

Leigh v Kyle

2014 NY Slip Op 30559(U)

February 28, 2014

Supreme Court, Suffolk County

Docket Number: 06-30268

Judge: Jr., Andrew G. Tarantino

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SHORT FORM ORDER

INDEX No. 06-30268
CAL No. 12-01576MM

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. ANDREW G. TARANTINO, JR.
Acting Justice of the Supreme Court

MOTION DATE 6-18-13 (#004 & #005)
MOTION DATE 8-13-13 (#006)
ADJ. DATE 1-7-14
Mot. Seq. # 004 - MG
 # 005 - MD
 # 006 - MD

-----X
MELINDA YOLANDA LEIGH, a/k/a MELINDA
LEIGH and CHRISTOPHER LEIGH,

Plaintiffs,

- against -

ANNMARIE KYLE, MD, ADRIAN POPP, MD,
ANDRES GONZALEZ, MD, WILLIAM
SPENCER, MD, BARRY SCHUVAL, DO,
GEORGE SCHMITZ, MD, BARRY
MORGENSTERN, MD, ROBERT GOODMAN,
MD, JOANNE M. KECHEJIAN, MD, ROBERT
G. COURGI, MD, ALAN MECHANIC, MD,
HUNTINGTON HOSPITAL a/k/a NORTH
SHORE LIJ HUNTINGTON HOSPITAL,
HUNTINGTON MEDICAL GROUP, PC,
NORTH SHORE MEDICAL GROUP a/k/a
NORTH SHORE MEDICAL GROUP OF THE
MOUNT SINAI SCHOOL OF MEDICINE,
LONG ISLAND INFECTIOUS DISEASE
ASSOCIATES, CENTER FOR DIABETES AND
ENDOCRINOLOGY, MEDICAL ARTS
RADIOLOGY a/k/a HUNTINGTON MRI and
LONG ISLAND NEUROSURGICAL
ASSOCIATES, PC,

Defendants.
-----X

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Leigh v Kyle
Index No. 06-30268
Page No. 2

Upon the following papers numbered 1 to 112 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (004) 1 -25; (005) 26-57; (006) 58-78; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 79-88; 89-98; 99-100; Replying Affidavits and supporting papers 101-102; 103-105; 106- 110; Other 111-112; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that motion (004) by defendants, Alan Mechanic, M.D. and Long Island Neurosurgical Associates, PC, pursuant to CPLR 3212 for summary judgment dismissing the complaint asserted against them is granted; and it is further¹

ORDERED that motion (005) by defendants, Annmarie Kyle, M.D., George Schmitz, M.D., Joanne Kechejian, M.D., and North Shore Group of the Mount Sinai School of Medicine s/h/a North Shore Medical Group a/k/a North Shore Medical Group of the Mount Sinai School of Medicine, pursuant to CPLR 3212 for summary judgment dismissing the complaint is denied; and it is further

ORDERED that motion (006) by defendants, Barry Morgenstern, M.D., Robert Goodman, M.D., and Medical Arts Radiology a/k/a Huntington MRI, pursuant to CPLR 3212 for summary judgment dismissing the complaint is denied as untimely.

It is noted that by order dated May 16, 2013 (LaSalle, J.), the time in which defendants were permitted to serve and file their motions for summary judgment was extended to May 31, 2013. In motion (006), defendants Barry Morgenstern, M.D., Robert Goodman, M.D., and Medical Arts Radiology a/k/a Huntington MRI did not serve their motion for summary judgment until July 19, 2013, as evidenced by their affidavit of service, well after the court ordered extension to May 31, 2013. Thus, their motion is deemed untimely (*Brill v City of New York*, 2 NY3d 648 [2004]). It is noted that while these moving defendants seek summary judgment in their favor, the facts and issues are not identical to those concerning their co-defendants in motions (004) and (005).

Accordingly, motion (006) by defendants Barry Morgenstern, M.D., Robert Goodman, M.D., and Medical Arts Radiology a/k/a Huntington MRI is denied.

