

Serao v Kaplan

2013 NY Slip Op 31636(U)

July 19, 2013

Sup Ct, Suffolk County

Docket Number: 09-3393

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 2-1-13
ADJ. DATE 5-9-13
Mot. Seq. # 005 - MD

-----X
ERIC SERAO, an infant under the age of 14
years, by his Mother and natural guardian,
KATHLEEN SERAO and KATHLEEN SERAO,
Individually,

Plaintiffs,

- against -

MARTIN P. KAPLAN, M.D. and PORT
JEFFERSON PEDIATRICS, P.C.,

Defendants.
-----X

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Upon the following papers numbered 1 to 26 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (005) 1-14; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 15-23; Replying Affidavits and supporting papers 24-26; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (005) by defendants Martin P. Kaplan, M.D. and Port Jefferson Pediatrics, P.C., pursuant to CPLR 3212 for summary judgment dismissing the complaint is denied.

In this medical malpractice action, the plaintiff, Kathleen Serao, individually and derivatively, seeks damages for personal injuries she alleges were sustained by Eric Serao, the infant plaintiff, due to the alleged

negligence of the defendants, Martin P. Kaplan, M.D. and Port Jefferson Pediatrics, P.C. It is alleged that the defendants negligently departed from the accepted standard of care during the care and treatment of the infant plaintiff from June 14, 2000 through August 30, 2006, in failing to diagnose and treat Chiari Beaumont malformation and associated conditions, causing him to sustain progressive scoliosis and traumatic brain injury, resulting in the need for two decompression surgeries and release of a tethered spinal cord. It is alleged that the defendants failed to properly examine the infant after his birth, failed to recognize and treat conditions associated with Chiari malformation, failed to properly diagnose and treat the onset of scoliosis permitting it to progress without treatment, and failed to follow up with the finding of mild dextroscoliosis contained in the x-ray report dated July 15, 2004. Causes of action are premised upon the alleged negligent departures from the standard of care, lack of informed consent, conscious pain and suffering, and a derivative claim.

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 defendants seek summary judgment dismissing the complaint on the bases that they did not depart from the accepted standards of care and did not proximately cause the infant plaintiff’s injuries. In support of this application, defendants have submitted, inter alia, an attorney’s affirmation; the affidavit of defendant’s expert Damien Forletti, M.D.; copies of the summons and complaint; defendants’ answer without cross claims; plaintiff’s verified bill of particulars; signed and certified double-sided copies of the transcripts of the examinations before trial of Kathleen Serao dated April 20, 2010 and Martin Kaplan, M.D. which are not bound on the side and do not comply with 22 NYCRR 202.5 (a); and certified copies of the plaintiff’s records maintained by defendants, Mather Memorial Hospital emergency room, Stony Brook University Hospital.

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 Derdiarian 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]).

Damien Forletti, M.D. averred that he is a physician duly licensed to practice medicine in New York and specializes in pediatric medicine in which he is board certified. While he avers that he has been engaged in the private practice of pediatric medicine in Suffolk County for twenty four years, he does not set forth the basis for his experience with regard to the medical conditions which are the subject of this action. While he set forth that he has reviewed pertinent medical records in preparation for giving his opinion, he does not indicate which records he reviewed and which he considered relevant. However, Dr. Forletti rendered an opinion based upon a reasonable degree of medical certainty that the treatment rendered by defendant Martin Kaplan to the infant plaintiff was in conformance with good and accepted medical practice, and that there were no acts or omissions on Dr. Kaplan's part that were a proximate cause of the injuries claimed to have been suffered by the infant plaintiff.

Dr. Forletti set forth that Dr. Kaplan was the pediatrician for the infant plaintiff from birth to age six, at which time he diagnosed scoliosis and immediately referred the infant to the orthopedist, Dr. Wesley Carrion. While Dr. Forletti sets forth that Dr. Carrion ordered certain care and treatment and diagnostic testing, Dr. Carrion's medical records have not been provided to this court.¹ Dr. Forletti continued that various imaging studies revealed mild or Type I Chiari malformation which is a congenital condition in which the undersurface of the brain (cerebellar tonsils) herniates through the opening at the base of the skull (foramen magnum) into the spinal canal, and that such displacement of the brain may cause compression of brain tissue, and may block the normal pulsations of spinal fluid between the spinal canal and the intra cranial space. He continued that most cases of Type I Chiari malformation are asymptomatic and are diagnosed in adolescents and adults.

