

Curcio v Mehling

2014 NY Slip Op 30553(U)

February 24, 2014

Supreme Court, Suffolk County

Docket Number: 09-1206

Judge: Jeffrey Arlen Spinner

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This opinion is uncorrected and not selected for official publication.

ORDERED that motion (001) by third-party defendant Peter Curcio pursuant to CPLR 3212 for summary judgment dismissing the complaint and any cross claims asserted against him has been rendered academic by the decision rendered in motions (002) and (003), and is denied as moot; and it is further

ORDERED that motion (002) by defendants/third-party plaintiffs Brian M. Mehling, M.D., Mehling Orthopedics, P.C., and Good Samaritan Hospital Medical Center pursuant to CPLR 3212 for summary judgment dismissing the complaint and any cross claims asserted against them is granted and the complaint and any cross claims asserted against them in the main action are dismissed; and it is further

ORDERED that motion (003) by third-party plaintiffs Brian M. Mehling, M.D., Mehling Orthopedics, P.C., and Good Samaritan Hospital Medical Center pursuant to CPLR 3212 for summary judgment in their favor on the issue of liability by third-party defendant Peter Curcio, has been rendered academic by the decision in motion (002) dismissing the complaint as asserted against them, and is denied as moot; and the third-party action is dismissed in its entirety.

This action for medical malpractice was commenced by Debra A. Curcio on behalf of her infant daughter, Crystal Curcio, with causes of action sounding in negligence, lack of informed consent, and a derivative claim on behalf of Debra A. Curcio. It is alleged that the defendants, Brian M. Mehling, M.D., Mehling Orthopedics, P.C., and Good Samaritan Hospital Medical Center, negligently departed from the good and accepted standards of care and treatment of the infant plaintiff, and failed to provide informed consent for the treatment rendered to her. The infant plaintiff came under the care and treatment of the defendants on April 6, 2005 for injuries she sustained when a weight fell on her left foot crushing her large (first) toe while she was at home in her garage. She was diagnosed with a comminuted fracture at the distal portion of the distal phalanx, including the tuft as well as a longitudinal fracture line extending to the metaphysis. The tip of the nail bed was lifted and bleeding, and there was a 1/8 cm laceration on the medial aspect of the proximal nail plate line. She was initially treated in the emergency room at defendant Good Samaritan Hospital and came under the care and treatment of defendants Brian Mehling and Mehling Orthopedics, P.C. for management of the injury, including surgery. The gravamen of the complaint concerns the failure by these defendants to properly diagnose and treat the infant for an infection which developed in her foot, causing her to suffer cellulitis, osteomyelitis, delayed healing, deformity, severe pain, blistering and swelling, scarring on her left toe and chest, and hospitalization.

In the third-party action, the defendants/third-party plaintiffs, Brian M. Mehling, M.D., Mehling Orthopedics, P.C., and Good Samaritan Hospital Medical Center, seek judgment over against the third-party defendant, Peter Curcio, based upon his proportionate share of liability on the basis that he was negligent in that he allegedly failed to maintain his premises in a reasonably safe condition, and caused and created such condition which injured the infant. It is alleged that when Peter Curcio opened the refrigerator door in his garage, a weight slid from a peg located near the weight tree. The weight fell on his infant daughter's left foot causing her to sustain injury for which she subsequently sought treatment from defendants/third-party plaintiffs, Brian M. Mehling, M.D., Mehling Orthopedics, P.C., and Good Samaritan Hospital Medical Center.

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.*). 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 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]).

In motion (001), third-party defendant Peter Curcio seeks summary judgment dismissing the complaint asserted against him on the bases that he did not negligently maintain his premises or cause a defective condition, the weight and weight rack were not inherently dangerous, and that he had no actual or constructive notice of the alleged dangerous condition. In support of this application, he has submitted, inter alia, an attorney’s affirmation; copies of the third-party summons and complaint, the summons and complaint in the main action, the answers served by defendant/third-party plaintiff and third-party defendant, bill of particulars served in the third-party action; the signed and certified transcript of the examination before trial of Peter Curcio taken February 16, 2010, and continued on December 20, 2011; and a copy of a photograph.

