

Makinen v Torelli

2011 NY Slip Op 31882(U)

July 7, 2011

Supreme Court, Suffolk County

Docket Number: 06-29963

Judge: John J.J. Jones Jr

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 9-30-10 (#006)
MOTION DATE 11-3-10 (#007)
MOTION DATE 3-30-11 (#008)
ADJ. DATE 1-26-11 (#006 & #007)
ADJ. DATE 3-30-11 (#008)
Mot. Seq. # 006 - MG
 # 007 - XMG
 # 008 - MD

-----X		
CEANNA MAKINEN, Individually and as the	:	DUFFY & DUFFY, ESQS.
Administratrix of the Estate of MICHAEL	:	Attorney for Plaintiff
MAKINEN, Deceased,	:	1370 Rex Corp. Plaza
	:	Uniondale, New York 11556
	:	
Plaintiff,	:	MCHENRY, HORAN & LAPPING, P.C.
	:	Attorney for Defendant Schulman and Long Island
	:	Medical Diagnostic Imaging
	:	6800 Jericho Turnpike, Suite 202E
- against -	:	Syosset, New York 11791
	:	
	:	KELLER, O'REILLY & WATSON, ESQ
	:	Attorney for Defendants Torelli, South
MICHAEL WILLIAM TORELLI, M.D., SOUTH	:	Shore and Walsh
SHORE FAMILY PRACTICE ASSOCIATES,	:	242 Crossways Park West
P.C., IRENE AUDREY SCHULMAN, M.D.,	:	Woodbury, New York 11797
LONG ISLAND MEDICAL DIAGNOSTIC	:	
IMAGING, P.C., JOHN STEPHEN WALSH, M.D.	:	CATALANO GALLARDO & PETROPOULOS
and KERRI ANN PETITPAIN, R.N., L.N.P.,	:	Attorney for Defendant Petitpain
	:	100 Jericho Quadrangle, Suite 214
Defendants.	:	Jericho, New York 11753
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Upon the following papers numbered 1 to 68 read on these motions and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 32; 44 - 65; Notice of Cross Motion and supporting papers 33 - 36; Answering Affidavits and supporting papers 37 - 39; 66 - 68; Replying Affidavits and supporting papers 40 - 41; 42 - 43; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (#006) by defendant Kerri Ann Petitpain seeking summary judgment dismissing plaintiff's complaint, the cross motion (#007) by defendants Michael Torelli and South Shore

CA

Family Practice Associates, P.C. seeking summary judgment dismissing plaintiff's complaint, and the unopposed motion (#008) by defendant Long Island Medical Diagnostic Imaging, P.C. for an order directing the production of a complete and certified copy of all the records maintained by the Medical Examiner's office regarding the autopsy performed on Michael Makinen hereby are consolidated for the purposes of this determination; and it is further

ORDERED that the motion by defendant Kerri Ann Petitpain seeking summary judgment dismissing plaintiff's complaint is granted; and it is

ORDERED that the cross motion by defendants Michael Torelli and South Shore Family Practice Associates, P.C. seeking summary judgment dismissing plaintiff's complaint is granted, and it is further

ORDERED that the unopposed motion by defendant Long Island Medical Diagnostic Imaging, P.C. for an order directing the production of a complete and certified copy of all the records maintained by the Medical Examiner's office regarding the autopsy performed on Michael Makinen is denied.

Plaintiff Ceanna Makinen, individually and as the Administrator of the Estate of Michael Makinen, commenced this action against defendants Michael Torelli, M.D., South Shore Family Practice Associates, P.C., Irene Schulman, M.D.¹, Long Island Medical Diagnostic Imaging, P.C., John Walsh, M.D.², and Kerri Ann Petitpain, R.N., N.P. to recover damages for medical malpractice, lack of informed consent and wrongful death against defendants. Plaintiff also asserts a cause of action for loss of consortium. The following facts are not in dispute. Plaintiff's decedent, Michael Makinen, was a patient of South Shore Family Practice Associates, P.C. (hereinafter referred to as "South Shore Family Practice") and presented on April 13, 2005 with complaints of a cough, sore throat, chest congestion and back pain. Nurse Petitpain diagnosed Mr. Makinen as suffering from bronchitis, and an upper respiratory infection with cough and pharyngitis. Nurse Petitpain attributed Mr. Makinen's back pain to a muscular cause that was consistent with his ongoing cough, upper respiratory infection and bronchitis. Mr. Makinen returned to South Shore Family Practice on April 16, 2005, but this time he was examined by Dr. Torelli, who reviewed Nurse Petitpain's April 13th evaluation of Mr. Makinen. Dr. Torelli diagnosed Mr. Makinen with bronchitis, and referred him to Long Island Medical Diagnostic Imaging, P.C. for a chest x-ray to rule out pneumonia. On April 16, 2005, a chest x-ray was performed and read by Dr. Seth Steinman, who concluded that Mr. Makinen had pneumonia. Dr. Steinman did not find any evidence of an aortic dissection on Mr. Makinen's chest x-ray, and his interpretation of Mr. Makinen's x-ray was confirmed by Dr. Schulman on April 18, 2005.

