Shierts v Fenton
2012 NY Slip Op 30882(U)
March 30, 2012
Sup Ct, Suffolk County
Docket Number: 08-45614
Judge: W. Gerard Asher
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SHORT FORM ORDER

INDEX No. 08-45614
CAL. No. 10-02153MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 5-31-11 (#007)
MOTION DATE 7-19-11 (#008)
ADJ. DATE 8-9-11
Mot. Seq. # 007 - MG; CASEDISP
008 - MD

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JEANNE SHIERTS, as Executrix of the Estate of JODIE LYNN SHIERTS, and JEANNE SHIERTS, Individually,

Plaintiffs,

- against -

KIMBERLY FENTON, M.D., MARY ANDRIOLA, M.D., SALMA SYED, M.D., ROBERT SEMLEAR, M.D., and SOUTHAMPTON HOSPITAL, NORMAN PFLASTER, M.D., and DANIEL SLONIEWSKY, M.D.,

Defendants.

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[* 2]

Upon the following papers numbered 1 to __ read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 3, 4 - 7 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 8 - 15 ; Replying Affidavits and supporting papers 16 - 17 ; Other joint exhibits ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motions (007, 008) are consolidated for the purpose of this determination; and it is further

ORDERED that the motion (007) by defendants Kimberly Fenton, M.D., Salma Syed, D.O., sued herein as Salma Syed, M.D., and Daniel Sloniewsky for summary judgment dismissing the complaint is granted; and it is further

ORDERED that the motion (008) by defendant Mary Andriola, M.D. for an order dismissing the complaint is denied as academic.

In this wrongful death action, plaintiff Jeanne Shierts, as executrix of the estate of Jodie Lynn Shierts, and individually, alleges that defendants departed from accepted medical practice in the care and treatment of her daughter, decedent Jodie Lynn Shierts ("the recipient plaintiff") after she underwent pancreas transplant surgery on March 30, 2007, performed by non-party Ty Dunn, M.D., at the University of Minnesota Medical Center. Plaintiff alleges in the bill of particulars that defendants Kimberly Fenton, M.D., Salma Syed, D.O., sued herein as Salma Syed, M.D., Daniel Sloniewsky, M.D., and Mary Andriola, M.D., who were the physicians caring for a pediatric patient ("the donor") whose organs were donated for transplantation, departed from accepted medical standards in failing to diagnose cancer while the donor was a patient at non-party Stony Brook University Hospital ("Stony Brook"), from March 13, 2007 through March 30, 2007, failing to rule out bacterial meningitis and viral meningitis, failing to note that the donor's symptoms were inconsistent with bacterial and viral meningitis, failing to identify the organism that caused the donor's death, failing to test the donor for lymphoma, failing to obtain autopsy results before offering his organs for transplantation, and offering the donor's diseased pancreas for donation when it was unsuitable for transplantation due to the presence of cancer.

By order dated June 18, 2009 (Cohen, J.), the Court directed that this action would be tried jointly with six related actions.[1] By order dated October 5, 2009 (Victor, J.), the Court so-ordered a stipulation discontinuing the within action as asserted against defendant Southampton Hospital. By order dated April 20, 2010 (Cohen, J.), the action was also discontinued as against Robert Semlear, M.D.

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[1] The six related actions are as follows:
Kelly v Fenton, Index No. 33833/08, Action #1
Kelly v New York Organ Donor Network, Index No. 12211/09, Action #2
Trueba v Diflo, Index No. 49098/09, Action #3
Lee v Fenton, Index No. 38346/09, Action #4
Lee v New York Organ Donor Network, Index No. 38345/09, Action #5
Shierts v New York Organ Donor Network, Index No. 12212/09, Action #6

and Norman Pflaster, M.D. By order dated October 26, 2010 (Cohen, J.), the Court directed the parties to submit a single set of joint exhibits for all summary judgment motions, consisting of the pleadings, bills of particulars, deposition testimonies of the parties, the donor's medical records from Southampton Hospital and Stony Brook University Medical Center ("Stony Brook"), the recipient's medical records from NYU Hospital Center, and the New York Organ Donor Network ("NYODN") donor packet. By stipulation dated July 27, 2011, plaintiff discontinued the action as asserted against Andriola, rendering her motion as academic.

The record reveals that the recipient plaintiff received a pancreas transplant from the donor, who had died of bacterial meningitis on March 30, 2007 at Stony Brook.[2] The donor had been ill since March 3, 2007. He was treated at Southampton Hospital intermittently. During his final admission to Southampton Hospital, a lumbar puncture revealed no bacteria in the cerebral spinal fluid ("CSF") despite symptoms which appeared to be bacterial meningitis, such as severe headaches, vomiting, and fainting. His doctors prescribed antibiotics and antiviral medications. His final diagnosis at Southampton Hospital was viral meningitis or encephalitis.

The donor was transferred to Stony Brook on March 13, 2007. Another spinal tap was performed, and, again revealed no bacteria in the cerebral spinal fluid. Further lab tests revealed no viral pathogens either. His attending physician, Kimbrly Fenton, M.D., a pediatric intensivist, diagnosed the donor with presumed, partially treated bacterial meningitis. By March 14, 2007, the donor became unresponsive and required assisted ventilation. The donor's Stony Brook medical record revealed that, on March 29, 2007, he had lost all cerebral autoregulation despite maximal medical management and had not improved after a lumbar drain was placed to reduce the intracerebral pressure. Dr. Fenton advised the donor's parents, who agreed that no resuscitation should be initiated. In addition, the parents requested organ donation. Dr. Fenton called NYODN and provided the basic demographic information, as well as her diagnosis of presumed partially treated bacterial meningitis. On March 30, 2007, the NYODN staff placed calls to multiple transplant centers to place four of the donor's organs. After reviewing the donor chart provided by NYODN, and in consideration of the donor's diagnosis, Dr. Dunn accepted the donor's pancreas on behalf of the recipient plaintiff. She stated that she was aware of the Southampton Hospital diagnosis of viral meningitis. Upon receiving the organ, Dr. Dunn testified that she inspected the pancreas and that it had no obvious deformities.

Plaintiff testified that the recipient plaintiff was diagnosed with diabetes at age 15 and became insulin dependent. She developed retinopathy, and soon thereafter, became a brittle diabetic. The recipient plaintiff developed kidney problems and began dialysis in her early 20's. In 2006, the recipient plaintiff's sister donated one of her kidneys to her. Plaintiff stated that the recipient plaintiff was on the transplant list for a pancreas prior to the kidney transplant. She was notified of the donor pancreas and underwent the transplant surgery on March 30, 2007. The recipient plaintiff began to have problems

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[2] The donor's parents authorized the donation of four organs. In addition to the donor's pancreas that was donated to the recipient plaintiff in the instant action, the donor's liver was donated to Kitman Lee, one of the donor's kidneys was donated to Gerard Trueba and the donor's other kidney was donated to James D. Kelly.

approximately one week after the surgery, however, it appeared that she was not rejecting the organ. On May 3, 2007, an autopsy of the donor's brain revealed that he died of a rare form of T-cell lymphoma in his leptomeninges. Plaintiff recalled that she and the recipient plaintiff were notified of the cancer. The donor pancreas was removed, and a biopsy of the organ revealed the presence of T-cells. The recipient plaintiff began chemotherapy. Plaintiff stated that on September 7, 2007, the recipient plaintiff was admitted to the hospital and was told to get her affairs in order. The recipient plaintiff had developed symptoms of lymphoma and expired on September 12, 2007.

Defendants Kimberly Fenton, M.D., Salma Syed, D.O., and Daniel Sloniewsky, M.D. now move (007) for summary judgment dismissing the complaint. Plaintiff's discontinuance of the action as against Andriola renders her motion (008) for summary judgment as academic.

A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (***Stewart Title Ins. Co. v Equitable Land Servs.***, 207 AD2d 880, 616 NYS2d 650 [2d Dept 1994]), but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]).

The requisite elements of proof in a medical malpractice case are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (***Gross v Friedman***, 73 NY2d 721, 535 NYS2d 586 [1988]; ***De Stefano v Immerman,*** 188 AD2d 448, 591 NYS2d 47 [2d Dept 1992]; ***Amsler v Verrilli***, 119 AD2d 786, 501 NYS2d 411 [2d Dept 1986]). On a motion for summary judgment, a defendant doctor has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby (***Williams v Sahay***, 12 AD3d 366, 783 NYS2d 664 [2d Dept 2004]).

The threshold question in determining liability is whether the defendants owed plaintiff a duty of care (***McNulty v City of New York***, 100 NY2d 227, 762 NYS2d 12 [2003]). Generally, a doctor only owes a duty of care to his or her patient. The courts have been reluctant to expand a doctor's duty of care to a patient to encompass nonpatients (*see* ***Eiseman v State***, 70 NY2d 175, 518 NYS2d 608 [1987]). Liability may not be imposed in the absence of a physician-patient relationship (***Levy v Nassau Health Care Corp.***, 40 AD3d 591, 833 NYS2d 403 [2d Dept 2007]). An extension of the duty is warranted in cases where the service performed on behalf of the patient necessarily implicates protection of household members (***Tenuto v Lederle Lab.***, 90 NY2d 606, 665 NYS2d 17 [1997]). Liability does not arise until a duty is found (***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***De Angelis v Lutheran Medical Center***, 84 AD2d 17, 445 NYS2d 188 [2d Dept 1981]).

A plaintiff, in opposition to a defendant physician's summary judgment motion, must submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact (***Alvarez v***

Prospect Hosp., *supra*; ***Stukas v Streiter***, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]). 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, 675 NYS2d 375 [2d Dept 1998]).

The evidence submitted by defendants Fenton, Syed, and Sloniewsky was sufficient to meet their burden of establishing, as a matter of law, that they did not depart from good and accepted medical practice inasmuch as they had no duty to the recipient plaintiff, and that the treatment they rendered to the donor was not a proximate cause of the recipient plaintiff's alleged injuries (***Eiseman v State***, *supra*; ***McNulty v City of New York***, *supra*). In support of their motions, defendants submit, *inter alia*, their deposition testimonies, and the joint exhibits.

The record reveals that Fenton was the attending pediatric intensivist caring for the donor at Stony Brook when the donor was admitted on March 13, 2007, and oversaw his care until March 19, 2007, and resumed the donor's care on March 29, 2007 until March 30, 2007. Thereafter, the staff from the NYODN supervised the organ donation process and Fenton withdrew from the case. Fenton testified that she had no role in determining whether the donor's organs were suitable for transplantation. In addition, she had no contact with any of the transplant centers, and had no knowledge of the recipient plaintiffs' identities. Likewise, Sloniewsky, also an attending pediatric intensivist, testified that he took over the donor's care until March 29, 2007, upon Fenton's return. He stated that his care and treatment of the donor ended before a request was made to donate his organs, and that he had no contact with NYODN, the transplant centers, or the recipients. He also had no involvement in the organ donation process. Syed, a pediatric infectious disease attending, testified that she was called for a consult on the first day of the donor's admission. She stated that the last day she had contact with the donor was on March 22, 2007. She had no reason to believe that the donor was suffering from a malignancy, inasmuch as his presentation was consistent with meningitis. She further testified that she had no contact with NYODN, the transplant centers, or the recipients.

As the moving defendants made a *prima facie* showing of entitlement to summary judgment, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*; ***Murray v Hirsch***, 58 AD3d 701, 871 NYS2d 673 [2d Dept 2009], *lv den* 12 NY3d 709, 881 NYS2d 18 [2009]). The plaintiff failed to meet this burden. In opposition, plaintiff submitted the affidavits of Paul W. Nelson, M.D. and Arnold N. Weinberg, M.D. Dr. Nelson avers that he is licensed to practice medicine in the States of Missouri and Indiana. Dr. Weingerg avers that he is a physician duly licensed to practice medicine in the State of Massachusettes. These affidavits, however, have no probative value inasmuch as neither expert addresses the alleged departures of the moving defendants. Moreover, there is no legal support for plaintiff's theory that a special relationship arose between the moving defendants and the recipient plaintiff once the recipient plaintiff was identified as a match to the donor's pancreas. There was no physician-patient relationship creating a duty, and there were no special circumstances which related the care they provided to the donor with the recipient plaintiff, of whom they had no knowledge. Therefore, the Court declines to extend the common law to create a remedy for the plaintiff (*see* ***McNulty v City of New York***, *supra*; ***Eiseman v State***, *supra*; ***Pulka v Edelman***, *supra*). In addition, the attorney's

affirmation is not probative on a motion for summary judgment since he has no personal knowledge of the incident (*see* ***Zuckerman v New York***, *supra*).

The Court acknowledges the tragic circumstances which led to the commencement of the instant action, and extends its sympathy for everyone involved, including the donor and his parents, the medical providers, the NYODN staff, the recipient plaintiff and her family. In addition, the Court notes that the donor's parents willingly waived HIPAA[3] restrictions (*see* ***Liew v New York University Medical Center***, 55 AD3d 566, 865 NYS2d 278 [2d Dept 2008]), openly provided their son's confidential medical records, and disclosed his ultimate diagnosis in order to help the recipient plaintiff. The Court finds that all parties acted responsibly by notifying the recipient plaintiff as soon as it was known that the donor had cancer, affording the recipient plaintiff all possible care and treatment possible. Unfortunately, inasmuch as it is not the standard of care to perform a biopsy upon a donor organ prior to transplantation, it was not foreseeable that the donor could have had cancer, this Court is constrained by the law to render this determination.

Accordingly, under the circumstances presented and the prevailing law, the motion by Fenton, Syed, and Sloniewsky for summary judgment dismissing the complaint as asserted against them is granted. Andriola's motion for an order dismissing the complaint is denied as academic.

Dated: March 30, 2012

W. Gerard Asher
J.S.C.

_X_ FINAL DISPOSITION _____ NON-FINAL DISPOSITION

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[3] HIPAA is the Health Insurance Portability and Accountability Act of 1996 (see Pub L 104-191, 110 U.S. Sat 1936).