In motion (002), defendants, Brian M. Mehling, M.D., Mehling Orthopedics, P.C., and Good Samaritan Hospital Medical Center, seek summary judgment dismissing the complaint and any cross claims asserted against them on the bases, inter alia, they were not negligent in the care and treatment of the infant plaintiff, that the sole proximate cause of the injuries sustained by the infant plaintiff was the negligence of her father in failing to maintain a reasonably safe premises, and that the father’s negligence caused and created the condition complained of. In support of this application, the Mehling defendants have submitted, inter alia, an attorney’ affirmation; the affirmation of Kenneth Glass, M.D.; a photograph; a copy of the summons and complaint, third-party summons and complaint, the answer of the Mehling defendants, plaintiff’s verified bill of particulars as to Good Samaritan Hospital; signed and certified transcripts of the examination before trial of Debra Curcio dated January 5, 2010, Brian Mehling dated March 17, 2010 and continued June 29, 2010, Peter Curcio dated December 20, 2011; and an uncertified copy of the Good

Samaritan Hospital record and records of the moving defendants which are not in admissible form to be considered on a motion pursuant to CPLR 3212 (see *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]). Expert testimony is limited to facts in evidence (see also *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]). However, plaintiff does not object and makes reference to the same records in her submission.

In motion (003), the third-party plaintiffs, Brian M. Mehling, M.D., Mehling Orthopaedics, P.C. and Good Samaritan Hospital seek summary judgment as against the third-party defendant Peter Curcio on the bases that negligently maintained the home premises, and the dangerous condition of the weights, of which Curcio had actual and constructive notice, and that said negligence was the sole proximate cause of the injuries suffered by the infant plaintiff. In support of this application, they have submitted, inter alia, an attorney's affirmation; copies of the pleadings; signed and certified transcript of the examination before trial of Debra Curcio dated January 5, 2010, Peter Curcio dated February 16, 2010 continued December 20, 2010; and uncertified office records from Winthrop Orthopaedic Associates which are not in admissible form to be considered on a motion for summary judgment.

Plaintiff Debra Curcio opposes defendants' motions for summary judgment dismissing the complaint, and has submitted, inter alia, an attorney's affirmation, the affirmation of Michael Murray, M.D.; as well as pleadings, uncertified medical records; and a transcript of her examination before trial. Third-party defendant Peter Curcio opposes motion (003) with an attorney's affirmation.

The Note of Issue was filed with this court on March 7, 2012, therefore, the last date on which a motion for summary judgment was permitted was July 5, 2012. Motion (003) was served on July 26, 2012, well after the 120 days. Counsel for the third-party plaintiffs offers no excuse for the untimely submission of motion (002) which was amended to add additional exhibits in motion (003). "Good cause" in CPLR 3212 (a) requires a showing of good cause for the delay in making the motion-a satisfactory explanation for the untimeliness-rather than simply permitting meritorious, non-prejudicial filings, however tardy. No excuse at all, or a perfunctory excuse, cannot be "good cause" (see *Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]; *First Union Auto Finance, Inc.*, 16 AD3d 372, 791 NYS2d 596 [2d Dept 2005]; *Tucci v Colella*, 26 Misc 3d 1234A, 907 NYS2d 441 [Sup Ct, Kings County 2010]). However, in that motion (001) was timely served, this court will consider the motion as the identical issues concerning the alleged liability of Peter Curcio is to be determined in both motions (001) and (003).

Based upon review and consideration of the evidentiary submissions, it is determined that the defendants/third-party plaintiffs, Brian M. Mehling, M.D., Mehling Orthopaedics, P.C. and Good Samaritan Hospital, have demonstrated prima facie entitlement to summary judgment in their favor on the bases that they did not depart from the good and accepted standard of medical care and treatment of the infant plaintiff, that the care and treatment provided by them did not proximately cause the injuries sustained by the infant plaintiff, and that the sole proximate cause of her injuries was the weight falling on her left first toe.

Peter Curcio testified to the extent that on April 6, 2005, he was at home with his daughter Crystal when she requested a juice box. He went into the refrigerator in the garage to get the drink, and Crystal followed him. When he reached into the refrigerator to get the drink, Crystal began to spin a weight which was situated on a peg, causing it to slide off the peg and fall onto her left big toe. She was wearing socks but no shoes. Curcio then saw the infant's mangled toe, open with jagged edges, and bleeding. One wound was approximately 1/4 inch in dimension, as was the other wound which went in the other direction. He and his wife took Crystal to the emergency room at Good Samaritan Hospital where she was first seen by Dr. Golden who ordered an x-ray, and thereafter, called Dr. Mehling, the orthopedist, to see Crystal. Dr. Mehling advised him that Crystal had an open fracture, and that he was going to try to keep the nail bed on, and would suture the wound. The infant plaintiff was discharged with a prescription for antibiotics and with instructions for cleaning the toe and to follow up with a doctor. Peter Curcio did not attend any follow up visits. That weekend, when his wife changed the dressing for the first time, they noticed a white substance coming out of the toe. His wife called Good Samaritan Hospital and spoke to Dr. Mehling who recommended that she go to his office rather than come to the emergency room as the wait in the emergency room would be eight hours. She was also instructed to bring cash as Dr. Mehling advised that he does not accept their insurance. Curcio testified that he felt that Dr. Mehling did not have his daughter's welfare as his primary interest, so they then sought care and treatment with another physician, Dr. Lewis. Peter Curcio was not happy with Dr. Mehling's manner and felt that Crystal should have been given intravenous antibiotics.

Debra Curcio testified to the extent that Crystal was two years of age at the time of the accident. She did not witness the event, but heard her daughter screaming. Her husband told her what happened. She described the wound on the upper portion of the left first toe. She stated they went straight to the emergency room where Crystal was seen by Dr. Golden, then by Dr. Mehling, who sutured her toe with dissolvable sutures. She stated that Dr. Golden told her that Crystal may have to stay at the hospital for a day or two to receive intravenous antibiotics so she would not get an infection. When she relayed the same to Dr. Mehling, he told her that it was not necessary. Crystal was discharged with a gauze dressing on her foot and given a prescription for oral antibiotics. Debra Curcio testified that when she changed the bandage about five days later, as instructed, she notice "white stuff." She called Good Samaritan Hospital emergency room and spoke with Dr. Mehling, who happened to be there. He stated that he would see Crystal, but that she should go to his office and not the emergency room as the wait would be about six to eight hours. She continued that when she told him that her insurance wouldn't cover for an office visit, he told her to bring cash. She told him to "forget it" and sought further care for Crystal with Dr. Lewis several days later. Dr. Lewis x-rayed Crystal's toe, and told her to continue the antibiotic and watch the toe. Around April 27, 2005, Crystal began running a fever. Her toe turned more purple and the discoloration was extending. Crystal was thereafter admitted to a hospital for treatment of a bone infection by Dr. Lewis.

Brian Mehling, M.D. testified to the extent that he is licensed to practice medicine in New York State and New Jersey. He is the principal of Mehling Orthopedics, P.C. He is currently board certified in orthopedics. On April 6, 2005, he was the orthopedist on call for Good Samaritan Hospital emergency room and saw Crystal Curcio as a patient. He treated her for a grade II open fracture of the first toe on her left foot. He described a grade II fracture as a fracture in which the opening in the skin is greater than one centimeter but less than ten centimeters. Irrigation and debridement were performed after anesthetizing the toe. He decompressed the subungual hematoma of the infant's toe. Mehling testified that he discussed surgery with the family and admission to the hospital for intravenous antibiotic administration, and that the

family elected to have the irrigation and debridement done in the emergency room. The risks and benefits and options were discussed. He explained that he could do the irrigation, debridement, and wound closure in the emergency room and discharge her home on oral antibiotics after intravenous antibiotics in the emergency room, which the family requested. She was administered intravenous antibiotics in the emergency room. He felt that continued intravenous antibiotics were not necessary.