In this medical malpractice action, causes of action for negligence and lack of informed consent have been pleaded by plaintiff, Melinda Yolanda Leigh, a then 40 year old female. A derivative cause of action has been asserted on behalf of Christopher Leigh, plaintiff's spouse. Melinda Yolanda Leigh had surgery at Mount Sinai Medical Center by Dr. Kalmon Post, on January 6, 2003, for transphenoidal drainage and excision of a Rathke's Cleft cyst. On July 17, 2003, the plaintiff returned for surgery at Mount Sinai Medical Center where Dr. Kalmon Post performed transnasal transphenoidal drainage of a recurrent Rathke's Cleft cyst. Cultures were taken. Thereafter, the plaintiff came under the care of Dr. Edward Laws at the University of Virginia Medical Center, and on May 10, 2004, underwent a gross total resection of the Rathke's Cyst, also with a transphenoidal approach. She received a fat graft with packing of fat in her sinuses. On June 3, 2004, she presented to Huntington Hospital with headaches, fatigue, and weakness, and was admitted by defendant Dr. Kyle and released on June 11, 2004, only to be readmitted on June 26, 2004. She was then flown to the University of Virginia on June 26, 2004, where she was admitted

¹ It is noted that the affidavit of service was notarized on June 19, 2013, also beyond the extended date in which defendant's were permitted to file for summary judgment.

until July 13, 2004. The plaintiff alleges that the defendants negligently departed from good and accepted standards of medical care and treatment in failing to timely diagnose and treat her for a cavernous sinus thrombosis, left internal carotid thrombosis, left middle cerebral artery thrombosis, and in failing to prevent a stroke, failing to diagnose and treat diabetes insipidus, failing to obtain fat graft cultures, failing to diagnose infection and fungal infection in a differential diagnosis, failing to take proper testing and studies, and failing to call proper consults, inter alia, and in misdiagnosing her medical condition. The plaintiff alleges that due to the negligent departures from the standard of care, she was left with multiple deficits, including impaired speech, mental, and physical functioning, and right hemiparesis.

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 (*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]).

Unsigned and uncertified copies of the deposition transcripts which are not accompanied by an affidavit pursuant to CPLR 3116 are not in admissible form as required by CPLR 3212 (*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]), and are not considered. Here, incomplete deposition transcripts raise factual issues concerning the full testimony of the various witnesses, leaving this court to speculate as to the omitted testimony. Unsigned but certified transcripts of examinations before trial which are not objected to may be considered (*see Zalot v Zieba*, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]). Hospital records must be properly certified pursuant to CPLR 4518 (c). 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]), and uncertified medical records are not in evidence.

In support of motion (004) Alan Mechanic, M.D. and Long Island Neurosurgical Associates, P.C. submitted, inter alia, an attorney’s affirmation; the affirmation of Theodore H. Schwartz, M.D.; copies of the summons and complaint, their answer, and plaintiff’s verified bill of particulars; uncertified medical records from Mount Sinai Medical Center, Huntington Hospital record; page from a Huntington Hospital record; backwards and reversed, and unsigned and uncertified copies of the transcripts of the examinations before trial of Annmarie Kyle, M.D.; blank exhibit G; signed copy of the transcript of the examination before trial of defendant Alan Mechanic, M.D.; and incomplete, unsigned and uncertified transcripts of the examinations before trial of George Schmitz, M.D., Adrian Popp, M.D., Andrea Gonzales, M.D., Barry

Leigh v Kyle
Index No. 06-30268
Page No. 4

Schuval, D.O., Barry Morgenstern, M.D., Robert Goodman, M.D. Robert G. Corgi, M.D., Melinda Yolanda Leigh, Christopher Leigh, Anne Sacks-Berg, M.D., and William Spencer, M.D. It is noted that the plaintiffs do not object to, and rely upon and refer in their opposing papers to the uncertified medical records.

In support of motion (005), Annmarie Kyle, M.D., George Schmitz, M.D., Joanne Kechejian, M.D., and North Shore Group of the Mount Sinai School of Medicine (North Shore Group) submitted, inter alia, an attorney's affirmation; affirmation of Michael Fishkin, M.D.; copies of the summons and complaint, answer served by defendants Schmitz, Kechejian and North Shore Group, and plaintiff's verified bill of particulars; the unsigned but certified transcripts of the examinations before trial of Yolanda Leigh, Adrian Popp, M.D., Andres Gonzales, M.D., William Spencer, M.D., Barry Schuval, M.D., Barry Morgenstern, M.D., Barry Goodman, M.D., Joanne Kechejian, M.D., Robert Corgi, M.D., Alan Mechanic, M.D., and Anne Berg-Sacks, M.D., which are not accompanied by proof of service pursuant to CPLR 3216; the signed and certified copy of the transcript of the examination and continued examination before trial of Christopher Leigh; the unsigned and uncertified transcript of the moving defendants Annmarie Kyle, M.D., and George Schmitz, M.D. which are considered (*Ashif v Won Ok Lee*, 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]); and various uncertified medical records and excerpts which are not in admissible form. The moving defendants have failed to provide a copy of the answer served by defendant Kyle as required pursuant to CPLR 3212.

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 [1999]). 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*, 224 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], *app denied* 92 NY2d 814, 681 NYS2d 475 [1998]; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2d Dept 1994]).

"The affidavit of a defendant physician may be sufficient to establish a prima facie entitlement to summary judgment where the affidavit is detailed, specific and factual in nature and does not assert in simple conclusory form that the physician acted within the accepted standards of medical care" (*Toomey v Adirondack Surgical Assoc.*, 280 AD2d 754, 755, 720 NYS2d 229 [3d Dept 2001][citations omitted]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; *Machac v Anderson*, 261 AD2d 811, 812-813, 690 NYS2d 762 [3d Dept 1999]).

To rebut a prima facie showing of entitlement to an order granting summary judgment by defendants, 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 defendants' 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]).

MOTION (004)

In motion (004), Alan Mechanic, M.D. and Long Island Neurosurgical Associates, P.C. submitted the affirmation of Theodore H. Schwartz, M.D. who affirms that he is licensed to practice medicine in New York State and is board certified in surgery and neurosurgery. He set forth his qualifications to render expert opinions in this matter on behalf of the moving defendants. He set forth the materials and records which he reviewed, and opined within a reasonable degree of medical certainty that Alan Mechanic, M.D. and Island Neurosurgical Associates, P.C. did not deviate from the accepted standards of care in the field of medicine and neurosurgery in the care of Melinda Leigh.

Dr. Schwartz set forth that the plaintiff had a long history of hypopituitarism and a Rathke's Cyst. Dr. Kalum Post initially drained the plaintiff's pituitary gland and performed two transphenoidal resections of the pituitary on January 6, 2003 and July 17, 2003. Following those two surgeries, the plaintiff presented with migraine-type headaches, nausea and vomiting. She then obtained care and treatment from Dr. Edward Laws at the University of Virginia Medical Center, who performed a more aggressive gross total resection of the cyst, utilizing the transphenoidal approach, on May 10, 2004. Dr. Laws also placed fat in the sinus to prevent leakage of the cerebral spinal fluid. She was discharged on May 14, 2004, but presented to Huntington Hospital, where she was admitted to the service of Annmarie Kyle, M.D. on June 4, 2004 for complaints of headaches, fatigue, and weakness for five days. Dr. Schwartz stated that defendant Alan Mechanic, M.D. only saw the plaintiff for a neurological surgery consult on one occasion, June 5, 2004, the second day of her admission.

Dr. Schwartz continued that when Dr. Mechanic saw the plaintiff, she was already being worked up for infection. an MRI and MRA had been ordered by another physician, and a lumbar puncture to obtain cerebral spinal fluid had already been performed. Dr. Schwartz stated that the MRI and MRA, and culture of the cerebral spinal fluid were the only two tests indicated from a neurosurgical point of view as of June 5, 2004, to rule out meningitis or brain abscess. Dr. Schwartz stated that it is his opinion as a neurosurgeon, that no other intervention was required by Dr. Mechanic relative to his performing a neurosurgery consultation, including neurosurgery. He bases his opinion on there being no evidence of a brain abscess on the films, the lumbar cultures showed a white count of 616, which was normal, and a red blood count of 530, which was slightly high but not unexpected for three and one-half weeks post-surgery, and was normal post-surgical inflammation. Dr. Schwartz also stated that the MRI demonstrated some inflammation of the sphenoid sinus, however, he continued, treatment for an infection of a sphenoid sinus is not within the province of a neurosurgeon. The results from the lumbar culture were negative. Based upon the only tests indicated at the time Dr. Mechanic saw the plaintiff, there was no evidence to support any suspicion that she was suffering from any type of bacterial meningitis at that time. The plaintiff was discharged from Huntington Hospital on June 11, 2004, and Dr. Mechanic played no role in her discharge.

Dr. Schwartz stated that a neurological surgeon called as a consultant on a case has a duty only to the attending physician to advise as to neurosurgical issues, and there were no neurosurgical issues as of June 5, 2004 when Dr. Mechanic saw the plaintiff. When the plaintiff returned to Huntington Hospital on June 26, 2004, she was not seen by Dr. Mechanic, but was flown to the University of Virginia where she was admitted and remained until July 13, 2004. An MRI on June 26, 2004 revealed that plaintiff had

suffered an acute infarction of the left middle cerebral artery, however, there was no indication of such infarction on the MRI/MRA of June 8, 2004. He continued that there was nothing that Dr. Mechanic did or did not do which contributed to the cerebral accident.

Based upon the foregoing, it is determined that Dr. Mechanic and Long Island Neurosurgical Associates have demonstrated prima facie entitlement to summary judgment dismissing the complaint as asserted against them.

In opposing this motion, the plaintiffs have submitted the redacted affidavit of a physician licensed to practice medicine in Pennsylvania who is board certified in neurological surgery. A redacted version of an expert affidavit lacks evidentiary value (*Marano v Mercy Hospital*, 241 AD2d 48, 670 NYS2d 570 [2d Dept 1998]). “[A] party may successfully oppose a summary judgment motion without disclosing the names of the party’s expert witnesses. In opposition to such a motion the party defending against a summary judgment motion may serve the movant with a redacted copy of its expert’s affirmation as long as an unredacted original is provided to the court for its in camera inspection” (*Marano v Mercy Hospital, supra*). This procedure preserves the confidentiality of the name of plaintiffs’ medical expert while also preserving plaintiff’s obligation in opposing defendant’s motion, in that by submitting a redacted affirmation and by offering the original to the court for in camera inspection, plaintiff has opposed the motion by evidence in admissible form (*Rubenstein v Columbia Presbyterian Medical Center*, 139 Misc 2d 349, 527 NYS2d 680 [NY County 1988]). A copy of the affidavit with the expert’s name and signature have not been provided to this court under separate cover. Accordingly, plaintiffs’ expert affidavit is not in admissible form and is insufficient to raise a triable issue of fact as to the defendant’s alleged malpractice (*Rose v Horton Medical Center*, 29 AD3d 977, 816 NYS2d 174 [2d Dept 2006]). Even if plaintiffs’ expert affidavit were considered, it is determined that the plaintiff has failed to raise a factual issue whether any act or omission by the moving defendants proximately caused the plaintiff’s claimed injuries.

Plaintiffs’ neurosurgical expert set forth his work experience and basis upon which to render expert testimony in this matter. He set forth the records and materials which he reviewed and opined within a reasonable degree of medical certainty that Dr. Mechanic departed from the standards of care in that he failed to follow-up with the studies and reports, and did not form an adequate differential diagnosis, and should have considered an infected sphenoid sinus. He continued, the failure of the radiologist to report on a potential narrowing of the internal carotid artery evident in the June 8, 2004 MRI study contributed to the diagnostic failure, as had Dr. Mechanic been provided with this information, it would have given him an additional reason to suspect an inflammatory process causing vascular constriction.

Plaintiffs’ expert set forth the history and first two surgical procedures performed by Dr. Post and Dr. Law, including certain anatomy and physiology. He then addressed plaintiff’s presentation to Huntington Hospital on June 4, 2004, and set forth the possibilities considered in the differential diagnosis, including, bacterial meningitis, fungal meningitis, viral meningitis, bacterial sinusitis, viral sinusitis, and post-operative sinusitis and fungal sinusitis. Plaintiffs’ expert stated that the imaging studies suggested a sinusitis, specifically inflammation of the sphenoid sinus; and cultures from the spinal tap essentially ruled out bacterial or fungal meningitis. However, no one looked at the sinuses or requested that anyone obtain sinus cultures. The plaintiff was discharged on June 11, 2004 by Dr. Kyle, with a discharge diagnosis of viral meningitis and sinusitis, and instructions to take the antibiotic Ceftin for two weeks. Thereafter, on June 21, 2004, the plaintiff was seen by Dr. Kyle for an office visit, at which time Dr. Kyle considered

migraine headaches and continued sinusitis in her differential diagnoses. The plaintiff was to see her neurologist, Dr. Salado on June 29, 2004, however, on June 24, 2004, the plaintiff suffered a thrombotic stroke and was brought to Huntington Hospital emergency department.

