**Costa v Columbia Presbyt. Med. Ctr.**

2012 NY Slip Op 32409(U)

September 14, 2012

Supreme Court, New York County

Docket Number: 102175/09

Judge: Joan B. Lobis

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SCANNED ON 9/20/2012

[* 1]

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

PRESENT: Lobis, Justice — PART 6

Costa, Carmen

- v -

Columbia Presyterian

INDEX NO. 102175/09

MOTION DATE 6-26-12

MOTION SEQ. NO. 02

MOTION CAL. NO.

The following papers, numbered 1 to 16 were read on this motion to/for Sum Judgmt

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1-4 |
| Answering Affidavits — Exhibits | 5-15 |
| Replying Affidavits | 16 |

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

FILED

SEP 20 2012

NEW YORK COUNTY CLERK'S OFFICE

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

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

Dated: 9/14/12

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.

[* 2]

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

---------------------------------------------------------------------X

CARMEN COSTA and FRANCISCO COSTA,

Plaintiffs,

Index No. 102175/09

-against-

**Decision and Order**

COLUMBIA PRESBYTERIAN MEDICAL CENTER a/k/a NEW YORK PRESBYTERIAN HOSPITAL, MICHAEL G. KAISER, M.D., ANGELA LIGNELLI, M.D., and ALAN JOHN SILVER, M.D.,

Defendants.

---------------------------------------------------------------------X

FILED

SEP 20 2012

NEW YORK
COUNTY CLERK'S OFFICE

**JOAN B. LOBIS, J.S.C.:**

Defendants[1] Angela Lignelli, M.D., Alan John Silver, M.D., and New York and Presbyterian Hospital s/h/a Columbia Presbyterian Medical Center a/k/a New York Presbyterian Hospital ("NYPH") move, by order to show cause, for summary judgment pursuant to C.P.L.R. Rule 3212. Plaintiffs Carmen Costa and Francisco Costa oppose the motion.

This action arises out of the performance of a lumbar myelogram with a cervical approach at C1-C2 on Carmen Costa on November 8, 2006. The records reflect that on November 7, 2006, Ms. Costa was brought by ambulance to Orange Regional Medical Center ("ORMC") with complaints of an acute onset of back pain and paresthesia of her legs. She had a prior history of having aneurysm clips, so her physicians at ORMC did not want to risk performing a magnetic resonance imaging ("MRI") scan in case the clips were not MRI-safe. ORMC physicians attempted to perform a lumbar computed tomography ("CT") myelogram to assess Ms. Costa's spine, but were unable to fully complete the assessment due to complications. From the images ORMC was able

---

[1] Plaintiffs have previously voluntarily discontinued their action against Michael G. Kaiser, M.D.

to obtain, it appeared that Ms. Costa had a mass in her lumbar region. ORMC then arranged for Ms. Costa to be transferred to NYPH for follow-up on her increasingly complicated case.

Michael Kaiser, M.D., the neurosurgeon who evaluated Ms. Costa at NYPH, ordered a myelogram to assess the necessity of surgical lumbar decompression. The NYPH records contain a consent form signed by Ms. Costa, which sets forth that plaintiff authorized and consented to Dr. "Lignelli/Silver" performing a C1-C2 puncture and myelogram, and that the risks and benefits, including bleeding and infection, had been explained to her. In the early morning of November 8, 2006, neuroradiologists Drs. Lignelli and Silver commenced the CT myelogram. The report from the myelogram sets forth:

> Patient was placed in left lateral decubitus position and was prepped and draped in the usual sterile fashion. Local anesthetic was administered. After appropriate localization under fluoroscopy a 20 gauge needle was introduced, and blood tinged CSF [cerebral spinal fluid] was visualized. The blood in the CSF did not clear. Approximately 10 cc of CSF were collected. Subsequently 18 cc of 240 omnipaque contrast were injected under fluoroscopic visualization. Contrast was seen to move away from the needle tip into the thecal sac. Free flow of contrast was observed with no localized collection of contrast at needle tip. Immediately after the injection, the patient reported pain and became unresponsive for a few seconds. The needle was immediately removed, patient was brought to horizontal position and procedure terminated.

Ms. Costa's physicians determined that she had suffered a stroke caused by contrast dye that was inadvertently injected into the medulla during the myelogram. Dr. Silver testified that the contrast was likely inserted into the spinal cord, where it should not be injected.

On February 17, 2009, plaintiffs commenced this action by the filing of a summons and complaint. The complaint alleges that defendants were negligent in failing to prevent contrast

[* 4]

dye from being negligently and inadvertently injected into Ms. Costa's medulla, causing an acute stroke with symptoms of aphasia, dysphasia, right facial droop, and paralysis. The complaint also raises claims against NYPH sounding in negligent hiring, training, and retention, and claims against all defendants on behalf of Mr. Costa sounding in loss of services. The bills of particulars served on defendants allege, inter alia, that defendants should not have performed the cervical CT myelogram; that the cervical CT myelogram was performed improperly; and that a lumbar CT myelogram, an MRI, or an MRA should have been performed instead of the cervical CT myelogram. In their opposition papers, plaintiffs concede that they are no longer asserting that the determination to perform the myelogram at the C1-C2 interspace was improper or that a study other than a myelogram should have been conducted; the key issue, then, is whether defendants departed from the standard of care in performing the myelogram.

The parties have different accounts of who performed the myelogram. At her deposition, Ms. Costa testified that on the morning before the surgery, Dr. Lignelli explained that she would perform the myelogram, a procedure explained to Ms. Costa as the insertion of a needle in the back of her head which would be used to insert dye to find out where her pain was coming from. Ms. Costa testified that Dr. Lignelli performed the entire myelogram and that she was unaware of any person, other than Dr. Lignelli, who touched the needle during the procedure. Dr. Lignelli testified that it was Dr. Silver's decision to perform a C1-C2 puncture as opposed to a lumbar puncture. She further testified that she commenced the C1-C2 puncture with the needle by herself, but when she did not get any cerebral spinal fluid, she asked Dr. Silver to come in from outside of the room and attempt the procedure, since he was the more experienced neuroradiologist. Dr.

Lignelli testified that she believed that Dr. Silver actually removed the needle that she had inserted, reinserted the needle, and was able to draw a small amount of cerebral spinal fluid. Dr. Lignelli testified that after Dr. Silver positioned the needle, he began injecting the contrast dye. She testified that after the contrast was injected, Ms. Costa began complaining of pain and shortly thereafter lost the ability to speak. Dr. Silver testified that Dr. Lignelli approached him before the procedure, informed him that she was planning to do a C1-C2 puncture for a myelogram, and asked him to observe and assist her. He testified that he was standing next to Dr. Lignelli when she commenced the procedure. Dr. Silver testified that he observed Dr. Lignelli initially place the needle. He testified that when Dr. Lignelli did not get any cerebral spinal fluid where it would be expected, he took over the procedure, partially withdrew the needle, redirected the needle very slightly, was able to get a return of cerebral spinal fluid, and began injecting the contrast dye. When he observed that the contrast dye was did not appear to be going into the subarachnoid space, he aborted the injection.

Defendants now move for summary judgment. As established by the Court of Appeals in Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985), and Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986), a party moving for summary judgment motion must show that there are no disputed issues of fact. A defendant in a medical malpractice case moving for summary judgment must demonstrate either that there were no departures from accepted standards of practice or that, even if there were departures, they did not proximately injure the patient. Roques v. Noble, 73 A.D.3d 204, 206 (1st Dep't 2010) (citations omitted). A defendant's initial failure to make a prima facie showing of entitlement to summary judgment requires denial of the motion, regardless of the opposition papers. Alvarez, 68 N.Y.2d at 324. If the movant meets his

or her burden, it is incumbent upon the opposing party to proffer evidence sufficient to establish the existence of a material issue of fact requiring a trial. Id. In medical malpractice actions, expert medical testimony is essential for demonstrating either the absence or the existence of material issues of fact pertaining to an alleged departure from accepted medical practice or proximate cause.

Defendants first argue that Dr. Lignelli should be granted summary judgment because she did not inject the contrast. They also argue that Dr. Silver followed the standard of care during the myelogram. Further, defendants assert that the risks of the procedure include headache, infection, death or paralysis from cord damage due to injection of contrast into the cord. Defendants maintain that because Ms. Costa's alleged injuries were risks of the procedure, there can be no causal connection between her alleged injuries and any deviation from the standards of care.

In support of their motion, defendants submit an affirmation from Caren Jahre, M.D., a board certified radiologist with a subspeciality in neuroradiology licensed to practice medicine in the state of New York. Dr. Jahre sets forth that she reviewed the NYPH records, the bills of particulars, and the parties' deposition transcripts. Dr. Jahre explains that, during a myelogram, a needle is advanced in the C1-C2 interspace, usually under fluroscopic guidance, until the tip of the needle is within the subarachnoid space within the spinal canal, at which time a free flow of cerebral spinal fluid is obtained. Dr. Jahre asserts that by aspirating the cerebral spinal fluid, the physician can be reasonably assured that the needle is in the subarachnoid space and not the spinal cord. Then, the contrast material is injected through the needle under fluroscopic guidance to further ensure that the contrast is in the subarachnoid space. Dr. Jahre sets forth that a myelogram using a cervical

approach is a procedure that carries risks, given that the procedure is performed in a very closed space in close proximity to the spinal cord and nerve roots. She states that the risks of the procedure include headache, infection, death, or paralysis from cord damage due to injection of contrast into the cord. She states that in placing the needle appropriately, obtaining cerebral spinal fluid, and injecting contrast, Dr. Silver followed the delineated steps of the procedure, and therefore, it is her opinion, within a reasonable degree of medical certainty, that Dr. Silver comported with the acceptable standards of care in the treatment of Ms. Costa. Dr. Jahre further opines that the case against Dr. Lignelli should be dismissed because Dr. Lignelli did not perform any of the pertinent aspects of the C1-C2 lumbar myelogram, but merely positioned Ms. Costa and initially placed the needle. She sets forth that Ms. Costa had not suffered any injury by the time that Dr. Silver took over the procedure; thus, Dr. Jahre opines, Ms. Costa's injuries are not causally related to the treatment rendered by Dr. Lignelli. Dr. Jahre concludes that it is her opinion, within a reasonable degree of medical certainty, that defendants at all times properly treated Ms. Costa in accordance with good and accepted standards; that no departures from good and accepted care by defendants proximately caused Ms. Costa's alleged injuries; and that Ms. Costa's alleged injuries were within the acceptable risks of the procedure.

Defendants have failed to make out a prima facie case of entitlement to summary judgment, as material issues of fact remain outstanding. First, Dr. Silver testified that during the myelogram, contrast dye was likely inserted into Ms. Costa's spinal cord. There is no dispute that Ms. Costa had a stroke because contrast dye was inserted into her spinal cord. Dr. Silver testified that contrast dye should not have been inserted into Ms. Costa's spinal cord. Yet, without explaining

[* 8]

how or why contrast dye came to be inserted in Ms. Costa's spinal cord, defendants' expert opines that the technique described by Dr. Silver was proper. Second, the fact that a certain type of bad outcome may be a known risk of a procedure does not eliminate the possibility that the outcome could also be caused by a departure from the standard of care. Dr. Jahre only conclusorily addresses the issue of proximate cause, opining that Ms. Costa's injury—stroke—was simply a consequence of a risk of the procedure—paralysis due to injection of contrast into the cord. Third, there are factual discrepancies among the parties' deposition testimony as to which physician—Dr. Lignelli or Dr. Silver—administered the contrast dye during the myelogram. Although Dr. Lignelli's and Dr. Silver's testimony is somewhat consistent, in that they both agree that Dr. Silver inserted the contrast dye, their testimony is contradicted by Ms. Costa, who was awake during the procedure and testified that only Dr. Lignelli performed the procedure. These issues of fact remain unresolved, precluding summary judgment. Accordingly, it is hereby

ORDERED that defendants' motion is denied; and it is further

ORDERED that the parties shall appear on October 23, 2012, at 10:00 a.m., for a pre-trial conference.

**FILED**

SEP 20 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: September 14, 2012

ENTER:

JOAN B. LOBIS, J.S.C.