Kenneth Glass, M.D. set forth in his expert affirmation that he is a physician licensed to practice in New York and is board certified in orthopedic surgery. He set forth his work experience and the materials and records which he reviewed. He opined within a reasonable degree of medical certainty that Dr. Mehling, and anyone in his practice, did not depart or deviate from good and accepted standards of care in the treatment of Crystal Curcio. He continued that the two year old child suffered a very significant traumatic injury to her toe as a result of a 25 pound weight falling on it in the garage at the Curcio's home. That weight was equivalent to the child's own weight. Dr. Mehling was confronted with a compound fracture. Everything that Dr. Mehling did was done within the appropriate standards of care, and was good and accepted practice, including the medications and dosages used, the suturing, evaluation of the wound, and the eventual discharge from the emergency room. There were no departures from the standard of care when Dr. Mehling instructed the parents to go to his office for follow up care.

Dr. Glass continued that the child was treated on only that one occasion by Dr. Mehling. She was next seen and treated by Dr. Lewis, whom the parents voluntarily took the child to for care and treatment, thus, severing ties with Dr. Mehling who was thereafter not permitted to perform any follow-up or subsequent treatment of the child, and thus, had no responsibility or obligation to the child from a medical standpoint. Dr. Glass continued that prior to Dr. Lewis seeing the child, when the mother contacted Dr. Mehling about the white substance on the child's toe, Dr. Mehling offered to see the child in his office to avoid the wait in the emergency room, but the mother did not take the child to see Dr. Mehling. Dr. Glass continued that any subsequent infection that may have occurred was a common occurrence with a compound fracture, and does not qualify as a departure or deviation on the part of Dr. Mehling. Such an infection, he stated, frequently occurs in the absence of negligence. This, Dr. Glass opined, is supported by Dr. Lewis's treatment of the child thereafter when Dr. Lewis saw the child within days of the treatment in the emergency room by Dr. Mehling.

Dr. Glass opined that the medical injury sustained by the child was caused entirely by the effects of the 25 pound weight falling on the infant's toe. There was no evidence of osteomyelitis when Dr. Mehling treated the child, and the treatment comported with good and accepted practice. Neither Dr. Mehling nor Good Samaritan Hospital departed from the accepted and proper standard of medical care and treatment. He concluded that none of the care and treatment provided was in any way causally related to the injuries claimed to have been suffered by the infant.

Based upon the foregoing, the Mehling defendants and Good Samaritan Hospital have demonstrated prima facie entitlement to summary judgment on the bases that they did not depart from good and accepted standards of care during the treatment of the infant plaintiff, and did not proximately cause the injuries claimed to have been sustained by the infant.

In order to rebut a prima facie showing of entitlement to an order granting summary judgment, the opposing party in a medical malpractice action 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 the instant action, Peter Curcio has submitted only the affirmation of his attorney in opposition to the motions by defendants/third-party plaintiffs. In motion (002), the defendants/third-party plaintiffs have established that they bear no liability for the plaintiff's injuries by way of the evidentiary proof and the affirmation of Dr. Kenneth Glass who has opined that the defendants/third-party plaintiffs did not deviate from the good and accepted standards of medical care and practice in treating the infant plaintiff, and that there is nothing that they did or failed to do which caused the injuries claimed to have been sustained by the infant plaintiff. No affidavit from an expert has been submitted by Peter Curcio to raise a factual issue to preclude summary judgment dismissing the complaint. Peter Curcio, by counsel, opposes the applications on the basis that he was not negligent. The defendants/third-party plaintiffs have clearly established that the injuries claimed by the infant plaintiff were proximately caused by the weight falling on the infant's toe, and were not due to any negligent departures from good and accepted standards of medical care and treatment by them. Thus, motion (001) for summary judgment by Peter Curcio dismissing the third-party complaint asserted against him has been rendered academic and is denied as moot.