At Huntington Hospital emergency, the plaintiff was seen Dr. Anne Sacks-Berg, an infectious disease specialist, who noted that the CAT scan of the brain without contrast compared to June 4, 2004 revealed swelling and edema of the left temporal lobe, which is new. A questionable area of high attenuation within the left middle cerebral artery-question spasm or clot within the vessel was also noted. Dr. Sacks-Berg was concerned about infection, even abscess. Plaintiffs' expert stated that the plaintiff was seen by Dr. Andres Gonzales, a neurologist, who stated that the plaintiff had a stroke secondary to the occlusion of her left middle cerebral artery caused by an infectious process which occurred sometime after her surgery, but he did not know if it was present during the hospitalization of June 4, 2004. The plaintiff was transferred by air to the University of Virginia Medical Center on June 26, 2004, and underwent surgery by Dr. Helms and Dr. Oskouian for transphenoidal re-exploration with gross total removal of sphenoidal sinus contents consistent with infection, mostly in the left sphenoid sinus. The plaintiffs' expert stated that he noted in the discharge summary of July 11, 2004, that the antifungal therapy was discontinued as the fungus from the initial screening was identified as *Malassezia Furfur*, a skin fungus. Plaintiffs' expert then stated that the final cultures came back showing that the infectious agent was fungal, and most likely *Scytalidium*.

Plaintiffs' expert opined in a conclusory statement that the sinus infection was present during the June 4, 2004 hospitalization. However, he has not set forth the basis for such opinion. He stated that Dr. Popp, the infectious disease physician, did not have cultures from the sinuses at the June 4, 2004 hospitalization. He also indicated that Dr. Spencer, the otolaryngologist, stated that it was within the scope of his practice, and possible to visualize the sinuses endoscopically, and to obtain cultures from the sinuses with a swab. Plaintiffs' expert stated that Dr. Spencer did not do so, nor did any other physicians, including Doctors Popp, Mechanic, Kyle, Schmitz, and Gonzalez, and no one requested such culture. Plaintiffs' expert continued that the left sided vascular occlusion and left sided sphenoid sinus inflammation and infection, the laboratory reports, and the operative finding of an infected sphenoid sinus, were consistent with the opinions of the treating physicians that the cause of the stroke was vascular occlusion, secondary to inflammation, secondary to the untreated infection in the sphenoid sinuses.

The plaintiffs' expert stated that at the June 4, 2004 admission to Huntington Hospital, the standard of care required that the evaluation of the sphenoid sinuses be included in any work-up in light of the recent transphenoidal surgery. He continued that the pus and infected material found by Dr. Helm and Dr. Oskouian on June 26, 2004, when they entered the sphenoid sinus, was "almost certainly present and causing Mrs. Leigh's symptoms...and was the inciting cause of the sinusitis suggested in imaging studies." He continued that it is the most probable explanation as no other explanation fits the facts. He also stated that a neurosurgeon or neurologist could have performed an open surgical or endoscopic procedure, and that neither Dr. Spencer nor Dr. Mechanic made any attempt to visualize the sphenoid sinuses, or obtain a culture, or made a recommendation for the same. The plaintiffs' expert opined that it was the standard of care for every provider engaged in diagnosing and treating the plaintiff's complaints to conduct a complete investigation of the sphenoid sinuses and their contents, as well as an evaluation of the other sinuses and the pituitary fossa. Again, plaintiffs' expert opined that either Dr. Spencer or Dr. Mechanic should have explored the sphenoid sinuses.

The plaintiffs' expert stated that Dr. Mechanic departed from the standard of care in not forming an adequate differential diagnosis. He then stated that the role of the "potential sphenoid sinusitis" was not given proper consideration by Dr. Mechanic or any of the other providers, and that he should have evaluated the sinuses or ensured that the same was done. He continued that the failure of the radiologist, Dr. Goodman, to report a potential narrowing of the internal carotid artery evident on the June 8, 2004 MRI study contributed to the diagnostic failure. Had Dr. Mechanic been provided this information, it would have given Dr. Mechanic an additional reason to suspect an inflammatory process causing vascular constriction.

