

Wilson v Good Samaritan Hosp. Med. Ctr.

2013 NY Slip Op 30413(U)

February 26, 2013

Supreme Court, Suffolk County

Docket Number: 09-23518

Judge: Arthur G. Pitts

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 9-27-12
ADJ. DATE 1-15-13
Mot. Seq. # 003 - MG

-----X
NACOLA WILSON,

Plaintiff,

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- against -

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GOOD SAMARITAN HOSPITAL MEDICAL
CENTER, GOOD SAMARITAN HOSPITAL
MAMMOGRAPHY & BREAST DIAGNOSTIC
CENTER, MICHELLE LISTHAUS, M.D.,
HENRY J. MONETTI, M.D. and LEONARD A
BENEDICT, M.D.,

Defendants.
-----X

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Upon the following papers numbered 1 to 22 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (003) 1 - 12; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 13-18; Replying Affidavits and supporting papers 19-22; Other ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that motion (003) by defendant, Henry J. Monetti, D.O., pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against him is granted.

In this medical malpractice action, the plaintiff, Nacola Wilson, seeks damages for personal injuries, premised upon the alleged negligent departures from the good and accepted standards of medical care and treatment by the defendants on the basis that they failed to timely diagnose and treat the plaintiff for breast cancer. On or about June or July of 2008, defendant Henry J. Monetti, D.O., the plaintiff's medical doctor, ordered a mammography screening as she presented to him with a history of an inverted nipple of the right breast for approximately two months prior to seeing him. The mammography was done July 19, 2008. Thereafter, Dr. Monetti ordered an ultrasound of both breasts. The ultrasound film of the plaintiff's right breast was conducted on July 23, 2008, and interpreted by defendant Michelle Listhaus, M.D. as probably benign with no abnormal adenopathy seen. Thereafter, the plaintiff was seen by her gynecologist, Leonard A. Benedict, M.D., whom it is alleged failed to refer the plaintiff for an immediate biopsy of the right breast. On February 4, 2009, defendant Listhaus performed a pathology study via an ultrasound guided core biopsy for the right breast, which revealed invasive lobular carcinoma. On February 12, 2009, a bilateral breast MRI revealed an extensive area of suspicious enhancement in the central aspect of the right breast, correlating with the biopsied malignancy. On March 10, 2009, the plaintiff underwent a bilateral mastectomy. The final pathology report revealed a diagnosis of invasive lobular carcinoma of the right breast and invasive ductal carcinoma of the left breast with nodal involvement both right and left. Chemotherapy and radiation were administered in follow-up. The plaintiff alleges that she is now at high risk of recurrence of the cancer with spread of the disease to distant areas of the body, primarily the lung.

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, 416 NYS2d 790 [1979]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [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, 427 NYS2d 595 [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, 435 NYS2d 340 [2d Dept 1981]).

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, 678 NYS2d 503[2d Dept 1998], *app denied* 92 NY2d 818, 685 NYS2d 420). 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 Derdarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166 [1980]; *Prete v Rafla-Demetrious*, 221 AD2d 674, 638 NYS2d 700 [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, 489 NYS2d 47 [1985]; *Lyons v McCauley*, 252 AD2d 516, 517, 675 NYS2d 375 [2d Dept 1998], *app denied* 92 NY2d 814, 681 NYS2d 475; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2d Dept 1994]).

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, 776 NYS2d 907 [2d Dept 2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]).

In motion (003), Henry Monetti, D.O. seeks summary judgment dismissing the complaint as asserted against him on the bases that he did not negligently depart from the accepted standards of care and treatment, that there is nothing that he did or did not do which proximately caused the injuries claimed by the plaintiff. In support of this application, defendant Monetti has submitted, inter alia, an attorney's affirmation; a copy of the summons and complaint, and plaintiffs' verified bill of particulars; uncertified copies of plaintiff's medical records which are not in admissible form pursuant to CPLR 3212 (*see Lozusko v Miller*, 72 AD3d 908, 899 NYS2d 358 [2d Dept 2010]); the unsigned and uncertified transcript of the plaintiff's deposition which is not in admissible form and is not accompanied by proof of service pursuant to CPLR 3116 (*see Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; *McDonald v Maus*, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]; *Pina v Flik Intl. Corp.*, 25 AD3d 772, 808 NYS2d 752 [2d Dept 2006]). The unsigned but certified copy of the transcript of the examination before trial of the moving defendant Henry Monetti which is considered as adopted as accurate by him (*Ashif v Won Ok Lee*, 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]) and is considered; the unsigned but certified transcript of the examination before trial of Michelle Listhaus, M.D. which is considered pursuant to (*Zalot v Zieba*, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]); and the affirmation of Herbert Feldman, M.D. It is noted that the plaintiff does not object to any of the inadmissible submissions, and relies upon the same in the opposing papers.

