

**Gullon v Levine**

2012 NY Slip Op 30583(U)

March 1, 2012

Supreme Court, Suffolk County

Docket Number: 07-19484

Judge: Joseph C. Pastorella

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 34 - SUFFOLK COUNTY

**COPY**

**PRESENT:**

Hon. JOSEPH C. PASTORESSA  
Justice of the Supreme Court

Mot. Seq. # 001 - MG

-----X  
YUDELKA GRULLON, as Mother and Natural  
Guardian of YERAZDY ALVARADO, an Infant,  
  
Plaintiffs,

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- against -

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Defendants.  
-----X

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Upon the following papers numbered 1 to 14 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 14; Notice of Cross Motion and supporting papers \_\_\_; Answering Affidavits and supporting papers \_\_\_; Replying Affidavits and supporting papers \_\_\_; Other \_\_\_; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that motion (001) by the defendants, Ivy Anne Engel, M.D. and Long Island Radiology Group, P.C., pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against them is granted.

This is an action premised upon the alleged medical malpractice and negligence of the defendants arising out of their care and treatment of the infant plaintiff, Yerazdy Alvarado. It is alleged that the defendants improperly interpreted a CT scan of the infant's brain, failed to detect a density or infarct in the middle cerebral artery of the brain, failed to suspect an infarct, and failed to administer TPA. It is alleged that the infant plaintiff presented to the emergency department at Southside Hospital on November 28, 2005, following a motor vehicle accident, with right arm weakness and paresis, increasing combativeness, and unresponsiveness to verbal command. The infant was thereafter transferred to Good Samaritan Hospital where she was treated for a left middle cerebral aneurysm with left middle cerebral aneurysm stroke, and possible carotid dissection.

The defendants, Ivy Anne Engel, M.D. (Dr. Engel) and Long Island Radiology Group, P.C., now seek summary judgment dismissing the complaint on the bases that although Dr. Engel issued a CT scan report confirming that she read the CT scan on November 29, 2005, and that her impression was that it was a "normal computed tomography of the brain," there is no proximate causation between her reading of the films at issue and the diagnosis and treatment of the infant plaintiff's carotid artery dissection; that she was not the infant plaintiff's treating physician; that her role was limited to interpreting the CT of the brain, without contrast, and documenting her findings; that she did not assume any general duty of care to independently diagnose or treat the infant's medical condition; that she did not see the CT scan at issue until November 29, 2005 at 11:43 a.m., after the infant had already been transferred to Good Samaritan Hospital and the middle cerebral artery dissection had already been diagnosed; that the report did not influence the way the infant was diagnosed and treated; and that she did not speak to anyone about her interpretation of the films.

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 (Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065 [1979]; Sillman v Twentieth Century-Fox Film Corporation, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (Winegrad v N.Y.U. Medical Center, 64 NY2d 851 [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 [1980]). The opposing party 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 [2d Dept 1981]).

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In support of motion (001), defendants Engel and Long Island Radiology have submitted, inter alia, an attorney's affidavit; copies of the summons and complaint, their answers and various discovery demands, and the plaintiff's verified bill of particulars as to Engel and Long Island Radiology; plaintiff's expert witness response; several pages of the unsigned and uncertified transcript of the examination before trial of William Edward McCormick, M.D. dated October 4, 2010, Heidi Jill Levine, D.O. dated June 29, 2010; uncertified medical record from Southside Hospital; uncertified consultation report of Sarita Duchatelier, M.D.; and the signed and certified transcript of the examination before trial of Ivy Anne Engel, M.D. dated August 4, 2010. The unsigned, uncertified copies of the aforementioned deposition transcripts are not in admissible form as required by CPLR 3212 (see Martinez v 123-16 Liberty Ave. Realty Corp., 47 AD3d 901 [2d Dept 2008]; McDonald v Maus, 38 AD3d 727 [2d Dept 2007]; Pina v Flik Intl. Corp., 25 AD3d 772 [2d Dept 2006]), are not accompanied by proof of service of the transcripts pursuant to CPLR 3116, and are not considered on this motion. The medical records submitted by the moving defendants are not certified, and therefore are not in admissible form to be considered on a motion for summary judgment (CPLR 3212). Expert testimony is limited to facts in evidence (see Allen v Uh, 82 AD3d 1025 [2d Dept 2011]; Hornbrook v Peak Resorts, Inc., 194 Misc2d 273 [Sup Ct, Tomkins County 2002]; Marzuillo v Isom, 277 AD2d 362 [2d Dept 2000]; Stringile v Rothman, 142 AD2d 637 [2d Dept 1988]; O'Shea v Sarro, 106 AD2d 435 [2d Dept 1984]).

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 [2d Dept 1998], *app denied* 92 NY2d 818). 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 [1980]; Prete v Rafla-Demetrious, 221 AD2d 674 [2d 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 [1985]; Lyons v McCauley, 252 AD2d 516 [2d Dept 1998], *app denied* 92 NY2d 814; Bloom v City of New York, 202 AD2d 465 [2d Dept 1994]).

In the instant action, the moving defendants have not submitted an affidavit or affirmation proffering an expert opinion concerning the moving defendants' alleged departures from good and accepted medical/radiological practice, and as to proximate cause. However, the deposition transcript of Dr. Engel has been submitted in support and is considered in this regard.

Ivy Anne Engel, M.D. testified to the extent that she was licensed to practice medicine in New York and was board certified in medicine and radiology. She was the Assistant Director of Radiology at Southside Hospital from December 2003 through March 2007, however, she stated, she was not an employee of Southside Hospital. She continued that she was employed in a private radiology group by Kenneth Schwartz, M.D., who had a contract at Southside Hospital to cover the radiology service for the hospital. She did not recall the name of the group, and stated that ARKS Radiology was the administrative arm of the group. She added that the group was the exclusive provider of radiology services at Southside Hospital in November 2005. Dr. David Weltman was the chairman of radiology, and Dr. Kenneth Schwartz was the chief of the entire practice as an administrative director.

Dr. Engel testified that Long Island Radiology is a private business corporation of which she is the sole owner. She utilizes it to do expert radiology review consultations outside of her radiology practice. Dr. Engel continued that while she was the Assistant Director of Radiology at Southside Hospital from December 2003 through March 2007 as a full-time radiologist, she read films and interpreted them, and participated in hospital meetings and other administrative type duties. In November 2005, she usually worked the day shift from 9 a.m. to 5 p.m., or once a week from 12 noon to 8 p.m., and worked five to seven days a week. Between 8 p.m. and midnight, about 20 radiologists shared coverage reading films by teleradiology at home on their computer. From midnight to 8 a.m., Imaging on Call, an outside teleradiology group from upstate New York with radiologists working anywhere in the United States, read and interpreted films. Imaging on Call was not part of Southside Hospital.

Dr. Engel testified that she reviewed the CT scan reports of Yerazdy Alvarado's cervical spine and brain in preparation for testifying. She stated that Dr. Pfeffer did the preliminary reading of those films in the evening of November 28, 2005 and recorded his report at 22:43 hours. No one contacted her the night of November 28, 2005 about the films or the patient. Dr. Engel added that on the morning of November 29, 2005 at 11:27, she reviewed the CT of the cervical spine, and at 11:43 a.m., she reviewed the CT scan films of the brain. When she did her review, she had not spoken to anyone about the infant and did not know what the infant's clinical presentation was in the emergency room. She did not speak to anyone about her interpretation of those films and did not contact, or attempt to contact, any of the infant's treating physicians. She stated that during the day, if there is a CAT scan for an ER patient, it takes precedence over the overnight films, such as the infant's films which she read on November 29, 2005, as there was already a preliminary report by Dr. Pfeffer. She stated that she did not become aware that the infant had been transferred to Good Samaritan Hospital until November 30, 2005 when she spoke with Dr. Pfeffer. Dr. Engel further testified that she had no responsibility for any radiologic care or interpretations, or care of patients at Southside Hospital on the evening of November 28, 2005 between 8:00 p.m. and midnight.

Dr. Engel continued that CAT scans usually do not show the parenchymal finding of an infarction until 24 to 48 hours after the symptoms start. After 24 hours or more, the appearance of an evolving infarction is evidenced most commonly with the parenchyma starting to become more edematous, and lower in density than normal on the film. She continued that it is a less common finding to see a sign of evolving infarction in the blood vessels of the brain on CT evaluation, and the condition could present with the blood vessels being a little brighter or denser (higher) than normal, but not always. When she reviewed the films in preparation for her testimony, she thought the density of the left middle cerebral artery and of the right middle cerebral artery were a little higher than normal, but within the normal range. If she were to diagnose something abnormal, she would have had to have seen it on two or three views consistently in a sequence, and that there were only two views where she could see the left middle cerebral artery. If it were abnormal, she would expect to see it on images or views 9-12, however, she saw no signs of edema, shifts, pressure or bleeding.

Dr. Engel testified that she saw no abnormality or sign of evolving infarction in the brain on the films, and interpreted the findings as being within the range of normal. She did not look at the spine CT when she reviewed the brain CT. She continued that the arteries of concern, the carotids, are in the neck, so they would not have been visualized on a CT of the cervical spine. However, she continued, the

internal carotids are in the brain, and she did not see any abnormalities of the internal carotids upon her review, and thought the carotids were within normal limits. She was able to see the distribution of the left MCA (middle cerebral artery) on the CT films, and although there was motion and streak artifact in the right and left middle cerebral arteries, she felt that the study was diagnostic (of adequate quality) to have interpreted it. She felt the left side of the brain, in the distribution of the left middle cerebral artery, was within the normal range of appearance. When asked if she saw anything that she felt was abnormal, she responded that “the density of the vessels can vary from low to high, and I felt the appearance of the right and left was within the normal range” that she expected to see on a study with that kind of motion artifacts. She added that the distribution of the left middle cerebral artery was at the upper range of normal, but she felt that it was still within a normal range.

Dr. Engel stated that she believes that the infant’s common carotid blood vessel in the neck was injured, possibly proximal in the neck, but she was not sure where the exact injury was. She continued that a CT of the soft tissues of the neck with contrast would have been needed to visualize any injury to the vessels, and such test was not performed. The CT of the neck was done to evaluate the bones and did not concentrate on the vessels. She continued that the diagnosis of dissection of an internal carotid artery is something that may be seen on a regular CT of the soft tissues of the neck with contrast, but it would be better visualized using CT arteriography, with special software programs to reconstruct the vessels, which she did not believe was available in 2005 at Southside. At that time, MRI’s were the imaging study of choice for diagnosing internal carotid artery dissections, and more specifically, an MRA or MR angiography. Dr. Engel stated that at Southside Hospital, between 8 p.m. and midnight, there is no qualified person to perform an MRI, and that the technician would have to be called in. She stated that it is up to the neurologist taking care of the patient to determine if an MRI or other studies should be conducted. She stated that she has previously interpreted MRI’s of the brain where she has seen an evolving infarction within the brain, as demonstrated by low density and bright perfusion imaging, which two findings together signify an acute infarction. She stated that in at least one hour, and less than 24 hours after a stroke, an MRI can show evidence of the infarct. She also testified that the decision to administer TPA is strictly with the neurologist. She did not recall the standards for TPA protocol in November 2005.

Dr. Engel testified that she discussed the report prepared by Dr. Pfeffer with Dr. Pfeffer on November 30, 2005, at which time she learned from him that the patient had been transferred to Good Samaritan due to an evolving infarction in the brain. She and Dr. Pfeffer reviewed the films together, as well as his initial reading of those films, on November 30, 2005. She testified that she agreed with his preliminary reading. They then decided to have the films reviewed by many other members of their group to see what their interpretations were.

Here, Dr. Engle has established prima facie entitlement to summary judgment. She has established by her testimony that it was her impression that the CT scan of the infant’s brain was a “normal computed tomography of the brain;” that there was no proximate causation between her reading of the films at issue and the diagnosis and treatment of the infant plaintiff’s carotid artery dissection in that she did not see the CT scan at issue until November 29, 2005 at 11:43 a.m., after the infant had already been transferred to Good Samaritan Hospital and the middle cerebral artery dissection had already been diagnosed; that she was not the infant plaintiff’s treating physician; that her role was limited to interpreting the CT of the brain without contrast and documenting her findings; that she did

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not assume any general duty of care to independently diagnose or treat the infant's medical condition; that the report did not influence the way the infant was diagnosed and treated, and she did not speak to anyone about her interpretation of the films.

To rebut a prima facie showing of entitlement to an order granting summary judgment by the defendant, 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 [2d Dept 2004]; Domaradzki v Glen Cove OB/GYN Assocs., 242 AD2d 282 [2d 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 [2d Dept 2007]).

Here, the plaintiffs have not opposed this motion and thus have not raised a triable issue of fact to preclude summary judgment dismissing the complaint as asserted against Ivy Anne Engel, M.D. and Long Island Radiology, P.C.

Accordingly, motion (001) is granted and the complaint as asserted against Ivy Anne Engel, M.D. and Long Island Radiology, P.C. is dismissed.

Dated: March 1, 2012

  
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 HON. JOSEPH C. PASTORESSA, J.S.C.

\_\_\_\_ FINAL DISPOSITION  X  NON-FINAL DISPOSITION