Dr. Forletti stated that from birth to age 6, the infant plaintiff was seen by numerous physicians², and also by two other pediatricians at Dr. Kaplan's office, Dr. Shelly Zeira on November 28, 2005, and Dr. Madom on July 22, 2004, November 8, 2004, January 10, 2005, and February 13, 2005. Dr. Forletti continued that Dr. Kaplan appropriately conducted comprehensive physical examinations of the infant plaintiff during the six year period he was involved with the infant's care. In 2000, when the infant was 0-6 months old, Dr. Kaplan evaluated the infant eight times. Dr. Kaplan's physical examinations did not reveal any clinically detectable scoliosis and there was no reason to subject the infant to x-ray studies to look for skeletal spine abnormalities. He stated that the infant was being treated for other specific complaints, including irritability when the mother held the back of the infant's head, which Dr. Forletti stated resolved after a couple weeks and blood tests failed to reveal any cause. Dr. Forletti, however, has not set forth the standard of care with regard to this complaint of irritability when holding the back of the infant's head, and he has not demonstrated that the same was complied with by Dr. Kaplan.

¹The general rule in New York is that an expert cannot base an opinion on facts he did not observe and which were not in evidence, and that the expert testimony is limited to facts in evidence *see Allen v Uh*, 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; *Marzuillo v Isom*, 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; *Stringile v Rothman*, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; *O'Shea v Sarro*, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]; *Hornbrook v Peak Resorts, Inc.* 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]). Thus, the court is left to speculate as to the contents of Dr. Carrion's records.

² These records have not been provided.

Dr. Forletti continued that in 2001, when the infant was 6-18 months of age, he was seen by Dr. Kaplan on eleven occasions, and the mother never raised concerns about the child's spine. While Dr. Forletti stated that Dr. Kaplan performed comprehensive examinations, he failed to state what those comprehensive examinations consisted of, and whether the infant's spine/back was evaluated at any time. While Dr. Forletti opined that based upon the mother's complaints, there was nothing suggestive of the need to refer the infant to either an orthopedist or neurosurgeon, he does not comment upon any findings relative to any examination of the infant's back. Dr. Forletti continued that in 2003, when the infant was 2 ½ to 3 ½ years of age, the infant was seen at Dr. Kaplan's office seven times, at which time the mother did not raise any concerns about the curvature of her son's spine. At 3 ½ years of age, a comprehensive well-child examination was conducted, including height, weight, blood pressure, vision check, inspection of the eyes, ears, nose throat, lungs, heart, abdomen, genitalia, and skin, and assessment of the child's gait. Dr. Forletti does not indicate that the child's back/spine was examined for scoliosis, or what the standard of care was, and how Dr. Kaplan complied with the same.

Dr. Forletti continued that in 2004, when the infant was 3 ½ to 4 ½ years, he was seen by Dr. Kaplan on four occasions. On June 17, 2004, Dr. Kaplan's examination "indisputably" included an evaluation of the patient's back wherein he documented that it was symmetrical and that Dr. Kaplan did not notice scoliosis. On July 15, 2004, the infant was again seen by Dr. Kaplan for complaints of severe right sided chest pain, and a chest x-ray was ordered, which revealed perihilar infiltrate in the lungs, and "mild dextroscoliosis" or a curvature of the spine to the right. Dr. Forletti opined that this finding must be considered in the context of a benign clinical evaluation of the spinal symmetry performed weeks earlier, and that it was not warranted to send the child to be evaluated by an orthopedist or neurosurgeon at the time to further evaluate him in the absence of any complaints typically associated with the Chiari malformation. However, he does not set forth those complaints typically associated with the Chiari Malformation or opine as to the cause of the child's severe chest pain for which Dr. Kaplan ordered the x-ray. Dr. Forletti opined that it is not the standard of care to refer every patient who has a mild dextroscoliosis to an orthopedist or neurosurgeon, and that the child's skeletal structure must be monitored periodically for symmetry. He continued that the child should be referred to a specialist when uneven hips or shoulder, or curvature of the back are seen. Dr. Forletti stated that thereafter, Dr. Kaplan performed annual scoliosis examinations of the infant. In 2004, when the infant experienced shortness of breath when running, and headaches, such findings did not warrant referring the infant for further evaluation by an orthopedic surgeon or neurologist.

Dr. Forletti continued that in 2005, the infant plaintiff was 4 ½ to 5 ½ years of age and was seen by Dr. Kaplan, and Dr. Madom from his office. Dr. Kaplan's school physical of the infant provided a negative scoliosis examination. Dr. Forletti opined that there was no reason for Dr. Kaplan to refer the infant plaintiff for orthopedic or neurosurgical evaluation in November 2005, in that the November 27, 2005 abdominal x-ray did not reveal scoliosis. However, Dr. Forletti does not indicate whether or not the section of the spine which was previously diagnosed with dextroscoliosis was visualized on the films, to support his opinion, leaving this court to speculate. Dr. Forletti set forth the additional medical care and treatment provided by Dr. Kaplan, and then, on July 27, 2006, when Dr. Kaplan performed an annual school physical, he noted a marked curvature of the infant's spine and referred the infant to Dr. Carrion. An MRI of the spine revealed scoliosis of the spine, herniation of the cerebellar tonsils at the base of the brain, with a large cyst (hydromyelia or syringomyelia) of the spinal cord extending from the T1-T2 level down to the T12 level with a tethered spinal cord, consistent with a Type I Chiari malformation. Thereafter, Dr. Egnor performed a decompression surgery and untethering

of the spinal cord, and a second decompression procedure which included placement of a shunt to drain the cyst in January 2007. Dr. Forletti stated that the mother's failure to note a "marked" curvature of her son's spine prior to June 2006 is consistent with the negative examinations by the treating physicians. Dr. Forletti concluded that the infant underwent the necessary surgeries to address the congenital deformities as soon as they became apparent at age six. Dr. Forletti does not comment, however, as to the standard of care for the treatment of the infant's headaches or dextroscoliosis, and whether, there was compliance with the standard of care.

It is determined that the conclusory opinions by Dr. Forletti, based upon the findings in the July 15, 2004 chest x-ray, which revealed "mild dextroscoliosis" or a curvature of the spine to the right, and his failure to state the standard of care relating to the child's complaints of headaches, raise factual issues which preclude the granting of summary judgment. In any event, the plaintiff's experts have raised factual issues in their opposing affirmations which preclude summary judgment.

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]).

Plaintiff's first expert affirms that he is licensed to practice medicine in New York State and is board certified in pediatrics. He set forth the materials and records which he reviewed and opined within a reasonable degree of medical certainty that good and accepted practice in 2004, as today, required that any appreciable degree of scoliosis in a four year old child must be investigated and causal or complication neuromuscular disorders or congenital malformations, such as Chiari malformation, must be identified or ruled out. It is the plaintiff's first expert's opinion that Dr. Kaplan departed from accepted practice when he received the July 15, 2004 x-ray report and failed to refer the infant to a pediatric orthopedist, the specialist best qualified/situated to observe and closely monitor scoliosis progression over time. The plaintiff's expert continues that referral to an orthopedist in the first instance for examination and for additional x-rays or MRIs, and if necessary, interval monitoring for scoliosis progression is mandatory, specifically because routine clinical examination by a community pediatrician is generally insufficiently sensitive to observe scoliosis in a four year old child.

The plaintiff's first expert stated that scoliosis can progress rapidly when it is secondary to a neuromuscular disorder or to a Chiari malformation which is thought to cause scoliosis through abnormal intramedullary pressure in the spinal cord disturbing postural tonic reflexes; syringomyelia is believed to result in scoliosis by a comparable mechanism. It is therefore critical to make the appropriate referral promptly. He continued that Dr. Kaplan, on June 17, 2004, evaluated the child's back as symmetrical, however, this did not justify his failure to refer the child, when mild dextroscoliosis was seen on x-ray one month later, to an orthopedist for further evaluation. That Dr. Kaplan dismissed the implication in the context of his own benign clinical evaluation of the child's spinal asymmetry, is inconsistent with the standard of care then and now existing.

The plaintiff's first expert disagrees with defendant's expert who stated that it was within the standard of care to refer the child to a specialist only upon the finding of uneven hips or shoulders, or curvature of the back because, this may be true for children ten years of age or older, but scoliosis in a four year old is rare, and when it exists in that age group, it is almost always due to an underlying neuromuscular disease or congenital disorder that must be diagnosed, and if necessary, treated expeditiously. The wait and see approach is not the standard of care. He continued that the proper referral was eventually made two years later on July 27, 2006 when Dr. Kaplan sent the child to Dr. Carrion when he observed a marked curvature of Eric's spine. He continued that the cerebellar herniation was a congenital condition, but an asymptomatic one that unquestionably would have been seen on MRI had a scan been performed in July 2004, even with a type I Chiari malformation.

Plaintiff's second expert, a physician licensed to practice in New York and New Jersey, and who is board certified in pediatrics with a special qualification in child neurology, is also board certified in electrodiagnostic medicine. He opined within a reasonable degree of medical certainty that Dr. Kaplan's failure to refer the child for a scoliosis work up in July 2004 was a substantial contributing cause of the two year delay in diagnosis and treatment of the infant's Chiari I malformation, which in turn, was a substantial contributing cause of the infant's syringomyelia and need for surgery to treat the tethering of the spinal cord and the progression and severity of those conditions. Had the Chiari I malformation been discovered at age four rather than at age six, it is almost certain that he would have required only decompression at the level of the foramen magnum and C1 vertebral body, and there would have been no, or only a very small syrinx that would not have required shunt placement, and the infant surely would not have required repeated surgery.

The plaintiff's second expert stated that syringomyelia associated with Chiari I malformation results from the action of the cerebellar tonsils, where they protrude through the foramen magnum, partially blocking the subarachnoid space and normal flow of the cerebral spinal fluid (CSF) and exerting abnormal pressure on the CSF. This excessive pressure, he explains, when exerted with each heartbeat, compresses the spinal cord and pushes the syrinx fluid caudally, extending the syrinx. The infant had a large syrinx extending from T1 to T2. The plaintiff's second expert could not state with precision how much syringomyelia progression occurred during the two year delay in referring and treating the infant, but he stated that it was reasonably certain that its growth was substantial; and that indeed, the very occurrence of the syrinx in the first instance may have been avoided had the decompression surgery been accomplished promptly in 2004 rather than in 2006 when the first surgery was done within three months of Dr. Kaplan's observation. Certainly, then, he continued, the second surgery draining the syrinx and shunt placement would not have been necessary, and tethering of the spinal cord would not have occurred, had the scoliosis workup begun in July 2004.

The plaintiff's second expert stated that he disagreed with defendants' expert that the November 27, 2005 abdominal x-ray at Mather Hospital did not result in any finding of skeletal abnormality generally or scoliosis specifically. This, he stated was because the radiology report did not make mention of bony structures. He continued that the finding of early scoliosis or mild dextroscoliosis in July 2004 in a four year old denotes the presence of a serious underlying condition causing it, and that merely looking at or palpating the infant's back and chest would not reliably reveal this early scoliosis. The plaintiff's second expert concluded that the July 2004 x-ray report mandated aggressive follow up by Dr. Kaplan and referral for orthopedic examination and MRI which would have disclosed the Chiari malformation and the need for its surgical decompression. At a minimum, the progression of syringomyelia and the need for spinal cord untethering would thereby have been avoided.

Based upon the foregoing, the plaintiffs' experts have raised multiple factual issues which preclude summary judgment from being granted to the defendants, irrespective of the opinions of the defendant's expert.

Accordingly, motion (005) is denied.

Dated: July 19, 2013


J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION