

**Burtman v Brown**

2010 NY Slip Op 33325(U)

November 16, 2010

Supreme Court, New York County

Docket Number: 116740/07

Judge: Alice Schlesinger

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

PRESENT: ALICE SCHLESINGER  
Justice

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

Index Number : 116740/2007

**BURTMAN, RUTH L.**

VS.

**BROWN, ROBIN R., M.D.**

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

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

MOTION DATE \_\_\_\_\_

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

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

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

PAPERS NUMBERED

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

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

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

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion for summary judgment by defendant Elizabeth J. Beutyman, M.D. is denied in accordance with the accompanying memorandum decision.

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

**FILED**

NOV 22 2010

NEW YORK COUNTY CLERK'S OFFICE

NOV 16 2010

Dated: November 16, 2010

*Alice Schlesinger*

**ALICE SCHLESINGER** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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

-----X  
RUTH L. BURTMAN,

Plaintiff,

-against-

ROBIN R. BROWN, M.D., HEATHER L. LURIE, M.D.,  
DESIREE A. CLARKE, M.D., HOPE LANGER, M.D.,  
WEST CARE MEDICAL ASSOCIATES, SHERMAN  
S. LIPSCHITZ, M.D., WEST SIDE RADIOLOGY  
ASSOCIATES, P.C., "JANE DOE", M.D.,  
(TRUE NAME UNKNOWN BUT INTENDING TO BE  
THE ASSISTANT SURGEON AT ST. LUKE'S-  
ROOSEVELT HOSPITAL CENTER), VINCENT M.  
ESPOSITO, M.D., ELIZABETH J. BEAUTYMAN, M.D.  
ROBERT T. GRANT, M.D., "JANE DOE", M.D., and  
"JOHN DOE", M.D., (TRUE NAMES UNKNOWN BUT  
INTENDING TO BE THE ATTENDING PHYSICIANS  
AT THE NEW YORK PRESBYTERIAN HOSPITAL  
ON OR ABOUT OCTOBER 31, 2006 AND  
CONTINUING THROUGH DECEMBER, 2006) and  
THE NEW YORK PRESBYTERIAN HOSPITAL,

Defendants.

-----X  
SCHLESINGER, J.:

This is a medical malpractice action wherein the plaintiff has filed claims against her obstetrical doctors, her primary care physician/internist Dr. Elizabeth Beautyman, a radiological service West Side Radiology Associates who performed an ultrasound on October 12, 2005, and finally a plastic surgeon Dr. Robert Grant who performed an excision of two abdominal masses on December 8, 2006. All of these defendants are moving for summary judgment.

The obstetricians who provided care are all associated with West Care Medical Associates, P.C., also a defendant. They are Dr. Robin Brown, Dr. Heather Lurie,

Index No. 116740/07

Motion Seq. Nos. 003,  
004, 005 & 006

**FILED**

**NOV 22 2010**

**NEW YORK  
COUNTY CLERK'S OFFICE**

Dr. Desiree Clarke and Dr. Hope Langer. Those doctors, as well at St. Luke's Roosevelt Hospital, have moved for summary judgment (seq. 005). They support their motion with expert affirmations from two doctors, Dr. Monique DeFour Jones, who is an Obstetrician/Gynecologist, and Surgeon Robert Aldoroty. Plaintiff alleges that these doctors had an obligation while they were treating Dr. Burtman, (who has a PhD in Psychology) during her pregnancy in the latter part of 2005 and early 2006 to refer her for a biopsy, particularly after they obtained a radiological ultrasound report that reflected two abdominal masses and concluded that the masses were "consistent with fibrolipomas".

The two experts supporting this motion indicate that in their opinion these doctors provided treatment that met the standards of good and acceptable care. Further, they say that these doctors did not cause any injury by failing to refer plaintiff for a biopsy. Finally, they say that the treatment of plaintiff's lipoma is not a gynecological issue, but rather a medical one. Since in the first instance I do find that these physicians, their group West Care Medical Associates and St. Luke's Hospital have, with the submission of their expert affirmations, made out a prima facie case entitling them to summary judgment, the burden shifted to the plaintiff to show that there are issues of fact sufficient to deny the motion. But since there is no opposition to this motion by the plaintiff, this burden has not been met. Therefore, the motion must be granted, and it is.