The plaintiffs' expert opined that the physicians who would have been in the best position to diagnose and treat the plaintiff's post-surgical infection would have been her neurosurgical team, including Doctors Laws, Helm, and Oskouian at the University of Virginia. After that, his opinion is that the specialty in the best position to evaluate her infection, with the obvious assistance of infectious disease, otolaryngology, and neurology, would have been a neurosurgeon. While Dr. Mechanic advised the plaintiff to consult with Dr. Laws and his team as soon as she got out of the hospital, plaintiffs' expert stated that Dr. Mechanic should have made that contact himself, or written down the suggestion. His failure to do so deprived the plaintiff of a clear opportunity for diagnosis and effective treatment.

It is noted, however, that the plaintiffs also submitted the redacted affidavit of a physician licensed to practice medicine in the State of Connecticut who is board certified in internal medicine with a subspecialty in infectious disease. He indicated that the plaintiff was discharged from UVA Medical Center and returned to her home in New York on May 12, 2004 and was to follow up with Dr. Laws in six weeks. Dr. Annmarie Kyle was aware of the plaintiff's medical history and saw the plaintiff on May 18, 2004, for complaints of headache. Dr. Kyle indicated in her office record that she discussed the plaintiff's case with Dr. Laws' office, and with his nurse who reiterated that her symptoms appeared to be more likely residual from the surgery. The plaintiff was then instructed to follow-up with her neurosurgeon as scheduled. However, on June 2, 2004, the plaintiff was seen by Dr. Kyle's partner, Dr. Kechejian, for fever, chills, and headache. Dr. Kechejian, suspecting an endocrine problem, wanted the plaintiff to move up her appointment with her endocrinologist and for Dr. Kyle to review the blood work. On June 3, 2004, a page of laboratory records was faxed to Dr. Laws by Dr. Kyle's office. On June 4, 2004, the plaintiff was then taken to the emergency department at Huntington Hospital and admitted by Dr. George Schmitz, who was covering for Dr. Kyle. She was discharged on June 11, 2004 by Dr. Kyle with a diagnosis of viral meningitis and sinusitis. There were no instructions given for the plaintiff to follow up with a neurosurgeon. On June 21, 2004, the plaintiff presented to Dr. Kyle's office with headache and fever. Three days later, the plaintiff was back in the emergency department at Huntington Hospital.

The plaintiffs' internal medicine/infectious disease expert stated that during that admission of June 24, 2004, the plaintiff was seen by Dr. Gonzales who opined that the plaintiff had a stroke incited by an infectious process, however, he could not say that the infection was present during the plaintiff's previous hospitalization. The plaintiff's expert stated that Dr. Spencer, the ENT specialist, noted that the right side of the plaintiff's nasal cavity had a crust with green purulent mucous, but he did not investigate this further. The plaintiffs' infectious disease expert then stated that it was also a deviation from the standard of care for Dr. Mechanic to fail to investigate or recommend an investigation of the sphenoid sinus. He then continued that it was the duty of all the physicians treating the plaintiff, including Doctors Kyle, Popp, Gonzales,

Spencer, and Mechanic, to make sure the evaluation of the sinuses was done, to rule out active infection in the sphenoid sinus, and potentially the sella. When the culture of the cerebral spinal fluid came back negative, it was thought the headaches and fever were caused by an aseptic meningitis or a sinusitis of an undetermined cause. He continued that the plaintiff should not have been discharged without a clear diagnosis. However, the plaintiff's internal medicine/infectious disease expert then opined that Dr. Kyle, the attending physician, was responsible for ensuring the plaintiff's hospital evaluation and work-up was complete and appropriate, and addressed all her needs.

Based upon the foregoing, it is determined that the plaintiffs' experts raised factual issues between their conflicting opinions concerning who was responsible for evaluating the plaintiff's sinuses, by indicating that all the treating physicians, as mentioned, were responsible to do so, then opining that it was Dr. Kyle, the attending physician, who had the ultimate responsibility for ensuring that the plaintiff's hospital evaluation and work-up was complete and appropriate, and addressed all her needs. Moreover, with regard to proximate cause, plaintiff's experts have not raised a factual issue concerning whether or not surgical intervention was either necessary or indicated when the plaintiff was seen by Dr. Mechanic during the June 4, 2004 hospitalization. The record is clear that from the onset sinusitis was part of the differential diagnosis at the time of the June 4, 2004 admission. There has been no testimony to raise factual issues concerning whether or not surgery would have been consistent with the standard of care during the June 4, 2004 admission as treatment for the suspected sinusitis. Thus, even if plaintiffs' experts' affidavits had been in admissible form, or unredacted copies provided to this court, it is determined that the plaintiffs' experts have failed to raise sufficient factual issues to preclude summary judgment from being granted to Dr. Mechanic and Island Neurology Associates.