On April 17, 2005, after telephoning plaintiff to advise her that he was experiencing severe back pain, Michael Makinen was found unresponsive at the home of his brother. Michael Makinen died on that same day, at the age of 42. A postmortem autopsy was performed by Dr. Gwen Harleman, M.D., the Suffolk County Medical Examiner. Dr. Harleman concluded that Michael Makinen's death was the result

¹ By Order of the Court, dated September 17, 2009, Dr. Schulman was granted summary judgment dismissing plaintiff's complaint against her.

²By Order of the Court, dated October 5, 2009, Dr. Walsh was granted summary judgment in his favor dismissing him from the action.

of a cardiac tamponade caused by a ruptured aortic dissection. Dr. Harleman also concluded that the cardiac tamponade was an acute event that occurred within minutes of the aortic rupture. Nurse Petitpain was a Nurse Practitioner at South Shore Family Practice and Dr. Torelli was her collaborating physician.

Nurse Petitpain now moves for summary judgment in her favor, arguing she did not depart from good and acceptable standards of medical care in the her treatment of Mr. Makinen, and that her treatment was not a proximate cause of his death. Nurse Petitpain asserts that during his April 13th examination, Mr. Makinen did not describe a sudden onset of back pain or that he recently had fallen. Nurse Petitpain asserts that she appropriately considered Mr. Makinen's medical history, evaluated his symptoms, conducted a physical examination, and administered and referred him for the appropriate tests consistent with his clinical presentation. In support of the motion, Nurse Petitpain submits, among other things, the pleadings, the parties' deposition transcripts, and Michael Makinen's medical records from South Shore Family Practice, Long Island Diagnostic Medical Imaging, P.C., and the Suffolk County Medical Examiner, Nurse Petitpain also submits her own affidavit and the deposition transcript of Dr. Harleman.

Dr. Torelli and South Shore Family Practice cross-move for summary judgment, arguing that if Nurse Petitpain is entitled to summary dismissal, then they are also entitled to such relief, because they did not depart from the accepted standards of medical care in the treatment rendered to Michael Makinen. Torelli and South Shore Family Practice (hereinafter collectively referred to as "Torelli") allege that the physical examinations and evaluations of Mr. Makinen were properly performed, and that appropriate testing was prescribed based on his clinical presentation. Torelli also asserts that good and proper professional judgment was exercised in diagnosing and managing Mr. Makinen's condition, and that Mr. Makinen did not communicate any signs or symptoms from which a diagnosis of an aortic dissection could have been made. Alternatively, Torelli asserts that plaintiff's claim for vicarious liability for the acts of the group's employees should be dismissed, because her claims against Dr. Walsh, an employee at South Shore Family Practice, were discontinued. In support of the cross motion, Torelli relies on the same evidence submitted on the motion for summary judgment.

To make a prima facie showing of entitlement to summary judgment in an action to recover damages for medical malpractice, a defendant physician must establish through medical records and competent expert affidavits that the defendant did not deviate or depart from accepted medical practice in defendant's treatment of the patient and that defendant was not the proximate cause of plaintiff's injuries (see *Plato v Guneratne*, 54 AD3d 741, 863 NYS2d 726 [2d Dept 2008]; *Jones v Ricciardelli*, 40 AD3d 935, 836 NYS2d 879 [2d Dept 2007]; *Mendez v City of New York*, 295 AD2d 487, 744 NYS2d 847 [2d Dept 2002]; *Koeppele v Park*, 228 AD2d 288, 644 NYS2d 210 [1st Dept 1996]). A physician owes a duty of reasonable care to his patients and will generally be insulated from liability where there is evidence that he conformed to the acceptable standard of care and practice (see *Spensieri v Lasky*, 94 NY2d 231, 701 NYS2d 689 [1999]; *Geffner v North Shore Univ. Hosp.*, 57 AD3d 839, 871 NYS2d 617 [2d Dept 2008]; *Roth v Tuckman*, 162 AD2d 941, 558 NYS2d 264 [3d Dept 1990]). A doctor is not a guarantor of a correct diagnosis or a successful treatment, nor is a doctor liable for a mere error in judgment if he or she has considered the patient's best interest after careful evaluation (see *Nestorowich v Ricotta*, 97 NY2d 393, 740 NYS2d 668 [2002]; *Oelsner v State of New York*, 66 NY2d 636, 495 NYS2d 359 [1985]; *Midler v Crane*, 67 AD3d 569, 889 NYS2d 149 [1st Dept 2009]; *Bernard v Block*, 176 AD2d 843, 575 NYS2d 506 [2d Dept 1991]). Where the defendant has met that burden, the plaintiff, in opposition, must submit a physician's affidavit of merit attesting to a departure or deviation from acceptable medical

practice and attesting to the fact that the departure or deviation was a competent cause of the injuries sustained by the plaintiff (*see Arkin v Resnick*, 68 AD3d 692, 890 NYS2d 95 [2d Dept 2009]; *Rebozo v Wilen*, 41 AD3d 457, 838 NYS2d 121 [2d Dept 2007]; *Johnson v Queens-Long Is. Group*, 23 AD3d 525, 806 NYS2d 614 [2d Dept 2005]; *Dellacone v Dorf*, 5 AD3d 625, 774 NYS2d 776 [2d Dept 2005]; *Domaradzki v Glen Cove Ob/Gyn Assoc.*, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]). However, general allegations of medical malpractice, merely conclusory in nature and unsupported by competent evidence establishing the essential elements of the claim, are insufficient to defeat a motion for summary judgment (*see Arkin v Resnick, supra*; *Lake v Kaleida Health*, 59 AD3d 966, 872 NYS2d 822 [4th Dept 2009]; *Holbrook v United Hosp. Med. Ctr.*, 248 AD2d 358, 669 NYS2d 631 [2d Dept 1998]).

Additionally, to succeed on a cause of action based on lack of informed consent, a plaintiff must establish that the doctor failed to disclose the reasonably foreseeable risks, benefits, and alternatives to the surgery that a doctor in a similar circumstance would have disclosed; that a reasonably prudent person in the plaintiff's position would not have undergone the surgery if he or she had been fully informed of the reasonable foreseeable risks, benefits, and alternatives to the surgery; and that the lack of informed consent is a proximate cause of the injury sustained (*see Public Health Law § 2805-d*; *James v Greenberg*, 57 AD3d 849, 870 NYS2d 100 [2d Dept 2008]; *Innucci v Bauersachs*, 201 AD2d 460, 607 NYS2d 130 [2d Dept 1994]).

Upon review of Nurse Petitpain's personal affidavit and the additional exhibits submitted in support of the motion and cross motion, the Court finds that Nurse Petitpain and Torelli have established, as a matter of law, that they did not deviate from good and acceptable medical practice in rendering care to Michael Makinen prior to his untimely death, and that there were no symptoms indicating further medical testing was warranted, which would have led to a diagnosis of an aortic dissection (*see Shahid v New York City Health & Hospitals Corp.*, 47 AD3d 800, 850 NYS2d 519 [2d Dept 2008]; *Fernandez v Elemam*, 25 AD3d 752, 809 NYS2d 513 [2d Dept 2006]; *Ericson v Palleschi*, 23 AD3d 608, 806 NYS2d 667 [2d Dept 2005]). The deposition transcript of Dr. Harleman, the Suffolk County Medical Examiner, established that Michael Makinen's death was the result of an acute cardiac tamponade secondary to an aortic dissection. Dr. Harleman testified, in relevant part, that Mr. Makinen had 1,000 milliliters of liquid and clotted blood in his pericardial sack, which meant that he bled extremely rapidly, and that the entire process of him developing an aortic dissection followed by a cardiac tamponade occurred within minutes on April 17, 2005. Dr. Harleman testified that the only evidence of aortic dissection that she found was the one that occurred on the day of Mr. Makinen's death, and that there was no evidence of a dissection having occurred earlier. Furthermore, Nurse Petitpain and Dr. Torelli each testified regarding the steps they took to diagnose and treat Michael Makinen, based upon his presenting symptoms. In addition, the submissions on the motions established Nurse Petitpain and Torelli's entitlement to judgment as a matter of law on the claim of lack of informed consent (*see Thompson v Orner*, 36 AD3d 791, 828 NYS2d 509 [2d Dept 2007]). Therefore, the burden shifted to plaintiff to submit proof in admissible form, demonstrating an existence of a triable issue of fact (*see Bacani v Rosenberg*, 74 AD3d 500, 903 NYS2d 30 [1st Dept 2010]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