As noted above, the experts supporting the obstetricians state that the treatment of the lipomas is a medical issue. This leads me to the second motion, one by Dr. Elizabeth Beautyman who was Dr. Burtman's Internist/Primary Care physician from August 4, 2005 through January 11, 2006 (seq. 003). The plaintiff claims that Dr. Beautyman also failed

to diagnose and treat an abdominal mass, which turned out to be a liposarcoma in the left upper quadrant of her abdomen.

Dr. Burtman first saw Dr. Beautyman on August 4, 2005. She had become pregnant in 2005 and, as stated earlier, had been receiving prenatal care from defendant West Care Medical Associates since late June 2005. It appears that on some earlier occasion, Dr. Burtman had been informed that she had a mass in her left axilla. When Dr. Burtman first saw Dr. Beautyman in August 2005, Dr. Beautyman allegedly gave the patient a full physical examination that included Dr. Burtman's abdomen. Despite the complete examination, she wrote down that she found nothing of a positive nature. She also indicated that plaintiff made no complaints to her. However, Dr. Burtman testified at her deposition that at this time she knew that she had two abdominal masses, the one in her axilla that felt like the size of an egg, while a second mass in the upper part of her abdomen felt like the size of a golf ball.

What is important here is that pursuant to complaints made by the plaintiff to one of her obstetricians on September 20, 2005, that doctor ordered an ultrasound to assess the masses, or at least the one in the area of her left axilla that had been reported. Thus, on October 12, 2005, Dr. Burtman underwent an ultrasound of her abdomen, which was read by a radiologist associated with Westside Radiology Associates, P.C., Dr. Sherman Lipschitz. (Dr. Lipschitz is not a defendant, though his P.C. is).

The report of the ultrasound stated that there were two soft tissue tumors. The one on the left anterior upper abdominal wall measured 4.7 x 4.7 x 1.7 cm. and the second in the left axilla measured 5.2 x 2.1 x 4.8 cm. Significantly, the conclusions were "two

palpable masses C/W [consistent with] fibrolipomas." This report was sent both to plaintiff's obstetrician and to Dr. Beautyman. According to Dr. Beautyman, she received the report and put it in the plaintiff's file. She did not contact Dr. Burtman to discuss the results.

The next and last time that Dr. Beautyman saw the plaintiff was on January 11, 2006. At that visit, her patient came to see her for treatment of injuries she had suffered as a result of an accident. Specifically, she complained of a hurt finger and twisted ankle. According to Dr. Beautyman, no complaints were made to her with regard to the abdominal masses. Therefore, the doctor states she confined her examination to the ankle and referred Dr. Burtman for physical therapy. Again, at this visit she did not discuss the ultrasound report with her patient, nor did she examine her abdomen.

In support of this motion is an affirmation from a Dr. Elias Sakalias, who is a board certified Internist. In his opinion Dr. Beautyman did nothing wrong vis-a-vis her treatment of Dr. Burtman. With regard to the August 5 examination, he says that the mass had not developed to an extent that was visible or apparent and therefore her examination with negative findings was acceptable. With regard to the January 11, 2006 visit, Dr. Sakalias points out that this was a visit solely to deal with the patient's injuries from the accident. Therefore, since there were no complaints with regard to her abdomen, there was no need to examine the abdomen or to discuss the ultrasound report with the patient. Here he points out that the ultrasound did suggest that the findings of likely lipomas pointed to a benign problem at worst.

The motion is opposed by an affirmation by an unnamed board certified Internist. (Plaintiff's counsel does submit to the Court a complete affirmation which discloses this

individual's name). This doctor opines that Dr. Beautyman did deviate from accepted standards of internal medicine in the first instance by not performing a complete physical examination and in the second instance by not following up with the patient after the doctor's receipt of the ultrasound report.

With respect to the August 5, 2005 visit, the plaintiff's expert points to the description the plaintiff gives of the masses at or about this time. In other words, the expert says that since the plaintiff herself could feel these masses and did alert her obstetricians to them, it is clear that Dr. Beautyman's failure to document the presence of these masses indicates that she did not perform a thorough examination.

With regard to the ultrasound report, the expert points out that its finding that the masses were "consistent with fibrolipoma" only suggests that they might be benign. However, as all the doctors involved in this case agree, the only way to obtain a precise diagnosis of these masses was to do a microscopic examination, in other words a biopsy. Therefore, what this expert says is that simply filing this report away and failing to alert the patient to the need for further tests was a departure from accepted standards of practice. This expert states further that on January 11, 2006, when Dr. Beautyman saw Dr. Burtman a second time, Dr. Beautyman had an obligation to examine plaintiff's abdomen in light of her receipt of the ultrasound report in October 2005. In other words, she was on specific notice at that time that there were two masses in Dr. Burtman's abdomen. Thus, along with this information comes an obligation to examine those masses and compare her findings with the size given in the report to see if there was any discernable growth. After doing this, she had an obligation as Dr. Burtman's primary care physician to discuss with the patient a need for further diagnosis of these masses.

In reply Dr. Beautyman's counsel argues that the position urged by plaintiff, that the doctor had an obligation to discuss the ultrasound report with the patient, "defies logic". However, I think not. Dr. Beautyman is a medical doctor, an internist who was Dr. Burtman's primary care physician. Even though Dr. Burtman may not may have made specific complaints about the abdominal masses in August 2005 and expressed concern on January 11, 2006, solely of a twisted ankle, that arguably was not a sufficient reason for Dr. Beautyman to ignore a report that suggested a benign condition but was not conclusive. Again arguably, at the very least, she had an obligation to discuss that report with her patient since Dr. Beautyman had no knowledge of whether the report had been brought to the attention of Dr. Burtman before. Nor did she, Dr. Beautyman, have any knowledge as to whether the significance of the wording of the report had been brought to the attention of the patient. As stated earlier, the experts giving opinions in support of the obstetricians here state that the ultrasound report, though ordered by one of the obstetricians, was in fact a medical issue, rather than a gynecological one. Dr. Beautyman was at the time the plaintiff's primary medical physician.

Therefore, I find that there are issues sufficient to deny summary judgment. They are Dr. Beautyman's alleged failure to examine Dr. Burtman's abdomen fully on the two days in question and to discuss with her a differential diagnosis with a suggestion for a follow-up biopsy. These allegedly were deviations from accepted standards of medicine. Further, it can be argued, and is, by plaintiff's counsel that these failures caused injury to the plaintiff because, if Dr. Beautyman had suggested a biopsy with the patient and if the patient had had that biopsy in the early part of 2006, the probabilities were that the upper abdominal mass, which turned out to be a liposarcoma, could have been excised at a

much earlier stage with far less damage to the musculature. As will be seen by a later discussion, it was not until January 2007, a year later, that there was an excision of the liposarcoma, which was then approximately 10 cm. So the motion by Dr. Beautyman is denied.

The next motion is by Westside Radiological Associates, P.C., also for summary judgment (seq. 006). As stated earlier, the P.C.'s one contact with the plaintiff was the performance and interpretation of an ultrasound on October 12, 2005. Dr. Sherman Lipschitz was deposed during discovery and testified as to the basis of his interpretation of the film. He said that he based his readings on the fact that the masses were well circumscribed and homogeneously echogenic. In contrast, according to Dr. Lipschitz, a liposarcoma is poorly margined and acoustically heterogenous. However, he also pointed out that there was no way radiographically to definitively determine whether the masses were fibrolipomas, which he described in the report as "consistent with" benign fibrolipomas, rather than malignant liposarcomas. The only way this could be done was via a clinical determination after a microscopic inspection. He also pointed out that the referral from Dr. Robin Brown said nothing about pain in the area or a change in the size of the masses.

This motion is supported by an affirmation from a Dr. John Pellerito, board certified in Diagnostic Radiology. He says that the care rendered by West Side Radiology was appropriate and proper and in no way related to any injuries suffered by the plaintiff because the report did not cause a delay in any diagnosis or treatment. Nor was the report of these masses a misdiagnosis. The report accurately described the appearance and size of the masses.

This defendant's counsel also refers the Court to a Second Department decision, *Mosezhnik v. Bernstein*, 33 AD3d 895 (2006). This case holds that radiologists have limited obligations regarding additional treatment for patients referred to them. Their role is limited to reporting, interpreting and documenting their findings. It is then up to the clinician to advise if further action is necessary. In other words, the radiologist does not assume a general duty of care to schedule or urge further testing or to diagnose the plaintiff's medical condition.

