

**Hardy v Lefkowitz**

2010 NY Slip Op 32335(U)

August 17, 2010

Supreme Court, Nassau County

Docket Number: 010502/08

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

**JUSTICE**

TRIAL/IAS PART 20

\_\_\_\_\_  
ANDREW HARDY, Individually and as  
Administrator of the Estate of ALMA HARDY,  
Deceased,

Plaintiff,

Index No.: 010502/08  
Motion Sequence...01  
Motion Date...07/07/10

-against-

GARY KEITH LEFKOWITZ, M.D., DANIEL  
SALVATORE McCALLY, M.D., UROLOGY  
ASSOCIATES, P.C., McCALLY & RING  
UROLOGY ASSOCIATES, LLP, HOWARD  
GRILL, M.D., SOUTH NASSAU COMMUNITIES  
HOSPITAL and NASSAU HEALTHCARE  
CORPORATION,

Defendants.

\_\_\_\_\_  
Papers Submitted:  
Notice of Motion.....x

This unopposed motion submitted by the Defendant, HOWARD GRILL,  
M.D. (hereinafter referred to as DR. GRILL), seeking an Order, pursuant to CPLR §  
3212, granting him summary judgment dismissing the complaint against him, is decided  
as provided herein.

The Plaintiff, ANDREW HARDY, individually and as Administrator of the  
estate of his deceased wife, ALMA HARDY, commenced this action seeking damages for

the decedent's wrongful death resulting from Defendants' alleged medical malpractice. The moving Defendant, DR. GRILL, is licensed to practice in the field of internal medicine. DR. GRILL treated the Plaintiff's decedent, ALMA HARDY, at three office visits: January 25, 2006, August 7, 2006, and January 27, 2007. Additionally, DR. GRILL saw Ms. Hardy while she was a patient at SOUTH NASSAU COMMUNITIES HOSPITAL on four occasions: April 15, 16, 17 and 18, 2006.

On April 12, 2006, while a patient at SOUTH NASSAU COMMUNITIES HOSPITAL, the Plaintiff's decedent underwent surgery which included the placement of a stent in the left ureter. In or about February 2007, ALMA HARDY was admitted to NASSAU UNIVERSITY MEDICAL CENTER. At that time, Ms. Hardy underwent a surgical procedure to remove the aforementioned left ureteral stent. However, the stent was unable to be removed and following this surgery Ms. Hardy remained in the intensive care unit where she expired on March 30, 2007. The gravamen of the Plaintiff's claims of medical malpractice are alleged to have begun on or about April 12, 2006 and continued through March 30, 2007. The claims center around the surgeries that were performed during that time. According to Ms. Hardy's death certificate, the cause of death was "pyelonephritis and sepsis, acute renal failure and cerebral hemorrhage, complicating ureteral stent placements (remote and 3/12/07) for nephrolithiasis".

The standards for summary judgment are well settled. A court may grant summary judgment where the moving party has made a prima facie showing that there are no genuine issues of material fact, and the moving party is, therefore, entitled to judgment

as a matter of law. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986). The burden is on the moving party to tender sufficient evidence to demonstrate the absence of any material issue of fact. *Id.* Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. *Id.*

The pertinent facts are as follows:

The Plaintiff's decedent, ALMA HARDY, had her first contact with the Defendant, DR. GRILL, on January 25, 2006. She presented at DR. GRILL's office, complaining of a rash on her neck and back. At that time, DR. GRILL elicited Ms. Hardy's prior medical history and conducted a complete physical examination. Based on the results of the physical exam and the blood work taken at that visit, DR. GRILL diagnosed the Plaintiff's decedent with elevated cholesterol and blood sugar, and dermatitis and tendinitis of the left shoulder. DR. GRILL advised the patient to follow up with her gynecologist (for a mammography) and prescribed her medication for the shoulder complaints. Ms. Hardy was also advised to follow a diabetic diet and encouraged to lose weight. There were no urological complaints at this office visit. A return office visit was scheduled for March 2, 2006; however, MS. HARDY failed to appear on that date. (*See* Exhibit N, DR. GRILL's Affidavit, annexed to the Defendant's motion; Exhibit Q, DR. GRILL's office records, annexed to the motion).

DR. GRILL next saw Ms. Hardy when she was a patient in SOUTH NASSAU COMMUNITIES HOSPITAL. She was admitted on April 12, 2006, by the Defendant, GARY LEFKOWITZ, M.D. On that date, Ms. Hardy underwent surgery that

included a cystoscopy, left retrograde pyelogram, and the placement of a stent in the left ureter. DR. GRILL was not involved in this procedure and did not see the Ms. Hardy until April 15, 2006, three (3) days after the procedure. (See Exhibit N, DR. GRILL's Affidavit annexed to the DR. GRILL's motion; Exhibit R, SOUTH NASSAU COMMUNITIES HOSPITAL records for ALMA HARDY, annexed to the DR. GRILL's motion).

On April 15, 2006, DR. GRILL reviewed Ms. Hardy's hospital chart along with the results of a urinalysis and a blood culture. The findings led to a diagnosis of urosepsis, following the placement of the left ureteral stent. DR. GRILL prescribed intravenous fluids, antibiotics, and ordered repeat blood work.

DR. GRILL saw Ms. Hardy the next day, April 16, 2006. At that time, DR. GRILL noted that Ms. Hardy's white blood count was decreased. The blood culture identified the material contaminant to be E-coli. The physical exam, performed by DR. GRILL, was negative and the diagnosis remained unchanged.

On April 17, 2006, Ms. Hardy's condition remained largely unchanged, and as such, DR. GRILL planned to continue the patient's medications and to conduct repeat blood work.

DR. GRILL also saw Ms. Hardy on April 18, 2006, the date that she was discharged from SOUTH NASSAU COMMUNITIES HOSPITAL. On that date, DR. GRILL examined Ms. Hardy and noted that she had no fever and that her infection was improving. Ms. Hardy was to be discharged on oral antibiotics. DR. GRILL did not

write the patient's discharge instructions, which were for the patient to follow up with the Defendant, DR. GARY LEFKOWITZ.

DR. GRILL next saw Ms. Hardy during an office visit on August 7, 2006. Ms. Hardy complained of blood in her urine. DR. GRILL conducted a physical examination and ordered several tests. The physical exam revealed that the Ms. Hardy's abdomen was soft and nontender, her bowel sounds were normal, and her extremities showed no edema. Her neurological system was grossly intact and she refused a rectal exam. Further, the physical exam indicated no costo vertebral angle tenderness (CVAT), which can be a sign of kidney infection. The test for CVAT and a urinalysis were also negative. (*See Exhibit N, DR. GRILL's Affidavit annexed to his motion; Exhibit Q, DR. GRILL's office records annexed to the motion*).

As a result of the physical exam and tests, DR. GRILL diagnosed the patient with increased cholesterol, hematuria, and some rectal bleeding, which he believed to be related to hemorrhoids. DR. GRILL recommended that Ms. Hardy have a consultation with her gynecologist, undergo a colonoscopy, and referred her back to her urologists, regarding the hematuria. Ms. Hardy did not keep her return visit appointment, scheduled for October 2, 2006. (*See Exhibit N, DR. GRILL's Affidavit annexed to DR. GRILL's motion; Exhibit Q, DR. GRILL's office records, annexed to the motion*).

The final time that DR. GRILL saw Ms. Hardy was at an office visit on January 24, 2007. Ms. Hardy complained of blood in her urine. DR. GRILL conducted a physical exam and diagnosed Ms. Hardy with hematuria and kidney stones. Ms. Hardy

was referred to her urologist for a further work up. (*See* Exhibit N, DR. GRILL's Affidavit, annexed to the motion; Exhibit Q, DR. GRILL's office records, annexed to the motion).

In or about February 2007, Ms. Hardy was seen at NASSAU UNIVERSITY MEDICAL CENTER. She underwent a CT scan of the abdomen which revealed that the left ureteral stent, surgically inserted by the Defendant, DR. GARY LEFKOWITZ, on April 12, 2006, was still in place. On March 12, 2007, Ms. Hardy underwent surgery at NASSAU UNIVERSITY MEDICAL CENTER to remove the stent. However, the stent could not be removed as it was encrusted with kidney stones. DR. GRILL was not part of the scheduling nor the performance of this procedure. (*See* Exhibit N, DR. GRILL's Affidavit, annexed to the motion; Exhibit S, NASSAU UNIVERSITY MEDICAL CENTER records for ALMA HARDY, annexed to the motion).

Following the surgery, Ms. Hardy remained in the intensive care unit at NASSAU UNIVERSITY MEDICAL CENTER, where she developed sepsis, multi organ failure, and a cerebrovascular accident. Ms. Hardy died on March 30, 2007, at NASSAU UNIVERSITY MEDICAL CENTER. DR. GRILL never saw Ms. Hardy while she was admitted to NASSAU UNIVERSITY MEDICAL CENTER, nor was DR. GRILL contacted by any of the treating physicians from NASSAU UNIVERSITY MEDICAL CENTER.

According to ALMA HARDY's death certificate, prepared by the physician who performed the autopsy, the cause of death was "pyelonephritis and sepsis, acute renal

failure and cerebral hemorrhage, complicating ureteral stent placements (remote and 3/12/07) for nephrolithiasis”. (See Exhibit T, autopsy report, annexed to the motion; Exhibit U, death certificate, annexed to the motion).

This action was commenced by the serving of a Summons and Complaint upon the Defendant, DR. GRILL, on or about June 17, 2008. (Exhibit A, annexed to the motion). On or about December 2008, the Plaintiff served a Verified Bill of Particulars as to the Defendant, DR. GRILL. (Exhibit F, annexed to the motion). Subsequently, the Plaintiff’s attorney, by way of letter on October 21, 2009, waived the deposition of the moving Defendant, DR. GRILL. (Exhibit K, annexed to the motion).

