

Jolly v Silver

2011 NY Slip Op 32154(U)

July 26, 2011

Supreme Court, Nassau County

Docket Number: 12636/09

Judge: John M. Galasso

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU
PRESENT: HONORABLE JOHN M. GALASSO, J.S.C.

.....
ABHIK JOLLY, an infant under the age of
18 years, by his father and natural
guardian, ALOK JOLLY, and ALOK JOLLY,
Individually,

Plaintiffs,

- against -

Index No. 12636/09
Sequence #s 001,002
Part 37

HILTON SILVER, M.D., HILTON SILVER, M.D.,
P.C., ISABEL BARATA, M.D., PRIYA SHAH, M.D.,
and NORTH SHORE UNIVERSITY HOSPITAL,
Defendants,

07/11/11

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Upon the foregoing papers, defendants Hilton Silver, M.D. and Hilton Silver M.D., P.C.'s motion (Seq. #001) and defendants Isabel Barata, M.D., Priya Shah, M.D. and North Shore University Hospital's motion (Seq. #002) for summary judgment pursuant to CPLR 3212 in this medical malpractice action are determined as follows:

On Friday November 30, 2007 at about 8:00 p.m. the infant plaintiff, age 15, arrived at defendant Hospital's emergency room complaining of abdominal pain for the last 11 hours. He was examined by the resident on duty and then defendant Dr. Isabel Barata, who as part of a differential diagnosis ordered a white cell blood test and CT scan, which was performed that evening around 11:00. Defendant Dr. Priya Shah, a radiologist, reviewed the scan 9:00 a.m. the next morning after the resident radiologist made preliminary findings beforehand.

The blood test which counted white blood cells was normal. \* The CT scan, according to Dr. Shah, did not display or fail to display any findings consistent with a possible appendicitis diagnosis. Dr. Barata suggested clinical correlation in her report.

An unidentified resident called defendant Dr. Harold Silver, plaintiff's pediatrician, and discussed the findings and plan for discharge. Plaintiff was discharged the early morning of December 1, 2007 and told to see his personal physician within 1 to 2 days.

Later that same day on December 1<sup>st</sup>, plaintiff was able to be seen by Dr. Silver, who re-examined plaintiff's abdomen, the source of plaintiff's complaints of pain for now over 24 hours. As a result of the physical, Dr. Silver did not observe any clinical evidence that plaintiff was suffering from appendicitis and, instead, diagnosed plaintiff as having constipation.

\* An elevated white blood cell count is indicative of infection.

At approximately 6:00 a.m. the next day, plaintiff was admitted to the hospital and given an ultrasound, where it was discovered plaintiff had acute appendicitis. Subsequently, the appendix was removed and the laboratory determined it had perforated.

As a result, plaintiff had to remain in the hospital until December 7, 2007 to be treated by IV antibiotics to eliminate the infection.

Defendants have demonstrated their entitlement to summary judgment as a matter of law by the depositions and medical reports submitted, as well as the affirmations of Dr. Howard Kolodny (Seq. #001) and Dr. David Feder (Seq. #002).

Dr. Kolodny, an internist, endocrinologist and professor of medicine opined that Dr. Silver's treatment of plaintiff on December 1, 2007 did not depart from good and accepted medical practice. Upon reviewing the medical and hospital records as well as Dr. Silver's examination before trial which described the examination step by step, in his opinion within a reasonable degree of medical certainty Dr. Silver's treatment and care was not a proximate cause of plaintiff's appendix perforating within hours of his examination, thereby necessitating a prolonged hospital stay.

Dr. Silver evidently spoke with a resident at the Hospital, although he does not recall this early morning conversation. In any event, he was told by either the Hospital, plaintiff's parents or both that plaintiff's blood work was normal and the CT scan was interpreted as having negative evidence of appendicitis. \*

Since palpation of plaintiff's abdomen demonstrated no signs or symptoms of appendicitis and Dr. Silver found firm stool in the lower bowel, he excluded appendicitis as a diagnosis and did not have plaintiff follow up with a repeat scan or blood work.

Dr. Kolodny explained that Dr. Silver's care or alleged lack of care for appendicitis did not cause any injury to plaintiff. This is because appendicitis follows a progression of symptoms and a diagnosis cannot be suspected or made unless or until a sign or symptom presents itself. Since there nothing reported by the Hospital would lead Dr. Silver to the conclusion plaintiff had appendicitis and nothing in his own examination of plaintiff lead to a founded suspicion of appendicitis \*\* warranting a referral of plaintiff to a surgeon for possible removal of the appendix, Dr. Silver cannot be held liable that afterwards the infection progressed to the point that it perforated and plaintiff had to undergo surgery with a more extensive recovery period.

Since Dr. Silver has demonstrated in the first instance his entitlement to summary judgment, the burden now shifts to plaintiff to raise a question of fact which would require a trial.

\* There is a chart notation by Dr. Silver that the hospital scan "found" plaintiff was constipated; however, the Hospital report does not contain any such diagnosis. Plaintiff was diagnosed with gastritis and prescribed pepcid and zofrin.

\*\* When there is a complaint of abdominal pain, appendicitis is always suspect; however mere abdominal pain is not enough to support a diagnosis of appendicitis.

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In opposition to Dr. Silver's motion, plaintiff submits an affirmation from a physician in the field of internal medicine. Upon reviewing the hospital report for November 30, 2007, plaintiff's expert surmises that a hospital resident with whom Dr. Silver talked to on the telephone told him everything on the CT report as well as the blood test results and findings from plaintiff's physical examination, including the discharge diagnosis of gastritis.

The expert notes that 15-year-old Abhik Jolly reported to the ER on November 30, 2007 with stabbing abdominal pain in the "epigastric" area. \* The CT scan report noted the scan did not "clearly visualize the appendix."

The gravamen of the experts' affirmation is that since the CT scan did not clearly visualize the appendix and plaintiff later presented to the office of Dr. Silver with persisting complaints of abdominal pain (and contrary to Dr. Silver's notation in plaintiff's chart, CT scans are not diagnostic of constipation), he should have ordered other radiological tests, another white blood cell count and/or performed a rectal examination.

Dr. Silver testified that, as a pediatrician, he does not perform rectal examinations and, if appendicitis is diagnosed, the patient is referred to a surgeon for such testing.

In the case of Dr. Silver, there is no evidence of what he allegedly was told over the telephone by a resident at the Hospital. There is no evidence of the time of the call, but there is testimony that a shift change occurred and the resident radiologist who initially read the scan may have been off duty.

Although it is clear that Dr. Silver was informed by someone that the first blood test was normal, the notation in Dr. Silver's chart stating the CT scan diagnosed constipation is clearly erroneous (and may have been relayed to him by plaintiff's father, Alok Jolly).

Nevertheless, by the time plaintiff saw Dr. Silver, he had been complaining of abdominal pain for at least 24 hours and the CT scan was not definitive one way or the other. \*\* Plaintiff has raised a question of fact of if Dr. Silver had ordered any follow-up tests such as another blood test which presumably could have been performed expeditiously, would it have lead to a definitive diagnosis (and surgery) before the organ perforated. This issue goes to the heart of determining if plaintiff's lack of appropriate follow-up care was a proximate cause of plaintiff's emergency surgery and extended hospital stay.

Defendants' claim of speculation notwithstanding and given that plaintiff's initial white blood cell count was in the high normal range, there is insufficient evidence presented for the Court to conclude that plaintiff's assertions cannot be maintained by circumstantial evidence as a matter of law.

Defendants Hilton Silver, M.D. and Hilton Silver, M.D., P.C.'s motion for summary judgment is denied (Seq. #001).

\* This, as expected, resulted in a differential diagnosis of appendicitis; therefore tests were performed to rule it out. Pain in the epigastric (navel) area, as testified to by defendant Dr. Barata, is not indicative of appendicitis. It is the abdominal pain in general that calls for appendicitis to be ruled out.

\*\* It also showed no stool was present in the colon at the time.

Turning to the motion of Dr. Priya Shah and North Shore University Hospital, \*\*\* the affirmation of their expert Dr. David Feder also presents sufficient evidence of defendants prima facie entitlement to summary judgment as a matter of law.

In opposition, plaintiff's expert points to the notation in the report of Dr. Andrew Hong, who performed the surgery, that "the CT Scan [that was] obtained Friday night was reread by the Radiologist as being consistent with acute appendicitis." Plaintiff asserts that Dr. Hong's notation is proof that the scan was initially misinterpreted by Dr. Priya Shah.

However, this notation, which is the only part of plaintiff's medical record that the expert finds fault with, is unsupported by proof that the scan was misinterpreted by Dr. Shah. In fact the expert did not review the CT scan himself, nor did plaintiff submit any other affirmation from an expert attesting to Dr. Shah's alleged erroneous findings.

In addition, Dr. Hong's report is unaffirmed and consequently inadmissible as evidence to buttress the expert's affirmation. It is not even clear from the report if Dr. Hong himself also reviewed the scan.

Moreover, although plaintiff was informed that Dr. Hong is still employed by North Shore University Hospital, there is no separate affirmation from Dr. Hong explaining his notation, identifying the Radiologist who "reread" the scan and corroborating that he also reviewed the films.

The only actual evidence in this regard prior to plaintiff's surgery is from Dr. Shah, who testified that on December 2, 2007 she reviewed an appendix ultrasound ordered prior to plaintiff's surgery by Dr. Christopher Raio, an emergency medical physician and initially interpreted by a resident radiologist, Dr. Janice Lee. Dr. Shah stated "I think [Dr. Hong is] a surgeon but I don't know him." She testified that she never discussed plaintiff's case with Dr. Hong or reread the November 30<sup>th</sup> CT scan.

However, the ultrasound she reviewed indicated plaintiff had acute appendicitis and subsequently Dr. Hong performed the appendectomy. \*\*\*

The remainder of plaintiff's expert affirmation focuses solely on Dr. Silver.

The Court concludes plaintiff has failed to raise any genuine material question of fact that would necessitate a trial of these defendants. Accordingly, this motion for summary judgment is granted (Seq. #002),

The complaint and all cross-claims against defendants Isabel Barata, M.D., Priya Shah, M.D. and North Shore University Hospital only are dismissed.

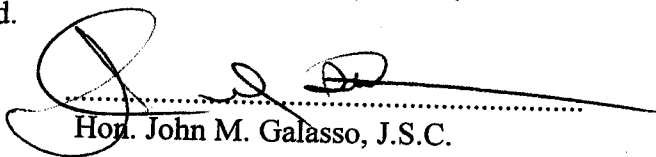
July 26, 2011

**ENTERED**

JUL 29 2011

NASSAU COUNTY

COUNTY CLERK'S OFFICE

  
Hon. John M. Galasso, J.S.C.

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\* Plaintiff does not oppose the motion for summary judgment of defendant Isabel Barata, M.D.

\*\*\* Dr. Shah also explained that the notation of "appendix not clearly visualized" in the CT scan report was not an uncommon result in children. That is why she concludes in the report "clinical correlation is necessary" before any CT scan repeat.