horn's response in the next week or two, following the injection.

It appears that Horn was averse to having the injection into his eye recommended by Dr. Yarian, and did not mention that recommendation to Dr. Guillory, although he saw Horn the same day after he had been seen by Dr. Yarian. Dr. Guillory was, however, aware of that recommendation from Dr. Yarian's letter. Dr. Guillory affirmatively determined that an injection was unnecessary, evidently without ever having discussed it with Horn. In his chart entry of

November 16, Dr. Guillory, while noting Dr. Yarian's recommendation, decided that the inflammation was due to retained cortical remnants, and determined to keep Horn on the same regimen which he had previously prescribed.

He then saw Horn again on November 21, at which visit the CME was of the same degree of severity. His vision was blurred and was 20/80 on a pinhole exam. Dr. Guillory's chart entry of that day indicated that he was considering an intraocular injection and had planned to discuss this with the retinal specialists. Horn was advised to return in a week. It is unclear whether Dr. Guillory ever followed up with the retinal specialists during that week; however, Horn never returned to Dr. Guillory's office, and on November 30, sought care from a specialist in Pennsylvania, Dr. Allen Ho. At that visit, Horn's vision was 20/200-20/400. Dr. Ho apparently gave Horn several options, including simplifying the drops to try to heal the surface, and surgical intervention to remove retained lens fragments, and thus advised of the risks of that procedure. Horn opted for surgery, which was performed by Dr. Ho on December 11. During the procedure, the periphery was inspected under scleral depression, and a nuclear fragment was discovered. Unfortunately, Horn's visual difficulties did not improve. Horn saw several more ophthalmologists, including one who performed an intraocular injection, but Horn's vision remained impaired.

Horn and his wife, suing derivatively, commenced this action against Dr. Guillory and the hospital. As is relevant, the pleadings allege that the defendants departed from accepted standards of medical practice in failing to perform the cataract surgery in a careful and skillful manner, in failing to properly identify and remove retained nuclear material during the cataract

surgery and shortly thereafter, in failing to discover and properly and timely remove retained lens material, including nuclear and cortical material from Horn's eye, in failing to timely administer steroid injections postoperatively into Horn's eye, in negligently recommending topical antibiotics for a protracted period of time, instead of ordering more aggressive treatment, in failing to inform Horn that unless he had surgery to remove retained nuclear fragments, his vision would continue to worsen, and in failing to timely perform a vitrectomy to remove the retained nuclear fragments. As a result, it is claimed that Horn developed CME, increased ocular pressure, and a significant permanent loss of vision in his right eye.

The hospital and Dr. Guillory now seek an order granting them summary judgment dismissing the action. The hospital asserts that this action was improperly commenced as to it since the surgery and postoperative care were rendered by Dr. Guillory, who was Horn's private attending, and was not a hospital employee. The hospital further claims that, even if Dr. Guillory had been a hospital employee, summary judgment must be granted as to it and Dr. Guillory, since he obtained Horn's informed consent to the cataract surgery, and did not depart from accepted standards of medical care.

On the informed consent issue, defendants observe that Horn had a six-month history of difficulty with reading and blurred vision, that as a result, he presented to Dr. Guillory, who recommended and explained the cataract surgery, that Horn then took about five months before deciding whether to proceed with that surgery, during which time he conducted internet research on the proposed procedure, and that thereafter, he signed several consent forms, including one which

recited that corneal swelling or retinal problems could occur which "could delay or prevent visual recovery." Defendants also rely on the affirmation of their expert ophthalmologist, Barry Belgorod, M.D. (Belgorod), who opined that Horn's informed consent to the surgery was obtained. Movants' counsel also claims that a reasonable person in Horn's position would have consented to the cataract surgery, had that person been informed of the risks of the procedure.

Regarding Dr. Guillory's alleged departures from accepted standards of medical care, Belgorod asserts that Dr. Guillory appropriately determined that the cataract in Horn's right eye was contributing to his decreased corrected visual acuity of 20/60, and that he was a candidate for cataract surgery. Belgorod opines that the capsular tear which occurred during the surgery was a known risk, which can happen absent negligence, that Dr. Guillory timely recognized the tear, and immediately performed a vitrectomy "to remove all vitreous fragments," followed by the proper placement of an intraocular lens. Belgorod claims that the steps Dr. Guillory took during the surgery were within accepted standards of practice.