In support of the underlying action, the Plaintiff has retained an expert witness who is board certified in Urology. (See Exhibit O annexed to the motion). As stated in the Plaintiff’s Expert Witness Response, the witness is expected to testify, in relevant part, that DR. GRILL failed to timely perform a physical exam, failed to appreciate the Plaintiff’s decedent’s condition, failed to properly perform laboratory tests and failed to order appropriate diagnostic studies, CT scans and/or MRIs, failed to determine the cause of the patient’s hematuria and the cause of the patient’s kidney stones, failed to appreciate the patient’s lab studies, failed to inform the patient of the need to remove/exchange the ureteral stent, and failed to consult with the Defendant urology specialists, DR. LEFKOWITZ and DR. McCALLY. The Plaintiff’s expert’s expected testimony mirrors the main allegations, as to DR. GRILL, contained in the Complaint and the Bill of Particulars.

To establish a prima facie case of liability in a medical malpractice action, a plaintiff must prove (1) the standard of care in the locality where the treatment occurred, (2) that the defendant breached that standard of care, and (3) that the breach of the standard was the proximate cause of injury. *Berger v. Becker*, 272 A.D.2d 565 (2nd Dept. 2000). To succeed on a summary judgment motion in a medical malpractice action, the moving party must make a prima facie showing of the absence of a triable issue of fact as to whether the defendant physician was negligent. *Taylor v. Nyack Hospital*, 18 A.D.3d 537 (2nd Dept. 2005). Thus, a moving defendant doctor has the initial burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby. *Williams v. Sahay*, 12 A.D.3d 366 (2nd Dept. 2004).

A moving defendant must address the allegations set forth in the Complaint and the Bill of Particulars. *Terranova v. Finklea*, 45 A.D.3d 572 (2nd Dept. 2007). Bare allegations that do not refute the specific factual allegations of the case are insufficient to establish entitlement to judgment as a matter of law. *Grant v. Hudson Valley Hosp. Center*, 55 A.D.3d 874 (2nd Dept. 2008).

If the moving party meets their burden, in opposition, “a plaintiff must submit a physician’s affidavit of merit attesting to a departure from accepted practice and containing the attesting doctor’s opinion that the defendant’s omissions or departures were a competent producing cause of the injury.” *Domaradzki v. Glen Cove Ob/Gyn Assocs.*, 242 A.D.2d 282 (2d Dept. 1997). General allegations of medical malpractice, contained in an expert’s affidavit, that are conclusory and unsupported by evidence will

not suffice to meet the plaintiff's burden of proof. *Luu v. Paskowski*, 57 A.D.3d 856 (2nd Dept. 2008).

In order to establish proximate cause in a medical malpractice action, a plaintiff must present "sufficient evidence from which a reasonable person might conclude that it was more probable than not that the defendant's deviation was a substantial factor in causing the injury." *Johnson v. Jamaica Hosp. Med. Ctr.*, 21 A.D.3d 881 (2nd Dept. 2005). In this instant action, the Plaintiff has made no such showing.

In support of this instant motion, the Defendant, DR. GRILL, submitted the Affidavit of a medical expert witness, Dr. Melvin Holden. (Exhibit P annexed to the motion). Dr. Holden is board certified in internal medicine, the area in which DR. GRILL practices. On the basis of the information that Dr. Holden reviewed, including the Affidavit of DR. GRILL, the relevant doctors' and hospitals' records, depositions, and other documents, Dr. Holden opines that DR. GRILL acted appropriately at all times in treating the Plaintiff's decedent, ALMA HARDY. Dr. Holden also states, with a reasonable degree of medical certainty, that DR. GRILL performed proper physical examinations and testing of the patient, properly interpreted all test results, properly diagnosed the patient, and properly referred the patient to specialists and urologists. Dr. Holden further notes that the Plaintiff's allegations center around the failure to timely remove a left ureteral stent, a procedure in which DR. GRILL had no involvement. According to Dr. Holden, the placement and management of stents are outside the purview of internal medicine.

The moving Defendant, DR. GRILL, has established a prima facie showing that his treatment of the Plaintiff's decedent was non-negligent. This is supported by the aforementioned medical records, the Affidavit of DR. GRILL, and the Affidavit of Dr. Melvin Holden. Further, the Defendant, DR. GRILL, has addressed the specific allegations set forth in the Plaintiff's Complaint and Bill of Particulars.

As the moving Defendant has met his burden by demonstrating the absence of a departure from good and accepted medical practice, the burden now shifts to the Plaintiff to establish the existence of a material issue of fact. The Plaintiff has not offered any opposition to the Defendant, DR. GRILL's instant motion for summary judgment.

Accordingly, it is hereby

**ORDERED**, that this instant motion for summary judgment, pursuant to CPLR § 3212, seeking dismissal of the Plaintiff's complaint as against the Defendant, HOWARD GRILL, M.D., is **GRANTED**.

All applications not specifically addressed herein are **DENIED**.

This constitutes the Decision and Order of the Court.

DATED: Mineola, New York  
August 17, 2010

  
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Hon. Randy Sue Marber, J.S.C.

**ENTERED**  
AUG 19 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE