

**Galligan v Columbia Univ. Coll. of Physicians &
Surgeons**

2011 NY Slip Op 33159(U)

December 9, 2011

Supreme Court, New York County

Docket Number: 100738/09

Judge: Joan B. Lobis

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

PRESENT: LOBIS
Justice

PART 6

C. GALIGAN, SUSAN

INDEX NO.

100730/09

MOTION DATE

9/20/11

MOTION SEQ. NO.

03

MOTION CAL. NO.

COLUMBIA UNIVERSITY COLLEGE OF
PHYSICIANS AND SURGEONS, ET AL.

The following papers, numbered 1 to 18 were read on this motion to/for Summary judgment

PAPERS NUMBERED

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

1-15

Answering Affidavits — Exhibits

16-17

Replying Affidavits

18

Cross-Motion: Yes No

FILED

Upon the foregoing papers, it is ordered that this motion

DEC 12 2011

NEW YORK
COUNTY CLERK'S OFFICE

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION
and Order. The clerk of
court is directed to enter
judgment in accordance with
this decision and order.

Dated: 12/9/11

JBL
JOAN B. LOBIS J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
SUSAN GALLIGAN and WILLIAM GALLIGAN,

Plaintiffs,

Index No. 100738/09

-against-

Decision and Order

COLUMBIA UNIVERSITY COLLEGE OF
PHYSICIANS AND SURGEONS, ORANGE
DERMATOLOGY ASSOCIATES, P.C., and
DAWN BARILLI, RPA-C,

FILED

Defendants.

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-----X
JOAN B. LOBIS, J.S.C.:

NEW YORK
COUNTY CLERK'S OFFICE

Defendants¹ Orange Dermatology Associates, P.C. (the "P.C."), and Dawn Barilli, RPA-C ("Ms. Barilli"), move, by order to show cause, for an order pursuant to C.P.L.R. Rule 3212, granting them summary judgment in their favor and dismissing the complaint. Plaintiff² Susan Galligan opposes the motion and asks that the court instead grant her summary judgment.

This action sounds in medical malpractice against Ms. Barilli and the P.C., and negligent hiring and supervision against the P.C. The action arises out of treatment that plaintiff received at the P.C. in July 2006. The medical records from the P.C. reflect that on July 17, 2006,

¹ The action against Columbia University College of Physicians and Surgeons was discontinued with prejudice by stipulation dated December 4, 2009, prior to this defendant joining issue.

² Initially, this action included a loss of consortium claim on behalf of plaintiff's husband, William Galligan. This claim was discontinued by stipulation dated October 19, 2010. Although the October 19, 2010 stipulation also includes an agreement between the parties to amend the caption to remove the former plaintiff William Galligan and former defendant Columbia University College of Physicians and Surgeons, the court's records do not reflect that the caption change was ever effected.

plaintiff presented to Ms. Barilli complaining of changing moles on her arms and a red freckle or mole on her left arm. Ms. Barilli noted a 5 millimeter variegated macule with irregular borders on plaintiff's right deltoid (shoulder area) and a 1 centimeter brown hazy macule with surrounding erythema. Ms. Barilli performed a saucer biopsy of the two moles, which she testified at her examination before trial ("EBT") entails cutting underneath the mole to remove it. The two specimens were separately placed into containers labeled "A" and "B" and sent to a dermatopathology laboratory at College of Physicians & Surgeons of Columbia University ("Columbia"), where they were received on July 20, 2006. The preliminary report from Columbia indicated that the sample from plaintiff's left arm (labeled sample "A") was a non-malignant sample, and that the sample from plaintiff's right shoulder (labeled sample "B") was a malignant sample. Ms. Barilli relayed the information to plaintiff. At some point during a discussion on or about July 28, 2006, plaintiff and/or Ms. Barilli suspected that the samples had been mislabeled or mixed up, because the right shoulder sample was the smaller tissue sample of the two samples, but the sample that was identified as malignant was the larger tissue sample. Ms. Barilli spoke with Dr. Niedt at Columbia and the pathology report was corrected. The corrected report indicated that the sample from the right shoulder (the smaller tissue sample) was the non-malignant sample and that the sample from the left arm (the larger tissue sample) was the cancerous lesion. The P.C.'s records reflect that on July 28, 2006, Ms. Barilli faxed a copy of the corrected pathology report to plaintiff's surgeon, Richard Shapiro, M.D, of New York University Medical Center ("NYU"), and faxed a request to Columbia to forward the slides to Dr. Shapiro.