The opposition consists again of an affirmation from an unnamed board certified Radiologist (the name is submitted to the Court). That radiologist opines that it was the responsibility of the radiologist to recommend follow-up for further diagnostic testing. This expert also says that a radiologist must describe all masses in sufficient detail that identifies the characteristics of the masses for future reference and comparison. The expert says that the radiologist here did not do that, but does not specify how. Nor did the defendant specifically point out limitations of ultrasound and recommend a further radiological study such as a CT scan or an MRI. The expert says that this failure resulted in a delay of the diagnosis that would have led to the excision of the masses at an earlier time.

The motion by Westside Radiology is granted. Plaintiff fails to distinguish the *Mosezchenik* case from this one. In the Second Department case, monography was the issue and here a sonogram. But with regard to the duty of a radiologist, there is no difference. In fact, Dr. Lipschitz did describe the masses and did give their size. The opposing radiologist does not disagree with this description or interpretation, although he viewed the ultrasound himself. Westside Radiology is entitled to a dismissal of the action

against it since its report was accurate and gave the necessary information to the clinicians to recommend whatever follow up was necessary.

The final motion and the most difficult one is by Dr. Robert Grant, a Plastic Surgeon, who is also moving for summary judgment (seq, 004). Dr. Grant first saw the patient at the end of October 2006. She went to him complaining about the size of these masses and the fact that they were causing her pain. Dr. Grant made a diagnosis of "SQ masses". He discussed his diagnosis at length with Dr. Burtman and advised her that the best course of action would be a surgical excision of the two masses, which he believed based on the ultrasound report were lipomas. He also told her that he felt that additional radiological testing before the excision was not necessary.

On December 8, 2006, Dr. Grant performed the excision of the two masses. While he had estimated, by using a ruler, the size of the left upper quadrant mass to be approximately 8 cm, a doubling of the size given on the ultrasound taken one year earlier, the size turned out to be 10 cm. In his operative report, he described the masses as lipomas and sent them to pathology to be diagnosed. Despite the fact that he believed he had completely removed the masses, in fact when he received the pathology report of December 19, 2006, not only did it show that the left quadrant mass was an "atypical lipoma" measuring 10 cm, but the report also said that the atypical cells appeared on the "ink surgical margin" as well. In other words, the margins were not clean and, assuming that further surgery was indicated, a complete excision of the mass would have to be done.

On December 19, Dr. Grant saw the patient and discussed the pathology report with her. He pointed out that the atypical lipoma diagnosis would suggest a liposarcoma (a malignancy) and because of that, he told her that she should see a surgical oncologist.

He specifically recommended one particular physician he knew. Instead, Dr. Burtman went to Memorial Sloan Kettering Cancer Center and on January 4, 2007, after further pathological diagnosis, it was conclusively shown that the mass was a liposarcoma. This further report was written by Dr. Mark Edgar, a pathologist at that hospital. Dr. Samuel Singer, a surgical oncologist at Memorial Sloan Kettering, then recommended to the plaintiff that she undergo a "wide radical incision of the area". Dr. Singer performed this surgery on January 6, 2007, which was accomplished without complications and this time with clear margins. Various follow-ups with Dr. Singer were unremarkable, except for complaints that the patient made of sharp pain around the mesh that Dr. Singer had put in as part of his surgical repair.

This motion is accompanied by an affirmation from Dr. John Kane, III. He is a well-qualified board certified Surgical Oncologist. His affirmation, while somewhat general in presentation, concludes with the following opinions. First, he opines that Dr. Grant as a Plastic Surgeon took a proper medical history. Second, he indicates that Dr. Grant properly discussed options with the patient when he saw her on October 31, 2006. Dr. Kane points out here that all the previous physicians had treated these masses as lipomas. Third, he notes that the operation on December 8, 2006, was performed without incident and that the masses were clinically consistent with lipomas. He also says that the margins taken were appropriate, as was the length and location of the incision. Fourth, he points out that on December 19, 2006, Dr. Grant properly made the plaintiff aware of the pathological findings and immediately referred her to a surgical oncologist. Finally, and perhaps most important, he states that Dr. Grant's surgery on December 8, 2006, neither

compromised the site nor had any effect on the possibility of increasing the risk of cancer or its recurrence.

