

Perricone v St. Catherine of Siena Med. Ctr.
2011 NY Slip Op 31761(U)
June 22, 2011
Supreme Court, Suffolk County
Docket Number: 06-2551
Judge: Peter H. Mayer
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 1-18-11
ADJ. DATE 3-8-11
Mot. Seq. # 002 - MG; CASEDISP

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BARBARA PERRICONE, as Administratrix of the	:	LAFFAN & LAFFAN, LLP
Estate of CORRINE G. PERRICONE, Deceased, and on	:	Attorney for Plaintiff
behalf of her distributees and BARBARA PERRICONE,	:	221 Mineola Boulevard
Individually,	:	Mineola, New York 11501
	:	
Plaintiffs,	:	
- against -	:	BARTLETT, MCDONOUGH, BASTONE
	:	& MONAGHAN, LLP
ST. CATHERINE OF SIENA MEDICAL CENTER,	:	Attorney for Defendant St. Catherine of
"JOHN DOE," name being fictitious representing a	:	Sienna
physician at ST. CATHERINE OF SIENA MEDICAL	:	670 Main Street:
CENTER, and "ROB DOE," last name being fictitious,	:	Islip, New York 11751
representing an employee of ST. CATHERINE OF SIENA	:	
MEDICAL CENTER,	:	
	:	
Defendants.	:	

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion for summary judgment dismissing the complaint by the defendant St. Catherine of Siena dated December 16, 2010 and supporting papers 1-40; (2) Notice of Cross Motion - none; (3) Affirmations in Opposition by the plaintiff dated March 8, 2011 and supporting papers 41-42 ; (4) Reply Affirmation - none; ~~(and after hearing counsels' oral arguments in support of and opposed to the motion)~~; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that this motion (002) by the defendant St. Catherine of Siena Medical Center pursuant to CPLR 3212 for summary judgment dismissing the plaintiffs' verified complaint is hereby granted and the complaint and any cross claims are dismissed with prejudice.

The complaint of this action sets forth causes of action sounding in medical malpractice for the wrongful death and conscious pain and suffering of Corrine G. Perricone, deceased. It is claimed that the plaintiff's decedent presented by ambulance to the emergency department of St. Catherine of Siena Medical Center on February 2, 2004, having been found by her son in a confused and incoherent state. She was admitted to St. Catherine of Siena Medical Center and died on February 5, 2004 at age 76. The plaintiff alleges, inter alia, that the defendants failed to timely and properly diagnose the plaintiff's decedent's condition; failed to initiate an appropriate work-up; and failed to properly treat the plaintiff's decedent, proximately causing her death.

St. Catherine of Siena Medical Center (St. Catherine) now seeks an order granting summary judgment dismissing the complaint of this action and any cross claims asserted against it on the bases that neither it nor its employees departed from the accepted standards of medical care and practice; that the decedent was admitted to the service of her private attending physician, Dr. Roth, who was responsible for coordinating her care and treatment and ordering all consults; and that there is nothing that St. Catherine, by its staff and employees, did or did not do which proximately caused the decedent's death.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (*Holton v Sprain Brook Manor Nursing Home*, 253 AD2d 852, 678 NYS2d 503 [2nd Dept 1998], *app denied* 92 NY2d 818, 685 NYS2d 420 [1999]). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (*see, Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166 [1980]; *Prete v Rafla-Demetrious*, 224 AD2d 674, 638 NYS2d 700 [2nd Dept 1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (*see, Fiore v Galang*, 64 NY2d 999, 489 NYS2d 47 [1985]; *Lyons v McCauley*, 252 AD2d 516, 517, 675 NYS2d 375 [2nd Dept], *app denied* 92 NY2d 814, 681 NYS2d 475 [1998]; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2nd Dept 1994]).

To rebut a prima facie showing of entitlement to an order granting summary judgment by the defendant in a medical malpractice action, the plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendant's acts or omissions were a competent-producing cause of the injuries of the plaintiff (*see, Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.*, 7 AD3d 759, 776 NYS2d 907 [2nd Dept 2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [2nd Dept 1997]). "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury" (*Bengston v Wang*, 41 AD3d 625, 839 NYS2d 159 [2nd Dept 2007]).

In support of this motion (002), St. Catherine has submitted, inter alia, an attorney's affirmation; the expert affidavit of Ian Newmark, M.D.; the affidavit of Edward Attard; copies of the summons and complaint, the moving defendant's answer and combined demands for discovery, the plaintiff's verified bill of particulars and supplemental verified bill of particulars; uncertified extracts from the plaintiff's medical records which are not in admissible form pursuant to CPLR 3212; a copy of the transcript of the examination before trial of John Bernovich dated May 3, 2010; and the unsigned transcript of the examination before trial of Barbara Perricone dated June 16, 2010 which is not in admissible form as required by CPLR 3212 (see, *Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 850 NYS2d 201 [2nd Dept 2008]; *McDonald v Maus*, 38 AD3d 727, 832 NYS2d 291 [2nd Dept 2007]; *Pina v Flik Intl. Corp.*, 25 AD3d 772, 808 NYS2d 752 [2nd Dept 2006]), nor is it supported by an affidavit pursuant to CPLR 3116 and is, therefore, not considered.

John Bernovich testified at his non-party deposition that he is married to the plaintiff, Barbara Perricone, the daughter of the decedent, Corinne Perricone. He testified that his wife lives a great deal of the time in their home in Arizona. They also have another home in Riverhead where he resides. It was his understanding through a telephone conversation with Barbara Perricone on February 2, 2002 at approximately 5:30 p.m. that her brother, John Perricone, went to his mother's apartment for dinner and found his mother confused and just getting out of bed. Thereafter an ambulance was called and the EMS staff transported her to St. Catherine of Siena emergency room. Bernovich continued that he arrived at the hospital about an hour and a half later and spoke to Rob who advised him that some testing was being done and that, thus far, there were negative findings. Mr. Bernovich testified that he left the hospital at about 8:30 or 9:00 p.m. and that the decedent was admitted to the hospital some time after he left. He thought she was somewhat confused when he arrived, but as he was leaving, he felt she was "a little better" because she understood that he was leaving and that she told him that he could not really do anything for her. He stated that she was receiving oxygen by nose, and her blood pressure and heart rate were being monitored.

Mr. Bernovich continued that he did not know who the decedent's primary care physician was but later learned it was Dr. Roth. He did not believe that Dr. Roth became involved in the decedent's care at the hospital and stated he did not know who the admitting physician was. He returned to the hospital the following morning about 9:30 or 10:00 a.m. and learned the decedent was in the intensive care unit as she had gone into a "semi-conscious or semi-comatose" state. He continued that she was awake, confused, and scared when he saw her. He did not know what tests were performed or what the results were. He testified that he and his wife asked for a "do not resuscitate" order, but the nurse would not give them a sign to be placed at the bedside. He never spoke to any doctor before the decedent died on February 5, 2004. After her death, he spoke to Dr. Roth, whom, he stated, did not know the cause of the decedent's death. An autopsy was performed but he was not sure of the cause of death. He stated that he thought her death may have been caused by stroke, but continued that he learned that her death had something to do with carbon dioxide accumulating in her blood, and that her death was not due to a stroke or hemorrhage.

Edward Attard set forth in his supporting affidavit that he is the Administrative Director of Regulatory Affairs for St. Catherine of Siena Medical Center and that in February 2004, Dr. Ronald Roth, Dr. Schenley Que, Dr. Scott Capustin, Dr. Ezra Deutsch, and Dr. Bruce Mayerson were private attending physicians at St. Catherine, and that none of them was an employee of St. Catherine.

The defendant's expert, Dr. Ian Newmark, has set forth in his duly notarized affidavit submitted in support of this motion that he is a physician licensed to practice medicine in the State of New York and is board certified in internal medicine with special certifications in the sub-specialties of critical care and pulmonary medicine. He has set forth the materials he reviewed and states his opinions to a reasonable degree of medical

certainty. It is Dr. Newmark's opinion that the care and treatment rendered by the emergency doctors, nurses and staff at St. Catherine of Siena Medical Center to Corrine G. Perricone did not deviate from the accepted standard of care and that the staff at St. Catherine did not proximately cause the decedent's alleged injuries or damages.

Dr. Newmark set forth the decedent's condition at home when the EMS team arrived and her condition upon arrival to the emergency room at St. Catherine on February 2, 2004. He noted a past history of COPD and noted her medications to be an Albuterol inhaler and a cholesterol pill. She was seen by the emergency room physician before 7:40 p.m. and various tests including EKG, CCU bloods, urinalysis, CT of the brain, foley catheter with intake and output to be strictly monitored, portable chest x-ray, and urine and blood cultures and sensitivities were ordered. Dr. Ezra Deutsch noted the EKG to be abnormal. Dr. Newmark continues that at about 9:15 p.m., her O2 Sat was 67% so oxygen at 3 liters was started with the saturation improving to 91%. Vital signs were monitored. She was noted not to be in apparent distress; however, she was mildly confused. The remainder of the physical examination was normal. The emergency room physician, Dr. Richard Sollazzo, ordered a CT of the brain without contrast on February 2, 2004 at 10:35 p.m. The CT, Dr. Newmark states, was interpreted by Dr. Heyligers to be a "normal exam." At 11:15 p.m. after the CT scan, she was noted to have dyspnea and the O2 Sat was 92%. A portable chest x-ray ordered by Dr. Sallazzo was interpreted by Dr. Heyligers as revealing "no acute disease." Dr. Newmark set forth the decedent's vital signs and the entries into the nurse's progress notes during her stay in the emergency room and indicates that the emergency room note reveals the decedent was awake, alert and vocal with clear speech, oriented to year and place, that she denied dyspnea, her lung sounds were decreased bilaterally, and a mild inspirational wheeze was audible. She was confused as to "certain issues" but followed all commands. She complained that her bones hurt and indicated she was having urinary incontinence at home. Dr. Roth admitted her at 1:00 a.m. on February 3, 2004 to his service, on the "stroke pathway." Thereafter, she was seen by N.P. Barbara Johnson who conducted a history and physical. Her impression, countersigned by Dr. Roth, was "acute CVA." A neurology workup was performed by Dr. Schenley Que, a cardiology consult was conducted by Dr. Deutsch, and a pulmonology consult was performed by Dr. Scott Capustin.

It is Dr. Newmark's opinion that the decedent was timely triaged within four minutes of arriving in the emergency room and that 34 minutes after her presentation to the emergency department, the above mentioned diagnostic tests were ordered expeditiously. He states it is not the standard of care to order an MRI within the first six hours of the patient's presentation to the emergency room based upon her presenting symptoms and complaints. The CT scan that was ordered was appropriate in light of her complaints, symptoms, mental status, and weakness. Dr. Newmark set forth Ms. Perricone's various oxygen saturation levels, and carbon dioxide and other chemistries while she was in the emergency department. He opines, based upon those readings, there is no basis to sustain the claim that St. Catherine failed to recognize the signs and symptoms of carbon dioxide narcosis. Dr. Newmark continues that there was no reason to suspect carbon dioxide narcosis as the signs and symptoms of the narcosis are non-specific. Therefore, states Dr. Newmark, there was no reason for the hospital staff to order arterial blood gases periodically.

Dr. Newmark continues that arterial blood gases were ordered by Dr. Roth on February 5, 2004, at which time the patient had been under Dr. Roth's care since the early morning hours of February 3, 2004. Additionally, he states, the emergency room record does not support that there was increasing evidence that the decedent's inspired O2 concentration was continually increasing, nor does the record indicate that there was abnormal or increased levels of bicarbonate. Dr. Newmark continues that based upon her presentation, it was appropriate for the emergency room staff to consider hemorrhagic stroke as a possible explanation for the patient's mental status changes. Dr. Newmark continues that although the plaintiff alleges that it was a

departure by the emergency room staff to make a diagnosis of stroke, at no time did the emergency staff make the diagnosis of stroke as that diagnosis was actually made by the private attending physician, Dr. Roth. Dr. Newmark adds that Ms. Perricone was admitted to the service of Dr. Roth with a final diagnosis of "change in mentation and hyponatremia."