Belgorod further claims that Dr. Guillory's postoperative care, including his prescribing antibiotics and anti-inflammatory eye drops, was appropriate. Additionally, Belgorod asserts that when Horn developed CME postoperatively, Dr. Guillory properly referred him to his colleague, Dr. Fuchs, a retinal specialist, who appropriately recommended a conservative course of treatment, since there was a likelihood that any retained cortical fragments would reabsorb, without the need for more invasive procedures. According to Belgorod, when thereafter, Horn's CME worsened, Dr. Guillory properly sent him again to Dr. Fuchs, who, on seeing Horn on October 25,

2006, did not change Horn's treatment, but advised Dr. Guillory that if the anti-inflammatory treatment failed to work, an intraocular steroid injection or a vitrectomy of cortical material should be considered. Belgorod stated that Dr. Guillory appropriately relied on Dr. Fuchs's advice, because he was a retinal specialist. Since an injection and vitrectomy presented their own risks, Belgorod claimed that waiting for several weeks or a few months to undertake those more aggressive measures was a proper course of action. He further suggests that Horn did not receive an intraocular injection because he was averse to receiving that treatment. Belgorod, aside from asserting that Dr. Guillory's care and treatment were appropriate, baldly concluded that the claimed deviations from standards of accepted medical practice were "not causally connected to the claimed injuries."

Plaintiffs do not deny in their opposition papers that Dr. Guillory was a private attending physician, who was not a hospital employee, and that the surgery was performed by Dr. Guillory, who also rendered all relevant postoperative care. Nor do plaintiffs deny that an appropriate informed consent was obtained. In fact, plaintiffs' opposition papers are silent on these issues, which were clearly raised in the moving papers.

Plaintiffs only offer opposition to those portions of the motion which are based on a claimed lack of departures from standards of accepted medical practice on Dr. Guillory's part. They rely on the redacted "affirmation" of their expert ophthalmologist,<sup>3</sup> who concedes that the

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<sup>3</sup> Defense counsel objected to the redacted "affirmation," which contained a final page reciting that the expert's statement was sworn to, but which had blank lines for the expert's and the notary's signatures. Defense counsel noted that because the expert was licensed in Pennsylvania, an affidavit, rather than an affirmation, was required. CPLR 2106. However, defense counsel indicated that if the original unredacted version was in fact notarized, it would be adequate. The court has reviewed the original in camera, and it is notarized. Thus, it shall be considered.

cataract surgery was indicated and warranted, since the cataract's removal would increase Horn's vision. That expert also acknowledges that capsular tears are a known risk of cataract surgery and that ophthalmic surgeons are trained to recognize this risk, and to recognize, and, if possible, remove retained fragments. The expert then asserts that Dr. Guillory was negligent in failing to identify, appreciate, and remove the retained nuclear fragment during the cataract surgery. Plaintiffs' counsel notes that Dr. Guillory's surgical report, while mentioning the removal of cortical fragments, was silent as to nuclear fragments. The expert further claims that the presence of a retained nuclear fragment should have been appreciated after the surgery, and that accordingly, Dr. Guillory should have promptly ordered its removal postoperatively. Plaintiffs' expert maintains that, while it was permissible for Dr. Guillory to rely on the use of topical anti-inflammatory drops for one to two weeks, since cortical remnants have the capacity to reabsorb, once the increased inflammation, persistent decreased and blurry vision, and CME appeared, Dr. Guillory should have suspected a retained nuclear fragment, which type of fragment allegedly does not typically reabsorb. Thus, it is claimed that Dr. Guillory should have ordered an intraocular injection and surgical removal of the residual fragments, evidently, if the injection did not work. According to plaintiffs' expert, Dr. Guillory failed to act reasonably, irrespective of the recommendations of the retinal specialists, because ophthalmologists, such as Dr. Guillory, are trained to recognize cataract surgery complications, such as retained cortical and nuclear fragments, and are also trained as to the proper course of treatment for such complications. That expert maintains that Dr. Guillory's departures from accepted standards of medical practice caused the CME to worsen, scar tissue to develop, and permanent damage to Horn's vision to ensue.

In reply, movants observe that plaintiffs did not dispute that dismissal of the action as to the hospital was warranted, as was dismissal of the lack of informed consent cause of action. Movants raise new grounds for summary judgment, namely that Dr. Guillory acted appropriately during the cataract surgery in removing as many fragments as he possibly could, and that there is no standard of care as to when a pars plana vitrectomy should be performed because there is no difference in outcome regardless of when that procedure is performed.

The branch of the motion which seeks dismissal of the entire action as to the hospital is granted, since plaintiffs do not dispute that Dr. Guillory alone performed the surgery and rendered the postoperative care in issue, and that he was a private attending physician, rather than a hospital employee. Garson v. Beth Israel Medical Center, 41 A.D.3d 159 (1st Dep't 2007); Walter v. Betancourt, 283 A.D.2d 223 (1st Dep't 2001) (hospital not liable for the acts of a private attending physician). Further, the branch of the motion which seeks an order dismissing the lack of informed consent cause of action is granted because it is undisputed that Horn's consent to the cataract surgery had been obtained. The court further notes that, in light of Horn's history of six months of decreased and blurry vision, it is unlikely that a reasonable person in Horn's position would have refused the proposed cataract surgery if fully informed of the risks. See Orphan v. Pilnik, 66 A.D.3d 543 (1st Dep't 2009) (summary judgment appropriately granted as to lack of informed consent where neither plaintiff, an exotic dancer, nor her expert offered any evidence that a reasonable person in plaintiff's position having been told of suspicious and possibly cancerous breast lump would not have undergone surgery had she been informed of risk of 6.5 centimeter scar). This leaves the cause of action asserted against Dr. Guillory, alleging that he departed from accepted standards of medical care.

The law is well settled that the movants on a summary judgment application bear the initial burden of prima facie establishing their entitlement to the requested relief, by eliminating all material allegations raised by the pleadings. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986); Winegrad v. New York University Medical Center, 64 N.Y.2d 851 (1985); Kuri v. Bhattacharya, 44 A.D.3d 718 (2d Dep't 2007). In a malpractice case, a physician would have to establish that he did not depart from accepted standards of practice, or that, even if he did, he did not proximately cause injury to the patient. Lowhar v. Eva Stern 500, LLC, \_\_\_ A.D.3d \_\_\_, 2010 NY Slip Op 00821 (2d Dep't 2010). The failure to meet one's burden mandates the denial of the application, "regardless of the sufficiency of the opposing papers." Winegrad, 64 N.Y.2d at 853. However, where the movant demonstrates its prima facie entitlement to summary judgment, the burden shifts to the other side to raise a material triable issue of fact warranting the motion's denial. Alvarez, 68 N.Y.2d at 324. Also, "the remedy of summary judgment is a drastic one, which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable, since it serves to deprive a party of his day in court." Gibson v. American Export Isbrandtsen Lines, Inc., 125 A.D.2d 65, 74 (1st Dep't 1987) (internal citations omitted).

To the extent that movants urge new grounds for summary judgment in their reply papers, the court declines to dismiss on those grounds. See In re Moorman v. Meadow Park Rehabilitation & Health Care Center LLC, 57 A.D.3d 788, 789 (2d Dep't 2008) ("Court properly declined to consider the new arguments or new grounds, asserted for the first time in the . . . reply papers, in support of the relief sought"); In re Allstate Ins. Co. v. Dawkins, 52 A.D.3d 826 (2d Dep't 2008). In the exercise of discretion, the court also declines to entertain movants' additional grounds raised by their counsel in a letter sent to the court almost a month after this motion was marked fully

submitted. Tran Han Ho v. Brackley, 69 A.D.3d 533, 534 (1st Dep't 2010) (court properly exercised its discretion in refusing to consider sur-reply papers offered after the motion had been submitted). In any event, the court notes that the studies upon which movants rely to attempt to demonstrate that the outcome would have been the same irrespective of when Horn had the subsequent follow-up surgery, do not appear to be conclusive on the issue. For example, one paper recited that "[t]he incidence of [CME] increased as the time between cataract surgery and vitrectomy increased," and that "[t]he decrease in final visual acuity with postoperative [CME] was statistically significant." Even Belgorod in his reply affirmation indicated that the timing of such surgery was not "*usually . . . of the essence.*" (Emphasis added.) Thus, there remains the issue of whether Dr. Guillory was negligent in failing to timely advise Horn to have a pars plana vitrectomy.

Also, movants' attempt to demonstrate for the first time in their reply papers that Dr. Guillory acted appropriately during the cataract surgery in attempting to remove all nuclear particles which he could possibly have removed, is unavailing, since the plaintiffs' claim in this regard was clearly raised in their pleadings, and therefore, should have been addressed in the initial moving papers by demonstrating that Dr. Guillory exercised due care in attempting to locate and remove all nuclear fragments during the cataract surgery. In any event, no affidavit or deposition testimony from Dr. Guillory has been offered on the issue of his attempt to visualize and remove nuclear fragments during that surgery.

In addition, Dr. Guillory has not eliminated the issue of his alleged failure to recognize that there was a retained nuclear fragment, and to therefore timely advise Horn to have an intraocular injection, since it does not appear that Dr. Guillory ever suggested this course of treatment to Horn,

who may well have agreed to have the injection if pressed by Dr. Guillory. In this regard the court notes that, eventually, Horn had an intraocular injection by a specialist he saw after he had the pars plana vitrectomy.

Accordingly, it is

ORDERED that the branch of the motion which seeks summary judgment in favor of Mount Sinai Hospital is granted and the action is severed and dismissed as to it with costs and disbursements to Mount Sinai Hospital as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the branch of the motion which seeks summary judgment in favor of Samuel L. Guillory, M.D. is granted only to the extent of dismissing the second cause of action, sounding in lack of informed consent, but is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue.

The parties shall appear for a pre-trial conference on April 6, 2010, at 9:30 a.m.

This constitutes the decision and order of the court.

Dated: March 12, 2010

  
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JOAN B. LOBIS, J.S.C.

**FILED**  
MAR 17 2010  
NEW YORK  
COUNTY CLERK'S OFFICE