In opposition to the motion and cross motion for summary judgment, plaintiff contends that Nurse Petitpain and Torelli failed to establish a prima facie case that they did not depart from good and acceptable standards of care in rendering treatment to Mr. Makinen, and that their departures from good and acceptable medical standards are the proximate cause of the death of Michael Makinen. In opposition

to the motions, plaintiff submits an affidavit of a medical expert³, who is board certified in Internal Medicine with a sub-specialty in Cardiovascular Diseases. Plaintiff's expert opined that Nurse Petitpain and Dr. Torelli deviated from the applicable standard of care by failing to consider that Michael Makinen was suffering from an initial tear in the aorta, which was the cause of the symptoms that he presented with on April 13, 2005 and April 16, 2005, and that the appropriate course of treatment was to have Mr. Makinen immediately evaluated by a cardiologist. Plaintiff's expert states that Mr. Makinen had a history of hypertension, and that complaints of cough, congestion and back pain by a person with such a history are symptoms of a potential cardiac complication. Plaintiff's expert asserts that Mr. Makinen had pulled his back out on April 13 2005, and that the pain he experienced was "so bad that he fell on his face onto the flooring suffering a slight bruise [and that when] he went to his private doctor he [was] diagnosed with back spasm." Plaintiff's expert further states that Mr. Makinen returned to South Shore Family Practice and saw Dr. Torelli, who diagnosed him with bronchitis, although Mr. Makinen still was coughing, fatigued, and his skin was "clammy" and cool. Plaintiff's expert concludes that if Nurse Petitpain and Dr. Torelli had performed a proper "work-up" on either April 13th or April 16th, Michael Makinen's initial aortic tear would have been revealed, and it would have prevented the progression of the larger aortic dissection and cardiac tamponade which resulted in his death

Plaintiff has failed to raise a triable issue of fact in opposition to Nurse Petitpain's and Torelli's prima facie showing (*see Castro v New York City Health & Hosps. Corp.*, 74 AD3d 1005, 903 NYS2d 152 [2d Dept 2010]). Plaintiff's expert's conclusion that Mr. Makinen was suffering from an initial tear of the aorta when he presented to South Shore Family Practice on April 13 and April 16, 2005 is at odds with the information contained in Mr. Makinen's medical charts and the autopsy report, as well as with Dr. Harleman's deposition testimony. As previously stated, Dr. Harleman testified that the aortic dissection and the cardiac tamponade sustained by Mr. Makinen on April 17, 2005 occurred acutely, rapidly and within minutes of the aortic dissection's beginning, and that there was no evidence of an earlier dissection having occurred prior to the one that occurred on April 17, 2005. Although Dr. Harleman testified that Mr. Makinen was hypertensive and a smoker, which are risk factors for an aortic dissection, she also testified that she was unable to determine how long he had been hypertensive. In fact, when Mr. Makinen presented to Nurse Petitpain on April 13, 2005, his blood pressure initially was hypotensive, which is not a risk factor for aortic dissection, and then normal after a repeat test. Michael Makinen's blood pressure also was normal on April 16, 2005 when Dr. Torelli treated him. Dr. Harleman also explained that the abrasions that she observed on Mr. Makinen's face occurred at the time of the final event, the aortic dissection, and not several days beforehand as alleged by plaintiff and her expert. Hence, the conclusions reached by plaintiff's expert assume facts not supported by the evidence, are not based on any facts in the record, and are not support by facts fairly inferable from the evidence (*see Hambsch v New York City Tr. Auth.*, 63 NY2d 723, 480 NYS2d 195 [1984]; *Cassano v Hagstrom*, 5 NY2d 643, 187 NYS2d 1 [1959]). An expert is not allowed to reach a conclusion by assuming material facts not supported by the evidence and is not allowed to guess or speculate in drawing a conclusion (*see Reilly v Ninia*, 81 AD3d 913, 917 NYS2d 652 [2d Dept 2011]; *Lee v Shields*, 188 AD2d 637, 591 NYS2d 522 [2d Dept 1992]). Moreover, plaintiff's expert's affirmation is filled with hindsight reasoning and conclusory assumptions, which are insufficient to defeat summary judgment (*see Zawadzki v Knight*, 76