Dr. Newmark further opines that all the laboratory tests ordered before the patient was admitted were appropriately ordered, interpreted and appreciated, and all were appropriately and expeditiously carried out. All the care and treatment rendered in the emergency department by the emergency department staff was in accordance with the accepted standard of care and was not a proximate cause of the alleged injuries claimed to the decedent. After the decedent was appropriately referred to and admitted to the service of Dr. Roth, it was Dr. Roth's responsibility to order all appropriate consultations and to coordinate the patient's care and treatment.

Based upon the foregoing, St. Catherine of Siena Medical Center has demonstrated prima facie entitlement to summary judgment dismissing the complaint and all cross claims which may have been asserted against it. In opposing this motion, the plaintiff has submitted an attorney's affirmation and the affidavit of her expert, Richard W. Finley, M.D.

Dr. Finley sets forth in his affidavit that he is a physician duly licensed to practice medicine in the State of New York and is board certified in emergency medicine, infectious disease and internal medicine. Dr. Finley states that he reviewed the hospital record of St. Catherine of Siena Medical Center and sets forth his opinions with a reasonable degree of medical certainty that certain medical professionals on staff at St. Catherine of Siena Medical Center deviated from the accepted standards of care in connection with the care and treatment rendered to Corrine Perricone and hastened her ultimate demise. However, he does not identify who the certain medical professionals were, what their roles were in caring for the plaintiff's decedent, and when the departures from accepted standards of medical care were made. He does not distinguish between hospital employees and the medical professionals on staff at the hospital and the decedent's private attending physician who was on staff at St. Catherine and admitted plaintiff's decedent to the hospital and assumed responsibility for her care.

Dr. Finley states that during her hospitalization, Ms. Perricone's inspired oxygen concentration was continually increased which should have aroused the curiosity of the medical staff monitoring her progress at St. Catherine. He does not indicate what those concentrations were, when they were increased, or whether the increases occurred when the decedent was under the care and supervision of her private attending physician. He continues that arterial blood gases were not checked at all until one hour prior to her death, and this test would have been a necessary and required procedure to determine if the patient was suffering from carbon dioxide narcosis. He states that carbon dioxide narcosis can frequently result in a patient with chronic lung disease who is placed on too much oxygen. Dr. Finley states that this is apparently what happened here, although he does not indicate the basis for that opinion, nor does he indicate what concentrations of oxygen were being administered and when. Additionally, he does not indicate the signs and symptoms of carbon dioxide narcosis to support his opinion.

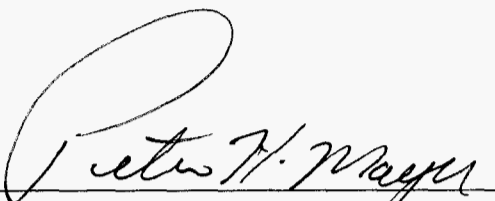
Dr. Finley continues that blood chemistries showed an increasing level of bicarbonates in the blood, but does not indicate which chemistries he is referring to, when the chemistries were done, and what the bicarbonate levels were. Although he states that the bicarbonates should have led to further investigation by the nursing staff who should have requested blood gas analysis and considered the diagnosis of carbon dioxide narcosis, Dr. Finley has not established that this was a nursing responsibility, whether nursing can request blood gas analysis, or that the standard of care required a nurse to request blood gas analysis or make such a diagnosis.

It is Dr. Finley's opinion that the staff at St. Catherine's deviated from accepted standards of care, however, he does not indicate who on staff deviated from accepted standards, whether they were employees of St. Catherine, or whether it was the private attending physician on staff at St. Catherine of Siena. Based upon the foregoing, it is determined that Dr. Finley's opinions are conclusory and vague, lack foundation, are unsupported by admissible evidence, and do not raise a factual issue to preclude summary judgment being granted to St. Catherine of Siena (see, *Zuckerman v City of New York*, supra; *Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1985]; *Kurkova v New York University Medical Center*, 2009 NY Slip Op 32178U [Sup. Ct. of New York, Kings County]).

Accordingly, motion (002) by St. Catherine of Siena Medical Center for an order granting summary judgment dismissing the complaint as asserted against it is granted and the complaint and any cross claims are dismissed with prejudice.

Dated: _____

6/22/11



PETER H. MAYER, J.S.C.