In opposition to the motions by defendants Mehling, Mehling Orthopedics, and Good Samaritan Hospital Medical Center, Debra Curcio has submitted the affirmation of Michael Murray, M.D., a physician licensed to practice medicine in New York State who is board certified in orthopedic surgery. Dr. Murray has not provided a copy of his curriculum vitae or set forth his education and training and work experience to qualify as an expert in this matter. However, in considering his affirmation, it is determined that no factual issues have been raised to preclude summary judgment in favor of the moving defendants/third-party plaintiffs on the issues of both negligence and proximate cause.

Dr. Murray opined within a reasonable degree of medical certainty that the Mehling defendants departed from good and accepted medical practice by failing to take a complete and adequate history of the injury sustained by the child; failed to appreciate the significance of the injury and the likelihood of her developing osteomyelitis; failed to undertake debridement of the child's wound in a sterile environment; and failed to admit the child following sterile debridement and administration of intravenous antibiotic regime.

Dr. Murray has not addressed that Dr. Mehling testified that he discussed surgery with the family and admission to the hospital for intravenous antibiotic administration, and that the family elected to have the irrigation and debridement done in the emergency room. The risks and benefits and options were discussed. He explained that he could do the irrigation, debridement, and wound closure in the emergency room and discharge her home on oral antibiotics after intravenous antibiotics in the emergency room, which the family requested. The child was administered intravenous antibiotics in the emergency room. While Dr. Murray opined that the mechanism of injury increased the likelihood of developing osteomyelitis, he does not opine that even if the child had been admitted and was given further intravenous antibiotic therapy instead of oral antibiotics, that she would not likely have developed osteomyelitis. Instead, he opined that the mechanism of the injury increased the likelihood of osteomyelitis rather than it being caused by Dr.


Mehling.

Several days after the child was seen in the emergency room by Dr. Mehling, when the mother changed the dressing on the child's toe, she noted a white substance. She spoke with Dr. Mehling who happened to be at the emergency room. However, when Dr. Mehling told her to bring the child to his office so he could see her, she refused to bring the child in due to issues with her insurance. However, she did not seek care and treatment for her daughter from any other health care providers for days. Dr. Murray does not address the testimony of the plaintiff that she then waited several days before bringing the child to Dr. Lewis for care and treatment. Nor does Dr. Murray address the issue that upon seeing the child, Dr. Lewis did not commence intravenous antibiotics or admit the child to the hospital for care and treatment, as Dr. Murray asserted Dr. Mehling should have done. Dr. Mehling only treated the child in the emergency department at Good Samaritan Hospital following the incident, and thereafter, the mother severed ties with him and did not bring the child to see him when he offered to see her. Nor did she take the child to the emergency room or other physician to have the child treated immediately, but instead waited days before bringing her to Dr. Lewis. Thereafter, it was not until around April 27, 2005, three weeks after the child was seen by Dr. Mehling, that Crystal began running a fever, her toe turned more purple and the discoloration was extending. Crystal was thereafter admitted to a hospital for treatment of a bone infection by Dr. Lewis. Dr. Murray does not opine that the infant developed osteomyelitis while she was under the care and treatment of Dr. Mehling when she was seen at Good Samaritan Hospital.

Based upon the foregoing, it is determined that although Dr. Murray opined that defendant Mehling departed from the standard of care, he has not demonstrated that the alleged departures were the proximate cause of the injuries to the infant claimed by the plaintiff, or that he did not provide proper informed consent.

Accordingly, motion (002) for summary judgment dismissing the complaint in the main action is granted to the defendants/third-party plaintiffs. Motion (003) by the defendants/third-party plaintiff's for summary judgment in their favor has been rendered academic on the issue of liability, and as a matter of law, both the complaint and third-party complaint are dismissed.

Dated: FEB 24 2014



 J.S.C.

HON. JEFFREY ARLEN SPINNER

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