

Navarra v Four Winds Hosp.-Westchester

2011 NY Slip Op 31525(U)

May 26, 2011

Supreme Court, Nassau County

Docket Number: 019839/09

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 18

_____ X
KYLE NAVARRA, an infant by his parents and
natural guardians, DEBBIE NAVARRA and
RAMON NAVARRA and DEBBIE NAVARRA
and RAMON NAVARRA,

Plaintiff,

Index No.: 019839/09
Motion Seq...01
Motion Date...04/06/11

-against-

FOUR WINDS HOSPITAL -WESTCHESTER,

Defendant.

_____ X
Papers Submitted:
Notice of Motion.....X
Affidavit in Support.....X
Affirmation of Ellis H. Tobin, M.D.....X
Memorandum of Law.....X
Affirmation in Opposition.....X
Reply Affidavit.....X

Upon the foregoing papers, the motion by the Defendant, Four Winds Hospital-
Westchester (“Four Winds”) seeking an order pursuant to CPLR § 3212 granting it summary
judgment dismissing the complaint against it, is determined as provided herein.

The Plaintiffs in this action seek to recover for medical malpractice and
negligent supervision. They allege that the Defendant, Four Winds, failed to properly treat

the infant Plaintiff, Kyle Navarra, (Kyle) by failing to diagnose a staphylococcus (“staph”) infection in his lungs. They additionally allege that unsanitary conditions at Four Winds gave rise to the spread of bacteria, specifically staphylococcus, and that Four Winds employed an improper and/or negligent infection control protocol. They also allege that Four Winds negligently supervised its patients which resulted in Kyle’s roommate attacking him and causing him to suffer a concussion and broken molar.

The infant Plaintiff, Kyle, a fifteen year old sophomore in high school at the time, was admitted to Four Winds on March 27, 2007 pursuant to his psychiatrist, Dr. Robert Katz’s referral, for treatment of various mental health issues including attention deficit disorder. Blood test results of March 28, 2007 indicate a marked white blood cell count and a slightly elevated lymphocyte value, neither of which are clinically indicative of an infection.

On March 29, 2007, Kyle was seen at Four Winds’ health services by Psychiatric Practicing Nurse Weber following an attack by two patients. Kyle reported that he was in his room when his roommate, Josh, and another patient came in and jumped him. He reported that Josh hit him in and about the head about six times. He complained that he was dizzy, nauseous and vomiting. He had a dime-sized contusion on the left side of his head and a broken lower molar. He was advised to take Motrin and to consult with a dentist.

Kyle was seen by an internist on March 30th and a dentist on March 31st who confirmed the broken molar and advised Kyle that he should have the tooth filled when he gets home and that he might need root canal.

A progress note dated April 3rd indicates that Kyle was not feeling well and that he had a sore throat. He was hyper throughout the day. That night he was given Benadryl at 10:30 p.m. because he was having trouble sleeping.

On April 4, 2007, Kyle was seen at Four Winds health services by Nurse Practitioner Woodward. After examining Kyle and conducting a rapid strep screen test, which was negative, she diagnosed him with a virus. At her Examination Before Trial, Nurse Woodward testified that she examined Kyle's head, ears, nose and throat, including tympanic membranes, without erythema; she found a posterior pharynx with moderate edema without exudates. Kyle's neck was supple without adenopathy. His lungs were clear and his cough was dry. She prescribed Advil for pain and fever and cough suppressant. Kyle was told to return to health services in two or three days if his symptoms worsened or he did not feel better.

Kyle was discharged on April 5, 2007. His discharge assessment indicates that he had a supportive social network and that he did not have suicidal intentions. He was instructed to follow-up with his pediatrician.

Kyle saw his pediatrician, Dr. Shear, on April 6, 2007. Dr. Shear's medical records indicate that Kyle's throat was a little pink but was not toxic; he did not have any body aches or sinus problems; and, he had a good air movement in his lungs but some rales, abnormal sounds accompanying the normal respiratory sounds on auscultation of the chest, were noted. Dr. Shear prescribed Zithromax. Kyle's medical condition rapidly deteriorated.

He was hospitalized at Winthrop Hospital on April 7, 2007, where he was diagnosed with a staph infection in his lungs.

“The essential elements of medical malpractice are (1) a deviation or departure from accepted medical practice, and (2) evidence that such departure was a proximate cause of injury (citations omitted).” *Wexelbaum v. Jean*, 80 A.D.3d 756 (2d Dept. 2011), quoting *DiMitri v. Monsouri*, 302 A.D.2d 420, 421 (2d Dept. 2003). “In order to establish the liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff’s injuries.” *Stukas v. Streiter*, 83 A.D.3d 18 (2d Dept. 2011). “Thus on a motion for summary judgment dismissing the complaint in a medical malpractice action, the 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 (citations omitted).” *Wexelbaum v. Jean*, supra; see also, *Stukas v. Streiter*, supra.

If the moving defendant only establishes that he did not commit medical malpractice, in opposing the motion, the plaintiff must establish the existence of a material issue of fact with respect to only that issue. *Stukas v. Streiter*, supra. Similarly, if the moving defendant establishes a lack of proximate cause, the plaintiff need establish only the existence of a material issue of fact with respect to that issue. *Stukas v. Streiter*, supra. However, if the moving defendant establishes both a lack of negligence and proximate cause, in opposing the motion, the plaintiff must establish an issue of fact as to both of those

issues. *Stukas v. Streiter*, supra.

“[G]eneral allegations of medical malpractice which are conclusory in nature and unsupported by competent evidence tending to establish the elements of medical malpractice” do not suffice (citations omitted). *Shectman v. Wilson*, 68 A.D.3d 848 (2d Dept. 2009); see also, *Diaz v. New York Downtown Hosp.*, 99 N.Y.2d 542 (202); *Romano v. Stanley*, 90 N.Y.2d 444 (1997); *Amatulli by Amatulli v. Delhi Const. Corp.*, 77 N.Y.2d 525 (1991). The plaintiff’s expert must set forth the medically accepted standards of care and explain how they were departed from. *Geffner v. North Shore University Hosp.*, 57 A.D.3d 839, 842 (2d Dept. 2008) (citations omitted). And, the plaintiff’s expert must address all of the key facts relied on by the defendant’s expert. See *Kaplan v. Hamilton Medical Associates, P.C.*, 262 A.D.2d 609 (2d Dept. 1999); *Geffner v. North Shore University Hosp.*, supra; *Rebozo v. Wilen*, 41 A.D.3d 457 (2d Dept. 2007).

An expert’s affidavit which lacks evidentiary support in the record or is contradicted thereby is not sufficient to establish the existence of a triable issue of fact. *Micciola v. Sacchi*, 36 A.D.3d 869, 871 (2d Dept. 2007) (Citations Omitted). Furthermore, “[a]n expert may not reach a conclusion by assuming material facts not supported by the evidence, and may not guess or speculate in drawing a conclusion (Citations Omitted).” *Rosato v. 2550 Corp.*, 70 A.D.3d 803 (2d Dept. 2010); see also, *Cassano v. Hagstrom*, 5 N.Y.2d 646 (1959); *Hambusch v. New York City Tr. Auth.*, 63 N.Y.2d 723, 725 (1984). “[H]indsight reasoning ... is insufficient to defeat summary judgment (Citations Omitted).”

Miccola v. Sacchi, supra at p. 841.

“To establish proximate cause, the 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 (Citations Omitted).” *Alicea v. Liguori*, 54 A.D.3d 784, 785 (2d Dept. 2008), quoting *Johnson v. Jamaica Hosp. Med. Ctr.*, 21 A.D.3d 881, 883 (2d Dept. 2005). The plaintiff’s expert need not “ ‘quantify the extent to which the defendant’s act or omission decreased the plaintiff’s chance of better outcome or increased [the] injury, as long as evidence is presented from which the injury may infer that the defendant’s conduct diminished the plaintiff’s chance of a better outcome or increased [the] injury (Citations Omitted).’” *Alicea v. Liguori*, supra, at p. 786, quoting *Flaherty v. Fromberg*, 46 A.D.3d 743, 745 (2d Dept. 2007).

In support of this its motion, Four Winds has submitted the affirmation of an infectious disease doctor, Dr. Ellis H. Tobin. He opines, to a reasonable degree of medical certainty, that Four Winds’ treatment of Kyle complied with the applicable medical standards of care. Analyzing the results of Nurse Woodward’s April 4th exam, Dr. Tobin concurs in her diagnosis. Dr. Tobin represents that “the hallmark signs and symptoms of staph pneumonia includes shortness of breath, productive cough [that produces sputum or mucus] and a toxic appearance,” none of which were exhibited by Kyle on April 4th. He further opines that Kyle’s symptoms on April 4th did not warrant referral to a doctor or hospitalization.

Dr. Tobin opines that the failure to procure the results of a throat culture which Nurse Woodward testified she prepared to be sent to a laboratory was of no consequence because throat cultures aren't used to test for staph infections which is what Kyle was ultimately diagnosed with. He also opines that Kyle's symptoms did not warrant a staph screen, and that even if one was conducted, the results would have taken two to three days to procure at which time Kyle would have already been discharged and treated by his pediatrician.

Dr. Tobin also rejects the Plaintiffs' claims regarding the sanitary conditions at Four Winds. He initially notes that Kyle did not have Methicillin-Resistant Staphylococcus Aureus ("MRSA") but had a non-MRSA staph infection, for which infection control commandability is simply not implicated. Dr. Tobin explains that non-MRSA staph aureus organisms exist in everyone's skin as it is expected to be an indigenous form of our own normal flora. Although most people do not become infected with it, Kyle's viral respiratory infection increased the chance of it progressing to staph pneumonia. Dr. Tobin explains "[w]hereas a diagnosis of MRSA may implicate an infection control process at a hospital, there is no infection control commandability that is implicated as it pertains to non-MRSA staph." Accordingly, he opines that the claim that Four Winds' infection prevention process was somehow deficient is untenable. Put differently, the Plaintiffs' claims that Kyle contracted this particular infection because of negligent or improper infection control practices is completely unjustifiable and speculative.

Dr. Tobin notes that Kyle saw his own pediatrician, Dr. Shear, on April 6th, at which time he remained nontoxic without body aches or sinus problems. While his throat was pink and some rales were noted, the air movement in his lungs was good. Dr. Shear merely prescribed an antibiotic. He did not refer Kyle to a specialist nor did he hospitalize him.

Dr. Tobin also opined that Kyle's rapidly deteriorating condition, i.e., the manifestation of asthma and the development of Acute Respiratory Distress Syndrome, was not caused in any way by the treatment provided at Four Winds. Those conditions were caused by the rapid and natural progression of Kyle's infection to staph pneumonia.

Dr. Tobin similarly rejects the Plaintiffs' claim that the March 29th altercation caused his staph pneumonia. He explains that a broken molar did not give rise to an increased susceptibility to staph pneumonia. While a foreign object lodged in one's lung can cause pneumonia, there is no evidence Kyle aspirated his broken molar.

The Defendant, Four Winds, has established its entitlement to summary judgment dismissing the medical malpractice claim thereby shifting the burden to the Plaintiffs to establish the existence of a material issue of fact.

In maintaining that it did not have knowledge or reason to know of any violent propensities by Josh, Four Winds relies solely on the fact that Kyle admitted at his Examination Before Trial that he did not tell anyone at Four Winds about any concerns about Josh's propensities until after Josh jumped him. Standing alone, that hardly establishes that

Four Winds lacked knowledge or reason to know that Josh had violent propensities. Indeed, Kyle testified at his Examination Before Trial that he had seen Josh hit other patients.

Accordingly, Four Winds' motion for summary judgment dismissing the Plaintiffs' claim for negligent supervision is **DENIED**.

The Plaintiffs do not dispute that Kyle did not have MRSA infection and have abandoned their claims regarding the sanitary conditions at Four Winds. They have also abandoned their claims that Kyle's broken tooth played a role in his infection and that Four Winds can be held vicariously liable for the dentist, Dr. Simon's, actions.

Assuming, *arguendo*, that the Plaintiffs' could rely on Kyle's discharge summary from Winthrop Hospital to establish the existence of a material issue of fact, his parents informing Winthrop that Kyle had a productive cough two to three days prior to his admission places the cough at April 4th or 5th and not necessarily when Nurse Woodward examined him.

The fact that the failure to procure Kyle's throat culture test results could be attributed to negligence by Four Winds does not give rise to a factual issue, either. That test is not used to diagnose staph infections, and it would not have been returned before Kyle's discharge from Four Winds, at which time he underwent treatment by his pediatrician.

As for Four Winds' alleged failure to record Kyle's temperatures, not only is this refuted by the record, the required causative link is lacking. While the Plaintiffs' expert faults Four Winds for not doing a chest X-ray or CBC, the causative link is conclusory and

lacking in evidentiary support. The Plaintiffs have established only a speculative causal nexus which simply does not suffice.

Similarly unavailing is the Plaintiffs' conclusion that no one was notified of Kyle's continuous fever on April 5th. Kyle's medical records indicate that a nurse was notified that day that Kyle had a 103.9 fever. In any event, once again, a critical causative link has not been identified.

Accordingly, it is hereby

ORDERED, that the Defendant, Four Winds' motion for summary judgment is **GRANTED** to the extent that the Plaintiffs' claim for medical malpractice is **DISMISSED**.

This constitutes the decision and order of the Court.

DATED: Mineola, New York
May 26, 2011



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

ENTERED

MAY 31 2011

NASSAU COUNTY
COUNTY CLERK'S OFFICE