Accordingly, motion (004) is granted and the complaint as asserted against Dr. Mechanic and Island Neurology Associates is granted.

MOTION (005)

In motion (005), Annmarie Kyle, M.D., George Schmitz, M.D., Joanne Kechejian, M.D., and North Shore Group of the Mount Sinai School of Medicine (North Shore Group) submitted the affirmation of Michael Fishkin, D.O., a physician licensed to practice medicine in New York State and board certified in family practice medicine. Dr. Fishkin set forth his education and training, and the medical records and materials which he reviewed in rendering his expert opinion. He opined within a reasonable degree of medical certainty that the moving defendants did not depart from the standard of care and did not proximately cause the injuries claimed by the plaintiff.

Dr. Fishkin set forth the plaintiff's pertinent medical and surgical history, including two prior surgeries for drainage of a Rathke's Cleft cyst in 2003. In January 2004, Dr. Kyle saw the plaintiff for complaints of numbness in her hands and arthralgia. An MRI was obtained, and medication was prescribed, including medication for migraine headaches. On May 10, 2004, the plaintiff underwent a third transphenoidal resection of the Rathke's Cleft cyst and was discharged on May 12, 2004. She saw Dr. Kyle on May 18, 2004 with complaints of a headaches, increased thirst, and was prescribed various medications and instructed to follow with her neurologist and neurosurgeon as scheduled. On May 20, 2004, when the plaintiff communicated by telephone that she continued to experience issues with her sinuses, Sudafed and

an increase in the dose of Inderal was recommended. On June 2, 2004, Dr. Kechejian, one of Dr. Kyle's partners at North Shore Medical Group, saw the plaintiff for complaints of low grade fever and headaches, for which blood tests and blood cultures were taken, inter alia, and she was recommended to advance her appointment with her endocrinologist and follow up with Dr. Kyle. The laboratory results were signed off by Dr. Kyle when they arrived at the office, and she faxed them to Dr. Laws, plaintiff's neurosurgeon at UVA. Thereafter, the plaintiff was seen for complaints of fever, headaches, and photophobia at the emergency room at Huntington Hospital by Dr. Schmitz, a colleague of Dr. Kyle. Dr. Schmitz admitted the plaintiff, and ordered various medications, tests, and consults with neurologist Dr. Gonzalez, endocrinologist Dr. Corgi, infectious disease specialist Dr. Popp, and neurosurgeon Dr. Mechanic. Dr. Schmitz's differential diagnoses were meningitis, post-operative infection, inflammatory changes, sinusitis, and adrenal insufficiency. Dr. Gonzales performed a lumbar puncture to rule out meningitis. Dr. Schmitz reviewed CT scan results with the radiologist, noting postoperative changes in the sphenoid sinus, but did not recall discussing whether or not there was co-existing sinusitis. He noted that there was no obvious abscess collection reported.

Dr. Fishkin continued that Dr. Popp examined the plaintiff and started her on antibiotics, noting her surgical history and the impression to rule out meningitis and sinusitis. He was aware that the CT scan of June 4, 2004 reported the possibility of sinusitis. Dr. Kyle then saw the plaintiff on June 5, 2004. Dr. Fishkin continued to recite the ongoing care and treatment of the plaintiff, her discharge from Huntington Hospital and subsequent readmission on June 24, 2004, with transfer to UVA on June 26, 2004, at which time the plaintiff underwent further surgery to remove the contents of the sphenoid sinus. She was treated with antifungal medication as the initial fungal cultures of the sphenoid sinus were positive for yeast. Dr. Fishkin opined that at all times, Dr. Kyle, Dr. Kechejian, Dr. Schmitz, and North Shore Medical Group, who treated the plaintiff as internists, comported with acceptable standards of care during their care and treatment of the plaintiff, and that no act of commission or omission by them or their staff either contributed to or proximately caused the injuries claimed by the plaintiff.

Dr. Fishkin stated that all consultations in neurology, neurosurgery, infectious disease, endocrinology, and ENT were timely requested and appropriate, and were completed. All the appropriate screening and diagnostic studies were timely ordered and completed, reported, and followed-up. Physical examinations were appropriate and documented. Dr. Fishkin stated that as internists, it was not within the realm of their expertise to order cultures on tissues, additional body fluids, sputum, inflammatory exudate, pleural fluid, ascetic fluid, CSF, urine or pus aspirated from abscesses. Rather, a determination as to whether and/or when these cultures were indicated would be within the expertise of the multiple treating specialists. He continued that the defendants did not fail to perform or consider various radiographic imaging studies, that they timely reviewed the results of those studies, and properly relied upon the various consulting specialists to provide input and recommendations with respect to the significance of the results of the various imaging studies, and they did not fail to order appropriate diagnostic studies.

Dr. Fishkin also opined that Doctors Kyle, Schmitz, and Kechejian did not fail to properly diagnose and treat the plaintiff's condition during their respective encounters and treatment; that they arrived at differential diagnoses, recommended the appropriate and necessary tests, and obtained the necessary and indicated consults upon which they relied in arriving at a differential diagnosis and implementing a treatment plan for any diagnosis made. Dr. Fishkin continued that it is his further opinion that the care and treatment provided by them did not cause or contribute to a delay in diagnosis of the plaintiff's condition.

Leigh v Kyle
 Index No. 06-30268
 Page No. 11

He continued that they were not the appropriate physicians to order and/or perform a nasal culture for fat culture and were entitled to rely upon the specialists to make the determination as to whether the same was needed. He stated that they did not fail to timely diagnose and treat a cavernous sinus thrombosis, left internal carotid thrombosis, left middle cerebral artery thrombosis and/or diabetes insipidus as such diagnoses are outside their area of expertise; and that they did not fail to anticipate and prevent a stroke, as diagnosis of any of these conditions would be within the realms of expertise of the various consulting physicians. With regard to whether or not the sinuses should be drained, he continued, it was within the purview of the consulting specialists involved in the plaintiff's care.

Dr. Fishkin has not set forth the standard of care for treating a sinusitis, and how the moving defendants, Annmarie Kyle, M.D., George Schmitz, M.D., Joanne Kechejian, M.D., and North Shore Group of the Mount Sinai School of Medicine, comported with those standards of care and treatment. Dr. Fishkin does not set forth that surgery was warranted as part of the treatment and if so, when such surgery should have been performed, and if it would have prevented the events which followed and plaintiff's claimed injuries. There are factual issues associated with whether these moving defendants should have contacted Dr. Laws at the University of Virginia and had the plaintiff follow-up with him, and whether or not the failure to do so caused or contributed to the events and injuries claimed by the plaintiff. While Dr. Fishkin stated that these defendants relied upon the specialists for care and treatment, and that the nasal culture should have been performed by the specialists, he does not opine that obtaining a nasal culture was outside the realm of these treating internists, or that they could not have ordered it. Additionally, Dr. Fishkin does not opine that obtaining a nasal culture had any impact upon the outcome in that he opined that all treatment was appropriate, proper medications were prescribed, and that bacterial and viral sinusitis were considered in the differential. Based upon the foregoing, these moving defendants have not established prima facie entitlement to summary judgment dismissing the complaint.

It is noted that the plaintiffs have submitted the same redacted expert opinions in oppositions to the motion for summary judgment by these moving defendants. In that Annmarie Kyle, M.D., George Schmitz, M.D., Joanne Kechejian, M.D., and North Shore Group of the Mount Sinai School of Medicine have not established prima facie entitlement to summary judgment dismissing the complaint, the burden has not shifted to the plaintiffs to raise a factual issue to preclude summary judgment.

Accordingly, motion (005) by Annmarie Kyle, M.D., George Schmitz, M.D., Joanne Kechejian, M.D., and North Shore Group of the Mount Sinai School of Medicine is denied.

Dated: 2. 28. 2014



 A.J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION

TO: GEISLER, HENNINGER & FITZMAURICE, LLP
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Leigh v Kyle
Index No. 06-30268
Page No. 12

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