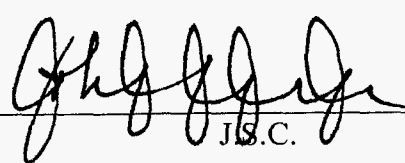
³ The unredacted copy of the medical expert's affidavit submitted by plaintiff for an in camera inspection is being mailed back to plaintiff's counsel simultaneous with the issuance of this order.

NY2d 898, 561 NYS2d 907 [1990]; *Micola v Sacchi*, 36 AD3d 869, 828 NYS2d 572 [2d Dept 2007]). Thus, plaintiff's expert's affidavit failed to raise a triable issue of fact regarding the causation of Mr. Makinen's death or Nurse Petitpain and Dr. Torelli's alleged deviation from the requisite standard of care (see *Bacani v Rosenberg, supra; Roques v Noble*, 73 AD3d 204, 899 NYS2d 193 [1st Dept 2010]).

Furthermore, plaintiff failed to raise a triable issue of fact as to her claim for lack of informed consent, since she presented no evidence in opposition to the branches of Nurse Petitpain's motion and Torelli's cross motion seeking summary dismissal of such claim. Accordingly, Nurse Petitpain's motion for summary judgment and Torelli's cross motion for summary judgment are granted. The action is severed and shall continue as against the remaining defendant.

Finally, Long Island Medical Diagnostic Imaging, P.C.'s motion for an order directing the production of a complete and certified copy of all the records maintained by the Medical Examiner's office pertaining to the autopsy performed on Michael Makinen is denied. Although CPLR 3101 (a) provides that there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof (see *Cirale v 80 Pine Street Corp.*, 35 NY2d 113, 359 NYS2d 1 [1974]), the filing of the note of issue denotes the completion of discovery (see 22 NYCRR §202.21 [d]). Despite the fact that interviews may still take place post-note of issue, at that juncture in the litigation any further pretrial disclosure is only allowed upon a showing of "unusual or unanticipated circumstances" and "substantial prejudice" (see *Arons v Jutkowitz*, 9 NY3d 393, 850 NYS2d 345 [2007]; *Jones v Grand Opal Constr. Corp.*, 64 AD3d 543, 883 NYS2d 253 [2d Dept 2009]; *James v New York City Tr. Auth.*, 294 AD2d 471, 742 NYS2d 855 [2d Dept 2002]). In the instant matter, Long Island Medical Diagnostic Imaging, P.C. failed to demonstrate the existence of unusual or unanticipated circumstances that developed subsequent to the filing of the note of issue, which requires additional pretrial proceedings to prevent substantial prejudice to its case (see *Wigand v Modlin*, __ AD3d __, 2011 NY Slip Op 02654 [2d Dept 2011]; *Owen v Lester*, 79 AD3d 992, 915 NYS2d 277 [2d Dept 2010]). Moreover, Long Island Medical Diagnostic Imaging, P.C. failed to include the affirmation of good faith with its moving papers stating what, if any, communications have transpired between the parties that would evince a diligent effort on its behalf to resolve the issues raised in the instant motion (see 22 NYCRR §202.7 [c]; *Mironer v City of New York*, 79 AD3d 1106, 915 NYS2d 279 [2d Dept 2010]; *Natoli v Milazzo*, 65 AD3d 1309, 886 NYS2d 205 [2d Dept 2009]; *Walter B. Melvin, Architects, LLC v 24 Aqueduct Lane Condominium*, 51 AD3d 784, 857 NYS2d 697 [2d Dept 2008]).

Dated: 7 July 2011



J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION