

Kelly v Guigliano

2012 NY Slip Op 33214(U)

May 18, 2012

Sup Ct, Suffolk County

Docket Number: 06-15426

Judge: Ralph T. Gazzillo

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On January 5, 2005, plaintiff was taken by ambulance to defendant Southampton Hospital with complaints of numbness to his hands and feet since the prior day. On January 6, 2005, defendant Mindy Tran Hoang Nguyen, a registered nurse, administered a flu shot to plaintiff. According to plaintiffs' bill of particulars, Southampton Hospital failed to properly manage plaintiff's complaints and condition in failing to ensure that plaintiff received treatment from medical professionals who could diagnose and treat his condition. Plaintiff also alleges that Nguyen negligently administered a contraindicated flu shot to plaintiff, without informed consent, while he was suffering from Guillain-Barré Syndrome (GBS), thereby worsening his condition.

In a prior motion, defendants Southampton Hospital and Mindy Tran Hoang Nguyen sought summary judgment dismissing the complaint, arguing that they are not vicariously liable for the acts and omissions of codefendants, and that the claims for medical malpractice and informed consent are without merit. By order dated July 28, 2011, this Court denied the motion, finding the affidavit submitted by defendant of Dr. Steinberg was inadmissible inasmuch as it was not accompanied by the required certificate of conformity with the laws of the state where it was notarized. Defendants now move for leave to renew their prior motion, and upon renewal, for an order granting them summary judgment dismissing the complaint. On this motion, defendants seek to cure the defect in their prior papers and have submitted the proper certificate of conformity. Leave to renew is granted, as failure to include certificates of authentication pursuant to CPLR 2309 (c) is not a fatal defect and authentication can be secured later and given nunc pro tunc effect (*see Matapos Tech. Ltd v Compania Andina De Comercio Ltda*, 68 AD3d 672, 891 NYS2d 394 [1st Dept 2009]; *Raynor v Raynor*, 279 AD 671, 108 NYS2d 20 [2d Dept 1951]).

In support of their motion, defendants submit a copy of the pleadings, an expert affidavit of Dr. Joel Steinberg, medical records regarding plaintiff's treatment at Southampton Hospital and excerpts of the parties' deposition testimony. Plaintiffs oppose the motion, arguing that a triable issue of fact remains as to the causal connection between the flu shot and the subsequent exacerbation of plaintiff's GBS. In opposition, plaintiffs submit various medical records, excerpts of the parties' deposition testimony, and an expert affirmation of Dr. Allan Hauskemecht. The Court notes that the sur reply filed by plaintiff entitled, "Supplemental Affirmation in Opposition" was not considered in the determination of this motion (*see* CPLR 2214; *McMullin v Walker*, 68 AD3d 943, 892 NYS2d 128 [2d Dept 2009]; *Boockvor v Fischer*, 56 AD3d 405, 866 NYS2d 767 [2d Dept 2008]).

In Dr. Steinberg's affidavit, he states that he is a physician duly licensed to practice medicine in the states of New Jersey and Pennsylvania, and that he has held the position of Medical Advisory Board Member and Vice President of the Guillain-Barré Syndrome/CIDP Foundation International. He states that it is his opinion with a reasonable degree of medical certainty that the care rendered to plaintiff by the doctors, nurses and other staff members at Southampton Hospital did not deviate from the accepted standard of care, and that their treatment was not the proximate cause of plaintiff's alleged injuries. Based on his review of plaintiff's medical records, Dr. Steinberg summarizes the care and treatment rendered to plaintiff. He states that plaintiff was taken by ambulance to Southampton Hospital on January 5, 2005 at approximately 11:55 a.m, with complaints of numbness in both hands and feet since the prior day. When plaintiff arrived in the emergency room, he was seen by defendant Lawrence Rubin, a physician's assistant, and blood was drawn and a urine sample taken. Rubin discussed the condition of plaintiff with Dr. Guigliano over the telephone and obtained admission orders directing plaintiff to be admitted to the telemetry unit within the hospital. Plaintiff was admitted to the telemetry unit by Dr. Guigliano to rule out a

cerebral vascular accident (CVA) and to treat the hypertension crisis. Plaintiff received the influenza virus vaccine on January 6, 2005 at 6:50 a.m. The diagnosis of GBS was made at 4:55 p.m on January 6, 2005 after the neurological consultation ordered by Dr. Guigliano.

Dr. Steinberg describes GBS as a rare disorder wherein a person's own immune system damages nerve cells in the body, causing muscle weakness and sometimes paralysis. He states that people can develop GBS after having the flu or other infections, and on very rare occasions, they may develop it days or weeks after getting a vaccination. He states that in 1976, there was a reported small statistical increased occurrence of GBS following administration of an influenza vaccine made to protect against the swine flu virus. Despite numerous studies, the exact reason for the association remains unknown. Since the 1976 study, multiple studies were done showing an association between getting a flu shot and developing GBS which suggested that one person out of 1,000,000 vaccinated may be at risk of GBS from receiving the vaccine. Thus, the Center for Disease Control and Prevention (CDC) set forth guidelines indicating patients who should not be vaccinated without first consulting a physician. This included among other people, those who had developed GBS within six weeks of getting a prior influenza vaccine and people suffering from moderate to severe illness with a fever who should wait until they recover before getting vaccinated.

Dr. Steinberg opines that there is no evidence to support the contention that any of the doctors, nurses or other staff members were not qualified to provide the treatment required by plaintiff. He states that informed consent was obtained from plaintiff prior to the administration of the flu vaccination. He further states that at the time the flu shot was administered to plaintiff, there was no evidence of him being acutely ill. He states that plaintiff's body temperature was never elevated, that blood cultures and a urinalysis revealed no growth, and that a spinal tap, performed prior to the flu shot, demonstrated no evidence of viral, fungal or bacterial infection. He states that while an active moderate to severe illness would have been considered a contraindication to the administration of the flu vaccine, plaintiff had a resolved cold approximately three days prior to his admission. Therefore, Dr. Steinberg concludes that plaintiff did not have an active infection at the time of treatment, and it was appropriate for the flu vaccine to be administered. He also opines that the medical records demonstrate that timely and appropriate consultations were ordered by the staff at Southampton Hospital.

Dr. Steinberg also states that there is no medical evidence to suggest a causal relationship between the flu shot being given to someone who had active GBS and any worsening or lengthening of the symptoms or recovery time frame. Thus, he concludes that Southampton Hospital and Nurse Nguyen did not improperly diagnose or delay the proper diagnosis of plaintiff, and that it was proper, appropriate and within accepted standard of medical care for plaintiff to receive the flu vaccine when he did. He further states that the administration of the flu shot did not cause or contribute to any of plaintiff's injuries and was not a proximate cause of his injuries.

Here, defendant Southampton Hospital and defendant Nguyen established a prima facie case that they did not deviate or depart from accepted medical practice through the submission of plaintiff's medical records, the parties' deposition testimony, and the expert affidavit of Dr. Steinberg (*see Sandmann v Shapiro*, 53 AD3d 537, 861 NYS2d 760 [2d Dept 2008]; *Bengston v Wang*, 41 AD3d 625, 839 NYS2d 159 [2007]; *Jonassen v Staten Island Univ. Hosp.*, 22 AD3d 805, 803 NYS2d 700 [2005]). Therefore, the burden shifted to plaintiff to come forth with admissible evidence to refute defendants' prima facie showing

(*Holbrook v United Hosp. Med. Ctr.*, 248 AD2d 358, 669 NYS2d 631 [2d Dept 1998]; *Pierson v Good Samaritan Hosp.*, 208 AD2d 513, 616 NYS2d 815 [2d Dept 1994]).

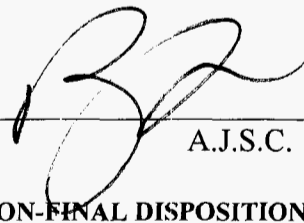
An affirmation by plaintiff's expert, Dr. Allan Hausknecht, opines that multiple departures on the part of the hospital from good and standard medical practice caused injury to plaintiff. The report states that plaintiff was not seen by a physician when he arrived at the Southampton Hospital for an inappropriate length of time. It also states that defendant Nguyen could not have obtained a proper informed consent from plaintiff when she gave him the flu shot, because plaintiff had not been diagnosed with GBS. It further states that there was an inappropriate delay in calling for a neurological consult as plaintiff was admitted to the hospital with a diagnosis of possible CVA. Dr. Hausknecht opines that the delay in obtaining a neurological consultation allowed for the inappropriate action of a nurse giving a flu shot to plaintiff, causing significant and permanent injuries to plaintiff.

Dr. Hausknecht describes GBS as an autoimmune disease of the nervous system where nerve cells are attacked as part of an antigen-antibody reaction causing weakness which typically ascends from the lower extremities to the upper extremities and respiratory muscles. He opines that plaintiff had a classic presentation of this condition. He states that over 80% of people who suffer from GBS have a complete recovery or only minimal permanent findings. He further states that there are no studies where a patient diagnosed with active GBS received a flu shot during the course of the disease as the flu shot is totally contraindicated in patients with GBS. He explains that physicians in a "free society would never entertain such a study and physicians would never knowingly give a flu shot to a person suffering from Guillain-Barré disease." Dr. Hausknecht concludes that it is an absolute medical certainty that the flu shot caused worsening of plaintiff's GBS. He states that while there are no articles that can be cited to prove this, the medical logic used in arriving at this opinion is generally and universally accepted.

Here, the bare and conclusory allegations in Dr. Hausknecht's affidavit is insufficient to raise a triable issue of fact (*see Romano v Stanley*, 90 NY2d 444, 661 NYS2d 589 [1997]; *Andreoni v Richmond*, 82 AD3d 1139, 920 NYS2d 225 [2d Dept 2011]; *Simmons v Brooklyn Hosp. Ctr.*, 74 AD3d 1174, 903 NYS2d 521 [2d Dept 2010]). Furthermore, Dr. Hausknecht's affidavit is devoid of analysis or reference to scientific data (*see Abaloa v Flower Hosp.*, 44 AD3d 522, 843 NYS2d 615 [1st Dept 2007]; *Ramirez v Columbia-Presbyterian Med. Ctr.*, 16 AD3d 238, 790 NYS2d 606 [1st Dept 2005]; *see generally Furey v Kraft*, 27 AD3d 416, 812 NYS2d 590 [2d Dept 2006]). Dr. Hausknecht's affidavit merely concludes that, among other things, the delay in plaintiff seeing a physician at the hospital and the delay in the hospital calling for the neurological consult was inappropriate. He does not address and explain what the accepted standard of medical care is and how defendants deviated from such standard of medical care (*see Feliz v Beth Israel Med. Ctr.*, 38 AD3d 96, 833 NYS2d 23 [1st Dept 2007]; *Thompson v Orner*, 36 AD3d 791, 828 NYS2d 509 [2007]; *DiMitri v Monsouri*, 302 AD2d 420, 754 NYS2d 674 [2d Dept 2003]). Accordingly, the motion for summary judgment by defendant Southampton Hospital and defendant Nguyen to dismiss the complaint against them is granted.

Dated: _____

5/18/12



 A.J.S.C.

___ FINAL DISPOSITION X NON-FINAL DISPOSITION