On August 4, 2006, Dr. Shapiro performed a wide, deep resection at the site of the moles on the left arm and the right shoulder. Plaintiff signed a consent form for both procedures.

The pre-operative diagnosis, as reflected in the records from NYU, was a malignant melanoma on the left arm and an atypical melanocytic lesion on the right deltoid. The post-operative diagnosis was the same. The records reflect that on August 1, 2006 (prior to the surgery), NYU dermatopathology had reviewed the previous biopsies. NYU's review of the prior biopsies revealed a compound dysplastic nevus with one fragmented margin that could not be properly evaluated on the right deltoid, and an early malignant melanoma in situ evolving in a junctional dysplastic melanocytic nevus on the left arm. The biopsies of the tissue that Dr. Shapiro removed on August 4, 2006, were consistent with the corrected report from Columbia and NYU's own review of slides from Columbia.

Plaintiff testified at her EBT that Dr. Shapiro "said that there is doubt as to which site had cancer in it [so] he needed to assure that the cancer was gone and [plaintiff's] understanding is that the resection was necessary on both arms." Plaintiff further testified that Dr. Shapiro told her that a diagnosis of dysplastic nevus did not require a resection, but that she would have to undergo a resection because there was a question of where on her body the samples came from.

Plaintiff alleges that Ms. Barilli and the P.C. departed from good and accepted medical practice when they incorrectly diagnosed a melanoma in plaintiff's right deltoid and failed to order additional tests or send plaintiff for further medical evaluations. Plaintiff further alleges that the misdiagnosis proximately caused her to undergo an unnecessary and improper operation on her right deltoid and a two-inch scar on her right deltoid.

Defendants now move for summary judgment dismissal of plaintiff's medical malpractice claim.³ On a motion for summary judgment, a defendant in a medical malpractice action bears the initial burden of demonstrating that there was either no departure from the standard of care, or that any such departure did not proximately cause plaintiff's alleged injury or damage. King v. St. Barnabas Hosp., 87 A.D.3d 238, 245 (1st Dep't 2011). To satisfy that burden, the defendant must present expert opinion testimony that is supported by the facts in the record and addresses the essential allegations in the bill of particulars. Roques v. Nobel, 73 A.D.3d 204, 206 (1st Dep't 2010). If the defendant meets this initial burden, the "nonmoving party need only raise a triable issue of fact with respect to the element of the cause of action or theory of nonliability that is the subject of the moving party's prima facie showing." Barnett v. Fashakin, 85 A.D.3d 832, 835 (2d Dep't 2011), quoting Stukas v. Streiter, 83 A.D.3d 18, 24 (2d Dep't 2011). To defeat a defendant's prima facie demonstration that its actions did not proximately cause the injuries alleged, a plaintiff must present expert opinion testimony that those actions were a substantial factor in bringing about the injury. Sisko v. New York Hosp., 231 A.D.2d 420, 422 (1st Dep't 1996).

Defendants argue that their care and treatment of plaintiff was not a proximate cause of her alleged injuries. In support of this contention, they submit an expert affirmation from Robert Auerbach, M.D., who states that he is a physician duly licensed to practice medicine in the State of New York and board certified in dermatology. Dr. Auerbach states that the basis for his opinions is his knowledge and expertise in the field of dermatology and his review of the parties' deposition

³ Neither parties' papers on this motion address the claim against the P.C. sounding in negligent hiring and supervision.

* 6]

transcripts; plaintiff's medical records from the P.C. and NYU; and plaintiff's bills of particulars. Dr. Auerbach opines, to a reasonable degree of medical certainty, that even though plaintiff's specimens were initially switched or mislabeled, defendants timely and properly corrected the mistake. He opines that because the mistake was timely corrected, there is no causation between defendants' care and plaintiff's alleged injuries. Since the mistake was corrected well in advance of Dr. Shapiro's procedure and before Dr. Shapiro made his final decision regarding plaintiff's moles, Dr. Auerbach opines that there was a break in the chain of events that eliminated any potential causal connection between the initial sample reversal and plaintiff's alleged injuries. Further, he points out that NYU's own dermatopathologist reviewed the original skin biopsies prior to Dr. Shapiro's surgery. Dr. Auerbach opines that the intervening review by NYU confirms that defendants' earlier reversal of the biopsy specimens was timely and properly corrected prior to any action taken by Dr. Shapiro. Based on the documentation from NYU's August 1, 2006 review of the original biopsy specimens and Dr. Shapiro's operative report, Dr. Auerbach opines that Dr. Shapiro was clearly aware of the correct information regarding the biopsy samples prior to the August 4, 2006 procedure. Dr. Auerbach opines that Dr. Shapiro performed the procedure on the right shoulder because of the atypical, dysplastic nature of the mole and because the August 1, 2006 report from the NYU dermatopathologist noted that one margin of the biopsy showed fragmentation and could not be properly evaluated.

Plaintiff maintains that the court should deny defendants' motion because she can show that a deviation from the standard of care did occur and that such deviation proximately caused her injuries. She asserts that numerous triable issues of fact exist, requiring denial of defendants'

motion. Plaintiff maintains that Dr. Auerbach's affirmation is conclusory, speculative, and lacks a foundation in the medical records. Plaintiff requests that, based on the evidence in the summary judgment motion record, the court issue an order finding that plaintiff is entitled to summary judgment on the issues of departure and proximate cause. She contends that defendants' expert never addressed the allegations in her bills of particulars that defendants departed from good and accepted medical practice when they incorrectly diagnosed a melanoma in plaintiff's right deltoid and failed to order additional tests or send plaintiff for further medical evaluations. Further, she maintains that her testimony that Dr. Shapiro told her that he had to perform both resections due to the mislabeling of the specimens is unrefuted. Plaintiff argues that Dr. Shapiro's statements to her are admissible on this motion because they fall under a hearsay exception for statements pertaining to diagnosis and treatment as articulated in People v. Spicola, 16 N.Y.3d 441 (2011), and People v. Ortega, 15 N.Y.3d 610 (2010).

In support of her opposition to defendants' motion and in support of her contention that she should be awarded summary judgment, plaintiff submits an affirmation from her expert (name redacted), who affirms that he/she is a physician duly licensed to practice medicine in the State of New York and board certified in dermatology. Plaintiff's expert sets forth that the basis for his/her opinion is his/her knowledge and expertise in the field of dermatology and his/her review of the parties' deposition transcripts; plaintiff's medical records from the P.C. and NYU; Dr. Auerbach's affirmation; and the litigation documents. Plaintiff's expert opines, to a reasonable degree of medical certainty, that defendants deviated from medically accepted standards of care in mislabeling and misreporting the biopsy samples; failing to realize their mistake until plaintiff

reported the error; and failing to perform an additional biopsy to correct the mistake or clarify plaintiff's diagnostic picture. The expert opines that the mislabeling of a biopsy sample, so that a subsequent treater can only speculate as to which biopsy sample came from which arm, falls below the standard of care. The expert opines that these departures proximately caused plaintiff's right shoulder surgical resection because the departures "forced the subsequent treating physician Dr. Shapiro to surgically excise the right arm mole." The expert opines that defendants' departures "eliminated the diagnostic means and/or prevented Ms. Galligan's right arm mole from being properly evaluated and diagnosed. In effect, Ms. Galligan underwent a surgical procedure to diagnose a benign mole." The expert sets forth that plaintiff now has a permanent scar because defendants' actions eliminated the possibility of a non-operative diagnosis. The expert states that it is obvious to him/her "that Dr. Shapiro's course of treatment was materially altered by defendants' mislabeling, misreporting, and mistakes." The expert further states that Dr. Auerbach's opinion that plaintiff underwent resection of her right shoulder due to biopsy fragmentation is without proof in the records and that Dr. Auerbach is purely guessing at Dr. Shapiro's motivation for performing the right shoulder resection.

Defendants, in reply, maintain that plaintiff is not entitled to summary judgment, citing that her argument for summary judgment is based on her own testimony of what Dr. Shapiro said to her. Defendants argue that these statements do not fall within an exception to the hearsay rule, because the exception is only as to statements made by a patient to a physician, not the other way around. Further, defendants argue that they have established a lack of causation because Dr. Shapiro was aware of the correct diagnosis prior to his decision to perform the surgical procedure

on August 4, 2006. They maintain that the only admissible evidence shows that Dr. Shapiro was not confused about the diagnosis prior to the resection surgery. Defendants submit a further affirmation from Dr. Auerbach reiterating his position that there was no proximate cause between the initial mislabeling and the right shoulder resection on August 4, 2006.

Defendants have met their initial burden to demonstrate the absence of proximate cause. Although defendants did not outright concede that the mislabeling was a departure, they demonstrated that nothing they did proximately caused plaintiff to have to undergo the resection on her right shoulder. They submitted expert opinion evidence by which their expert Dr. Auerbach opines, to a reasonable degree of medical certainty, that the mislabeling could not have proximately caused Dr. Shapiro to perform the right shoulder resection because the mislabeling was corrected well in advance of Dr. Shapiro's decision to perform the right shoulder resection; NYU's own staff examined the biopsy studies prior to the procedure; and NYU's records indicate that Dr. Shapiro knew which sample had come from which spot on plaintiff's body prior to the procedure. The medical records submitted with the motion support Dr. Auerbach's opinion. Dr. Auerbach's opinion that the initial mislabeling of the biopsy samples could not have proximately caused Dr. Shapiro to perform the right shoulder resection is neither conclusory nor speculative, as plaintiff maintains, since it is supported by the medical records.

In attempting to show that an issue of fact exists to preclude granting defendants summary judgment, plaintiff's argument and her expert's opinion heavily relies on the hearsay testimony of plaintiff during her EBT about what Dr. Shapiro said to her. Contrary to plaintiff's

argument that these hearsay statements are admissible because they fall within a category of hearsay exceptions as statements pertaining to plaintiff's diagnosis and treatment, the case law indicates that this exception exists for statements made by a patient to a medical care provider, and has not been applied the other way around. See, e.g., People v. Spicola, 16 N.Y.3d 441, 451-52 (2011); People v. Duhs, 16 N.Y.3d 405, 408 (2011). Hearsay evidence may be used to oppose a summary judgment motion, as long as its not the only evidence on which the opposition is based. Narvaez v. NYRAC, 290 A.D.2d 400, 400-01 (1st Dep't 2002). However, plaintiff's expert points to no evidence in the medical records or otherwise admissible evidence supporting his/her statements that defendants' actions forced Dr. Shapiro to excise the right shoulder mole and left plaintiff without the proper means to be properly evaluated or diagnosed. The expert appears to solely rely on plaintiff's testimony that Dr. Shapiro told her that he had to perform the right shoulder resection because he could not rely on the results of the biopsy. The expert fails to address the fact that the corrected report superceded the initial report before Dr. Shapiro performed the resection, that there was a subsequent evaluation of the biopsy results by NYU, and that the NYU records reflect that Dr. Shapiro's pre-operative diagnosis of the right shoulder was that it was benign. It is unclear why testimony or an affidavit from Dr. Shapiro was never elicited from plaintiff, which might have resolved the hearsay issue or shed light on his motivation for performing the right shoulder resection. Even assuming, for the purposes of this motion, that defendants did depart from the standard of care by mislabeling the biopsy studies, without presenting admissible evidence to rebut defendants' showing that this departure did not proximately cause the right shoulder resection, plaintiff has failed to rebut defendants' prima facie showing and summary judgment must be granted in favor of defendants.

As to the claim for negligent hiring and/or negligent supervision, "to establish a cause of action based on negligent hiring, negligent retention, or negligent supervision, it must be shown that the employer knew or should have known of the employee's propensity for the conduct which caused the injury." Shor v. Touch-N-Go Farms, Inc., 83 A.D.3d 927, 928 (2d Dep't 2011). Given the outcome of the issue of proximate cause on summary judgment, it appears that any claims for negligent hiring and supervision, together with claims that the P.C. is vicariously liable for Ms. Barilli's acts and/or omissions, are no longer viable. Furthermore, the fact that neither plaintiff nor defendants addressed the cause of action for negligent hiring/supervision in their papers leads the court to the conclude that this claim has been abandoned. The claims for negligent hiring and/or negligent supervision and the claims sounding in vicarious liability shall be dismissed. Accordingly, it is hereby

ORDERED that the motion of defendants Orange Dermatology Associates, P.C., and Dawn Barilli, RPA-C, is granted and the complaint is dismissed in its entirety.

Dated: *Dec. 9*, 2011

ENTER:

FILED

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 JOAN B. LOBIS, J.S.C.

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