Based upon review and consideration of the evidentiary submissions, it is determined that Dr. Monetti has established prima facie entitlement to summary judgment dismissing the complaint. In opposition, the plaintiff's expert has failed to raise a factual issue sufficient to preclude summary judgment and has further failed to demonstrate proximate cause of the claimed injuries with regard to the alleged departures by defendant Monetti, or that she is now at high risk of recurrence of the cancer with spread of the disease to distant areas of the body, primarily the lung.

The plaintiff testified that she did not remember Dr. Monetti ever performing a breast examination on her, and she would tell him at the time of the appointment that she had either scheduled a mammography or that she had been for the test. Dr. Benedict, her gynecologist, examined her breasts when she saw him either every six months or once a year. She never made any complaints to him about her breasts, and did not know if she had the mammography results forwarded to him, and Dr. Benedict never asked her for the results. She did not have an inverted nipple in May, 2008 when she saw him. In about June 2008, she noticed a change in her right nipple, that it seemed inverted, and it never changed thereafter. There was no pain and no discharge. She felt no other lumps or masses or hardening in either breast. The only physician she advised of the nipple was Dr. Listhaus, and she also told the technician who performed the mammography. She was not sure if she completed any forms at the time. She stated that the technician told her that she had so many biopsies previously, that the nipple could have been pulled in from that. She had previously seen Dr. Listhaus in 2000 or 2001 for a core biopsy for microcalcifications in her breast. In 2000, she underwent a hysterectomy, and had two prior myomectomies for fibroid tumors. The plaintiff was unsure if she had a mammography or sonogram

the year prior to 2008. On July 19, 2008, a mammography was performed, and on July 23, 2008, the sonogram of both breasts was performed, as she had a history of dense breasts.

The plaintiff testified that in November 2008, she saw Dr. Monetti for a physical, but did not tell him about the inverted nipple. She called Dr. Monetti and asked for a referral for the January 20, 2009 mammography, and but did not advise him or anyone else about the inverted nipple. On January 21, 2009, the sonogram was performed, and the plaintiff stated that she told the radiologist, Dr. Listhaus, that she had an inverted nipple, but Dr. Listhaus told her everything was fine and advised her to follow up in six months, and that she should see a surgeon after having a core needle biopsy of the right breast in February, 2009. Thereafter, she had no discussion with Dr. Monetti or Dr. Benedict concerning the results of the mammography or the sonogram. After the appointment, she called Dr. Monetti and got a referral for a biopsy wherein a clip was inserted into the site at the time of the biopsy. On February 4, 2009, she had a bilateral breast MRI, and Dr. Monetti called her with the results, advising her that she also needed a biopsy of the left breast as well as there was something suspicious. She thereafter went to Dr. Monetti's office to pick up the MRI report, and Dr. Monetti told her that the right breast could not be saved. On February 9, 2009, she was advised by a doctor from Good Samaritan Hospital that she had low grade lobular carcinoma of the right breast. Thereafter, she called Dr. Monetti's office and was referred to the surgeon, Dr. O'Hea, however, he was going out of town so she saw Dr. Burke instead around February 15, 2009.

The plaintiff continued that Dr. Burke advised her that she had cancer throughout the right breast and would need plastic surgery for reconstruction thereafter, and to have a biopsy for the left breast as well. After the left breast biopsy, Dr. Burke advised her that she had ductal carcinoma in the left breast, so he recommended bilateral mastectomies. Surgery revealed that eight out of twelve lymph nodes were positive on the right, and one of the eight removed from her left side. She followed up with PET scans which were negative. She had radiation therapy with Dr. Kim at Stony Brook for seven weeks. Chemotherapy was supervised per Dr. Lu, and she was prescribed Femara which she has to take for years. She stated that Dr. Lu advised her that there is always a chance for recurrence.

Dr. Monetti testified that he is a licensed Doctor of Osteopathy, and is board certified in family practice. Nacola Wilson first came to his office in 1997. He last saw her on August 19, 2008. In 1997, she felt something under her right arm, so he sent her for a mammography and ultrasound of her breast. He discussed with the plaintiff the radiologist's findings that there was no radiographic evidence of a dominant mass or malignancy in either breast. On September 12, 1999, he received a report wherein the radiologist recommended a biopsy, and if the biopsy was deferred, that follow-up magnification views of the right breast should be done in six months. He discussed the report with the plaintiff and recommended that she have a biopsy. He indicted that he did not personally examine her breast, and that the plaintiff's gynecologist was doing so. He received the report of October 16, 2000, from the plaintiff's radiologist, revealing that his associate, Dr. White, reviewed the report and indicted that the patient is to follow up with Dr. Staiger, the radiologist. An addendum report was issued October 23, 2000. The breast biopsy of November 25, 2000 was negative. Another report of May 29, 2003 was issued, indicating that it was benign. A six month followup study was recommended which was done on June 30, 2001, indicating no residual calcifications. Followup mammography was recommended for September 2001. The report of April 5, 2003 revealed a level of concern 3 right breast, meaning probably benign.

Dr. Monetti testified that on June 19, 2003, he wrote a note directing his staff to contact the plaintiff to see that she knew she had to have followup in six months. On November 21, 2005 the plaintiff indicated that she was going for a mammography in December. The report generated with that study revealed that she advised the radiology department that she had breast pain for one week, and indicated that there should be clinical correlation. He did not conduct such examination because the plaintiff's gynecologist was doing the breast examinations. On February 4, 2005, the plaintiff called his office for a referral to a breast surgeon. A nurse practitioner from Dr. Staigers office issue a report dated February 28, 2005 referring to an examination of December 28, 2004, but the record does not reveal the contents of that report relative to a biopsy. Prior to July 23, 2008, the plaintiff did not complain to him about an inverted or retracted nipple, but he learned of the same when he read the mammography and sonogram report of July 20 and July 23, 2008. He never discussed it with her as the report indicated that the nipple was not inverted. In January 2009, the plaintiff had an MRI of her breasts due to the mammography and sonogram revealing pleomorphic calcification, or calcifications in different shapes. Cancer was always in his differential from 1997, which was why she had the serial mammographies, sonograms, and biopsies (four on the left breast from December 2004 through February 15, 2005, and four on her right breast from September 27, 2000 through February 4, 2009).

Michelle Listhaus, M.D. testified to the extent that in July 2009, she had been employed at Good Samaritan Mammography & Breast Diagnostic Center pursuant to a contract with the hospital since 1994. The mammography center was owned by Good Samaritan Hospital. She first met the plaintiff on July 23, 2008 at the time of her ultrasound of the right and left breasts, but had no independent recollection of her. She stated that the technician first performs the ultrasound and, thereafter, she either repeats some or all of the examination. She believed that she discussed her findings with the plaintiff and provided her with a written report of her findings. She also advised the plaintiff to follow up with her doctor to discuss the breast examination results. She compared the 1998 ultrasound films with the new films and determined that there was a mass present in the plaintiff's right breast in 1998 at the 12 o'clock axis, previously described as a hypoechoic irregularly shaped multilobulated mass measuring 16 x 10 x 7 mm, 10 mm from the nipple, which she stated would not be highly suspicious for a malignancy. The report did not indicate how much tissue had been removed with the core biopsy which preceded it.

Dr. Listhaus testified that in the July 23, 2008 ultrasound, she described the mass in the right breast as a 9 mm hypoechoic nodule having a benign appearance as it had the same echotexture as the fibroadenoma. It was a smoothly bilobed, slightly hypoechoic mass at the 12 o'clock position measuring 7 mm in maximum diameter, but more prominent in size when compared to the plaintiff's prior study. She thought the size difference may have been partially related to differences in technique and differences in the machines used to conduct the studies. However, it was the same shape as previously noted. Dr. Listhaus continued that in 2008, however, there were two distinct adjacent nodules at the 12 o'clock axis, and in the 1999 study, there was one nodule in the 12 o'clock axis which measured 5 mm and was the site of the prior benign biopsy. She believed that the nodule which was previously biopsied in 1998 was the same nodule that she saw in the 2008 study that measured 9 mm. There were also films in 1999 which demonstrated changes, but it was impossible to determine which nodule had been biopsied. Dr. Listhaus further testified that the 1998 ultrasound guided core biopsy of the right breast at 12 o'clock showed fragments of fibroadenoma which superimposed areas of adenosis. The right breast biopsy of May 29, 2003 at the 12 o'clock axis showed benign fibroadenosis and nonproliferative fibrocystic changes negative for malignancy.

Dr. Listhaus continued that an inverted nipple can be a sign of cancer, and that a newly inverted nipple and a normal mammogram does not exclude the possibility of cancer. MRIs are more sensitive to detecting breast cancer than breast ultrasound. She continued that an inverted nipple can be due to prior surgery, trauma, and a decision cannot be made in a vacuum, but by looking at the whole clinical picture. It is the clinician's call whether to perform any additional tests. She did not order an MRI after the July 23, 2008 ultrasound based upon physical examination, and prior benign biopsies in the same general area, so she recommended followup mammogram and ultrasound in six months to follow up on some nodules in the right breast. She added, however, in 2008, MRIs were just coming into the field of diagnostic radiology. She had no communications with Dr. Monetti or Dr. Benedict concerning her findings and recommendations. With reference to breast examinations, the health history form filled out by the patient at the time of the examination indicted when the patient's last breast exam was done, and in this case, the plaintiff indicated that Dr. Benedict performed her last breast exam in May 2008.

Dr. Monetti's expert, Herbert Feldman, M.D., affirmed that he is licensed to practice medicine in New York State and is board certified in family practice medicine. He set forth his education, training, and work experience and opined within a degree of medical certainty that Dr. Monetti, at all times, comported within the standard of care and that there is nothing that he did or did not do which was a cause or substantial factor in causing the plaintiff's claimed injuries.

Dr. Feldman stated that the plaintiff was a patient of defendant Monetti from March 1997 through March 2009, during which time he referred her for a number of diagnostic examinations and biopsies of her breasts. The plaintiff saw Dr. Benedict on and off while in her teens, then in 2000, for annual or semi-annual visits, during which Dr. Benedict would perform a breast exam. In June 2008, the plaintiff first noticed that the nipple on her right breast became inverted, but she experienced no pain or discharge. She called Good Samaritan Hospital Mammography & Breast Diagnostic Center to schedule a mammography for July 19, 2008, and an ultrasound for July 23, 2008, and obtained referrals for the testing from Dr. Monetti, but never advised either Dr. Monetti or Dr. Benedict about the inverted nipple. She apprised both the technician and Dr. Listhaus at Good Samaritan about the inverted nipple. Dr. Listhaus interpreted both the mammography and ultrasound films, and found that the plaintiff did not have an inverted nipple upon examination, and advised that it was normal in appearance. Dr. Listhaus further noted bilateral cysts in the plaintiff's breasts, which cysts, she diagnosed as "benign in appearance," and advised the plaintiff to return in six months for a followup right mammogram and ultrasound to "assess for stability." Clinical correlation was recommended, and no aspiration biopsy was performed, although Dr. Monetti ordered the same.

Dr. Feldman continued that in six months, Dr. Monetti again referred the plaintiff for testing, and a report was faxed to him, but there was no other contact between Dr. Monetti and the plaintiff, and they did not discuss the results of the testing. However, the defendant's expert went on to say that in November 2008, the plaintiff saw Dr. Monetti for a physical examination, and did not advise him of the "inverted nipple" or make other complaints. He provided the plaintiff with referrals for a mammography and a sonogram, which revealed a suspicious mass in the 12 o'clock position of the right breast. An ultrasound was conducted on January 21, 2009, and thereafter, Dr. Monetti gave the plaintiff a referral for the breast biopsy, which was done at Good Samaritan Hospital. An MRI examination was also conducted. When Dr. Monetti received the results, he advised the plaintiff that the findings appeared worse than they thought and that she needed a biopsy of the left

breast as well, and further advised her that the right breast could not be saved. The biopsy of the left breast was performed by Dr. Burke, who recommended a double mastectomy, which was done.

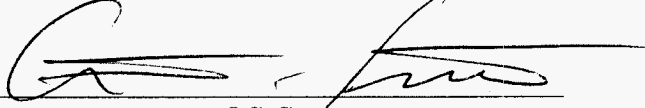
Dr. Feldman opined that Dr. Monetti acted within the standard of care in July 2008 in not ordering additional testing or biopsy, as the radiologist, Dr. Listhaus, found the nipple of the right breast was not inverted or retracted, but was normal. Dr. Feldman stated that because the plaintiff's gynecologist was performing the breast examinations on the plaintiff, Dr. Monetti had no duty to examine her breasts, and the plaintiff had no expectation that he would do so. Dr. Feldman continued that because Dr. Listhaus interpreted the mammography and sonogram as normal, with no suspicious findings, Dr. Monetti had no duty to refer the plaintiff for additional testing. Dr. Monetti had ordered a fine needle aspiration when he ordered the mammography and sonogram, however, Dr. Listhaus determined that the plaintiff did not require a biopsy. Dr. Feldman added that Dr. Monetti was responsive to the patient's requests for testing and referrals at all times and provided the referral for the July 2008 and January 2009 testing. When the January 2009 testing and MRI studies revealed that the plaintiff had cancer, he advised her of the results and recommended bilateral mastectomies. At none of the visits, did the plaintiff ever advise Dr. Monetti that she had an inverted nipple. Thus, concluded Dr. Feldman, based upon all the information available to Dr. Monetti throughout his care and treatment of the plaintiff, he acted appropriately at all times within the applicable standard of care, and thus, he did not proximately cause the injuries claimed by the plaintiff.

In opposing this motion, the plaintiff has submitted her affidavit averring that Dr. Monetti never gave her a referral for a fine needle biopsy. Plaintiff's expert, Timothy H. Chen, M.D. affirms that he is licensed to practice medicine in New York State and that he is a radiation oncologist. He does not set forth, however, whether or not he is board certified in any area of medicine. He set forth the materials and records which he reviewed, as well as the guidelines and fundamental elements of osteopathic patient care as it relates to the physician-patient relationship which emphasizes the patient's best interest. He continued that this involves determining and monitoring the nature of the patient's concern or complaint; appropriately incorporating osteopathic principles and practice; and implementing effective, evidence-based, and mutually agreed upon diagnostic and patient care plans, including appropriate patient education and follow-up; and must appropriately lead a healthcare team and foster effective communication between the health care professionals.

Dr. Chen stated that the complaint of inverted nipple was noted in plaintiff's July 19 and July 23, 2008 mammogram/sonogram reports that were provided to him as plaintiff's referring physician, and that Dr. Monetti departed from good and appropriate treatment when he ignored a "red flag" warning of potential malignancy based upon the complaint of inverted nipple. He does not address the issue that upon examination, Dr. Listhaus did not find that the nipple on the plaintiff's right breast was not inverted, or that the plaintiff never advised Dr. Monetti or Dr. Benedict of the same. He continued that Dr. Monetti, upon reviewing the radiologists' reports of July 2008, failed to instruct the plaintiff concerning future treatment, failed to monitor the plaintiff's complaint of the inverted nipple, and failed to refer her to a breast surgeon for evaluation, thus causing a delay in treatment. While Dr. Chen has set forth these alleged departures by Dr. Monetti, he has failed to establish the standard of care when the radiologist determines that there is no inverted nipple and indicates that no breast biopsy was necessary, or when the radiologist recommends follow up in six months. He has further failed to opine as to proximate cause relative to whether treatment and outcome would have been any different if the cancer had been diagnosed six months earlier.

Based upon the foregoing, the plaintiff's expert has failed to raise a factual issue to preclude summary judgment from being granted to defendant Dr. Monetti.

Dated: February 26, 2013



J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION