

**Grant v Scuderi**

2010 NY Slip Op 31402(U)

June 4, 2010

Sup Ct, NY County

Docket Number: 115345/06

Judge: Joan B. Lobis

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: Joan B. Lobis

PART 6

Index Number : 115345/2006

GRANT, ROBERT

vs  
SCUDERI, GILES R., M.D.

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE 3/11/10

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 16 were read on this motion to/for summary judgment.

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

Answering Affidavits – Exhibits \_\_\_\_\_

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

PAPERS NUMBERED

1-12

13-14

15-16

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion decided in accordance  
with accompanying decision and order.

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

**FILED**  
JUN 08 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 6/4/10

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  
NEW YORK COUNTY**

-----X  
**ROBERT GRANT and NANCY GRANT,**

**Plaintiffs,**

**-against-**

**Index No. 115345/06**

**GILES R. SCUDERI, M.D., HENRY CLARK, M.D.,  
BETH ISRAEL MEDICAL CENTER, V. FRANKLIN  
SECHRIEST, M.D., STEPHEN MUHLBACH, P.A.,  
INSALL SCOTT KELLY INSTITUTE FOR  
ORTHOPEDICS & SPORTS MEDICINE, JOSEPH  
ANNICHIARICO, D.O., AREFIN SIDDIQUE, M.D.,  
PHELPS MEMORIAL HOSPITAL CENTER, and  
MAHJABEEN HASSAN, M.D.,**

**Decision and Order**

**FILED**  
JUN 08 2010  
NEW YORK  
COUNTY CLERKS OFFICE

**Defendants.**

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

Defendant Joseph Annichiarico, D.O., moves, pursuant to C.P.L.R. Rule 3212, for an order granting him summary judgment and dismissing the complaint against him. Plaintiffs oppose the motion.

As pertains to this motion, this action sounds in medical malpractice related to Dr. Annichiarico's care and treatment of plaintiff Robert Grant at Phelps Memorial Hospital Center ("Phelps") between April 16 and April 30, 2004. Nancy Grant brings a derivative claim as Mr. Grant's spouse for loss of services. The action was commenced by the filing of a summons and verified complaint on or about October 13, 2006. Dr. Annichiarico served a verified answer on or about March 8, 2007. Plaintiffs served a verified bill of particulars as to Dr. Annichiarico on or about July 11, 2007. A preliminary conference took place on July 19, 2007, and discovery proceeded, including depositions. Plaintiffs filed note of issue on September 16, 2009. This motion for summary judgment followed.

Mr. Grant was born on March 14, 1930, and was seventy-four (74) years old at the time of the alleged negligence. In 1994, Mr. Grant had undergone bilateral knee replacements. In November 2003, Mr. Grant had a fall and sustained fractures, necessitating revision of both knee replacements. The knee revisions were done one at a time. Giles R. Scuderi, M.D., performed the revision on the right knee on December 13, 2003, while plaintiff's left leg remained in a cast for three months. On April 13, 2004, Dr. Scuderi then revised plaintiff's left knee at Beth Israel Medical Center ("Beth Israel").

On April 16, 2004, plaintiff was discharged from Beth Israel and was transferred to Phelps for rehabilitation. Dr. Annichiarico was the admitting physician who took plaintiff's history and conducted a physical. Mr. Grant's past medical history included heart disease, high cholesterol, hypertension, peripheral vascular disease, and diabetes. Dr. Annichiarico's notes of the physical did not mention a blister on plaintiff's left lower extremity. However, he ordered a Betadine "paint" to be applied carefully, twice daily, to a left leg blister. He also ordered discontinuance of the Lidoderm pain patches with which plaintiff was admitted around the left kneecap. Dr. Annichiarico testified at his examination before trial ("EBT") that he did not note the blister in his notes of the physical because when he conducted the physical, plaintiff's left leg was in a dressing. He stepped away from the patient and a nurse subsequently removed the leg dressing, at which time he was able to observe the blister. Upon admission, Dr. Annichiarico also ordered that plaintiff's leg be placed on a constant passive motion machine ("CPM") for four hours a day. He did not order any consultations.

On April 17, Arefin Siddique, M.D. (Dr. Annichiarico's associate) saw Mr. Grant. He did not order any consultations at that time; he testified at his EBT that he wanted to continue the treatment ordered by Dr. Annichiarico. On April 19, Dr. Siddique again examined plaintiff. He noted that the blister had redness and was intact. He called Nurse Daphne Chivily, a wound ostomy care nurse, to examine and treat the blister, and Mahjabeen Hassan, M.D., a plastic surgeon, for a surgical consultation. Nurse Chivily saw plaintiff on April 19. She took the history of the blister, examined it, and took pictures, describing the blister as a 6 cm by 3 cm bulla filled with dark yellow fluid. She aspirated the wound. The fluid was sent for a culture, which did not reveal bacteria. She recommended topical antibiotics and a non-adherent, non-constrictive dressing to protect the blister. The notes indicate that on April 19, Dr. Hassan attempted to perform a consultation, but plaintiff was unavailable as he was having a Doppler ultrasound test conducted.

Dr. Siddique saw plaintiff on April 20. The blister was intact with less fluid underneath. Dr. Siddique ordered no change in treatment. Dr. Annichiarico saw plaintiff on April 21. He noted the left knee was bending well, that the wound aspirate revealed no bacteria, and that the blister was flat with no drainage.

On April 22, 2004, Dr. Hassan performed a plastic surgery consultation and observed a healing blister on the anterior surface, but no infection, induration, or erythema. Dr. Hassan recommended preventing any further pressure on the area; keeping the area clean with a dressing or a local antibiotic, such as Betadine or bacitracin, applied to the blister skin; and continuing the wound care already provided. At that time, Dr. Hassan did not recommend surgery.

On April 28, 2004, Nurse Chivily noted that the epidermal layer was off of the blister and dead tissue (an escher) had formed. The blister was 5 cm by 2 cm, and erythema and maceration were noted. Nurse Chivily ordered a foam dressing to promote moisture and protect the tissue. On April 28 and 29, Dr. Siddique noted that the blister had further improved and was less erythematous. Mr. Grant was discharged from Phelps on April 30, 2004. The notes indicate that he was doing well and ambulating, and plaintiffs were instructed on follow up care.

The bill of particulars alleges that Dr. Annichiarico, inter alia, failed to take a proper and complete history of plaintiff; failed to examine plaintiff's left lower extremity; failed to recognize, record, treat, or appreciate the seriousness of a presence of a pressure blister on Mr. Grant's left lower extremity; failed to order medications, dressings, and an immediate consultation with plastic surgery or infectious disease specialists; failed to consult with vascular surgeons or order vascular studies regarding Mr. Grant's left lower extremity; allowed the blister to ulcerate, worsen, and become infected; negligently ordered and applied the CPM; and failed to discontinue using the CPM in a timely manner. Plaintiffs allege that these departures led to injuries, including permanent left foot drop, a non-healing wound, and numbness, tingling, and pain in Mr. Grant's lower extremity.

Dr. Annichiarico moves for summary judgment, asserting that there are no triable issues of fact. The party moving for summary judgment in a medical malpractice action must make a prima facie showing of entitlement to judgment as a matter of law by showing "that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was

not the proximate cause of the injuries alleged.” Roques v. Nobel, 2010 N.Y. Slip Op. 3177, \_\_\_ A.D.3d \_\_\_ (1st Dep’t 2010) (citations omitted). To satisfy their burden, defendants in medical malpractice actions must present expert opinion testimony that is supported by the facts in the record and addresses the essential allegations in the bill of particulars. Id. If the movant makes a prima facie showing, however, the burden shifts to the party opposing the motion “to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” Alvarez v. Prospect Hosp., 68 N.Y.2d 320, at 324 (1986) (citation omitted).

Specifically, in a medical malpractice action, a plaintiff opposing a summary judgment motion

must demonstrate that the defendant did in fact commit malpractice and that the malpractice was the proximate cause of the plaintiff’s injuries. . . . In order to meet the required burden, the plaintiff must submit an affidavit from a medical doctor attesting that the defendant departed from accepted medical practice and that the departure was the proximate cause of the injuries alleged.

Roques, 2010 N.Y. Slip Op. 3177 (internal citations omitted). Plaintiff’s expert opinion testimony must also be founded in facts in the record, not merely consisting of general or conclusory statements of negligence, in order to rebut defendant’s prima facie showing. Id.

In support of his motion, Dr. Annichiarico submits an expert affirmation from Craig H. Rosenberg, M.D., a physician licensed in New York and board certified in physical medicine and rehabilitation. Dr. Rosenberg opines that Dr. Annichiarico’s initial evaluation was appropriate, in that he appropriately examined the patient and ordered treatment of the blister. He further opines that Dr. Annichiarico did not deviate from the standard of care in ordering the CPM, which is used to promote the healing of the knee joint, the reason Mr. Grant was in rehabilitation. Dr. Rosenberg

states that there is no indication that the CPM caused, exacerbated, or had any impact on Mr. Grant's blister. Dr. Rosenberg sets forth that community standards dictated that Dr. Annichiarico call the appropriate specialists to evaluate and co-manage plaintiff's care. To that end, plaintiff was evaluated by a wound care nurse on April 19 and 28, 2004, and by a plastic surgeon on April 22, 2004. According to Dr. Rosenberg, Dr. Annichiarico did not cause or exacerbate the blister. He sets forth that all indications were that the patient's overall condition was stable; that the patient was followed by other medical professionals over the course of his admission; that the chart reflects that Mr. Grant's condition had improved; that there were no noted signs of infection in the blister; and, that the indications were that the blister was healing. Thus, Mr. Grant was properly and appropriately discharged in accordance with good and accepted standards of medical practice.

Dr. Annichiarico has failed to demonstrate his prima facie entitlement to summary judgment because the expert's affirmation failed to address several of the allegations set forth in the bill of particulars. Dr. Rosenberg did not address plaintiffs' allegations that Dr. Annichiarico failed to order an immediate consultation with plastic surgery or infectious disease specialists and that he failed to consult with vascular surgeons or order vascular studies regarding Mr. Grant's left lower extremity. Neither did he address Mr. Grant's alleged permanent injuries in any way. Further, while Dr. Rosenberg states that "community standards dictated that Dr. Annichiarico call the appropriate specialists to evaluate and co-manage the patient's wound care[,]," he does not address that it appears that Dr. Annichiarico never did actually order specialist consultations; rather, Dr. Siddique did that, on April 19, 2004, three days after plaintiff was admitted to Phelps.

Regardless, had Dr. Annichiarico's submissions been sufficient to demonstrate a *prima facie* case for summary judgment, plaintiffs' expert (name redacted)<sup>1</sup> has submitted an affirmation that raises material issues of fact in rebuttal. Plaintiffs' expert is a physician licensed to practice medicine in New York, who sets forth that he has extensive experience in trauma and critical care, has treated "hundreds of patients with pressure sores," and is familiar with the diagnosis, treatment, and prevention of pressure sores. The expert maintains that Dr. Annichiarico departed from good and accepted practice in treating Mr. Grant, in that he failed to recognize the clinical significance of the large pressure blister on plaintiff's left shin; he neglected to drain the blister upon admission on April 16, 2004; and he failed to obtain a culture of the fluid to rule out infection. Plaintiffs' expert further sets forth that Dr. Annichiarico's expert, Dr. Rosenburg, failed to recognize that the "large blister" was a "pressure sore" that needed emergent attention by a plastic surgeon in order to save the integrity of the limb. The expert opines that Dr. Annichiarico failed to provide good and acceptable medical care by neglecting to call for emergent plastic surgical treatment upon plaintiff's admission. Further, plaintiffs' expert sets forth that Betadine can induce burns, that Betadine is absorbed through the skin and through blistered skin that covers a pressure ulcer, and that once absorbed, Betadine accesses the deeper layers of the skin, causing burning and irritation. The twice daily "painting" of Betadine ordered by Dr. Annichiarico, and the failure to drain the blister, in plaintiffs' expert's opinion, caused an increase in the fluid pressure on the deeper skin layers, thus causing further erosion and destruction of the underlying tissue, resulting in "full-thickness" destruction of plaintiff's skin and musculature in the left anterior shin. The expert claims that Dr. Annichiarico failed to provide good and accepted medical care by failing to avoid further

---

<sup>1</sup> The original unredacted affidavit was provided to the court for an *in camera* review.

burning and irritation of the skin by the repeated application of Betadine. Plaintiffs' expert further opines that Dr. Annichiarico's care was a significant factor in causing Mr. Grant's blister to worsen, necessitating multiple debridements and causing substantial pain and loss of significant amounts of soft tissue from the leg.

Having failed to demonstrate a prima facie entitlement to summary judgment by eliminating all material issues of fact, Dr. Annichiarico's motion is denied. While Dr. Annichiarico's reply papers contain a second affirmation from his expert, this affirmation is beyond the scope of a reply, was improperly submitted for the first time on reply, and was not considered on this motion. See Tomaino v. 209 E. 84th St. Corp., 68 A.D.3d 527, 529 (1st Dep't 2009). The parties shall appear for a pre-trial conference on July 13, 2010, at 9:30 a.m. This constitutes the decision and order of the court.

Dated: *June 4*, 2010

*JBL*  
\_\_\_\_\_  
JOAN B. LOBIS, J.S.C.

**FILED**  
JUN 08 2010  
NEW YORK  
COUNTY CLERK'S OFFICE