

**Tierney v Girardi**

2010 NY Slip Op 31292(U)

May 14, 2010

Sup Ct, NY County

Docket Number: 10115007

Judge: Alice Schlesinger

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**ALICE SCHLESINGER**

**IA PART 16**  
PART \_\_\_\_\_

PRESENT.

Index Number : 101150/2007

TIERNEY, ANN MARIE

vs

GIRARDI, LEONARD, M.D.

Sequence Number : 002

SUMMARY JUDGMENT

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 \_\_\_\_\_

**FILED**  
**MAY 28 2010**  
**NEW YORK**  
**COUNTY CLERK'S OFFICE**

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion for summary judgment is granted with respect to defendants Dr. Alan Z. Segal, Dr. Erik Kobylarz, and Dr. Matthew Budway, and denied with respect to defendants Dr. Leonard Girardi, Dr. James Osoyo, and New York Presbyterian Hospital in accordance with the accompanying memorandum decision. The Clerk is directed to enter judgment accordingly.

**MAY 14 2010**

Dated: \_\_\_\_\_

*Alice Schlesinger*  
**ALICE SCHLESINGER** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

5-26-10

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

-----X  
ANN MARIE TIERNEY, as Executrix of the Estate of  
ANGELINA TROTTA,

Plaintiffs,

Index No. 10115007  
Motion Seq. Nos. 002 & 003

- against -

LEONARD GIRARDI, M.D., JAMES A. OSORIO, M.D.,  
DAVID B. MESSINGER, M.D., ALAN Z. SEGAL, M.D.,  
ERIK KOBYLARZ, M.D., MATTHEW J. BUDWAY, M.D.,  
SOUND SHORE CARDIOLOGY, P.C. and NEW YORK  
PRESBYTERIAN HOSPITAL NEW YORK WEILL  
CORNELL CENTER,

Defendants.

**FILED**  
MAY 26 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
**SCHLESINGER, J.:**

Angelina Trotta, at age 81 in 2005, had a myriad of serious health conditions most of which concerned her heart. On January 25, 2005 she was admitted to New York Presbyterian Hospital with a diagnosis of congestive heart failure and pulmonary edema. She was seen by defendant Dr. David Messinger, who had been called in as a consultant. After Dr. Messinger had performed an examination, taken a history and spoken with Mrs. Trotta's family, he recommended a cardiac catheterization, which he performed later that day. His findings were severe aortic insufficiency or severe leakage of the aorta valve, pulmonary hypertension, mildly reduced left ventricular systolic function and obstruction in one artery. He recommended open heart aortic valve replacement surgery and referred Mrs. Trotta to defendant Dr. Leonard Girardi for this procedure.

Dr. Girardi's surgery on January 26 consisted of replacing the diseased valve with a bioprosthetic one. Mrs. Trotta was then sent to intensive care.

On January 28, 2005 at 12:45 a.m., Mrs. Trotta developed atrial fibrillation. She was treated with various medications including beta blockers, which therapy continued until the late afternoon of that day. At approximately 5:15 p.m., defendant Dr. James Osorio, a critical care physician at the hospital, performed an electrocardioversion to the heart. This procedure worked, to the extent that Mrs. Trotta's rhythm returned to normal.

Her second bout with atrial fibrillation occurred at approx. 4:53 a.m. on January 29. Again, she was treated with various medications. This time the atrial fibrillation lasted for about 21 hours.

At approx 1:03 a.m. on January 31, 2005, Mrs. Trotta exhibited the first clinical signs of a stroke. The final diagnosis was that she had suffered a middle cerebral artery stroke. After the diagnosis of stroke was made on January 31, she was seen by a variety of doctors, neurologist and neurosurgeons, including defendant Dr. Alan Segal, a neurologist with a sub-speciality in vascular neurology who saw her for the first time on January 31, 2005.<sup>1</sup> It should be noted that from Mrs. Trotta's first encounter with atrial fibrillation until she stroked in the early morning hours of January 31, she was never given any anticoagulant medicine. Mrs. Trotta died on February 5, 2005.

The plaintiff's contention here is that defendant doctors Girardi, Osorio, and Messinger, and Messinger's P.C. Sound Shore Cardiology, and New York Presbyterian Hospital departed from accepted standards of medical care in failing to take the necessary steps, specifically the use of intravenous anticoagulant drugs, to prevent their patient from

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<sup>1</sup>All of the defendants in this case moved for summary judgment. The plaintiff did not oppose the motions put forth on behalf of Dr. Siegel, Dr. Erik Kobylarz and Dr. Matthew Budway. Therefore, when this matter first appeared for oral argument on March 31, 2010, I granted those motions in favor of these three doctors.

suffering a stroke. Further, it is the plaintiff's contention that after Mrs. Trotta went into atrial fibrillation in the early morning hours of January 28, together with the constellation of other high risk factors that she exhibited, it was likely that she would develop a stroke. Therefore, it was imperative for intravenous anticoagulant medicine, namely heparin, to have been administered.

When this Court originally received the various summary judgment motions, all of them were supported by affirmations by various physicians. Additionally, several of the defendants themselves, such as Dr. Segal, submitted their own affidavits. Most significantly, on the part of Dr. Girardi and Dr. Osorio and the Hospital, was an affirmation from Dr. Richard Stein, board certified in Internal Medicine and Cardiovascular Diseases. He began his affirmation by establishing his credentials where he indicates that he was fully familiar with the standards of practice in the medical community and "in particular the field of cardiology as well as the post operative management of patients who have undergone cardiac surgery."

His position, not surprisingly, is that none of the defendants here were negligent. It is his opinion that it was appropriate not to anticoagulate this patient as it could have resulted in significant bleeding complicating her recovery. Therefore, he states that it was appropriate clinical judgment to treat the atrial fibrillation in the way it was, exclusively with medication and with electrocardioversion.

In the course of his affirmation, Dr. Stein defines atrial fibrillation and explains that it is one of the most common types of cardiac arrhythmia. The condition involves the two upper chambers of the heart, the atria, where in the presence of such condition there is a fibrillating or quivering of the heart muscle of the atria instead of a coordinated contraction.

He states in his affirmation that the electrocardioversion and the various medications, on balance, were the appropriate therapy for the atrial fibrillation, even though he acknowledges that Mrs. Trotta did have a risk of developing a thromboembolism and stroke associated with post-operative atrial fibrillation. He says further that coumidin would have taken from 36-72 hours to reach a therapeutic level. So once again, he opines that Drs. Girardi and Osorio properly exercised their clinical judgment in not resorting to that treatment. Further, he says that the patient's history of rheumatic heart disease did not alter the picture. Finally, he adds that in January 2005, physicians like himself did not have enough clinical data to address issues of anticoagulant therapy and post-cardiac surgery.

On behalf of the other defendants Dr. Messinger and his P.C. Sound Shore Cardiology, an affirmation is provided by Dr. James Slater, the Director of Cardiac Catheterization at NYU Langone Medical Center. He is board certified in Internal Medicine, Cardiovascular Medicine and Interventional Cardiology. He agrees with Dr. Stein that Mrs. Trotta was not a candidate for anticoagulant therapy because, first, she had a bioprosthetic valve inserted which does not cause clots to the extent that mechanical valves do, and second, that the time that she spent in atrial fibrillation was not that excessive to have resorted to therapy, other than what she was given. He also discusses why he believes that neither Dr. Messinger nor his P.C. did anything wrong. Dr. Messinger saw Mrs. Trotta on January 27. After that day his partner Dr. Richard Charney, not a defendant but a member of South Shore Cardiology P.C., also saw her on January 28 and January 31 of 2005. It should be noted that between January 29 and January 30, 2005, a weekend, no one from the PC saw and examined Mrs. Trotta, as the hospital was monitoring her, but there was a Sound Shore doctor on call.

Dr. Messinger has testified that after the catheterization, he no longer ordered any medications as the patient was Dr. Girardi's responsibility. Dr. Slater does exonerate Dr. Messinger and his P.C. because he believed, as Dr. Messinger did, that Mrs. Trotta was being properly looked after by other competent professionals who did the right thing.

I find that the moving papers do make out a prima facie case for the defendants and, thus, if not properly challenged, should be successful. However, as will be seen in the subsequent discussion, I do find that the challenge has been met.

In opposition to the moving papers is an affirmation from a board certified cardiologist who practices that speciality in Connecticut. In a supplemental affidavit, which I invited on March 31, 2010, this physician identifies himself as Dr. Ronald Aronson, who is licensed in both Connecticut and in New York, but practices exclusively in Connecticut. While it is true, as counsel for the defendants assert, that he does not recite the usual cataloging of his practice, nor does he say that he has reviewed all the relevant literature in this area, it is apparent that he is knowledgeable in his field. And it must be emphasized that both of the experts for the various defendants here also have specialities in the field of cardiology. In fact, when Dr. Segal, a neurologist was questioned at his deposition about atrial fibrillation and what it can lead to (on page 31), he acknowledged that although he was not a cardiologist, he did have some familiarity with atrial fibrillation.

I point this out because this is a case that centers around the treatment of Mrs. Trotta's atrial fibrillation and whether it conformed to accepted standards of practice. Also, an issue here, and perhaps the most significant one, is whether or not there is reason to believe that Mrs. Trotta's bouts with atrial fibrillation led to the devastating stroke that she suffered on January 31, 2005 and her death on February 5, 2005.

In the original affirmation by Dr. Aronson, he stated, implicitly, that it was the atrial fibrillation, improperly treated by failing to administer heparin, an anticoagulant, which had led to the stroke. He also indicated that Mrs. Trotta's history of rheumatic heart disease, as well as her other cardiac conditions, together with the atrial fibrillation, placed her at a very high risk for stroke. On balance, he opined that this risk of a stroke was greater than the risk for a bleed, which could come from the administration of anticoagulants since they do thin the blood. However, his position was that with close monitoring a bleed could be detected and treated, unlike a stroke which is not predictable or easily treatable. Therefore, his position was that the only prophylactic for an ischemic stroke, which this was, was the use of an intravenous anticoagulate.