In opposition, there is an affirmation from an unnamed board certified Plastic Surgeon (again, the Court is given the name) who says that he is familiar with the techniques needed to diagnose and treat soft tissue masses and fatty tumors. He opines that the care rendered by Dr. Grant was substandard because by the time Dr. Grant saw Dr. Burtman, the mass was highly suspicious for a malignancy because it had doubled in size from a year before. Here he points out that Dr. Grant acknowledged that fact, that a doubling of a mass in a short period of time does often point to a malignancy, although Dr. Grant did say also that this evaluation is not always applicable to a pregnant woman.

It is the expert's position that, in fact, radiological tests should have been ordered by Dr. Grant before his surgery because these tests might have given more information indicating that this large mass was a malignancy. Further, the expert opines that rather than do a surgical excision, Dr. Grant should have instead done a procedure with local anesthesia, such as a core biopsy, to obtain tissue which could then have been diagnosed. The failure to do these things was a departure from accepted care. Finally, the pathology report showed that Dr. Grant failed to remove the entire cancerous mass, which necessitated a need for a second surgical excision.

I said earlier that this was the hardest motion, and during oral argument I indicated that I would have to reread these papers. I did, and in doing that I read Dr. Grant's records as well as his deposition. I also read the entire Sloan Kettering record.

During his deposition, Dr. Grant acknowledged that, if in fact he had believed that this mass was a malignant liposarcoma, then he would have immediately referred his

patient to a surgical oncologist who would have had more experience in excising such masses. He acknowledged that his own experience in dealing with liposarcomas was limited. When asked why he did not do a frozen section during the operation, he opined that he believed there was not enough tissue to make a proper diagnosis. He also explained why he believed that a core biopsy might not have worked, also due to insufficient tissue to make a proper diagnosis. Counsel for the moving defendant argues that the care was in all ways proper and that after the second surgery, Dr. Burtman was doing extremely well. Therefore, he points out that Dr. Grant's surgery caused no injury to the plaintiff.

However, after due consideration, I am not convinced that there are no issues extant. Dr. Grant himself acknowledges that, if he had believed that the mass was malignant he would have and should have referred Dr. Burtman immediately to a surgical oncologist. He also acknowledges that the size of the mass was very large and had doubled in a short time, pointing to the likelihood of a malignancy. One could argue, therefore, that Dr. Grant either should have made such a referral immediately or done radiological tests to obtain more information. Further, he should have performed a less invasive surgery, such as a core biopsy, to at least attempt to obtain the tissue needed to make a diagnosis. The fact is that he did none of these things and instead, pursuant to his belief that he was dealing with a benign lipoma, went ahead and did the excisions himself. However, and it is unclear why, but perhaps based on his belief that this was merely a lipoma and the need for clean margins was not mandated, his excision resulted in margins that were not clean. Therefore, there was a need for a second surgery to remove all the atypical cells. Thus, it could and was argued by the plaintiff's expert that the incomplete

surgery by Dr. Grant was a departure from accepted standards because it mandated a second more invasive surgery. Also, the opposition points out that if the additional tests had been done or an immediate referral made to an oncologist, there would have been only one surgery. Therefore, since issues do exist here, the motion on behalf of Dr. Grant is denied.

Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendant Elizabeth J. Beautyman, M.D., (seq 003) is denied; and it is further

ORDERED that the motion for summary judgment by defendant Robert T. Grant, M.D., (seq 004) is denied; and it is further

ORDERED that the motion for summary judgment by defendants Robin R. Brown, M.D., Heather L. Lurie, M.D. Desiree A. Clarke, M.D., Hope Langer, M.D., West Care Medical Associates and St. Luke's-Roosevelt Hospital (seq 005) is granted; and it is further

ORDERED that the motion for summary judgment by defendant West Side Radiology Associates (seq 006) is granted.

The Clerk is directed to sever and dismiss with prejudice. all claims against defendants Robin R. Brown, M.D., Heather L. Lurie, M.D., Desiree A. Clarke, M.D., Hope Langer, M.D., West Care Medical Associates, St. Luke's Roosevelt Hospital Center, and West Side Radiology Associates, P.C. The remaining claims shall continue. Counsel shall appear in Room 222 for a pre-trial conference on January 26, 2011 at 9:30 a.m.

Dated: November 16, 2010

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**FILED**

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J.S.C.  
**ALICE SCHLESINGER**