With regard to the various defendants, Dr. Aronson pointed out that Dr. Charney from Sound Shore saw the patient on January 28 and noted that she was in fibrillation and wrote, "if remains in A FIB will need coumidin." Further, no one from Sound Shore P.C. followed the patient after January 28 in order to monitor the atrial fibrillation or to see if, in fact, any anticoagulation therapy had been given. Dr. Aronson's opinion is that the failure by each of the treating physicians, including Dr. Messinger and his P.C. as well as her surgeon Dr. Girardi and Dr. Osorio, the critical care physician overseeing her care, to treat Mrs. Trotta with intravenous anticoagulatents, specifically heparin, was a definite departure from accepted standards of medical care.

On March 31, at oral argument I believed Dr. Aronson (whose name at that time was unknown to me) did not explicitly, as opposed to implicitly, opine that the actual stroke suffered by the decedent was in fact a result of atrial fibrillation. I made it clear that he would not be able to say with absolute certainty that this was the case because nobody

really knew with absolute certainty that it was, but he had to be able to say that "more likely than not" this was so, and give his reasons why.

In the supplemental affirmation, Dr. Aronson elaborates on his earlier opinions and discusses the events of January 28 with the first episode of atrial fibrillation and its progression. All of these opinions go to his clearly stated position that the failure to order anticoagulation medication was a deviation from the standard of care. He also opines with certainty that this medication was necessary to prevent clots and ultimately the stroke. Finally, he says that the patient's stroke was more likely than not due to atrial fibrillation and he bases his opinion on the course of events after surgery, namely the development of atrial fibrillation followed shortly thereafter with this massive stroke. This, he says, is typical of strokes associated with atrial fibrillation.

Not surprisingly, both defense counsel strongly urge this Court to reject Dr. Aronson's opinion. They argue that Dr. Aronson, in the first instance is not qualified to give such an opinion and, secondly, that he still has not satisfied this Court's concern with causation. I disagree strongly on both points.

As I indicated earlier, this is a case about atrial fibrillation and how it should be treated and whether, if not treated in a particular way, it can and did lead to a stroke in a patient such as Mrs. Trotta. After reading Dr. Aronson's supplemental affidavit, I reread the affidavit of Dr. Segal and his deposition, as well as the affirmations of the other experts and part of the New York Presbyterian Hospital chart. It should be noted that while Dr. Segal, in his deposition, given while he was still a defendant, speculates that there could be other causes for the stroke here, he also acknowledges that he has no independent recollection of this case and further that he signed onto, indicating his agreement with, a

neurological assessment written by a Dr. Katz from Neurology on January 31, 2005 which stated "suspect embolic stroke secondary to A -FIB status post cardioversion".

Further, on page 48 of his deposition Dr. Segal agreed that this opinion was a fair clinical assessment, except for the location of the stroke (this means that the stroke was ultimately believed to be in a different part of Mrs. Trotta's brain from where it was originally thought to have occurred). While it is true that in the ensuing pages of the deposition, pages 49-50, Dr. Segal enumerates a whole litany of other possible causes for the stroke, in addition to atrial fibrillation, he does acknowledge that none of these other possibilities were noted in the entire hospital chart.

Further, in ¶ 21 of Dr. Stein's affirmation in support of the defendants' summary judgment motion, in explaining why it was appropriate for the physicians to exercise their judgment in not administering coumidin, he says "in a post cardiac surgical patient given the significant risk of bleeding from surgical sites even though there is a risk to developing a thromobone embolism and stroke associated with post operative atrial fibrillation."

Therefore, while this Court is not making any definitive finding that Mrs. Trotta developed a stroke from atrial fibrillation, Dr. Aronson's opinion to this effect certainly finds support in the opinions of the other doctors, as well as the hospital records themselves. Therefore, I do find in the first instance that Dr. Aronson is qualified to give his opinion in this area. I further find that he has satisfactorily stated an opinion as to both deviation from the standards of care and causation of injury and death to Mrs. Trotta. Therefore, the motions for summary judgment by the remaining defendants Dr. Messinger, South Shore,

P.C., Dr. Girardi and Dr. Osorio are all denied.<sup>2</sup>

Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendants are denied; and it is further

ORDERED that the motions for summary judgment by defendants Alan Segal, Erik Kobylarz and Matthew Budway are granted; and it is further

ORDERED that all counsel shall appear in Room 222 on June 16, 2010 at 9:30 a.m. for a pre-trial conference.

This decision constitutes the order of the Court.

Dated: May 14, 2010

**MAY 14 2010**

*Alice Schlesinger*  
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ALICE SCHLESINGER JSC

**FILED**  
MAY 26 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

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<sup>2</sup>The use of a TEE (transesophageal echocardiogram), or in this case the nonuse of this will not be an issue in this case as it was never pled . This is consistent with my statement to that effect at oral argument on March 31, 2010.